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A Distributive Theory of Criminal Law

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A DISTRIBUTIVE THEORY OF CRIMINAL LAW

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In criminal law circles, the accepted wisdom is that there are two and only two true justifications of punishment—retributivism and utilitarianism. The multitude of moral claims about punishment can thus be reduced to two propositions: (1) Punishment should be imposed because defendants deserve it; and/or (2) punishment should be imposed because it makes society safer. At the same time, most penal scholars notice the trend in criminal law to de-emphasize intent, centralize harm, and focus on victims, but they largely write off this trend as an irrational return to antiquated notions of vengeance. This Article asserts that there is in fact a distributive logic to the changes in current criminal law. The distributive theory of criminal law holds that an offender ought to be punished, not because he is culpable or because punishment increases net security, but because punishment appropriately distributes pleasure and pain between the offender and victim. Criminal laws are accordingly distributive when they mete out punishment for the purpose of ensuring victim welfare. This paper demonstrates how distribution both explains the traditionally troubling criminal law doctrines of felony murder and the attempt-crime divide and makes sense of current victim-centered reforms. Understanding much of modern criminal law as distribution highlights an interesting political contradiction. For the past few decades, one, if not the most, dominant political message emphasizes rigorous individualism and holds that the state is devoid of power to deprive a faultless person of goods (or “rights”) in order to ensure the welfare of another. But many who condemn distribution through the civil law or tax system embrace punishment of faultless defendants to distribute satisfaction to crime victims. Exposing criminal law as distributionist undermines these individuals’ claimed pre-political commitment against government distribution.

INTRODUCTION ............................................................................................................................. 2
I. DISTRIBUTION IN TORT AND CRIMINAL LAW ........................................................................ 8
   A. Fault, Utility, and Distribution in Tort Law ........................................................................... 10
   B. Retribution, Utility, and Distribution in Criminal Law .......................................................... 13
II. DISTRIBUTION EXPLAINS CLASSIC CRIMINAL LAW QUANDARIES ..................................... 20
   A. Felony Murder ......................................................................................................................... 21
   B. The Attempt-Crime Divide ...................................................................................................... 31
III. DISTRIBUTIONIST SENTIMENTS UNDERLIE MODERN PENOLOGY .................................... 36
   A. Distribution in the Victims’ Rights Movement ....................................................................... 38
   B. Distribution in Criminal Law Reform .................................................................................... 43
      1. Sentencing Reform ................................................................................................................ 44
      2. Victim Impact Evidence Law ................................................................................................... 48
IV. POWER, POLITICS, AND DISTRIBUTION’S FATE ................................................................... 54
CONCLUSION .............................................................................................................................. 68

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

- Anthony Kennedy

INTRODUCTION

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

In private disputes, when two persons’ interests conflict over a scarce good, a distributive

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1 Anthony Kennedy, Address at the Sixth South Pacific Judicial Conference (Mar. 3–5, 1987).
3 See Michael S. Moore, The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (Ferdinand Schoeman ed., 1987) [hereinafter Moral Worth] (commenting that retributivism is a “straightforward theory” that justifies punishment “only because offenders deserve it”).
principle dictates that the resource be allocated in a just way, which may or may not involve rights-claims or maximizing utility.\(^6\)

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

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


\(^9\) Distribution does not have to involve wealth. See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at http://plato.stanford.edu/entries/justice-distributive/ (noting that distributive principles “can vary in what is subject to distribution”).

Despite the fact that certain criminal policies have long reflected distributive values, and distributive sentiments are apparent in the ideology and policies of the victims’ rights movement,\(^{11}\) penal theorists and criminal law scholars virtually ignore the possibility of a distributive theory of punishment. Consider Sanford Kadish’s argument:

It is hard to see . . . how inflicting pain on the criminal restores anything—certainly it doesn’t restore the victim to his property or compensate him for his economic loss or for his medical expenses and pain and suffering. And even if it somehow did, in the unpalatable sense that the victim received a restorative amount of pleasure from the offender’s suffering, it is not the morality of retributive punishment that would have been demonstrated, but the desirability of satisfying the vengeful feelings of the victim, which is not the same thing.\(^{12}\)

Theorists also assert that criminal law’s exclusive blaming function makes the question of distribution misplaced.\(^{13}\) However, in recent times, scholars have noted the many ways in which tort theory and criminal law theory overlap.\(^{14}\) Moreover, financial restoration through tort suits is not the principal distributive intervention sought by victims’ rights advocates, and lawmakers are responsive to the restoration-through-punishment argument.\(^{15}\)

Understanding the distributive basis of criminal law and its current popularity reveals an interesting political contradiction. Redistributive programs have historically been products of

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\(^{15}\) See *infra* notes 262, 331–332 and accompanying text.
left/progressive politics, engendering counterattacks from the right.\textsuperscript{16} In the late 19\textsuperscript{th} and early 20\textsuperscript{th} Centuries, concern over legislatures’ distributionist use of “police power”\textsuperscript{17} prompted a legal response that emphasized property rights and freedom of contract.\textsuperscript{18} Despite the decline of Lochnerism, over time, liberalism (meaning rights-regarding not left-leaning) became the dominant mode of legal reasoning for both conservatives and progressives.\textsuperscript{19} Today, redistribution is a principal normative evil to conservatives,\textsuperscript{20} marginally-useful to mainstream Liberals,\textsuperscript{21} and appealing only to leftists.

Many consider state regulation of one individual to establish some level of welfare for another fundamentally unjust.\textsuperscript{22} The standard libertarian view endorses as its utopian vision a society in which atomistic individuals pursue any private end and the government plays the minimal role of protecting a bare-bones set of rights.\textsuperscript{23} This anti-distribution narrative has been

\textsuperscript{16} Although all legal rules affect distribution, many are not done in the name of distribution. \textit{See infra} notes 42–44 and accompanying text.


\textsuperscript{19} \textit{See} Duncan Kennedy, \textit{The Critique of Rights in Critical Legal Studies, in Left Legalism/Left Critique} 189 (Brown & Halley eds., 2002) [hereinafter \textit{Critique of Rights}] (asserting that “rights now bear the main burden of universalization for both” liberals and conservatives).

\textsuperscript{20} \textit{See} Robin West, \textit{Progressive and Conservative Constitutionalism}, 88 Mich. L. Rev. 641, 651-52 (1990) (remarking that conservatism is “united by an aversion to the distributive normative authority of the political state”).

\textsuperscript{21} \textit{See Anthony T. Kronman, Contract Law and Distributive Justice}, 89 Yale L.J. 472, 474 (1980) (noting that Liberals support baseline redistribution but generally reject private law distribution); \textit{Critique of Rights, supra note 19, at 217} (observing that Liberals feel a “sense of danger” in abandoning rights claims).

\textsuperscript{22} \textit{See id.} at 473 (remarking that libertarians “deny that the state is ever justified in forcibly redistributing wealth”); Arthur Ripstein, \textit{The Division of Responsibility and the Law of Tort}, 72 Fordham L. Rev. 1811, 1814 (2004) (noting view that “any redistribution [i]s necessarily unjust”); \textit{Critique of Rights, supra note 19, at 217} (observing that Liberals feel a “sense of danger” in abandoning rights claims).

\textsuperscript{23} \textit{See Kenneth W. Starr, From Fraser to Bong Hits: Bong Hits and the Decline of Civic Culture}, 42 U.C. Davis L. Rev. 661, 662 n.4 (2009) (stating that libertarians define humans in “individualistic, atomistic terms” and support “freedom from all forms of social and legal constraint”). \textit{See generally} Robert Nozick, \textit{Anarchy, State, and Utopia} ix & passim (advocating a “minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on”).
popular since the 1970s, when politicians capitalized on public dissatisfaction with Great Society policies and government spending to popularize the hyper-individualism ethic. At the same time, a parallel justification for limiting distribution arose in the form of economic arguments about efficiency. Today, efficiency concerns and liberalism meld to form a neoliberal paradigm that conceives of pursuit of capital as one, if not the most, fundamental right. The criminal system, however, appears insulated from these principles. Critics thus note with irony that the criminal regulatory system has grown to embody a massive inefficient tax-and-spending program that distributes funds to carceral programs nearly exclusively for the poor. The substance of criminal law also became more distributionist as considerations of culpability and deterrence gave way to concerns over victims’ interests.

This Article offers an analytically descriptive account of facets of criminal law as distributive phenomena. Criminal laws are distributive when they mete out punishment for the primary purpose of ensuring victim welfare. A question might arise as to whether it is desirable or morally appropriate for the government to use criminal law to distribute pleasure to victims.

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24 See Martha T. McCluskey, Thinking with Wolves: Left Legal Theory After the Right’s Rise, 54 BUFF. L. REV. 1191, 1194 (2007) (observing that the right has successfully undermined ideas grounding the 20th Century welfare state).


26 See infra notes 60–63 and accompanying text (discussing law and economics).

27 In this view, the state must promote the “will of the economic actor.” West, supra note 20, at 657-58. See also Wendy Brown, Neo-liberalism and the End of Liberal Democracy, 7 THEORY & EVENT 1, 6 (2003) (noting the current configuration of morality as “rational deliberation about costs”).

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

Whether and to what extent criminal law should incorporate victim welfare as a consideration cannot be answered in the abstract any more than what should be taxed and how much. Nevertheless, a cogent argument can be made that ensuring victim welfare through punishment is bad policy because victims actually heal through forgiveness or because in certain circumstances jailing offenders makes victims worse off. One could also critique incorporating victims’ interests into criminal policy on the ground that it inevitably strengthens the current oppressive carceral state. Neither of these arguments establish that distributing through criminal law is inherently bad, just that it appears unjustified in its current form and context.

Proving that the criminal law should never engage in distribution, however, is not the goal of this paper. Rather, the paper seeks to demonstrate two things. First, it will show that much of criminal law is actually distributive, rather than retributive or utilitarian, a possibility ignored thus far in the penal literature. Second, it will undermine the claims of those who reject progressive laws and policies on the principled ground that the government should never engage in distribution. A popular view is that the state is devoid of power to deprive a person of his legitimate goods (or “rights”) in order to ensure the welfare of another, however welfare is measured. But many of the same voices that condemn distribution through the civil law or tax system embrace criminal punishment to ensure victim satisfaction. Thus, the distributive

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32 See id. at 772 (stating that “as a tool of tough-on-crime penological goals, the victim must occupy a specific, predefined legal space” that supports punitive policies); MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME 26 (2002) [hereinafter VICTIMS’ WAR] (opining that during war on crime, victims were rhetorical tools to enhance state authority).
33 See, e.g., Aaron Xavier Fellmeth, Civil and Criminal Sanctions in the Constitution and Courts, 94 GEO. L.J. 1, 18 (2005) (asserting that punishment is “not primarily distributive”)
34 See Kronman, supra note 21, at 498 (remarking that libertarianism “regards compulsory transfers aimed at achieving distributive fairness as a kind of theft”); supra notes 22–23.
35 See infra note 351 and accompanying text.
theory of criminal law exposes that society’s distributionist sentiments have not evaporated in the face of seemingly neutral arguments regarding rights, economics, and limited government. Rather, society retains alternating instincts about individual rights, efficiency, and distributive fairness. Lawmakers appeal to and marshal these instincts to serve distinct political interests and constituencies. Today, society’s instincts have been marshaled to favor tort fault rules that benefit powerful corporate defendants but to reject the requirement of criminal fault for the benefit of politically salient crime victims.

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

PART I: DISTRIBUTION IN TORT AND CRIMINAL LAW

Distributive justice, in its broad sense, means the fair apportionment of benefits and burdens in society. In its narrow sense, distribution pertains to the fair allocation of goods between private individuals who dispute over scarce resources. Here, the relevant egalitarian

36 See ARISTOTLE, NICOMACHEAN ETHICS VII, at 1130(b)-1131(a) (asserting that distributive justice involves providing a fair share of “honor or wealth, or anything else that can be divided”); JOHN RAWLS, A THEORY OF JUSTICE 274–84 (1971) (setting forth background institutions that ensure “justice as fairness” but not endorsing socialism over capitalism).
37 See LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 37-38 (2002) (noting that “‘distributive’ refers to the allocation of a particular loss between the disputing parties”).
measure is “localized” between parties to the dispute, rather than between individuals and society. 38 The distributive theory of criminal law in this Article is about local distribution between criminal defendants and victims, and it regards solely those criminal laws whose principal justification appears to be satisfying victims’ interests (as society constructs them) by imposing punishment on offenders. 39 Thus, this Article is not about how to distribute punishment throughout society (i.e. what ought to be a crime). 40 Penal distribution, as referenced in this paper, also does not mean constructing criminal law to respond to social inequality. 41 Criminal distribution simply means depriving an offender of liberty in order to increase the well-being of the victim, much like taxation deprives an individual of money in order to ensure the welfare of others.

In addition, the ideas in this paper should be kept distinct from the critique that all legal rules are distributive in nature, regardless of purported alternative justifications. Critical legal scholars have long censured proponents of rights, fault, and other seemingly neutral rules for using arbitrary deontic principles to obscure the maldistributive and inegalitarian effects of certain legal arrangements. 42 For example, critics assert that the claim, “the guilty should be punished,” uses the purportedly objective philosophical concept, desert, to obscure a legal regime that at best produces inequality and at worst deliberately preserves hierarchy. 43 This Article, however, does not presume that retributivism and utilitarianism are merely political

38 See Stephen R. Perry, The Moral Foundations of Tort Law, 77 IOWA L. REV. 449, 461 (1992) (observing that distribution can be “localized” where relevant “group is limited to the victim and her injurer”).
39 See supra notes 7–10 and accompanying text.
40 See generally PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW (2008).
41 Rehabilitation is distributionist in this sense. See Four Reflections, supra note 7, at 1554.
43 See Alice Ristroph, How (Not) to Think Like a Punisher, 61 FLA. L. REV. 727, 747 (2009) (demonstrating that “desert-thinking” can “provide[] a safe harbor for racial disparity”); Kelman, supra note 42, at 647 (focusing on arbitrary temporal lines accepted by retributivism that exclude considerations of defendant background).
mechanisms to camouflage unfair distribution. Rather, it assumes that retributivism and utilitarianism are coherent philosophical constructs that can satisfactorily explain many areas of criminal law but exposes distinctly distributionist criminal rules by analyzing certain doctrines that cannot be rationalized by retributivism or utilitarianism.

A. Fault, Utility, and Distribution in Tort Law

Distributive theorizing has long been a staple of tort law analysis. Courts and scholars describe strict liability rules as a matter of distributive justice when they seek to fairly distribute the cost of accidents between injurers and injureds. To the question, “who should be liable for purely accidental injury,” the distributive answer is whomever placing liability upon will secure a fair equilibrium. For example, Judge Traynor famously opined in Escola v. Coca Cola Bottling Co. of Fresno that “the cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public.” Thus, distributive justice demands that the “the burdens and benefits of risky activities are fairly apportioned.”

Opposition to tort law distribution manifests through arguments about fault and utility. Turning to fault arguments first, early 20th Century theorists countered the principle that tort law should be about balancing cost by characterizing tort liability as a form of punishment only

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44 Mark Kelman argues that retributivism serves “ideological needs;” “[I]f one reacts with enough horror and shock at the idea of punishing those one defines as faultless without paying much attention to how faultlessness is defined—perhaps one can . . . simply rule out the determinist claim that ‘crime is unavoidable.’” Supra note 42, at 610–11.
45 See supra note 8 and accompanying text.
46 See Robert E. Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401, 406 (1959) (asserting that loss distribution “may be based on the [financial] capacity of the class of persons such as defendant in comparison with the class of persons such as plaintiff”). See, e.g., Brooks v. Beech Aircraft Corp., 902 P.2d 54, 58 (N.M. 1995) (calling strict liability fair because it places cost of industry “upon those who profit” instead of “the innocent victim”).
47 See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (noting strict liability argument “that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them”).
48 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).
appropriate for those at fault. Anti-distributionist courts and scholars reframed the question of who should bear the burden of accidents as who deserves to pay. However, emphasizing fault would be ineffective at completely stamping out distribution without a narrow concept of causation. If many parties could be termed at fault, plaintiffs could proceed against only wealthy defendants. Fault and causation rules thus work together to narrow the class of defendants who “deserve” liability. These distribution-thwarting rules appeal to those with libertarian sentiments, those favoring industrial growth, and those who believe judges are incompetent to engage in efficient or fair wealth distribution. In addition, through analogizing tort damages to punishment, negligence proponents can maintain that holding an “innocent” tortfeasor liable is morally unjust. This enables them to assert that the move from strict liability to negligence was not just a product of early 20th Century courts’ desires to subsidize industry, but the arrival of courts at the philosophically enlightened legal rule.

50 See Paul J. Zwier, Cause in Fact in Tort Law –A Philosophical and Historical Examination, 31 DePaul L. Rev. 769, 802 (1982) (characterizing early 20th century tort law as contest between realists who emphasized social need and natural law theorists who emphasized fault).

51 See Martin A. Kotler, Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine, 58 U. Cin. L. Rev. 1231, 1234 (1990) (describing tort law “as an attempt to punish conduct which violates certain core values”).

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

53 See HORWITZ, supra note 17, at 52.

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

55 See HORWITZ, supra note 17, at 124 (characterizing negligence as “the doctrine of an emerging entrepreneurial class” who argued against liability for injuries but “socially desirable activity”).

56 See, e.g., Rosenberg, supra note 8, at 229 (doubting whether courts possess expertise and authority to distribute). Cf. Kronman, supra note 21, at 501 (observing that the judicial competence argument does not prove “distributional effects should also be ignored in the initial design of a system”).

57 See Robert J. Rhee, Tort Arbitrage, 60 Fla. L. Rev. 125, 181 (2008) (noting that negligence is often equated with blameworthiness); HORWITZ, supra note 17, at 124 (commenting that courts viewed strict liability as “an amoral doctrine” because it imposed liability without blameworthiness).

In the latter 20th Century, a distinct attack on private law distribution emerged in the form of law and economics, which explains and/or justifies tort law with reference to efficiency. The idea is that tort liability rules should and often do encourage would-be injurers and injureds to act in maximally efficient manners. Critical legal scholar Duncan Kennedy describes law and economics as a response in part to “the gigantic liberal law reform project . . . carried out in the courts after World War II.” To conservatives who decry the undemocratic and inefficient nature of redistributing in private cases, the law and economics approach, which heralds efficiency as a determinate method of adjudicating private disputes leaving larger distributive questions to be addressed by the democratic legislature, has natural appeal. Thus, since the 1980s, a main scholarly project has been to encourage purging distributionist considerations from individual cases and claim that such concerns should be addressed, if at all, through large scale programmatic policies. There is, however, some potential conceptual


60 See Robert A. Schapiro, Monophonic Preemption, 102 NW. U. L. REV. 811, 820 (2008) (observing that law and economics views tort law as a means to the “optimal level of accident avoidance”). The dominant school of law and economics, the Chicago School, endorses a normative view of efficiency, see Minda, supra note 59, at 609, although not all and schools do. See Lewis Kornhauser, The Great Image of Authority, 36 STAN. L. REV. 349, 353-56 (1984) (stating that law and economics theories can be descriptive or predictive).


overlap of utilitarian and distributive accounts of tort law. Efficiency may dictate distributively satisfying rules; legal decisions made in the name of distributive fairness could end up being “efficient;” and some might support redistribution because an economically secure populace is utile. Nonetheless, despite some conceptual spillage, fault supporters, utilitarians, and distributionists have staked out relatively distinct philosophical grounds for tort law.

**B. Retribution, Utility, and Distribution in Criminal Law**

The fault and efficiency foundations of tort law find symmetry with similar penal theories that base criminal liability on culpability or the production of utility through crime reduction. Fault-based or retributivist accounts of criminal liability are often traced to Immanuel Kant’s “categorical imperative,” which defines ethical behavior as choices that are moral a priori (not subject to experiential reasoning) and universalizable. The nutshell way of describing retributivism is that offenders “should be punished only because and to the extent that they deserve it,” regardless of any benefit to society. Retributivism demands that the defendant’s

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


66 See HORWITZ, supra note 17, at 112 (noting possibility that one could “in the name of utility” seek to “redistribute wealth”).

67 See Law and Economics, supra note 61, at 468 (remarking that law and economics “made a sharp distinction between efficiency oriented and distributively oriented decision making”); KAPLOW & SHAVELL, supra note 37, at 989 n.26 (2002) (noting the “common belief” that distribution is “unimportant” in law and economics).

68 See Mixed Theories, supra note 59, at 1811 (describing retribution and utility in criminal law as similar to correction and efficiency in tort law).

69 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 89 (H.J. Paton trans., 1964) (1785) (“Act as if the maxim of your action were to become through your will a universal law . . . .”); see also IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., 1887) (stating that “juridical punishment” must be imposed “only because the individual on whom it is inflicted has committed a crime.”). The categorical imperative is “connected (wholly a priori) with the concept of the will,” id. at 111, and thus originates from “the a priori conditions of human cognition.” Aya Gruber, Righting Victims’ Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense, 52 BUFF. L. REV. 433, 451 n.61 (2004) [hereinafter Righting Wrongs].

70 See Stephen P. Garvey, Punishment as Atonement, 46 UCLA L. REV. 1801, 1835–36 (1999) [hereinafter Atonement]; see also Moral Worth, supra note 3, at 179. There is a critique of retributivism as “circular or empty.” See Christopher, supra note 4, at 861. In response, some espouse a “mixed theory” whereby utilitarian considerations dictate what should be a crime and retributivism limits punishment. See, e.g., H.L.A. HART,
culpability alone determine punishment, and hence it is called an “agent-relative” doctrine.\textsuperscript{71} Thus, “retribution” as it is used in this paper should be distinguished from more colloquial characterizations of the principle as revenge.\textsuperscript{72} A harmed victim might “seek retribution” whether or not the defendant was culpable.\textsuperscript{73}

Although retributivists nearly universally define culpability with reference to mens rea,\textsuperscript{74} they vastly differ on the kinds of mental states sufficient for liability. Retributivists generally believe that acting with more intention, for example purposefully, is more culpable than acting with less intention, for example negligently.\textsuperscript{75} However, some theorists entertain the possibility that being unable to recognize certain risks is sufficiently morally blameworthy to merit retributive condemnation.\textsuperscript{76} Of course, there are numerous retributivist objections to premising criminal liability on negligence, and many reject that negligence establishes culpability.\textsuperscript{77} Nonetheless, for the purposes of this paper, arguments that equate negligence with fault fall

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\textsuperscript{71} See Righting Wrongs, supra note 69, at 445.


\textsuperscript{73} See Kevin Cole, Killings During Crime: Toward a Discriminating Theory of Strict Liability, 28 AM. CRIM. L. REV. 73 (1990) (calling this “harm-based retributivism,” which many theorists reject).


\textsuperscript{76} See, e.g., Kenneth W. Simons, Culpability and Retributive Theory: The Problem of Criminal Negligence, 1994 J. CONTEMP. LEGAL ISSUES 365, 397 (1994) (finding punishment for “culpable indifference” retributively appropriate); JEAN HAMPTON, THE INTRINSIC WORTH OF PERSONS 105 (Daniel Farnham ed., 2007) (claiming that failure to recognize risks reflects actor’s choice not to develop adequate moral faculties); but see Michael D. Bayles, Character, Purpose, and Criminal Responsibility, 1 LAW & PHILOSOPHY 1, 11 (1982) (“Failure to conform to a standard of care on one occasion does not indicate an attitude of indifference to standards of care.”).

under the retributive taxonomy. Retributive concepts may also underlie other required elements of crimes, for example, the requirement of actus reus.

Utilitarian penal discourse premises punishment on the production of a beneficial state of affairs, namely security against crime, and generally focuses on three main theories: Deterrence, incapacitation, and rehabilitation. Utilitarianism is considered at odds with retributivism because it sacrifices the a priori principle of desert to a posteriori considerations of utility. Rehabilitation, which purports to produce utility by reforming criminals, is currently unpopular, having been rejected as welfarist and insufficiently retributive because it confers “benefits” on criminals. Thus, for several decades, deterrence has been the most visible utilitarian justification, with incapacitation recently coming into vogue. Today, it is common to encounter arguments characterizing certain criminals as “undeterrable” and calling for permanent

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78 See John C. Jeffries & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1372 (1979) (observing that most scholars find negligence “a minimally sufficient basis of guilt”).

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

80 See Miko Bagoric and Kumar Amarasekara, The Errors of Retributivism, 24 MELB. U. L. REV. 124, 131 (2000) (observing that utilitarianism authorizes punishment only “if some good can flow from it”).

81 See Herbert L. Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1079 (1964); supra note 4.

82 See, e.g., John Bronsteen, Retribution’s Role, 84 IND. L.J. 1129, 1137 (2009) (noting criticism that utilitarians support “punishment of the innocent when that would increase overall utility”); Bagoric & Amarasekara, supra note 80, at 133 (observing the persuasiveness of this objection to utilitarianism).


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

Distribution in the criminal context has not been theorized as in the tort context. Nevertheless, it appears evident that retribution and utility bear the same hostile relationship to criminal distribution as fault and efficiency bear to tort distribution. Penal distribution dictates that the criminal receive the amount of punishment that restores the victim to an appropriate state. To put it in tort-like terms, when a defendant is not punished, the victim must “bear the entire burden” of the crime, whereas imposing punishment relieves the victim from shouldering


89 See Steven K. Erickson, Mind Over Morality, 54 BUFF. L. REV. 1555, 1570 (2007) (reviewing CHARLES PATRICK EWING & JOSEPH T. McCANN, MINDS ON TRIAL (2006)) (posing that deterrence criticisms “never gain much popular traction” because public supports criminal system); Gruber, supra note 69, at 458 (noting that utilitarian punishment justifications “resonate the most strongly”).

90 See JEREMY BENTHAM, A THEORY OF LEGISLATION 332 (1882) (“Punishments are inefficacious when directed against individuals who could not know the law, who have acted without intention . . . .”); Steven Shavell, Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent, 85 COLUM. L. REV. 1232, 1248-49 (1985) (contending that harm tends to be greater when there is intent).


92 See supra note 7 and accompanying text.
the entire suffering burden. The punishment dictated by the victim’s need for closure may be less or more than what constitutes appropriate deterrence or desert.

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

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93 See supra note 49 and accompanying text.
96 Jules Coleman, Tort Law and the Demands of Corrective Justice, 67 IND. L.J. 349, 384 (1992) [hereinafter Corrective Justice Demands] (asserting that corrective justice “demands that wrongful (or unjust) gains and losses be rectified”); Margaret J. Radin, Compensation and Commensurability, 43 DUKE L. J. 56, 60 (1993) (opining that corrective justice creates a state between victim and injurer that is “morally appropriate . . . to the status quo ante”).
98 See Rosenberg, supra note 8, at 232 (remarking that corrective justice involves “a normative judgment regarding the specific harm-causing act”); Julie Chi-hye Suk, Antidiscrimination Law in the Administrative State, 2006 U. ILL. L. REV. 405, 412 (2006) (observing that corrective justice involves remedying wrongdoing whereas distributive justice involves “just distribution”); cf. Four Reflections, supra note 7, at 1556 (noting that some theories of corrective justice use causation, not fault, as the basis for liability).
However, it is not clear why restoring the victim is what one at fault must do.\textsuperscript{100} Indeed, the retributive rationalization runs into even more problems when the compensatory amount relates to unforeseeable harms.\textsuperscript{101}

Many assert that compensation is required to vindicate the value of victims.\textsuperscript{102} If valuing victims is key, however, it seems that fault is not necessary. A person injured by faultless conduct is of no lesser value than one injured through negligence. Corrective justice proponents respond with the tautological argument that only \textit{wrongdoing} creates the need for victim vindication.\textsuperscript{103} But then there is the issue of why only culpable action is normatively related to correction.\textsuperscript{104} In the end, it may be that corrective justice reflects both a distributionist mistrust of a society that forces victims to bear the costs of accidental injuries\textsuperscript{105} and the reality of an

\textsuperscript{100} See Four Reflections, supra note 7, at 1558 (observing that compensation may be “not enough punishment” or may be “more than the punishment one deserves”); Larry Alexander, \textit{Causation and Corrective Justice: Does Tort Law Make Sense?}, 6 LAW & PHIL. 1, 4 (1987) (maintaining that compensation can cause “suffering either more than or less than retributively deserved”).

\textsuperscript{101} See FEINBERG, supra note 99, at 58-59 (contending that the facts underlying desert “must be facts about the subject”). Hart and Honore rationalize the correction of unforeseeable harms as a form of “make up” retribution, stating that it seems fair to hold someone liable for unforeseeable loss “when we consider that a defendant is often negligent without suffering punishment.” H.L.A. HART AND TONY HONORE, \textit{CAUSATION IN THE LAW} 243 (2d ed. 1985).


\textsuperscript{103} See, e.g., Jules L. Coleman, \textit{The Structure of Tort Law}, 97 YALE L.J. 1233, 1249 (1988) (observing that victim’s “claim to compensation as a matter of justice is \textit{analytically} connected to... the injurer’s conduct.”).

\textsuperscript{104} A related objection is that distributing wealth is not true “compensation.” See Gregory C. Keating, \textit{The Heroic Enterprise of the Asbestos Cases}, 37 SW. U. L. REV. 623, 635 (2008) (commenting that death “is beyond compensation”).

\textsuperscript{105} See Rosenberg, supra note 8, at 233 (observing that “entitlements enforced by corrective justice simply reduce to a form of distributional insurance”); Elizabeth Adjin-Tettey, \textit{Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies}, 49 MCGILL L.J. 309, 343-44 (2004) (asserting that corrective justice seeks to “rectify deviations” from the original “just distribution”). Corrective justice theorists respond that distributive justice cannot explain why tort law permits only recovery from human injurers. The answer may be that tort law developed in an era when individual suits were the only way to secure distribution and accidents were considered intentional. See Richard L. Abel, \textit{A Critique of Torts}, 37 UCLA L. REV. 785, 786 (1990) (observing that the “misfortunes we now interpret as accidental... often were construed as intentional by reference to beliefs in witchcraft and sorcery”).
individualized tort regime that prioritizes fault. Yet the repackaging of fault/distribution as correction produces distortive effects that both retributivists and distributionists condemn.

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

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106 Joel Feinberg explains tort liability as “weak retributivism:” “[I]f someone has got to be hurt in [an] affair, let it be he wrongdoer . . . .” FEINBERG, supra note 99, at 220.
108 See, e.g., Hampton, supra note 94; Fletcher, supra note 94.
109 Id. at 58.
111 Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. REV. 65, 76 (1999). In addition, if “desert” is correction of harm, much of criminal law cannot be rationalized because it does not involve harm.
112 Jean Hampton endorses a corrective view of retribution that does not require harm to the victim. See supra note 94, at 1661.
113 This seems to reduce compensatory justice to retributivism. See Heidi M. Hurd, Expressing Doubts About Expressivism, 2005 U. CHI. LEGAL F. 405, 407 (2005) (asserting corrective justice collapses into retributivism when it assumes that victims are “vindicated if and only if their offenders receive their just deserts” irrespective of victim restoration).
114 Fletcher, supra note 94, at 52.
Consequently, justifying criminal laws by reference to distributive ends is quite a separate endeavor from supporting laws that retributively punish or achieve maximum deterrence.\textsuperscript{115} Although distributive justice, retributivism, and utilitarianism can be used to rationalize the same legal rule and often overlap in significant ways, they are separate justificatory programs with their own set of supporters and detractors.\textsuperscript{116} The next Part analyzes traditional criminal laws that appear by many accounts unjustifiable by appeal to retributivism and utilitarianism and reveals their true distributive bases.

\section*{II: \textsc{Distribution Explains Classic Criminal Law Quandaries}}

This Part examines traditional criminal law doctrines that have proven troubling to retributivists and utilitarians and determines whether, in fact, distribution could explain their continued existence. To that end, this section considers the much-debated laws involving felony murder and the divergence between attempts and completed crimes.\textsuperscript{117} Felony murder and attempt laws rest liability on results (what Sanford Kadish calls the “harm doctrine”)\textsuperscript{118} and are subject to the critique that individuals should not be punished for “bad luck.”\textsuperscript{119} Although defenders of these laws offer various justifications, many scholars simply write them off as

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\begin{itemize}
\item \textsuperscript{115} See Rosenberg, \textit{supra} note 8, at 232 n.55 (observing that distributive reasoning “applies a social criterion of fair wealth equilibrium independent of . . . individual desert”).
\item \textsuperscript{116} See \textit{supra} notes 64–67 and accompanying text.
\item \textsuperscript{117} This paper deliberately excludes statutory rape and public welfare offenses. Statutory rape laws do not reflect distributive goals, but rather specific moral norms regarding sexuality and family. See Gerald Leonard, \textit{Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code}, 6 BUFF. CRIM. L. REV. 691, 774–803 (2003). Public welfare offenses are not distributive because they generally do not involve actual injury, see State v. Warfield, 80 P.3d 625, 628 (Wash. Ct. App. 2d Dist. 2003), and they are usually justified by utilitarianism. \textit{See infra} notes 123–128 and accompanying text.
\item \textsuperscript{118} Kadish, \textit{supra} note 12, at 679. Although Kadish uses “harm doctrine” to describe lessening liability for those who intend but do not produce harm, this paper uses the term to describe any link between liability and unintended results. The “harm doctrine” is distinct from the John Stuart Mill’s “harm principle” that limits government action to preventing harm. \textit{See John Stuart Mill}, \textit{On Liberty} 9 (1859).
\item \textsuperscript{119} \textit{See infra} notes 156–164 and accompanying text.
\end{itemize}
irrational. A distributive rationale, however, appears to account fully for why these laws continue to exist and thrive in modern times.

A. Felony Murder

The felony murder doctrine, which holds felons strictly liable for deaths occurring during felonies, “is one of the most widely criticized features of American criminal law.” Felony murder is not, however, the only strict liability criminal law. There is a discreet category of criminal laws called public welfare or regulatory offenses that make defendants strictly liable for violations of government regulations. These offenses originated during the industrial revolution when federal legislation responded to the dangers inherent in mass production of consumable goods. Lawmakers reasoned that strict liability was appropriate given the particular risks of widespread harm posed by industrialization, the difficulty in proving negligence, and the de minimus nature of most regulatory penalties. As a consequence, the

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driving rationale of regulatory criminal law was utilitarian—to incentivize producers to use extra care in manufacturing. Unlike regulatory offenses, felony murder does not involve large numbers of injuries, and intent is not especially difficult to prove. Moreover, far from imposing a small regulatory penalty, application of the felony murder doctrine can be the difference between life and death. Consequently, felony murder is often considered a crime of more questionable validity than public welfare offenses.

Strict liability is by its nature troubling to retributivists, and thus much of the defense of felony murder has taken place on distinctly utilitarian terrain. Utilitarians assert that the felony murder rule produces two main deterrent effects: (1) It deters potential criminals from committing felonies, and (2) it encourages those who commit felonies to be careful. The criticisms of the deterrence basis for the felony murder rule are legion. Many assert that given

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128 The Model Penal Code and many lower courts permit strict liability only for “violations” or minor offenses. See Model Penal Code § 2.05 (1980); United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985). However, the Supreme Court has not limited the sentence that may be imposed for regulatory crimes. See Balint, 258 U.S. at 252.
129 See Feinberg, supra note 99, at 224 (maintaining that that strict liability protects the public by providing safety incentives).
131 See Kadish, supra note 12, at 695-96 (calling rule “rationally indefensible”).
133 See Guyora Binder, The Origins of American Felony Murder Rules, 57 Stan. L. Rev. 59, 131 (2004) (tracing utilitarian argument to 19th Century theorists who saw rule "as a device for regulating dangerous activities"); Tomkovicz, supra note 129, at 1450 (stating that the “rule’s conflict with accepted culpability principles” creates need for deterrence justifications).
134 See Fisher v. State, 786 A.2d 706, 732 (Md. 2001) (stating that rule “is intended to deter dangerous conduct”); Criminal Responsibility, supra note 132, at 64–65 (noting this deterrence argument).
how felons reason and the infrequency and randomness with which deaths occur during felonies, there is little chance that potential murder liability measurably affects incentives.\textsuperscript{136} Moreover, deterrence could be achieved more easily by increasing felony penalties or creating a predictable measure of enhancement (like sentencing every 10\textsuperscript{th} convicted felon to life)\textsuperscript{137} than by placing felons on punishment “roulette wheels.”\textsuperscript{138}

Randomly giving life sentences, however, would never survive judicial or societal scrutiny.\textsuperscript{139} This indicates that non-utilitarian moral intuitions explain the resilience of the rule.\textsuperscript{140} In fact, retributive accounts of felony murder have long existed. One of the earliest retributive justifications of felony murder came in the form of the “transferred intent” principle.\textsuperscript{141} The contention is that intent to commit a felony “transfers” to any concurrent death, such that the felon is presumed to have intended the death.\textsuperscript{142} This concept of a culpability “trigger” is disturbing to retributivists because not all felons intend or even reasonably foresee death.\textsuperscript{143} Thus, experts commonly dismiss such retributive accounts as ethically unsound.\textsuperscript{144}

\begin{thebibliography}{99}
\bibitem{136} See \textit{id.} at 452–53; Marcia J. Simon, \textit{Note, An Inappropriate and Unnecessary Expansion of Felony Murder in Maryland}, 65 Md. L. Rev. 992, 1010 (2006) (asserting that “it is highly unlikely that commission of a felony will result in death”); Enmund v. Florida, 458 U.S. 782, 800 n.24 (1982) (citing statistic that only 0.43\% of robberies result in homicide).
\bibitem{137} See \textit{Criminal Responsibility, supra} note 132, at 64–65 (maintaining that deterrence could be achieved “more efficiently, by convicting every tenth felon of murder”).
\bibitem{138} See \textit{United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2001)} (approving strict liability sentencing enhancement as “punishment bonus”).
\bibitem{139} I say “likely” because given the phenomenon of repeat offender statutes, see, e.g., \textit{ALA. CODE \S 13A-5-9 (1975)}, many felons are in an enhancement lottery.
\bibitem{140} See \textit{Criminal Responsibility, supra} note 132, at 64 (observing rule’s “resilience”).
\bibitem{141} “Transferred intent” often describes the assessment of liability to one who intends a crime, acts, and produces an injury, but the person injured was not the intended victim. \textit{See \textit{MODEL PENAL CODE \S 2.03(2) (2009)}}.
\bibitem{142} \textit{See State v. O’Blasney, 297 N.W.2d 797, 798–99 (S.D. 1980)} (stating that “general malicious intent is transferred from [the felony] to the homicide”) (internal quotations omitted).
\bibitem{143} \textit{See Kenneth W. Simons, When is Strict Criminal Liability Just?}, 87 J. CRIM. L. \& CRIMINOLOGY 1075, 1110 (1997) (criticizing this “constructive culpability” where harm “triggers” culpability). There is a related ideology that once a person becomes a felon, he is perpetually culpable. \textit{See Gerber, supra} note 130, at 782 (observing view that “no felon can possibly be innocent”).
\bibitem{144} \textit{See, e.g., Kadish, supra} note 12, at 697 (calling transferred intent argument irrational); Gerber, \textit{supra} note 130, at 770 (1999) (stating that transferred intent “contradicts our most basic conception of proportionality”).
\end{thebibliography}
Nevertheless, there are more sophisticated retributivist justifications of the felony murder rule. Some argue that the rule appropriately condemns felons who negligently cause death for immoral reasons. However, many formulations of the felony murder rule plainly do not require negligence, much less ill will. Cases impose murder liability when victims die of heart attacks, when police shoot bystanders, when dealers sell drugs that cause overdose, and other situations that do not neatly fit in a negligence-plus-motive paradigm. Others make a “practical retribution” argument that strict liability is justified because most felony murderers possess the requisite intent and to require mens rea risks exonerating some culpable killers. However, as noted before, intent to kill is not particularly difficult to prove. Moreover, treating nonculpable defendants as sacrificial lambs in the quest for aggregate just punishment seems fundamentally incompatible with Kantian retributivism. Thus, the question remains whether there is a deontological justification for the blanket felony murder rule.

In answering this question, it is helpful to provide a brief background to the concept of “moral luck.” There are tomes of philosophical writing on this topic, but what follows is a

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145 See, e.g., Simons, supra note 143, at 1123-24 (justifying rule by asserting that felons should make “extensive efforts” to be careful).
146 Culpability, supra note 122, at 967 (defending “expressive” theory that predicates blame on “the actor’s expectation of causing harm” and “the moral worth of [his] ends”).
147 See Cole, supra note 73, at 127 (observing argument that common underlying felonies do not establish blameworthiness for murder); but see Culpability, supra note 122, at 979 (calling such cases “sporadic”).
149 See infra notes 189–191 and accompanying text (discussing cases).
150 See, e.g., United States v. Soler, 275 F.3d 146, 153 (1st Cir. 2002); United States v. McIntosh, 236 F.3d 968, 972 (8th Cir. 2001) (applying sentence enhancement to drug dealer for unforeseeable drug user death).
152 See MICHAEL MOORE, A THEORY OF CRIMINAL LAW 156 (1997) (calling this “consequentialist” retributivism that regards “the guilty receiving punishment as a good . . . to be maximized”).
153 See supra note 129 and accompanying text; Cole, supra note 73, at 97 (commenting that such reasoning supports “strict liability throughout the criminal law”).
154 See Russell Christopher, Does Attempted Murder Deserve Greater Punishment Than Murder? Moral Luck and the Duty to Prevent Harm, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 419 (2004) [hereinafter Luck and
truncated discussion for the purpose of discovering a retributivist justification for the harm doctrine. One of the strongest objections to the harm doctrine is that it premises punishment on mere luck.\textsuperscript{156} Thus, it is unacceptable to assess murder liability to a felon who engaged in a relatively safe felony and encountered “bad luck” when the investigating officer accidentally shot his partner, but assess only felony liability to an armed robber who did not encounter resistance.\textsuperscript{157} Retributivism, however, regularly tolerates the operation of luck. “Bad luck” certainly accounts for a portion of almost every convicts’ criminal disposition (termed “constitutive” luck),\textsuperscript{158} but retributivists do not consider that ground to deny criminal liability.\textsuperscript{159} Luck regarding criminal opportunity (called “circumstantial luck”)\textsuperscript{160} is also generally palatable to retributivists. Circumstantial luck occurs when two similarly intentioned actors produce different results because one was presented with a criminal opportunity the other was not.

\textsuperscript{155} This topic was popularized in philosophical literature by the famous essays Thomas Nagel, \textit{Moral Luck}, in \textit{Moral Luck} 57 (Daniel Statman ed., 1993) and Bernard Williams, \textit{Moral Luck, in id.}, at 35.

\textsuperscript{156} See Kadish, supra note 12, at 688 (asserting that fault cannot depend “on what is beyond [one’s] control”).

\textsuperscript{157} See Donald A. Dripps, \textit{Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame}, 56 VAND. L. REV. 1383, 1404 (2003) (maintaining that “rational” position is that without mens rea there is no difference between a felony murderer and felon).

\textsuperscript{158} See Nagel, supra note 155, at 60 (defining constitutive luck as luck regarding “the kind of person you are”).


\textsuperscript{160} See Nagel, supra note 155, at 60 (describing circumstantial luck as luck regarding “the kinds of problems and situations one faces”).
Holding the noncriminal actor less culpable is acceptable to retributivists because there is always the possibility that he would have acted lawfully had the criminal opportunity arisen.161

The difficult case of bad luck for retributivists is when two defendants intend and act in the same manner, and luck is the only factor leading to disparate results (“resultant luck”).162 In this case, disparate results cannot be attributed to any different choices or non-choices made by the two defendants.163 Philosopher Thomas Nagel characterizes the challenge as reconciling the obvious importance that law and society attach to fortuitous results with the unimpeachable logical mandate that luck should not matter.164 Many have responded to Nagel’s challenge with complex theories of liability and morality. The arguments rationalizing moral luck from a seemingly deontological standpoint appear to fall into three categories: Proof, intuitionism and instrumentalism. These arguments ultimately do not explain the harm doctrine as clearly as distribution.

The proof argument holds that unintentional harm matters as an indicator of the harmer’s moral comportment.165 This theory hypothesizes a thin version of luck in which consequences are less random than they appear.166 Judith Andre, for example, morally differentiates the reckless driver who kills from the one who does not on the ground that “[s]ome people

161 See Kadish, supra note 12, at 690 (asserting that bad luck may lead you to “reveal[] your badness” but “it is that choice for which you are blamed”).
162 See Luck and Harm, supra note 154, at 426 n.31 (observing argument that “only outcome luck is problematic”).
163 See Kadish, supra note 12, at 690 (stating that retributivism may tolerate “fortuity prior to choice” but not “fortuity thereafter”); Michael S. Moore, The Independent Moral Significance of Wrongdoing, 5 J. CONTEMP. LEGAL ISSUES 237, 237 (1994) [hereinafter Significance of Wrongdoing] (calling punishing nonculpable harmers “anathema” to moral philosophers).
164 Nagel, supra note 155, at 147. See also Luck and Harm, supra note 154, at 421 (noting conflict between the “nearly universal intuition” that results matter and the “seemingly unimpeachable argument” that people should not be punished for bad luck).
165 See Judith Andre, Nagel, Williams, and Moral Luck, 43 ANALYSIS 202 (1983); Norvin Richards, Luck and Desert, 95 MIND 198, 201 (1986).
166 See Andre, supra note 165, at 207 (“We have more control over the kind of person we are than we sometimes think”); Herman, supra note 154, at 148 (asserting that luck should not encompass “the normal or expectable range of independent (of our will), causally ‘live’ effects”).
persistently misjudge, and in the process hurt other people. (We might call the agents ‘morally accident-prone.’) They are malformed in some way; something prevents them from correctly assessing the facts before they act.”  

Even if retributivists would accept being “morally accident-prone” as sufficient for criminal culpability, there are lingering problems. First, if results always indicate character, we must believe that the spree killer whose stray bullet kills a terrorist about to detonate a bomb (saving thousands) has by virtue of that result evidenced something excellent in his character. Second, even if results have some bearing on character, the criminal law unlikely recognizes this attenuated connection as a basis for formal liability.

Both the intuitionist and instrumentalist positions begin with the recognition of a societal intuition to base blame on results. The intuitionist account of moral luck contends that society’s intuition invests results with moral content. However, as Joel Feinberg remarks, “That the bulk of the people believe that a particular proposition is true is a good reason, I agree, for tolerance and respect. But it is not a good reason, even in a democracy, for believing that proposition to be true.” Moreover, the purportedly collective social intuitions favoring the

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167 Andre, supra note 165, at 205.
168 See id. (conceding that the morally accident-prone “are neither blameworthy nor punishable”). Cf. Hampton, supra note 94 (characterizing harm-causing as part of a bad character for which one is responsible).
169 See Morse, supra note 12, at 384–85 (supporting moral condemnation of one whose dangerous conduct “produces an entirely unintended and unforeseen benefit”).
170 But see id. at 411 (asserting that results are “misleading indicators of both risk and mens rea”).
171 See Andre, supra note 165, at 206 (distinguishing the “sense of diminished worth” from causing harm from “moral fault”).
172 See Nagel, supra note 155, at 69 (commenting that “our basic moral attitudes . . . are determined by what is actual”); Janice Nadler & Mary R. Rose, Victim Impact Testimony and the Psychology of Punishment, 88 CORNELL L. REV. 419, 423 (2003) (observing that “people’s punishment judgments are guided” by psychological significance of harm).
174 Failed Attempts, supra note 154, at 119; see also Morse, supra note 12, at 421–22 (arguing that social intuition does not mean “desert is independently attributable in part to results”).
harm doctrine may be based on the feelings of crime victims and those sympathetic to them.\(^{175}\) Yet victims who suffer horrible injuries often react in ways that they, themselves, in hindsight see as morally condemnable.\(^{176}\) As one victim of the Oklahoma City bombings explained, “Victims and family members are not dispassionate. We are angry, depressed, and mourning.”\(^{177}\)

Instrumentalist arguments regard the law’s recognition of societal intuition as instrumentally important to some separate moral scheme.\(^{178}\) Instrumentalist courts and scholars assert that divergences between criminal law and social intuition lead to bad results like widespread vigilantism and lack of public confidence in government.\(^{179}\) Justice Stewart remarked in the death penalty context that “the seeds of anarchy are sown” when “people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve.’”\(^{180}\) However, a retributivist would plainly reject punishment of the innocent to cater to society’s wishes.\(^{181}\) Instrumentalist arguments also appear to prove too much and too little. Satisfying society’s punitive demands could justify the imposition of punishment whenever society demands it, whether or not the defendant produces harm. Conversely, society’s tolerance for crime might dictate foregoing punishment of culpable harm-causers.

Many retributivists thus simply write off the social intuition to blame for harm as mere inferential error, asserting that society unreasonably equates unintentional harm with

\(^{175}\) See Schulhofer, supra note 12, at 1516 (denying that intuitions supporting harm doctrine have widespread appeal).

\(^{176}\) One Oklahoma City victim stated that after the bombing he “wanted McVeigh and Nichols killed without a trial” and concluded that “victims are too emotionally involved in the case and will not make the best decisions.”Senate Committee Report on Crime Victims’ Rights Amendment, S. Rep. No. 108–191 (Nov. 7, 2003), at 85 (quoting Bud Welch).

\(^{177}\) Id. (quoting Patricia Perry).

\(^{178}\) See, e.g., Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. Calif. L. Rev. 1, 28 (2007) (arguing that law should “maximize its moral credibility” by reflecting “community intuitions of justice”).

\(^{179}\) See e.g., Hart, supra note 70, at 36; Schulhofer, supra note 12, at 1511 (rejecting that “official retaliation” is better than “mob violence”).

\(^{180}\) Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

\(^{181}\) A consequentialist could argue that society becomes less stable when courts doctrinalize vengeance. See Schulhofer, supra note 12, at 1513.
culpability. Nevertheless, a case can be made that society’s intuition to blame when bad things happen is not arbitrary, irrational, or divorced from morality, but a reasonable manifestation of society’s adherence to distributive justice principles in a culture of legal individualism. The distributive logic behind punishing unintentional harmers is evident: There are two individuals involved in the criminal incident—the innocently intentioned, unlucky defendant and the innocent victim. The victim has been put in a deprived condition by the event involving the defendant, and the legal system’s role is to create a fair distributive balance between the victim and criminal. A question might then arise as to why society supports alleviating victims’ suffering in a retributively problematic way (by punishing the nonculpable). The answer is that within the current criminal law narrative, punishment of offenders is the exclusive manner of providing relief to victims.

Given that distribution is not the preferred discourse of criminal law, or most law, there is a tendency to cover distributive sentiments by claiming fault. Thus, courts examining felony murder do not overtly mention the distributive basis of the rule, preferring to rely on utilitarian reasoning, transferred intent, or tradition. Nonetheless, some doctrinal developments underscore that victimhood is key in assessing felony murder liability. There is a

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182 See, e.g., ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 100 (1976) (calling adherence to harm doctrine “an irregularity in the sentiments of all men”); Dripps, supra note 188, at 1388 (describing society’s linking culpability with unintentional harm as a “fundamental attribution error”).


184 See Nadler & Rose, supra note 172, at 447 (study finding mock jurors more lenient when victims were better able to cope); Tomkovicz, supra note 129, at 1371 (observing that victim injury “generates an inclination to respond” with “pay back”).

185 See, e.g., Atonement, supra note 70, at 1844 (maintaining that victim restoration can only be achieved by “vindicate[ing] the victim’s worth through punishment”). See Susan Bandes, Victims, “Closure,” and the Sociology of Emotion, 72 LAW & CONTEMP. PROBS. 1, 10 (2009) (observing a “feedback loop” in which society promises victims closure and the system is structured by that promise).

186 See Kadish, supra note 12, at 701 (contending that retributive instincts “run deep and powerfully in our culture”).

187 See Ristroph, supra note 43, at 742 (noting that philosophical “rhetoric is available to defend almost any . . . punishment.”).

188 See supra notes 133–135, 142 and accompanying text.
line of cases holding that a defendant is not liable for felony murder when a co-felon dies, even though he would have been liable had an innocent been killed. Courts avoid justifying this rule by overt reference to the comparative worth of felon and bystander victims. However, the weak reasoning behind the division combined with its popularity belie that the doctrine reflects the basic view that felon-decedents should not receive distributive relief.

To be sure, considering the felony murder rule a matter of distributive justice raises some inevitable questions. One question is why a distributionist regime would accept the notion that death is different. To answer, perhaps the fact that strict liability has not been extended to felonies producing non-death harms is just a historical development with no clear connection to retribution, utility, or distribution. However, there is cogent argument that the death-is-different idea is more easily rationalized by distributionism than utilitarianism or retributivism. Utilitarians can be confronted with the argument that it would be far more effective to deter felonies by making felons strictly liable for non-death harms like destruction of property or injury. Empirically, these results likely happen more often than death, and punishing for them would more effectively shape incentives. As a retributive matter, if fortuitous death indicates moral blameworthiness then so should other fortuitous bad results.

By contrast, one can argue that death calls for a wholly different distributive solution. When non-death harms occur, a victim can feel “closure” from punishing the felony alone,

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189 See, e.g., Com. v. Redline, 137 A.2d 472, 483 (Pa. 1958) (holding that police’s justifiable killing of a co-felon cannot engender murder liability).
190 See, e.g., People v. Hickman, 297 N.E.2d 582, 586 (Ill. App. 3d. 1973) (“We do not . . . indulge in the fanciful theory that the victim being a felon assumed the risk . . . .”).
191 Despite the ready criticisms, see, e.g., People v. Austin, 120 N.W.2d 766, 770 (Mich. 1963) (asserting that it is impossible to draw a logical distinction between accidental and “justifiable” felony killings), courts widely implement this distinction. See People v. Raymer, 662 P.2d 1066 (Colo. 1983); State v. Hansen, 734 P.2d 421 (Utah 1986); Wooden v. Commonwealth, 84 S.E.2d 811 (Va. 1981); State v. Brigham, 758 P.2d 559 (Wash. 1988). See also UTAH CODE ANN. § 76-5-203(2)(d)(ii) (1953) (creating exception for felony murder liability when a co-felon is killed).
192 Cf. Tomkovicz, supra note 129, at 1458 (opining that historical influence might explain persistence of rule).
193 See supra note 136.
whereas when there is a death, more punishment must be meted out to restore survivors to an appropriate status. In addition, death may create a tipping point between distributive and retributive sentiments. When victim suffering is significant, society embraces distributive intervention. When harm is not great, society reverts back to fault instincts. Today, however, distributive sentiments are beginning to trump culpability concerns in a variety of criminal cases, not just when harm is at its zenith. In sum, it appears by all accounts that retributivism fails to make sense of the felony murder rule and utilitarian defenses are internally contradictory and empirically unsound. By contrast, the felony murder rule makes perfect sense as a means of distributing satisfaction to harmed victims by imposing increased penalties on felons who cause deaths.

B. The Attempt-Crime Divide

For decades, theorists have struggled to rationalize criminal law’s mandate that two people who intend and commit the same criminal acts should be treated differently because one completed the crime and the other did not (sometimes called the “punishment differential”). In fact, the preceding arguments involving moral luck are most often set forth in the context of

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195 See Tomkovicz, supra note 129, at 1464 (observing the “evocative symbolic value” of death).
196 There is also the question of why distributionist instincts have not led to all unintentional deaths being charged as murder. To answer, distributive sentiments trump retributive sentiments only when distribution burdens the socially disfavored, like felons. See id. at 1474 (remarking that the public rejects holding “innocents,” but not felons, liable for accidental death); infra Part IV.
197 See infra notes 282–285 and accompanying text.
198 See Simons, supra note 143, at 1112 (noting that “retributivists have yet to give an account of the acceptable dimensions of the moral luck ‘differential’”).
199 Failed Attempts, supra note 154, at 117 (observing that “[e]very bona fide philosopher of law tries his hand” at this conundrum).
200 See, e.g., Morse, supra note 12, at 390; see Luck and Harm, supra note 154, at 419 (using term “punishment differential”).
this conundrum.\textsuperscript{201} As with felony murder, there have been many attempts to justify the punishment differential by reference to utilitarianism and retributivism. As in the felony murder context, these attempts have been met with numerous objections.

The principal consequentialist justification of the punishment differential is that punishing completed crimes more severely will encourage attempters to abandon.\textsuperscript{202} However, “by the time the defendant has done the substantial acts toward carrying out the crime that the law of attempt requires, there is very little chance of a change of heart.”\textsuperscript{203} Others suggest that the differential incentivizes those who, for example, shot victims to try to save their lives.\textsuperscript{204} Yet it seems quite far-fetched that a shooter will try to save his victim because he is afraid of the punishment differential.\textsuperscript{205} As a result, utilitarian justifications engender much skepticism. This leaves the retributive argument that those who complete crimes are more culpable than those who do not.\textsuperscript{206} As discussed in detail in the last sub-section, there are many theories positing the moral content of apparent luck, but these ultimately prove unsatisfying.\textsuperscript{207} The question becomes whether there are other deontological arguments that can explain the attempt-crime divide.

\hspace{1em}\textsuperscript{201} See e.g., Failed Attempts, supra note 154; Morse, supra note 12; see also Ken Levy, The Solution to the Problem of Outcome Luck: Why Harm is Just as Punishable as the Wrongful Action that Causes It, 24 LAW AND PHILOSOPHY 263, 267 n.7 (2005) (citing articles on attempts and moral luck).

\hspace{1em}\textsuperscript{202} See Schulhofer, supra note 12, at 1519 (discussing argument that the divide incentivizes “the actor to desist”).

\hspace{1em}\textsuperscript{203} Kadish, supra note 12, at 687.

\hspace{1em}\textsuperscript{204} Id. at 1519–20 (noting argument that punishment differential creates incentive to aid victims).

\hspace{1em}\textsuperscript{205} There is also the argument that without the differential, “an actor who has attempted to kill, but has failed, would have no disincentive not to try again.” Luck and Harm, supra note 154, at 420 n.7. But this is only true if the punishment is a “maximal” sanction. See Luis Ernesto Chiesa Aponte, Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing, 10 NEW CRIM. L. REV. 1 (2007). In addition, being lenient on attempters “could tend to decrease deterrence.” Schulhofer, supra note 12, at 1521; see also CRIMINAL ATTEMPTS, supra note 173, at 122.

\hspace{1em}\textsuperscript{206} See Leo Katz, Why the Successful Assassin Is More Wicked than the Unsuccessful One, 88 CALIF. L. REV. 791, 792 (2000) (arguing that the “real challenge” is providing deontological justification for punishment differential).

\hspace{1em}\textsuperscript{207} See supra notes 154–181 and accompanying text.
One plausible way to rationalize the divide from a retributive and utilitarian standpoint is by concentrating on the “substantial step” requirement.\textsuperscript{208} Attempt law divides movements toward crime into preparatory acts that do not engender liability and substantial steps that bear a legally sufficient relationship to the completed crime.\textsuperscript{209} The trend in criminal law has been toward characterizing acts quite removed from completed crimes, like reconnoitering, as substantial steps. Thus, the vast majority of attempts are not cases in which the crime certainly would have succeeded had not resultant luck intervened.\textsuperscript{210} Retributivists, in turn, should have little trouble differentiating most attempters from completers because, as noted before, an actor who has not made a choice is less blameworthy than one who made an immoral choice.\textsuperscript{211} From a utilitarian perspective, persons whose attempts are far from completion are less dangerous and require less deterrence.\textsuperscript{212}

Of course, this set of arguments does not directly respond to the hypothetical as framed by theorists, which necessarily involves identical defendants only separated by the “luck of the draw.”\textsuperscript{213} Nonetheless, there is a “practical retribution” argument here: It would be patently unjust to treat most attempters the same way as completers, so attempts should be punished less.\textsuperscript{214} In order to protect the many whose attempts are farther back on the timeline, the law

\textsuperscript{208} See Model Penal Code § 5.01(1)(c) (1980) (stating that attempt requires “a substantial step in a course of conduct planned to culminate in his commission of the crime”); United States v. Saavedra-Velazquez, 578 F.3d 1103, 1107 (9th Cir. 2009) (asserting that there must be “a substantial step towards committing the crime”).

\textsuperscript{209} See United States v. DeMarce, 564 F.3d 989, 998 (8th Cir. 2009) (“A substantial step goes beyond ‘mere preparation’ but may be less than the ‘last act necessary . . .’”); United States v. Smith, 264 F.3d 1012, 1016 (10th Cir. 2001).

\textsuperscript{210} See Herman, supra note 154, at 144 (maintaining that “not all attempts are like the [hypothetical] shooting case”).

\textsuperscript{211} See Criminal Attempts, supra note 173, at 119 (commenting that retributivism supports less punishment for “incomplete attempts”).

\textsuperscript{212} See Morse, supra note 12, at 389 (noting that “[m]ost preparatory conduct is not itself terribly dangerous or immoral”).

\textsuperscript{213} See Kadish, supra note 12.

gives a “free pass” to the few who have taken the last step.\textsuperscript{215} Of course, a straightforward retributive solution to the punishment differential would be to grade steps along the preparation to completion timeline.\textsuperscript{216} Today, courts resolve the punishment differential problem by unilaterally increasing penalties for attempts.\textsuperscript{217}

The practical retribution argument, however, will not convince Kantians that the attempt/crime divide is morally defensible. Moreover, there is still the question of why, in the hypothetical case, people do believe that the completer is more blameworthy. In addition to moral luck arguments, there are some deontological defenses of the divide that concentrate, not on the difference in wrongdoing, but on the difference in the warranted punishment.\textsuperscript{218} Some scholars assert that although similarly situated attempters and completers are equally culpable, the fact that their results diverged impacts due punishment. Because the completer has benefitted from reaching his goal and the attempter has not,\textsuperscript{219} the completer should suffer a greater deprivation.\textsuperscript{220} However, as an empirical matter, a murderer may suffer agonizing remorse, whereas an attempter may experience feelings of relief that produce great joy.

\begin{itemize}
  \item \textsuperscript{215} See id. at 131 (maintaining that in law of attempt, “[o]nly a rough approximation is possible”).
  \item \textsuperscript{217} See Morse, supra note 12, at 379. This might explain politician’s desires to eliminate the harm doctrine from attempt law despite their support for it elsewhere.
  \item \textsuperscript{218} Some argue that the completer is more blameworthy because he chose not to render aid, whereas the attempter was never faced with the choice. \textit{See, e.g., Luck and Harm, supra note 154}. But this would not justify the differential when the completer tries to aid or aid cannot be rendered.
  \item \textsuperscript{219} See HART, supra note 70, at 131; Michael Davis, \textit{Why Attempts Deserve Less Punishment than Completed Crimes}, 5 LAW & PHIL. 1, 9 (1986) (“The successful murderer has the advantage of having done what he set out to do.”).
  \item \textsuperscript{220} See Adam J. Kolber, \textit{The Subjective Experience of Punishment}, 109 COLUM. L. REV. 182, 201 (2009) (positing that retributivists grade punishment according to offenders’ subjective experience of pain); Morse, supra note 12, at 426 (noting the argument that the completer “has gained more and should receive more blame and punishment to right the moral ledger”).
\end{itemize}
Moreover, most thoughtful retributivists reject predicking punishment on the offender’s subjective experience because of the perverse implications.\textsuperscript{221}

Thus the question remains why people feel that equally culpable completers and attempts should be treated differently.\textsuperscript{222} The attempts to explain this intuition by appeals to utilitarianism or retributivism are not extremely persuasive. By contrast, as a distributive matter, it is perfectly rational to treat completers and attempters differently.\textsuperscript{223} The remedial requirements attendant to actual victimhood simply do not exist when the attempter has not produced harm. When there is no victim, there is no one to whom to distribute pleasure, and a different judicial response is warranted.

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

\textsuperscript{221} Kolber, \textit{supra} note 220, at 219–30 (discussing objections to subjectivizing punishment). There is also the argument that “if post-crime satisfaction is a genuine moral desert criterion, it should be applied to all criminals.” Morse, \textit{supra} note 12, at 427.

\textsuperscript{222} See Herman, \textit{supra} note 154, at 146 (noting possibility “that what interests us about attempts has no bearing on moral blameworthiness”).

\textsuperscript{223} See Cole, \textit{supra} note 73, at 113 (noting that the differential may be explained by “increased public demand for retaliation when harm results”).
PART III: DISTRIBUTIONIST SENTIMENTS UNDERLIE MODERN PENOLOGY

For the greater part of the twentieth century, victims’ distributive interests were clearly subsidiary to defendants’ fault and rehabilitative potential.\(^{224}\) That began to change in the 1960s when rising crime rates and increasing media coverage made crime a hot-button political issue.\(^{225}\) Over the next two decades, a confluence of factors, including rapid social changes, reaction to Warren Court progressivism, increases in capital flows, and new race relations fueled a reactionary politic of crime and punishment.\(^{226}\) The tough-on-crime political platform emerged with President Nixon’s declaration of a war on crime\(^{227}\) and rose to prominence during the presidency of Ronald Reagan, who used crime as the prime example of welfare’s failure.\(^{228}\) Because punitive reform carries political force,\(^{229}\) it has remained a dominant message despite partisan changes in government.\(^{230}\) Today, crime control is “one of the few forms of domestic governance defensible within [conservative] political ideology.”\(^{231}\)

\(^{224}\) See Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 121-22 (2008) (noting that until late 20th Century, rehabilitation was primary sentencing goal); *supra* note 89.


\(^{227}\) See Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 8, 12 (Jan. 22, 1970).

\(^{228}\) See Ronald Reagan, Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut (June 20, 1984), available at http://www.reagan.utexas.edu/archives/speeches/publicpapers.html (attributing crime rates to “a liberal social philosophy that too often called for lenient treatment of criminals”); Michael Tomry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL. F. 25, 70 (1994) (noting that Reagan and Bush waged several rhetorical wars on crime); *Rape and Feminism, supra* note 28, at 620 (commenting that in this era, “[h]orrors of criminals became . . . invaluable as examples of why there should be ‘no tolerance’ for people’s ‘poor excuses’”).


Tough-on-crime proponents waged their rhetorical campaign on three fronts: reforming the dialectic of retributivism, emphasizing deterrence and incapacitation, and introducing penal distribution. Political discourse of crime and punishment highlighted the desert component of retributivism while minimizing its limiting principle of proportionality.\textsuperscript{232} As a result, criminals could be seen as perpetually responsible and deserving of any amount of punishment.\textsuperscript{233} At the same time, crime control advocates portrayed incapacitation and deterrence as necessary in a world rife with random violence.\textsuperscript{234} Finally, if desert and utility could not justify ratcheting up punishment, politicians were quick to rely on distributive justice to victims.\textsuperscript{235} This Part will describe the rise of the distributive argument for criminalization in modern times, as manifested through popular discourse and legal doctrine. To that end, it will begin by discussing the victims’ rights movement’s paradigm of just punishment. Next, it examines the proliferation of the harm doctrine in criminal law as evidenced by sentencing reforms and victim impact law.


\textsuperscript{235} See Feminist War, supra note 31, at 768–69 (“Retributivism, as articulated during the war on crime, stood for the principle that the general, undifferentiated criminal element was constantly culpable to the highest degree . . . .”).


\textsuperscript{235} Victims’ War, supra note 32, at n.133 (“To maintain its fever pitch of hatred, the war on crime needs ever more, and ever more sympathetic, victims.”); Feminist War, supra note 31, at 769 (noting that the “tragedy of the victim” sustained tough-on-crime ideology).
A. Distribution in the Victims’ Rights Movement

The victims’ rights movement is the term given to various interests groups, active over the past 30 years, who coalesce around the principle that the criminal law is inadequately attentive to victims’ needs and the particular remedies should be increased victim participation and harsher punishments. Some of the original victims’ rights supporters were feminists concerned with the criminal system’s treatment of rape and domestic violence victims. The victims’ rights movement, however, rose to prominence during the tough-on-crime era, and it gained popularity, not by denigrating criminal justice as sexist, but by calling for more exacting punishment of paradigmatically violent criminals. As a consequence, although the movement may not have originated as a right-wing faction dedicated to enhancing punishment severity, the victim increasingly became the primary justification for ever harsher criminal laws. Today, the victims’ rights movement positions victims’ rights in opposition to defendants’ constitutional


237 See Barker, supra note 225, at 626 (noting that early victims’ rights movement included “unlikely coalitions made up of radical feminists [and] conservative ‘law and order’ groups”); Demleitner, supra note 236, at 567 (remarking that feminists were early victims’ rights supporters).

238 See, Rape and Feminism, supra note 28, at 622–24 (arguing that victims’ rights rhetoric thwarts feminist reform); Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity Through Modern Punishment, 51 HASTINGS L.J. 829, 876–78 (2000) (commenting that conservatives were more successful at characterizing rape as problem of predators than feminists were at characterizing rape as issue of inequality).

rights and explicitly embraces conservative anti-crime policies. Advocates have been successful in establishing victim’s bills of rights in every state, with provisions ranging from limiting the exclusionary rule to retrenching the insanity defense. One of the movement’s most visible achievements has been to establish victim impact statements as essential evidence during sentencing.

On the surface, the term “victims’ rights” invokes a liberal rather than distributionist paradigm. Although rhetorically about “rights,” victims’ rights ideology bears little relation to the small government principles most of its conservative supporters otherwise espouse. Conservatives generally differentiate “real” rights from mere interests in welfare. They endorse a Lockean analysis of rights as being appropriately about protections against government action (“negative rights”), not access to government benefits (“positive rights”). In this view, the right to private property is a “real” right, whereas with the right to education, the

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242 See, e.g., CAL. CONST. ART. 1, § 28(f)(2) (“[R]elevant evidence shall not be excluded in any criminal proceeding . . . .”); PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 28 (1982) (asserting that when “the ‘criminal goes free because the constable blundered,’ the victim is denied justice”).
244 See infra Part III B(2).
246 See supra notes 20–27 and accompanying text.
248 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (MacPherson ed., 1980) (1690); see also ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122–45 (1969) (using this terminology).
word “right” is a misnomer for a welfare scheme of government-funded education. Of course, critics have long noted the incoherency of attempts to draw an objective line between rights protection and distribution. For example, protecting property calls upon a vast legal regime to uphold the property owner’s financial interests against competing interests. Nonetheless, it is not necessary here to explode the difference between rights and distribution, because the victims’ rights movement is not about negative rights and minimizing government.

Victims’ rights rhetoric is less about protecting victims from the government than allowing victims to compel government action. Victims’ “rights” are actually demands that the state enable greater victim participation, order financial compensation, eliminate defense-friendly rules that impede convictions, and ensure “adequate” punishment. The last

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250 See Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEx. L. REV. 387, 389 n.7 (1984) (contending that “rights theory does not provide an objective, apolitical basis for decisionmaking”); Joseph Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. REV. 975, 980-84 (asserting that the legal decisions cannot be “rationally justified” by the “inherent logic of rights”); supra notes 43–44.


252 Some do protect alleged victims from invasive investigation techniques. See Crime Victims’ Rights Act, 18 USC § 3771(a)(8) (CVRA) (mandating “respect for the victim’s dignity and privacy”). However, because prosecutors “undervalue victims’ privacy,” the victims’ rights movement adopts an agenda “on which prosecutors and victims can agree: longer sentences and fewer procedural protections for defendants.” Tom Lininger, Bearing the Cross, 74 FORDHAM L. REV. 1353, 1396 (2005).

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

254 See, e.g., COLO. REV. STAT. § 24-4-2-105.

255 See supra note 253; Daniel E. Lungren, Victims and the Exclusionary Rule, 19 HARV. J.L. & PUB. POL’Y 695, 701 (1996) (arguing that a system that prioritizes defendants’ rights over victims’ desire for retribution “has lost its sight and soul”).
in this list particularly underscores the unusual way rights are described in the victims’ rights movement. The victim has a “right” to the government punishing the defendant. Victims’ rights discourse calls on the government to engage with victims—to restore their dignity, ensure their satisfaction, and value them—in short, to give them their “due.” And as one commentator notes, people are “said to have ‘their due’” when they “receive what they should according to the purpose and the criterion of a given distribution.”

Not all victim advocates support the model of benefitting the victim through defendant suffering. Restorative justice theorists centralize the role of the victim but underscore the curative value of forgiveness, dialogue, and relationship building. In the ideal restorative justice world, offenders and victims profit from participating in proceedings that promote healing. Like social programs that seek to increase rather than divide “the pie,” restorative justice seeks to increase pleasure for victims and offenders, not utilize the criminal law to distribute the scarce resource of pleasure between them. Unlike restorative justice supporters, the victims’ rights movement maintains that victims receive closure through participating in proceedings as defendants’ adversaries and seeing defendants punished.

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256 See CAL. CONST. ART. 1, § 28(a)(5) (giving victims the “right to expect that persons convicted of committing criminal acts are sufficiently punished in both the manner and the length of the sentences imposed”).
257 See id. (granting victims “the right to expect that the punitive and deterrent effect of custodial sentences imposed by the courts will not be undercut or diminished by the granting of rights and privileges to prisoners”); Henderson, supra note 30, at 986 (observing that victims’ rights policies “appear[] to assume that a victim has a right to a conviction”).
258 See Kenna v. U.S. Dist. Ct., 435 F.3d 1011 (9th Cir. 2006) (stating that CVRA puts defendants and victims “on the same footing” and restores victims’ dignity).
259 Benson, supra note 9797, at 536.
262 See VICTIMS’ WAR, supra note 32, at 167 (observing that restorative justice has “not been embraced by the [punitive] victims’ rights movement”); supra note 32. See, e.g., Jennifer Gerarda Brown, The Use of Mediation
Victims’ groups demand influence over the criminal process and elimination of defense-friendly substantive and procedural laws. They indict current law for unfairly subordinating victims’ interests to defendants’ procedural protections and call for a more satisfactory “balance.” One might assert that within the liberal framework, it is acceptable for the government to deprive a person of something he obtained in a wrongful fashion. Certainly, it is popular for victim supporters to claim that defendants do not “deserve” rights. However, even if certain defendants are ultimately guilty, they cannot be said to have “wrongfully” obtained rights.

Instead, the liberal argument for reconfiguring the procedural balance must rely either on a “practical retribution” argument that procedural rules privilege the guilty more than they protect the innocent or the utilitarian claim that their costs outweigh their benefits. In this

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263 See, e.g., Russell Butler, What Practitioners and Judges Need to Know Regarding Crime Victims’ Participatory Rights in Federal Sentencing Proceedings, 19 Fed. Sent. R. 21 (2005) (approving of law that gives “victims the opportunity to review [presentence reports] and to argue for enhancements”); CAL. CONST. ART. 1, § 28(a)(2) (“Victims of crime are entitled to have the criminal system view criminal acts as serious threats to the safety and welfare of the people of California.”).


265 See supra notes 152 & 214 and accompanying text.

266 See supra notes 152 & 214 and accompanying text.

267 See supra notes 152 & 214 and accompanying text.

268 See supra notes 152 & 214 and accompanying text.

269 See supra notes 152 & 214 and accompanying text.

270 See supra notes 152 & 214 and accompanying text.

271 See supra notes 152 & 214 and accompanying text.

272 See supra notes 152 & 214 and accompanying text.

273 See supra notes 152 & 214 and accompanying text.
view, changing the procedural balance is not distributionist but an independent retribution or utility-maximizing policy shift that only coincidentally benefits victims. This means, however, that defendants should have fewer procedural rights in all cases, not just ones involving victims. In turn, victims are material at all only if one assumes they have expertise on how to configure the system’s procedural balance. The rhetorical thrust of the victims’ rights message is not so much that victims have expertise on the retributively appropriate procedural balance, but that changing the procedural balance vindicates victims’ interests in healing through participation and punishment. In sum, the victims’ rights movement is deeply distributionist in its explicit message, the structure of its arguments, and the reforms it supports. The increasing focus on victim interests combined with the prevalent trend of describing crime in victimhood terms has had a profound effect on current criminal law’s treatment of unintentional harm.

B. Distribution in Criminal Law Reform

Very few scholars deny the influence of the victims’ rights movement on the current state of criminal law. Today, the centrality of harm and decreased role of mens rea is not reflected merely in a couple of troubling criminal law quandaries. Rather, it is manifest in many areas of criminal law. Victim-focused ideology is pushing the law toward eliminating different culpability standards for juveniles and the mentally ill. Moreover, currently, harm is an

270 See Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411, 1434 (1993) (noting that victims assert expertise). Cf. SENATE COMMITTEE REPORT, supra note 176, at 85 (quoting bombing victim as stating, “We usually lack expertise and have a desire for vengeance that we claim is the need for justice”).
271 See supra note 265.
explicit basis for punishment in any case in which it has been produced.\textsuperscript{276} The following subsections address two areas of sentencing law exemplary of the distributive theory of criminal law.

1. Sentencing Reforms

In the sentencing context, courts have come to embrace openly the argument that unintentional and unforeseeable results constitute valid bases for punishment.\textsuperscript{277} Many cases uphold strict liability sentencing provisions on the bare ground that “sentencing is different.”\textsuperscript{278} Some courts unflinchingly impose strict liability on the basis of textual statutory interpretation of sentencing guidelines,\textsuperscript{279} while others rely on weak philosophical justifications.\textsuperscript{280} As with the classic criminal law quandaries, retributivists and utilitarians struggle to find appropriate justifications for strict liability sentencing provisions.\textsuperscript{281} This, combined with the structure of sentencing guidelines and the manner of their interpretation by courts, indicates that distributive sentiments lay at the heart of the sentencing shift.


\textsuperscript{277} Some courts say that the sentencer should account for victim harm as it evolves. See, e.g., Kenna, 435 F.3d at 1016–17 (asserting that sentencer must consider victim’s condition “at the time it makes its decision”).

\textsuperscript{278} See United States v. Griffiths, 41 F.3d 844, 845 (2d Cir. 1994) (“A distinction is drawn between strict liability crimes and strict liability enhancements.”); Walton, 255 F.3d at 443.

\textsuperscript{279} See, e.g., United States v. Mitchell, 366 F.3d 376 (5th Cir. 2004); United States v. Williams, 49 F.3d 92, 93 (2d Cir. 1995) (basing strict liability interpretation of USSG § 2K2.1(b)(4) on congressional intent).

\textsuperscript{280} See United States v. Mobley, 956 F.2d 450 (3d Cir. 1992) (asserting that strict liability provisions comport with retributivism and utilitarianism because guidelines are “offense specific”); Richardson, 238 F.3d at 840 (upholding strict liability provision as sentencing “bonus”).

\textsuperscript{281} Some courts justify strict liability provisions on the ground that the defendant should have exercised super care. See, e.g., Griffiths, 41 F.3d at 846 (asserting that firearm recipient has “the burden of ensuring that the firearm is not stolen”); Mobley, 956 F.2d at 450. However, these individual crimes are not hazardous industrial crimes, for which super care is appropriate. See supra note 46.
The federal sentencing guideline revolution in the 1980s was perhaps the single most important development signaling the rise of harm and decline of culpability in penal law. The guidelines formally link sentence length to harm, requiring judges to add penalty points whenever harm-based sentencing factors are present. The guidelines’ starkest indication of the centrality of harm is the “relevant conduct” provision, which holds defendants accountable for “all harm that resulted from” any “acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.” In many sentencing provisions involving harm, including the relevant conduct provision, the guidelines are silent on intent.

Through the creation of guidelines, policy makers hoped to reform what both Liberals and conservatives considered arbitrary and inconsistent sentencing practices. The U.S. Sentencing Commission sought to distill the main factors affecting judicial decision-making and produce a formula for applying those factors to individual cases. Although its origins might seem neutral, the guideline revolution coincided with the conservative political movements discussed above and accordingly formalized higher than average sentences and incorporated

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283 The federal guidelines make physical injury a mandatory sentencing factor in crimes such as Unlawful Manufacturing, Importing, Exporting, or Trafficking (§ 2D1.1), and Smuggling, Transporting, or Harboring an Unlawful Alien (§ 2L1.1). For economic crimes, the guidelines list financial harms without reference to intent, but make death and serious bodily injury relevant when defendants impose a “conscious or reckless risk.” See USSG §§2B1.1(b)(13)(A) & 2B5.3(b)(5)(A).

284 USSG § 1B1.3(a)(1)(A–C) (emphasis added).

285 See id.; supra note 283.


the concept that harm should dictate punishment level.\textsuperscript{289} The result is that the federal guidelines did not produce uniform sentences but did make sentences uniformly longer.\textsuperscript{290}

It is true that in the pre-guideline era, judges routinely based sentences on unintentional (and even unproven) harm for a variety of reasons. Judges likely reasoned that the harm was probably intentional,\textsuperscript{291} but there is also the possibility they acted to serve victim interests.\textsuperscript{292} The common law permitted judges to sentence defendants to anything within the statutory range for any (constitutional) reason, rendering sentencings more like cases in equity.\textsuperscript{293} As the sole meter of fairness, the judge could mete out pure retribution, send a deterrent “message,” or create a distributive balance between the parties.\textsuperscript{294} Rather than abandon equitable considerations when constructing sentencing “law,” federal guidelines discarded some and formalized others. The guidelines prohibit consideration of equitable factors that make the defendant a good candidate for less punishment despite apparent culpability, like disadvantaged upbringing,\textsuperscript{295} and relegate others, like age, health, and family circumstances to the status of extraordinary downward departures.\textsuperscript{296} It does ring of retributivism to hold that, absent an extraordinary circumstance, the

\textsuperscript{289} See supra notes 283–284 & infra note 299; Nash, supra note 276, at 1436 (observing that guidelines impose heavier penalties crimes involving victim harm).


\textsuperscript{292} See Henning, supra note 274, at 1143 (“Victims’ reactions . . . may elicit sympathy that motivates judges to impose harsher sentences”).

\textsuperscript{293} See Williams v. New York, 337 U.S. 961 (1949) (holding that because judges have discretion in punishment, they should possess “the fullest information possible”).

\textsuperscript{294} See \textit{id.} (observing that judge’s goal can be retribution, reformation, or rehabilitation).

\textsuperscript{295} USSG § 5H1.12 (deeming irrelevant a defendant’s “[l]ack of guidance as a youth” or “disadvantaged upbringing”); \textit{see also} § 5H1.10 (prohibiting consideration of socio-economic background); 28 U.S.C.A. § 994 (noting “the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties”).

\textsuperscript{296} See, e.g., USSG § 5H1.1 (“Age (including youth) is not ordinarily relevant in determining whether a departure is warranted.”); § 5H1.6 (“[F]amily ties and responsibilities are not ordinarily relevant” to departure). \textit{See
culpable should be punished. But this particular embrace of retributivism served to increase punishment and was thus consistent with victims’ interests.\textsuperscript{297} Equitable considerations that militate toward more punishment despite nonculpability, like victim injury, were not rejected as inconsistent with retributivism.\textsuperscript{298} They became mandatory sentencing factors.\textsuperscript{299}

The federal sentencing guidelines explicitly distinguish their guiding principles from “the principles and limits of criminal liability.”\textsuperscript{300} Courts have accordingly interpreted guideline provisions that premise punishment on injury as strict liability provisions,\textsuperscript{301} with some courts creating a presumption of strict liability.\textsuperscript{302} Courts often justify such decisions as textually-compelled and simply elide the question of the propriety of premising punishment on unintentional harm.\textsuperscript{303} Of course, this interpretive move is itself telling. If courts adhered to the purely retributive concept that culpability must accompany punishment, they would likely

\begin{footnotes}
\item[297] See Hessick, supra note 288, at 1157 (positing that guidelines’ consideration of prior bad acts but exclusion of prior good acts may be based concern for victims); USSG § 2b1.1 cmt. 3 (making “impossible” losses the measure of harm only when greater than “actual loss”).
\item[299] See, e.g., sections cited supra notes 283–284; USSG §§ 2A2.2, 2A2.3; 2A2.4; 2A4.1; 2A5.1; 2A6.2; 2B3.1 (adding points for victim injury). The guidelines also contain a discretionary upward departure for “significant physical injury.” USSG § 5K2.2.
\item[300] USSG §1B1.3 cmt. n.1.
\item[301] See, e.g., Mitchell, 366 F.3d 376 (holding robbery defendant strictly liable for victim injury); United States v. Pacheco, 489 F.3d 40, 47 (1st Cir. 2007). (approving upward departure for “significant physical injury” although defendant lacked intent); United States v. Carbajal, 290 F.3d 277 (5th Cir. 2002) (holding drug conspirator responsible for unforeseeable drug deaths); United States v. Reeder, 170 F.3d 93 (1st Cir.), cert. denied, 120 S. Ct. 174 (1999) (counting harm unintentionally caused by third party).
\item[302] See Richardson, 238 F.3d at 840 (“Sentencing enhancements generally are imposed on the basis of strict liability . . . .”); United States v. Lavender, 224 F.3d 939, 941 (9th Cir. 2000), cert. denied, 531 U.S. 1098 (2001); Mitchell, 366 F.3d at 379.
\item[303] See cases cited supra note 279; United States v. Litchfield, 986 F.2d 21, 23 (2d Cir. 1993) (imposing strict liability because provision “did not contain a knowledge requirement”).
\end{footnotes}
interpret the guidelines as requiring some level of intent or foreseeability.  

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

2. Victim Impact Evidence Law

Perhaps the doctrine that most clearly reflects the new distributive paradigm in criminal law is the law of victim impact evidence. In the 1991 case Payne v. Tennessee, the Supreme Court reversed prior precedent and held that prosecutors may present and comment on victim impact evidence during death sentencing proceedings. Victim impact evidence is comprised of live witness testimony, documentary evidence, and even multimedia presentations that

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306 See id. at 223 (stating that guidelines would be permissible if advisory).  
307 See Gall v. United States, 552 U.S. 38, 49−51 (2007) (admonishing district courts to begin with guideline calculation and stating that appellate courts may presume reasonableness of guideline sentences).  
311 Payne, 501 U.S. at 825.  
312 See id. at 814 (decedent’s mother’s testimony).  
describe the decedent’s life and/or the impact of the death on surviving victims.\textsuperscript{315} Prior Supreme Court precedent ruled the admission of such evidence unconstitutional because it impermissibly allowed the jury base death sentences on arbitrary factors unrelated to defendant culpability.\textsuperscript{316} Much of Justice Rehnquist’s majority opinion in \textit{Payne} reflects the notion, discussed above, that harm counts during sentencing because “sentencing is different.”\textsuperscript{317} The Court stated, “ Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.”\textsuperscript{318} The Court responded to the contention that sentencing should be about culpability, not by linking unintentional harm with culpability, but by pointing to the felony murder doctrine and the attempt-crime divide as evidence that criminal punishment does not invariably require culpability.\textsuperscript{319}

The majority also grappled with the claim that impact evidence invites juries to base sentences on the victim’s perceived worth.\textsuperscript{320} In response, Justice Rehnquist defended impact evidence as “designed to show instead \textit{each} victim’s uniqueness as an individual human being, whatever the jury might think the loss to the community resulting from his death might be.\textsuperscript{321} He went on to say that the significance of the victim impact statement is to demonstrate that, regardless of personal failings or achievements, the victim is “a murdered human being.”\textsuperscript{322}

\begin{itemize}
\item \textsuperscript{315} \textit{See Past Darkly, supra} note 273, at 156 (observing that impact evidence relates “to the personal characteristics of the victim and the ‘emotional impact of the murder on the victim’s family’”) (quoting \textit{Payne}, 501 U.S. at 827).
\item \textsuperscript{316} \textit{Booth}, 482 U.S. at 504 (holding that victim impact “may be wholly unrelated to the blameworthiness of a particular defendant”).
\item \textsuperscript{317} \textit{Payne}, 501 U.S. at 820.
\item \textsuperscript{318} \textit{Id.} at 825.
\item \textsuperscript{319} \textit{Id.} at 819. The Court stated that “two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.” \textit{Id.}
\item \textsuperscript{320} \textit{Id.} at 823 (noting \textit{Booth’s} concern that juries will punish more harshly when “victims were assets to their community”). \textit{Cf.} Gill v. State, No. SC89831 (Mo. Dec. 1, 2009) (holding capital defendant’s counsel ineffective for failing to introduce evidence of victim’s possession of pornography).
\item \textsuperscript{321} \textit{Payne}, 501 U.S. at 823 (internal quotations omitted).
\item \textsuperscript{322} \textit{Id.} at 824.
\end{itemize}
course, the natural retort is that the jury does not need impact evidence to know that a murder victim is “a murdered human being.” Moreover, if “uniqueness” is not about worth, then every victim is equally worthy and evidence of uniqueness is irrelevant.\textsuperscript{323} Thus, one is left to wonder—if impact evidence does not relate to the defendant’s culpability or the victim’s worth, what is the point of its admission?

The answer becomes clear when looking at the case from the perspective of the victims’ rights movement. Victims’ rights supporters lauded \textit{Payne} as a great victory\textsuperscript{324} for two primary reasons: First, the very process of expressing rage and pain is claimed to bring closure to surviving family members.\textsuperscript{325} Second, the evidence is undeniably compelling, and its introduction is likely to increase the chances of a death sentence, which victims presumptively desire.\textsuperscript{326} Turning to the first, Justice O’Connor’s concurrence underscores the process-based closure rationale. She opined that by admitting impact statements, courts could “give back” to victims.\textsuperscript{327} Closure through participation is a distributive notion because it dictates the reconfiguration of procedures to secure victims’ psychic benefits at the cost of defendants’ interests.\textsuperscript{328} Although some have argued that victim participation does not necessarily detriment

\textsuperscript{323} See id. at 866 (Stevens, J., dissenting) (“The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support.”).

\textsuperscript{324} See id. at 867 (Stevens, J., dissenting) (noting that given popularity of victims’ rights movement, “today’s decision will be greeted with enthusiasm”); Jose Felipe Anderson, \textit{When the Wall Has Fallen: Decades of Failure in the Supervision of Capital Juries}, 26 OHIO N.U. L. REV. 741, 786 (2000) (observing that victim groups “heralded” \textit{Payne} as victory).

\textsuperscript{325} See Joseph L. Hoffmann, \textit{Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases}, 88 CORNELL L. REV. 530, 532-33 (2003) (calling “the potential therapeutic effect” the “best argument” for impact evidence); \textit{Past Darkly}, supra note 273, at 151 (observing the “asserted psychological value to survivors of having a chance to testify (and emote) about their loss”).

\textsuperscript{326} See Logan, supra note 236, at 759 (commenting that impact evidence gives prosecutors “strategic litigation advantage”); Minow, supra note 270, at 416 (noting the “calculated judgment” that impact evidence causes sentencers to “sentence more stringently”).

\textsuperscript{327} \textit{Payne}, 501 U.S. at 832 (O’Connor, J., concurring).

\textsuperscript{328} See supra notes 263–264 and accompanying text (distribution and procedure).
defendants, the victims’ rights movement and victim impact law generally assume an adversarial relationship. While admitting victims’ statements of anger and anguish, courts continue to prohibit victims from advocating against the death penalty. As one expert opines, “[N]either the victims’ rights (community) nor the Supreme Court generates or tolerates narratives in which victims’ families can exercise mercy, kindness, or forgiveness towards defendants.”

The most obvious consequence of the admission of impact evidence is that it “encourage[s] jurors to decide in favor of death.” The majority opinion appears to endorse this outcome in its reciprocal fairness argument. The Court asserts that if defendants may present mitigating evidence to avoid a death sentence, it is only “fair” that prosecutors be able to present impact evidence in favor of a death sentence. In his dissent, Justice Stevens responds that to say “fairness requires that the State be allowed to respond with similar evidence about the victim . . . is a classic non sequitur: The victim is not on trial; her character, whether good or

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331 See, e.g., Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991) (Payne does not require admission of “the opinion of a victim’s family member that the death penalty should not be invoked.”); see Baird & McGinn, supra note 236, at 468 (contending that anti-death penalty victims’ “desire[s] to affect the prosecutorial process is ignored”).


333 Payne, 501 U.S. at 856 (Stevens, J., dissenting); see also Paul Gewirtz, Victims and Voyeurs: Two Narrative Problems at the Criminal Trial, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 144 (Brooks & Gewirtz, eds., 1996) (commenting that impact evidence “almost always” increases chance of death sentence).

334 Payne, 501 U.S. at 822 (opining that Booth “unfairly weighted the scales in a capital trial”).

335 Id. (lamenting that despite lack of limits on mitigating evidence, the state may not offer “a quick glimpse of the life’ which a defendant ‘chose to extinguish’”) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).
bad, cannot therefore constitute either an aggravating or a mitigating circumstance.” As a matter of retributive justice it makes little sense to “balance” the evidentiary scales between defendant and victim. As a matter of creating the appropriate distributive balance between the victims’ need for closure and the harm of a death sentence, it makes perfect sense. The majority candidly endorses admitting impact evidence in order to allow the prosecution to capitalize on “the full moral force of its evidence” and remind the jury that victims “are, or were, living human beings, with something to be gained or lost from the jury’s verdict.” Consequently, Payne is directly responsive to victims’ interest in participation and punishment.

So much is recognized by Justice Scalia’s statement that Payne’s rejection of the notion that “a crime’s unanticipated consequences must be deemed ‘irrelevant’” reflects “a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.”

That Payne is about the distribution of pain and participatory closure, rather than an opinion based on the unanalyzed instinct that “harm matters” or presupposition that defendants foresee a range of harms, is underscored by post-case developments. Today, prosecutors seeking the death penalty do not just present the arguably foreseeable effects of death on family

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336 Id. at 859 (Stevens, J., dissenting). See Daniel R. Williams, Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility, 57 HASTINGS L.J. 693, 719 n.148 (2005-06) (opining that “‘moral force’ can only be the sentiments . . . that impel the desire to punish with death”).
337 Payne, 501 U.S at 859 (Stevens, J., dissenting) (observing that there is evidentiary balance because prosecution can present aggravating and rebut mitigating evidence).
338 See id. at 863 (asserting that Payne allows sentencers to make “ad hoc” decisions).
339 Id. at 824 (O’Connor, J., concurring).
340 Id. at 826 (O’Connor, J., concurring); see also Booth v. Maryland, 482 U.S. 496 at 520 (Scalia, J., dissenting) (contending that sentences can be based on “human suffering the defendant has produced” and “not moral guilt alone”).
341 Id. at 834 (Scalia, J., concurring). See Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. CHI. L. REV. 361, 405 (1996) (“Victim impact statements are billed as encouraging empathy for the victim . . . .”).
342 Payne, 501 U.S at 837 (Souter, J., concurring) (asserting that the “foreseeability of the killing’s consequences imbues them with direct moral relevance”).
members, they introduce evidence regarding community opinion,\textsuperscript{344} highly inflammatory descriptions of decompositions and burials,\textsuperscript{345} and even carefully crafted videos portraying the victim from childhood through adulthood.\textsuperscript{346} The undertone of all these strategies is to remind the jury that it can vindicate victims’ interests (both living and dead) by imposing the death penalty.\textsuperscript{347} Exemplary is one case in which the decedent’s family was permitted to implore the jury to “[r]enew our faith in the criminal justice system and bring a phase of closure to this ongoing nightmare that fills our lives.”\textsuperscript{348} Indeed, at least one scholar has recognized that \textit{Payne} has a progressive valence because it introduces personal narrative into the legal process and encourages contextual equitable case-by-case decision-making.\textsuperscript{349}

In conclusion, conservative tough-on-crime ideology ushered in an era in American penal law and policy in which victim harm plays a central role. In popular politics as well as case doctrine, victims’ interests now stand along side and even trump concerns over retributive fault and social utility. Despite being couched in terms of liberal “rights,” the change in the criminal law is at its core distributionist. Increasingly, victims’ rights advocates and other legal actors treat sentencing as a means to balance the amount of retributive or utilitarian punishment due to the criminal with the amount of closure demanded by her victim. As noted in the introduction,

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  \item[344] \textit{See Past Darkly}, supra note 273, at 158 n.96 (citing cases admitting evidence of victims’ standing in the community).
  \item[345] \textit{See id.} at 165 (discussing case in which court admitted evidence “that the children were buried in the same caskets as their mothers”).
  \item[347] \textit{See Logan}, \textit{supra} note 236, at 735–36 (discussing sentencing in which prosecutor called impact evidence the “most important” aggravating factor, which helps jurors “understand the pain, the horror and the agony” suffered by victims’ families).
  \item[349] \textit{Gewirtz}, \textit{supra} note 333, at 142–43; \textit{see Bandes}, \textit{supra} note 341, at 392 (discussing claim that impact statements possess “progressive, pragmatic, and feminist” attributes).
\end{itemize}
however, the dominant political ideology in the late 20th century has been decidedly anti-distributive. In tort law, distributive strict liability rules take a clear back seat to negligence and claims of moral fault and economic efficiency. In popular politics, condemnation of redistribution and “socialism” resonates with the public. The next Part posits an explanation for the rise of distributive reasoning in criminal law despite its profound unpopularity in other spheres.

PART IV. POWER, POLITICS, AND DISTRIBUTION’S FATE

This Part explores reasons for distribution’s proliferation in criminal law and simultaneous decline in popular politics and private law.\(^\text{350}\) Today, many of the same people who philosophically reject wealth redistribution and call vocally for tort reform to stamp out its few distributive areas also support government-imposed harsh punishment of offenders to “make victims whole.”\(^\text{351}\) There is a simple explanation for this apparent contradiction: Power. In the late 1970s and 1980s, recessionary concerns, rapid urbanization, public dissatisfaction with Supreme Court progressivism, and other cultural and political factors combined to create a hospitable environment in which anti-distribution, radical individualist sentiments could

\(^{350}\) See White, supra note 28, at 809 (observing retrenchment of social welfare system and growth of criminal system).

\(^{351}\) The 1994 Republican “Contract with America” consisted of a package of 10 bills, including:
3. The Personal Responsibility Act: Discourage illegitimacy and teen pregnancy by prohibiting welfare to minor mothers and denying increased AFDC for additional children while on welfare, cut spending for welfare programs, and enact a tough two-years-and-out provision with work requirements to promote individual responsibility . . . and 9. The Common Sense Legal Reform Act: ‘Loser pays’ laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation.
flourish. This environment shaped political discourse on private law and criminal justice, which in turn served to reshape the social context. The result is a cyclical relationship between popular cultural beliefs and dominant political ideology and policy. In this setting, policymakers seek to both create law that reflects pre-existing sentiments and configure law to entrench values that undergird their political platforms. Distributionist criminal law is currently popular because enacting policies in the name of crime victims serves distinct political interests and reflects and reinforces the existing social structure.

In the tort context, right-leaning ideology rejects strict liability rules that facilitate wealth transfer to injured workers, environmental victims, and others. For the past few decades, “tort reform,” that is, changing the law to minimize tort litigation, has been one of the mainstays of the political right. Reigning in tort liability serves corporate, moneyed interests, and its costs

352 See supra notes 22–29 and accompanying text. CHARLES W. DUNN & J. DAVID WOODARD, THE CONSERVATIVE TRADITION IN AMERICA 10 (1996) (“While supply-side economics occupied the headlines [in the 1980s], the social agenda galvanized individual allegiances to Reagan and the Republican party.”).

353 See White, supra note 28, at 819–26 (observing that market conditions sustain carceral policies, which in turn reinforce neoliberal structure).


355 See supra notes 225–235 and accompanying text (popularity of punitive policies); Rape and Feminism, supra note 28, at 621 (linking current “discourse of criminality” to “efforts to entrench neoliberal individualist values”).

356 See infra notes 363–366 and accompanying text.


359 See Hoffman, supra note 325, at 472–73 (linking tort reform to lobbying efforts of American Tort Reform Association, which includes powerful physician, manufacturing, and insurance groups); Christopher J. Roederer, Democracy and Tort Law in America: The Counter-Revolution, 110 W. VA. L. REV. 647, 656 (2008)
are borne by plaintiffs who, unless well organized, have little power. That tort victims hold little political sway is evidenced by the fact that it is the plaintiff’s bar, not victims’ groups, who constitute the most powerful opponents of tort reform. Tort reform’s rhetorical strategy includes exploiting popular anti-distribution ideology and asserting that government should not force corporations to give hand-outs to plaintiffs who should have been more careful.

In the criminal law context, punitive polices and rhetoric are powerful political weapons. For policymakers, being generally tough-on-crime perpetuates social conditions that only inure to their political benefit. Not only do victim-friendly provisions garner popular support, when criminal law is strengthened, the group that loses is a subclass with very little political power. Supporting crime control initiatives is especially rewarding for conservative politicians because increasing felony convictions leads to the disenfranchisement of those who, if they chose to vote, would likely vote for progressive candidates and policies. Substantively, criminal rules serve to entrench the prevailing class and wealth structure. Because strengthening the carceral state has political benefits, politicians abandon the minimal government, anti-distribution, hyper-individualism rhetoric in their defense of crime control.

Richard L. Abel, How the Plaintiffs’ Bar Bars Plaintiffs, 51 N.Y.L. Sch. L. Rev. 345, 375 (2007) (asserting that despite power of plaintiff’s lawyers, victims “cannot organize themselves into a force for change”). See id.; cf. Feit, supra note 358, at 899 (observing that plaintiff’s lawyers and consumer groups have had “mixed success” at countering tort reform).


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

See Kelman, supra note 42. See also White, supra note 28, at 789 (contending that criminal law “reflect[s] and advance[s] the institutional and ideological interests of economic elites”).
Instead, they assert that serving crime victims’ needs is indispensable to the fair, moral, and compassionate administration of justice.\(^{367}\) Anti-distribution sentiment becomes relevant only when opposing defense-friendly provisions that seek to insert defendant background into the criminal law equation.\(^{368}\) When such policies are at stake, tough-on-crime advocates return to the mantra that law is about bright-line determinations of fault and not distributive fairness.\(^{369}\)

However, one might find curious society’s support of the counterintuitive notion that it is unjust to hold faultless corporations liable for money damages\(^{370}\) but fair to subject faultless human beings to incarceration.\(^{371}\) Society’s views make more sense, however, if one understands them as a function of specific politicized characterizations of those that reap the benefits and bear the burdens of distribution in tort and criminal law. Social science confirms time and time again that individuals’ assessments of fault and harm are largely conditioned by the level of identification they feel with alleged injurers and victims.\(^{372}\) Viewing the suffering of another human being may produce in an observer the desire to give that person relief, but it also

\(^{367}\) See, e.g., 151 Cong. Rec. H2093, H2097 (daily ed. Apr. 14, 2005) (statement of Rep. Poe) (“It needs to be reinforced as a culture that . . . we will be compassionate toward [victims], and we will make sure that criminals who commit crimes against them will pay.”); 151 Cong. Rec. S9087, S9088 (daily ed. July 27, 2005) (statement of Sen. Craig) (stating that victims “deserve our support and compassion, not to mention our insistence on an aggressive law enforcement”). See supra notes 36-37 and accompanying text (fairness argument).

\(^{368}\) See, e.g., Ronald W. Reagan, Remarks at the Annual Conference of the National Sheriff’s Association in Hartford, Connecticut (June 20, 1984), available at http://www.reagan.utexas.edu/archives/speeches/publicpapers.html (asserting that “Liberal” argument that crimes are “caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions” created “a class of repeat offenders and career criminals who thought they had the right to victimize”).

\(^{369}\) See Dunn & Kaplan, supra note 354, at 344 (remarking that “individualism manifests” in criminal law rules that deem defendant’s social background irrelevant); Co-opting Compassion, supra note 236, at 588 (observing prevalent view that introducing background is “a manipulative ploy by wrongdoers to avoid individual moral responsibility”).

\(^{370}\) See Simons, supra note 143, at 1098 (maintaining it would be unthinkable to hold a tortfeasor “who save[d] his boat at the expense of a dock in the midst of a storm” criminally responsible). However, today “punishing harm contributes to the legitimacy of the criminal justice system.” See Binder, supra note 10, at 736.

\(^{371}\) See Robert E. Lane, Self-Reliance and Empathy: The Enemies of Poverty: And of the Poor, 22 POLITICAL PSYCH. 473, 483 (2001) (observing that “[t]he explanation of a victim’s plight . . . influence[s] the observer’s desire to help”). By identification, I mean both empathy, which involves “imagining oneself to be in the position of the other” and sympathy, which “involves being flooded with emotion” on behalf of another. Lynne N. Henderson, Legality and Empathy, 85 MICH. L. REV. 1574, 1579 (1987) (hereinafter Empathy).
may produce anger (if the observer blames the person for his own suffering) or pleasure (if the observer believes the person deserves suffering).\textsuperscript{373} A crime victim’s suffering triggers society’s desire to provide relief and, in turn, its demands for government intervention.\textsuperscript{374} The desire to improve the conditions of the crime victim’s existence effectively trumps inconsistent retributive and utilitarian concerns.\textsuperscript{375}

Society’s empathetic tendencies, and hence society’s understanding of victimhood and suffering, do not exist in a vacuum, but are formulated in complicated ways by cultural narratives, social consciousness, politics, and law.\textsuperscript{376} Political Scientist Robert Lane identified two particular factors that affect observers’ assessments of individuals’ claims of victimhood—(1) The individual’s level of responsibility,\textsuperscript{377} and (2) the extent to which the observer perceives the individual as similar to her.\textsuperscript{378} Anti-welfare groups have long employed the strategy of exploiting racial animus and demonizing (or other-izing) individuals who benefit from welfare programs to defeat distributive policies.\textsuperscript{379} Racialized narratives conjure up “stereotypes assigned to blacks, namely being ‘lazy, criminal, [and] irresponsible’”\textsuperscript{380} and thus serve the dual

\begin{footnotesize}
\begin{enumerate}
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\item See Lane, supra note 372, at 478.
\item See text accompanying supra note 195.
\item See text accompanying supra note 196. The question is why, given that “[a]s potential injurers, we each have a fundamental interest in liberty” and “[a]s potential victims, we each have a fundamental interest in security,” Laura Greco, The Buck Stops Where?: Defining Controlling Person Liability, 73 S. CAL. L. REV. 169, 171 (1999), society values only tortfeasors’ liberty.
\item See Benjamin Fleury-Steiner, Narratives of the Death Sentence: Toward a Theory of Legal Narrativity, 36 LAW & SOC’Y REV. 549, 552 (2002) (observing “how morality is constructed at the intersections of experiential, institutional, and historically specific identities”).
\item Lane, supra note 372, at 475–79.
\item Id. at 483–84. See also Bandes, supra note 341, at 399 (“We feel empathy most easily toward those who are like us”); Steiner, supra note 376, at 560 (reporting that death sentencing jurors “emp[lo][r] stories of their own experiences” when “evaluating the defendant’s responsibility”).
\item Dorothy A. Brown, Race and Class Matters in Tax Policy, 107 COLUM. L. REV. 790, 795 (2007). She further notes that “[g]overnmental assistance is not treated as welfare when the recipients are considered to be blameless” but blacks are not “viewed as blameless.” id.
\end{enumerate}
\end{footnotesize}
purpose of establishing welfare recipients as dissimilar and undeserving. These narratives are so powerful that they move people not only to vote against the general social interest, but also to vote against their own interests. The constructed image of “lazy” black welfare “queens,” for example, moved many poor white Americans to vote for reforms that cut their own benefits as well.

The use of stereotype and caricature is not just a conservative strategy. The current debate over healthcare reform often manifests as a battle of narratives. Democrats seek to paint the insurance industry as a monstrous conglomeration of evil greedy corporations that gleefully inflicts pain on ordinary Americans. The conservative counter-attack, however, has not largely been to defend insurance companies. The most visible criticism has not even been the expected argument about healthcare quality. Rather, healthcare reform opponents focus on a subsection of potential recipients who are foreign, racially other, and therefore undeserving of healthcare. Accordingly, one of the most prevalent assaults on healthcare reform is that

381 See McCluskey, supra note 24, at 1292-93 (explaining that conservative exploitation of cultural insecurity explains why “non-wealthy white American voters lend support to political agenda that advocates spending more money incarcerating people of color than securing most Americans’ access to high-quality public education”).

382 See Girardeau A. Spann, The Conscience of a Court, 63 U. MIAMI L. REV. 431, 433 (2009) (contending that “tacit appeals to racial prejudice” can “convince ordinary citizens to resist distributive efforts that would have benefited whites”).

383 See F. Patrick Hubbard, The Nature and Impact of the “Tort Reform” Movement, 35 HOFSTRA L. REV. 437, 481 (2006) (observing that “[t]he political opponents of tort reform have adopted methods similar to those of proponents” including “arguing in terms of ‘rights of victims’”).


“illegal aliens” will benefit. This charge is so powerful, that Democrats have underscored its substantive validity by swearing that undocumented immigrants will not be covered.

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


387 Id. See also Remarks by the President to a Joint Session of Congress on Health Care (September 9, 2009), available at http://www.whitehouse.gov/the_press_office/remarks-by-the-president-to-a-joint-session-of-congress-on-health-care/ (stating that “the reforms I’m proposing would not apply to those who are here illegally”).


389 See Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 IOWA L. REV. 957, 964-76 (2007) (disputing claim that punitive damages have been increasing in frequency, amount, and randomness); See Valerie P. Hans, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 36 (2000) (engaging in qualitative study and finding that “jurors often doubt plaintiffs’ claims”).

390 See infra notes 391–397 and accompanying text.


392 Tort reformers have an easier time painting doctor-defendants as innocents. See 141 Cong. Rec. S5874, S5875 (May 1. 1995) (statement of Sen. Kyl) (defending medical malpractice reforms and mentioning the “heroic service of the doctors in the aftermath of the bombing in Oklahoma City”).

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growth and security.\textsuperscript{393} Recall the famed McDonald’s hot coffee lawsuit,\textsuperscript{394} which became the iconic example of all that is wrong with tort litigation and its plaintiff, Stella Liebeck, the archetype of a phony victim.\textsuperscript{395} The case continues to shape views about tort victims even though “debunking” facts have demonstrated that Ms. Liebeck was far from a money-hungry swindler.\textsuperscript{396} Within tort reform discourse, the victim is the fully responsible immoral party, and the defendant requires protection from an irrational, even socialist, legal system set on violating his rights in the name of redistribution.\textsuperscript{397}

The popular criminal law narrative is arguably the polar opposite. War-on-crime discourse has effectively cemented the characterization of defendants as fully-responsible evil enemies upon whom no amount of government punitive effort can be spared.\textsuperscript{398} To complement the image of the perpetually culpable offender, tough-on-crime rhetoric emphasizes ultimately innocent victims.\textsuperscript{399} In fact, politicians often choose to publicize cases in which victims are definitionally not-responsible, in particular, violent crimes involving small children.\textsuperscript{400} This casts the criminal trial as a moral contest between blameless victims and evil, individually

\textsuperscript{393} See, e.g., The Common Sense Legal Reforms Act, in Contract with America, supra note 351 (stating that the “dramatic growth in litigation carries high costs for the U.S. economy”).
\textsuperscript{396} These include the fact that Liebeck suffered third degree burns over 6 percent of body; that she offered to settle her claim for $20,000; that McDonald’s produced documents of 700 burn complaints; and that McDonald’s policy required coffee to be served at 185 degrees although average home coffee temperatures are between 135 and 140 degrees. See The Actual Facts About the McDonalds’ Coffee Case, http://www.lectlaw.com/files/cur78.htm. See also Michael McCann et al., Java Jive: Genealogy of a Judicial Icon, 56 U. MIAMI L. REV. 113 (2001) (discussing case).
\textsuperscript{397} See id. at 132 (observing that news coverage parallels “the simplistic tort tales circulated by tort reformers”). There is evidence that this type of narrative affects jury behavior as well. See Elizabeth Loftus, Insurance Advertising and Jury Awards, A.B.A. Journal, Jan. 1979, at 68 (finding that jurors exposed to advertising about litigation crisis awarded lower damages).
\textsuperscript{398} See Tomkovicz, supra note 129, at 1461 (observing society’s “sense that we are locked in a mortal struggle with the enemy—criminals”).
\textsuperscript{399} Co-opting Compassion, supra note 236, at 584 (noting popular view that victims are “blameless”).
\textsuperscript{400} Kanwar, supra note 194, at 231 (observing that “white female children” are “the public’s preferred image of a ‘victim’”).
In turn, tough-on-crime advocates can describe crime victims as “deserving” of relief and contrast them with greedy tort victims, lazy welfare recipients, and others who are not deserving of government assistance. In fact, however, those “lazy welfare queens” and other socially marginalized people, painted as paradigmatically undeserving by Reagan and like-minded others, empirically constitute the majority of crime victims.

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

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401 See Demleitner, supra note 236, at 567 (remarking that “[t]he victim became increasingly pitted against the offender, and only long sentences appeared to validate her pain and suffering”).

402 See Barker, supra note 225, at 626 (“the demand to restrict criminal offenders’ rights emerged out of a backlash against . . . welfarism”); Steiner, supra note 376, at 569 (discussing death penalty juror who considered himself a “‘conservative avenger’ to ‘even[] the score’ against the pro-welfare, liberal establishment”).

403 See supra note 379 and accompanying text.

404 See Kanwar, supra note 194, at 231 (noting shared demographics of victims and criminals).

405 Cf. Co-opting Compassion, supra note 236, at 585 (discussing President Clinton’s statement that “we sure don’t want to give criminals like gang members’ victims’ rights) (quoting Clinton’s Announcement in Support of a Victims’ Rights Amendment (Online News Hour, June 25, 1996)).

406 See supra notes 399–400; Co-opting Compassion, supra note 236, at 584 (observing construction of victims as “attractive, middle class, and white” persons subjected to “particularly brutal homicides”).

407 Kanwar, supra note 194, at 231.

408 See Co-opting Compassion, supra note 236, at 586–87 (contending that society views defendants as “monsters,” or “undifferentiated, poor, angry, violent, Black, or Latino male[s]”); Dubber, supra note 86, at 1621 (contending that media has led “white” America to “see crime as something that is committed by others”).
beyond their control⁴⁰⁹ and installed an ethic of exclusive victim identification.⁴¹⁰ Austin Sarat deconstructs a capital prosecutor’s argument, “We have a right to be vindicated and protected”:

“We” is both an inclusive and a violent naming, a naming fraught with racial meaning. Who is included in the “we”? While this “we” reaches from this world to the next as a remembrance of and identification with [the white victim], at the same time, it makes the black [defendant] an outsider in a community that needs protection from people like him.⁴¹¹

Despite these dominant tort and criminal law narratives, many continue to identify with tort plaintiffs’ plights and others continue to prioritize defendants’ liberty over victims’ punitive demands. As a result, crime victims’ advocates and tort reformers seek legal changes that minimize these intuitions while reflecting and reinforcing their preferred views of victimhood and responsibility. The tough-on-crime and tort reform rhetorical techniques for achieving legal reform are actually quite congruent: Characterize the status quo as existing in a moment of “crisis,” criticize the law and courts as illegitimate and incompetent for failing to respond in the desired manner, and argue for reform.⁴¹² In the tort context, the “crisis” is an “explosion” of frivolous litigation.⁴¹³ Carefully crafted political messages and media sensationalism has led the public to believe that the majority of tort suits are in fact ill-founded.⁴¹⁴ Tort reformers follow up with the claim that courts and/or juries are incompetent and unfair because they engage in

⁴⁰⁹ See Barker, supra note 225, at 620 (noting that defendants, once seen as “victims of social deprivation” were replaced by “innocent victims in need of state action”).
⁴¹⁰ VICTIMS’ WAR, supra note 32, at 9 (linking success of victims’ rights movement to psychic benefits of “identification with the victim”); see also FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 20 (1978) (contending that “average citizen” is more “worried about becoming a victim” than being falsely accused).
⁴¹² See Feld, supra note 85, at 1532 (“News media coverage of criminal justice administration typically emphasizes the ‘failures’—defendants freed on legal ‘technicalities’ and by lenient judges—and presents advocates for more severe punishment as the remedy.”); supra note 388.
⁴¹³ See Hubbard, supra note 383, at 471 (observing that tort reformers decry a “lawsuit crisis”).
⁴¹⁴ See, e.g., Contract with America, supra note 351; see Deborah L. Rhode, Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution, 54 DUKE L.J. 447, 447–51 (2004) (contending that the “media’s delight in profiling loony litigation” combined with “political polemics and business-sponsored media campaigns” created “widespread agreement that the nation has too much frivolous litigation”).
redistribution and argue for reform to narrow the law’s reach over defendants.\textsuperscript{415} As one expert explains:

Th[e] push for reform has attempted to gain public support of its legislative agenda and its ideology through the use of massive publicity campaigns that share a common rhetorical emphasis on the importance of widely shared values like fairness, efficiency, and personal responsibility. . . . This rhetoric is bolstered by attacks on plaintiffs and on the judicial system by means of the constant repetition of an asserted need to address a crisis and of anecdotal “horror stories” about the “tort tax,” a “litigation explosion,” “lawsuit abuse,” “frivolous lawsuits,” “judicial hellholes” and “dishonorable” courts.\textsuperscript{416}

Similarly, the first step in cementing tough-on-crime ideology involved media and political campaigns that described the magnitude of the crime problem as apocalyptic.\textsuperscript{417} Although in the formative years of the war on crime, crime rates were in fact elevated, it was not reality but political salience that kept the “crisis” of violent crime in headlines.\textsuperscript{418} For the past twenty years, crime rates have been decreasing\textsuperscript{419} while public perception continues to be that crime rates are at an all-time high.\textsuperscript{420} Like tort reformers, victims’ rights advocates condemn the legal system as inadequately responsive to the crime problem and call for radical changes.\textsuperscript{421} Unlike tort reformers who argue that tort law should be more attuned to fault and eradicate “illegitimate” distributive concerns, the victims’ rights movement seeks to make criminal law

\textsuperscript{415} See supra note 388 and infra notes 424 & 426 and accompanying text.
\textsuperscript{416} Hubbard, supra note 383, at 474.
\textsuperscript{417} See Rape and Feminism, supra note 28, at 621 (asserting that tough-on-crime politicians “routinely hyperbolize the danger of crime”). See, e.g., 151 Cong. Rec. H8074-01 (Statement of Rep. Poe) (supporting 2005 Child Safety Act to “stop the epidemic of violence and sexual abuse” and stating that “we have been reaping the destruction of [Hurricane Katrina] . . . [b]ut we have been for years reaping the greater destruction of a hurricane that continues to bring the wind, rain, and floods of the effects of child predators on America”).
\textsuperscript{418} See supra note 225.
\textsuperscript{420} SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 2.33 (2008) (reporting that between 1989 and 2008, save for 2 years, a majority of respondents (67% in 2008) believed crime was up from previous year), available at http://www.albany.edu/sourcebook/pdf/t2332008.pdf.
\textsuperscript{421} See supra Part IIIA.
less attuned to fault and more concerned with victim’s distributive interests.\textsuperscript{422} Conservative ideology thus regards the tort system as hopelessly flawed because it is distributive, but simultaneously views the criminal system as inadequate because it is not distributive enough.\textsuperscript{423} Many of the voices that exhort lawmakers to purge distributive considerations from individual tort cases invite criminal sentencing courts and juries to become roving calculators of punishment on the basis of victim suffering.

By this account, there is no principled conservative rejection of government distribution. Right-leaning policymakers do not withhold support whenever a legal rule is distributive. They only withhold it when the distributive rule burdens a favored group. For example, tort reformers condemn tort juries’ distributive tendencies as illicit sentiments that require strict legal control,\textsuperscript{424} but encourage and glorify criminal juries’ desires to serve victims’ interests.\textsuperscript{425} Consider Justice O’Connor’s argument that tort jury instructions must specifically guide jurors on how to assess punitive damages:

> In my view, [state punitive damage] instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.\textsuperscript{426}

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

> The State called as a witness Mary Zvolanek, Nicholas’ grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby

\textsuperscript{422} See supra Part IIIA & B(2).
\textsuperscript{423} See Roederer, supra note 359, at 678 (remarking that tort reformers view judges as “neutral referees, rather than guardians of justice”); supra note 264.
\textsuperscript{425} See supra Part IIIB(2).
sister and could not understand why they did not come home. I do not doubt that
the jurors were moved by this testimony-who would not have been? But surely
this brief statement did not inflame their passions more than did the facts of the
crime . . .

. . . In arguing that Payne deserved the death penalty, the prosecutor sought to
remind the jury that Charisse and Lacie were more than just lifeless bodies on a
videotape, that they were unique human beings. The prosecutor remarked that
Charisse would never again sing a lullaby to her son and that Lacie would never
attend a high school prom. In my view, these statements were permissible. 427

Within right-leaning philosophy, it is unfair and uncaring to prevent the admission of evidence in
a death sentencing that would allow the decision-maker to exercise empathy. 428 When it comes
to private law cases in which victims claim racial discrimination, empathy must be purged from
the legal process and the decision-maker made to swear to emotionless neutrality. 429

The one area in which conservative thinkers appear to prioritize a commitment to
liberalism over the tough-on-crime agenda is rape law. Feminist rape reformers support polices
like rape-shield and affirmative consent laws that seek to make rape trials fairer and less
traumatic for rape victims. 430 Far from embracing these victim-friendly laws, conservatives and
“third wave” feminists criticize the reforms as contrary to the liberal ideal that women should be
individually responsible agents. 431 The retreat of conservatives to rights-based claims in this

428 See supra note 341 and accompanying text; State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990) (calling the
exclusion of victim impact evidence “an affront to the civilized members of the human race”); 153 Cong. Rec.
S8742, S8746 (June 29, 2007) (statement of Sen. Kyl) (“A victim is not treated justly and equitably if her views are
not even before the court.”).
429 This message was delivered in stark fashion at Justice Sotomayor’s confirmation hearings. See Opening
Statement at Sotomayor Hearing (July 13, 2009) (statement of Sen. Jon Kyl) (characterizing empathy based on
“gender and Latina heritage” as “prejudices, biases and passions” but stating that during “sentencing, it may not be
wrong for judges to be empathetic”), available at http://kyl.senate.gov/record.cfm?id=315656; 155 Cong. Rec.
S8822, S8823 (August 5, 2009) (statement of Sen. Coburn) (stating that empathy is “antithetical to the proper role of
a judge”).
430 See Rape and Feminism, supra note 28, at 595–603 (discussing rape reforms); Aviva Orenstein, Special
Issues Raised by Rape Trials, 76 FORDHAM L. REV. 1585, 1599 (2007) (noting that rape shield laws seek to “spar[e]
women humiliation”); In re M.T.S., 609 A.2d at 1274 (characterizing affirmative consent standard as response to old
law that put victim on trial).
that affirmative consent “proposes that women, like children, have trouble communicating what they want”); Dan
context further underscores the fluidity and political nature of their commitment against distribution. The political story that plays out in date rape cases is very different from the politics of general criminal prosecution discussed above. The class of accused date rapists, and certainly the ones who make headlines, do not necessarily belong to the subordinated groups to which defendants often belong. Moreover, date rape reforms seek to change male behaviors that many people—especially those who harbor traditional views of gender roles—see as normal.

As a consequence, date rape reforms are not politically popular like other victim-centered criminal laws. Unlike the general “monster versus angel” narrative of crime, popular date rape narratives often portray the female complainant as irresponsible, or worse, a liar and the “nice boy” defendant as the true victim. Many are thus keenly attuned to danger that rape reform could hurt “innocent” defendants and down-play the distributive benefits to victims by disclaiming that they are “real” victims and asserting that (like tort plaintiffs) they should have been more careful. As a result, when feminists propose legal changes to remedy gender-based

Subotnik, Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy, 41 Akron L. Rev. 847, 847 (2008) (critiquing affirmative consent as “fueled by the notion that contemporary women can’t say ‘no’”).

See supra notes 363–366 and accompanying text.

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435 See Rape and Feminism, supra note 28, at 638 (asserting that “reforms aimed at countering racial and gender stereotypes within the criminal system have very little purchase among those who advocate retribution and victims’ rights”).

436 See John Dwight Ingram, Date Rape: It’s Time for “No” to Really Mean “No,” 21 Am. J. Crim. L. 3, 7 (1993) (observing “a widespread belief that the female gender is rife with spiteful shrews who often falsely accuse men”); Lynn Hecht Schafran, Writing and Reading About Rape: A Primer, 66 St. John’s L. Rev. 979, 995 n.58 (1993) (citing survey in which 38% of men and 37% of women indicated a seductively dressed woman is partly responsible for rape).

437 See Rape and Feminism, supra note 28, at 598 (noting the “media publicizing cases of false reporting, in which accused date rapists play the role of folk heroes”).

438 See id.; see, e.g., Subotnik, supra note 431, at 848 (“I never want to see a man’s life devastated through a bad rap from some vindictive woman.”).
distributive inequities in the criminal trial, opponents respond with principled objections to tinkering with rights to achieve social change and assertions of victims’ individual responsibility.

CONCLUSION

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

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

For now, it suffices to say that there is a distributive basis for criminal law, it has been with us for some time, and it is not going away soon.