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# A Theory of Differential Punishment

Jack Boeglin\*  
Zachary Shapiro\*\*

*A puzzle has long pervaded the criminal law: why are two offenders who commit the same criminal act punished differently when one of them, due to circumstances beyond her control, causes more harm than the other? This tradition of result-based differential punishment—the practice of varying offenders’ punishment based on whether or not they cause specific “statutory harms”—has long stood as an intractable problem for scholars and jurists alike.*

*This Article proposes a solution to this long-standing conceptual problem. We begin by introducing a dichotomy between two broad and exhaustive categories of ideological justifications for punishing criminal offenders. The first category, offender-facing justifications, includes many of the most familiar theories of punishment: deterrence, retribution, incapacitation, and rehabilitation. These offender-facing theories seek to justify punishment solely on the basis of facts about a criminal offender, such as her behavior, mental states, and perceived level of dangerousness. Yet, as we demonstrate, because offender-facing theories turn exclusively on facts about an offender and her conduct—rather than on the occurrence of harm outside of the offender’s control—they cannot provide adequate justification for the practice of differential punishment.*

*We also identify a second category of justifications for punishment that, at least in part, conditions the severity of criminal punishment on the effects that a particular criminal offense has on its victims. These victim-facing justifications include both “expressive” theories of punishment, according to which offenders should be punished out of respect for the victims they have harmed, and vengeance-based theories of punishment, according to which punishment serves to recognize and legitimate victims’ desire for revenge against their offenders. Because victim-facing justifications focus on the harm that*

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crimes cause to victims, they are, if valid, theoretically capable of justifying differential punishment.

However, we will show that victim-facing justifications for punishment are not available for every instance of criminal misconduct. When a criminal offense (1) has no "object" (in that it is not "done" to anyone), (2) has a "victim" who either consented to, or was otherwise culpable for, the commission of the offense, or (3) has a victim who desires to show "mercy" to the offender, victim-facing theories cannot justify differential punishment, rendering the practice categorically unjustifiable in such cases. We conclude by arguing that in these instances, where differential punishment is unjustified, offenders should be punished as if they had not brought about the harmful result that would otherwise subject them to heightened punishment.

INTRODUCTION .....	1501
I. OFFENDER-FACING JUSTIFICATIONS FOR PUNISHMENT ....	1505
A. <i>Deterrence</i> .....	1506
B. <i>Retribution</i> .....	1512
C. <i>Incapacitation</i> .....	1519
D. <i>Rehabilitation</i> .....	1521
II. VICTIM-FACING JUSTIFICATIONS FOR PUNISHMENT .....	1523
A. <i>Victim-Facing Expressive Theories of Punishment</i> .....	1524
B. <i>Vengeance-Based Theories of Punishment</i> .....	1527
C. <i>Who Qualifies as a Victim?</i> .....	1530
1. <i>Direct vs. Secondary Victims</i> .....	1530
2. <i>Society as Victim?</i> .....	1532
a. <i>The "Aggregation" View of Society</i> ..	1534
b. <i>The "Metaphysical" View of Society</i>	1536
III. WHERE DIFFERENTIAL PUNISHMENT IS UNJUSTIFIED .....	1540
A. <i>Crimes for Which There Is No "Object"</i> .....	1540
B. <i>Consent and Shared-Culpability Crimes</i> .....	1542
1. <i>Consent Crimes</i> .....	1543
2. <i>Shared-Culpability Crimes</i> .....	1545
C. <i>Crimes for Which the Victim Desires to Show the Offender "Mercy"</i> .....	1548
IV. APPLYING THE FRAMEWORK .....	1552
A. <i>Intentional Offenses</i> .....	1553
B. <i>Non-Intentional Offenses</i> .....	1554
CONCLUSION .....	1558

## INTRODUCTION

In 2009, three roommates at Purdue University in Indiana were drinking in their living room on a Saturday night when one of them, Landon Siela, headed to the bathroom. The other two roommates, William Calderon and Cory Lynch, each decided to “prank” Siela by pulling an unloaded gun on him and pretending to shoot when he returned to the living room. Tragically, Lynch’s gun, unbeknownst to him, still had a live bullet lodged in the chamber, which struck and killed Siela when Lynch pulled the trigger. As a result, Calderon and Lynch were both convicted of criminal offenses. But while Calderon was convicted only of the Class A misdemeanor of “pointing a firearm,” punishable by no more than a year in prison,<sup>1</sup> Lynch was convicted of reckless manslaughter, a Class C felony that carries a maximum sentence of eight years.<sup>2</sup>

It is clear that the fact that Lynch’s reckless actions caused Siela’s death exposed him to much harsher legal penalties than those faced by Calderon. It is less clear, however, what justifies this discrepancy in severity, given that Lynch does not seem to have behaved any more culpably than Calderon. This dilemma, a close cousin of the philosophical problem of “moral luck,” has long stood as an intractable puzzle in the theory of criminal law.<sup>3</sup>

The majority position among scholars on this topic, exemplified by Stephen J. Schulhofer in his influential 1974 article *Harm and Punishment*, is that differentiating punishment based on its results cannot be justified as a matter of practice.<sup>4</sup> However, some theorists have dissented from this view. A few proponents of retributive punishment, most prominently philosopher Michael Moore,<sup>5</sup> have attempted to resolve the dilemma of “differential punishment” by

1. For an overview of sentencing bands in Indiana for both misdemeanors and felonies, see Ave Mince-Didier, *Indiana Crimes by Class and Sentence*, CRIM. DEF. LAW., <http://www.criminaldefenselawyer.com/resources/criminal-defense/felony-offense/indiana-felony-class.htm> (last visited July 23, 2017) [<https://perma.cc/LG5V-P7QE>].

2. For a news account of this crime, see Jonathan Oskvarek, *Two Former Students Receive Sentences over Summer*, EXPONENT (Aug. 20, 2010), [http://www.purdueexponent.org/city/article\\_7600caf0-645d-54ac-bfb0-b91db03a366d.html](http://www.purdueexponent.org/city/article_7600caf0-645d-54ac-bfb0-b91db03a366d.html) [<https://perma.cc/KHC9-BZ5B>].

3. See generally THOMAS NAGEL, MORAL LUCK (Daniel Statman ed., 1993); BERNARD WILLIAMS, MORAL LUCK (1982).

4. Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974); see, e.g., David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 LAW & PHIL. 405, 414 (2007); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 SUP. CT. REV. 679 (1994).

5. MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 225 (2010).

claiming that the consequences of one's actions weigh directly on one's "moral desert," and thus that an action that causes greater harm merits greater punishment.<sup>6</sup> Other commentators, such as Judge Richard Posner, have advanced utilitarian rationales for more severely punishing those offenders who cause greater harm, arguing, *inter alia*, that this approach more effectively and efficiently deters future harmful conduct.<sup>7</sup> However, as of yet, no theorist has succeeded in producing a widely accepted justification for this feature of the criminal law.

In this Article, we propose a general theory of *differential punishment*—that is, the practice of differentiating an offender's punishment based on whether her actions bring about a statutory harm. In so defining differential punishment, we borrow Schulhofer's definition of *statutory harm* as "[a]ny consequence of conduct . . . [that] is a necessary element of a given offense."<sup>8</sup> As Schulhofer explains, the concept of statutory harm is not coextensive with what might ordinarily be thought of as the "harms" caused by a criminal offense, or with the ultimate harm or consequence that the criminal offense seeks to prevent.<sup>9</sup> For example, if a married man is murdered, his wife might be "harmed" in that she mourns his death and misses his company. But the wife's psychological distress is *not* a statutory harm for the crime of murder, because—unlike her husband's death—it is not a necessary element of the crime. Conversely, because the crime of burglary requires "unauthorized entry into a building *with intent to commit a felony therein*," one might reasonably think that the intended felony, and not the unlawful entry, is the ultimate harm the crime of burglary seeks to prevent.<sup>10</sup> However, because "unauthorized entry into a building" is a consequence of the offender's conduct that is a necessary element of the crime of burglary, it *is* a statutory harm. Moreover, it is important to note that not all crimes have a statutory harm—for instance, inchoate crimes, such as attempts, prohibit certain types of conduct even if such conduct does not lead to any statutorily prohibited consequences.

While a myriad of factors go into determining what specific sentence a judge will impose in any given case (such as an offender's "acceptance of responsibility" and past criminal history), differential punishment refers specifically to the practice of classifying offenders

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6. See *infra* Section I.B.

7. See *infra* Section I.A.

8. Schulhofer, *supra* note 4, at 1505.

9. *Id.*

10. Schulhofer provides a discussion of this example himself. *Id.* at 1506.

who cause particular statutory harms as guilty of offenses that carry higher penalties than those crimes applicable to offenders who engage in equally culpable behavior, yet for whatever reason do not bring about statutory harms.

In the pages below, we propose a novel theory of differential punishment that introduces a distinction between two broad and exhaustive categories of theoretical justifications for criminal punishment. On the one hand, what we will refer to as *offender-facing justifications* condition punishment on various facts about an offender, including her actions, mental states, and risk of dangerousness to herself and to others. Offender-facing justifications for punishment include many of the best-known theories of punishment, such as deterrence, retribution, incapacitation, and rehabilitation. As we will demonstrate, because offender-facing justifications focus exclusively on facts about an offender and her actions, they are not capable of justifying differential punishment based on results outside of the offender's control.

On the other hand, *victim-facing justifications* condition punishment on the effects that criminal offenses have on their victims. These justifications are premised on the notion that the state should take the interests of victims into account when determining how severely criminal offenders should be punished. Victim-facing justifications tend either to take the form of certain "expressive" theories of punishment, according to which offenders should be punished out of respect to victims for the harm that they have suffered,<sup>11</sup> or vengeance-based theories, which recognize victims' desire for revenge against their offenders. As we will show, because victim-facing justifications focus on the actual consequences of criminal conduct, rather than merely on offenders' culpable behavior, they are, if valid, capable of justifying the practice of differential punishment in many circumstances.

Therefore, to the extent that differential punishment can be justified at all, it can *only* be justified in reference to these victim-facing justifications. Yet, as we will demonstrate, victim-facing justifications for punishment are not applicable to all criminal offenses or instances of criminal misconduct. In cases where (1) a criminal offense has no "object" (in that it is not "done" to anyone), where (2) the victim of a crime consented to or was otherwise culpable for the commission of the criminal offense, or where (3) a victim disavows expressive or

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11. As we will discuss in greater detail later on, not all expressive theories of punishment are victim-facing—some expressive theories support a regime of punishment coextensive with an offender's culpability, and are thus entirely offender-facing. See *infra* Sections I.B, II.A.

vengeance-based punishment on his behalf, victim-facing justifications cease to function as legitimate justifications for differential punishment.

Our framework will demonstrate that, no matter which of the currently recognized theories of criminal punishment one thinks are legitimate, it follows that differential punishment will *never* be warranted in those three types of cases. Because previous authors have focused solely on the question of whether differential punishment can be justified *writ large*, they have failed to reckon with the possibility that the practice may be justified with respect to some types of offenses, but not to others. By distinguishing between offender-facing and victim-facing justifications for punishment, this Article provides a layer of nuance to the debate over differential punishment, and identifies for the first time three categories of offenses in regard to which all parties should agree differential punishment should not extend.

In those circumstances where differential punishment is unwarranted, an offender should only be punished for culpable behavior within her control, and not for any statutory harm resulting from her actions. Our general proposal is accordingly to punish offenders of completed crimes for which victim-facing justifications for punishment do not apply as if the statutory harm had not occurred. Under this framework, completed intentional crimes for which victim-facing justifications do not apply should be punished only as severely as are attempts of those same crimes.<sup>12</sup> In jurisdictions where attempts and completed crimes are *already* punished equally, our recommendation would therefore not have any effect on how such offenders are punished.

But our proposal would have far more dramatic implications with regard to the punishment of non-intentional offenses, as abandoning a regime of differential punishment would almost always lead to a significant reduction in punishment for offenders of non-intentional crimes. This is because non-intentional criminal conduct is generally not punished harshly unless it brings about a statutory harm. Indeed, in the absence of statutory harm, such behavior is generally only punished *at all* when it is independently criminalized (as with the crime of driving under the influence) or when it risks inflicting serious injury or bodily harm to another (as with the crime of reckless endangerment).

In Parts I and II, we introduce the dichotomy between offender-facing and victim-facing justifications for punishment, and show that only the latter category is capable of justifying differential punishment.

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12. Importantly, we are not recommending that such offenders be *charged* with (or convicted of) attempted crimes. Rather, we are suggesting that these crimes merely be punished as such.

In doing so, our Article presents the most comprehensive and up-to-date discussion in the academic literature of why many of the traditional theories of criminal punishment cannot justify the practice of differential punishment. In Part III, we venture into untrodden territory, identifying three distinct categories of criminal offenses to which victim-facing justifications for punishment *cannot* apply, even in principle. We conclude that, due to the unavailability of victim-facing justifications, differential punishment is never warranted in such cases.

In Part IV, we demonstrate how our conclusions in Part III should be applied both to intentional and non-intentional criminal offenses to which victim-facing justifications do not apply, and we suggest that such completed offenses should be punished as if the statutory harm had not occurred. Putting our recommendations into practice would greatly reduce the sentences for a significant class of criminal offenders at both the state and federal levels, cutting down on the chronic problem of over-incarceration that haunts our penal system without undermining the objectives of any of the recognized justifications for criminal punishment.

#### I. OFFENDER-FACING JUSTIFICATIONS FOR PUNISHMENT

Many of the classic justifications for criminal punishment—deterrence, retribution, rehabilitation, and incapacitation—do not depend on the occurrence of a statutory harm. These *offender-facing justifications* relate to various facts about an offender: his actions, mental states, level of dangerousness, etc. Thus, these justifications remain valid even in the case of inchoate crimes, such as attempts, where the offender has not caused any statutory harm. As we will argue in this Part, offender-facing justifications cannot justify differential punishment, precisely because they depend solely on facts about the offender and his behavior, rather than on the consequences of his actions.

Although we are the first to group these justifications for punishment together and label them “offender-facing,” we are not the first to suggest that many of the classic theories of criminal punishment cannot justify the role that the results of an offender’s conduct currently play in American criminal law. Other commentators, most notably Schulhofer in his 1974 paper, have made the case that whether or not an offender’s actions lead to a statutory harm is irrelevant to many of the justifications for criminal punishment.<sup>13</sup> However, a minority of scholars have pushed back against this view in recent decades.

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13. Schulhofer, *supra* note 4.



Therefore, we think that it is important to discuss each of these justifications in turn, in order to address any objections and to affirmatively make the case that offender-facing justifications do not, and cannot, justify differential punishment.

### A. Deterrence

Perhaps the most widely accepted justification for punishing criminal offenders is the *deterrence* of future crime.<sup>14</sup> While the law has other means of deterring undesirable conduct, such as civil fines and penalties, recourse to criminal punitive measures is usually seen as necessary to prevent the serious misconduct that the criminal law concerns itself with.<sup>15</sup> However, the question remains: Does differentiating punishment based on whether a given course of criminal conduct leads to a harmful result deter more crime than would punishing all instances of such conduct equally? We submit that it does not.

By punishing criminal offenders, the state can simultaneously accomplish two forms of deterrence.<sup>16</sup> First, punishing an offender disincentivizes the general population from engaging in criminal action by demonstrating the negative consequences of doing so; this is known as *general deterrence*. Second, punishing an offender incentivizes that offender to himself abstain from future criminal action; this is known as *specific deterrence*. For two reasons, we will take the word “deterrence” to mean “general deterrence” for the remainder of this section. First, nearly all arguments made in favor of differential punishment focus on the effects it has on general deterrence.<sup>17</sup> Second,

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14. While the general public and the vast majority of commentators accept deterrence as a legitimate aim of the criminal justice system, there are serious academic criticisms of deterrence and of utilitarian justifications for punishing offenders writ large. See, e.g., Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 214–15:

The strongest criticisms of utilitarian punishment, however, implicate the Kantian categorical imperative to never use individuals as means to other ends but to treat them as ends in and of themselves. . . . There is no necessary correlation between crime and sanction under utilitarian theory, only between sanction and increased social utility.

15. This insight plays an important role in the economic analysis of criminal law. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972) (“In other words, we impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules.”).

16. See generally ARTHUR W. CAMPBELL, SENTENCING RATIONALES, LAW OF SENTENCING § 2:2 (2015).

17. One minor exception is Bentham’s suggestion of “characteristicalness”—that, when possible, an offender’s punishment will have more deterrent effect if it resembles the harm the offender inflicted. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 182–83 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789). Because

most empirical studies conclude that lengthening an offender's sentence generally has a neutral or even positive effect on his likelihood of recidivism<sup>18</sup>—consequently, we can conclude at the outset that it would be categorically unwise to base substantial differences in punishment on the theory of specific deterrence.

While the majority of commentators believe, as we do, that result-based punishment in the criminal law does not advance the goal of deterrence,<sup>19</sup> a minority of scholars contest this issue. Within the academic literature, these deterrence-based arguments for differential punishment usually take one of four standard forms. We will address (and ultimately reject) each of these in turn.

The first argument commonly cited in favor of differential punishment is known as the “penal lottery.”<sup>20</sup> This view posits that, given that people are generally risk averse,<sup>21</sup> arbitrarily punishing certain offenders severely and others leniently will deter crime more effectively and efficiently than would punishing all offenders equally. If true, this proposition would lead to the conclusion that varying punishment based on results *would*, in fact, lead to greater deterrence than would punishing the underlying action consistently.

This theory rests upon a testable empirical proposition—namely, that the prospect of severe punishment, even if uncertain, deters more effectively than less severe, but certain, punishment does. As it turns out, however, the sizable literature investigating this question consistently finds certainty in punishment to be far more

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this argument's empirical basis has not been tested, because other scholars have not pursued the concept, and because this argument has more to do with the character rather than length of punishment, we will not discuss it further here.

18. For a summary of the empirical literature on this point, see Lin Song & Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served*, WASH. ST. INST. FOR PUB. POLY 5–6 (1993), [http://pgn-stage.wsipp.wa.gov/ReportFile/1152/Wsipp\\_Recidivism-The-Effect-of-Incarceration-and-Length-of-Time-Served\\_Full-Report.pdf](http://pgn-stage.wsipp.wa.gov/ReportFile/1152/Wsipp_Recidivism-The-Effect-of-Incarceration-and-Length-of-Time-Served_Full-Report.pdf) [<https://perma.cc/BVC5-NZKD>].

19. See, e.g., *id.*; H.L.A. Hart, *Intention and Punishment*, 4 OXFORD REV. 5 (1967), reprinted in PUNISHMENT AND RESPONSIBILITY 113, 130 (2d ed. 2008) (“[T]here seems no reason on any form of deterrent theory . . . for punishing the unsuccessful attempt less severely than the completed crime.”); Schulhofer, *supra* note 4. In an article rejecting all four of the arguments discussed here, Marcelo Ferrante raises some novel claims about the deterrent force differential punishment could incidentally serve assuming a number of sociological conditions and cognitive biases. Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007). While interesting, these arguments rely on sociological and psychological claims that have yet to be established, and so do not warrant greater discussion here. Moreover, due to their recentness, Ferrante's arguments cannot possibly be what currently motivates differential punishment.

20. See, e.g., Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277, 279 (2012).

21. Doron Teichman, *The Optimism Bias of the Behavioral Analysis of Crime Control*, 2011 U. ILL. L. REV. 1697, 1700.

important than severity in deterring undesirable action.<sup>22</sup> Pending new and contradictory evidence, therefore, the empirical proposition upon which this argument is founded appears false.

A second well-known argument for differential punishment is that it provides marginal incentives for offenders to abandon their criminal design before the criminal act is consummated, whereas equal punishment removes incentives for abandonment of criminal plans.<sup>23</sup> As Judge Richard Posner puts it:

If the punishment for attempted murder were the same as for murder, one who shot and missed (and was not caught immediately) might as well try again, for if he succeeds, he will be punished no more severely than for his unsuccessful attempt.<sup>24</sup>

Like the “penal lottery” argument, this argument also fails to justify the role that results play in the criminal law. First, these alleged marginal incentives are largely irrelevant in instances of non-intentional criminal conduct, where the offender generally does not desire the proscribed result to occur in the first place. Moreover, even in the case of intentional crimes, this argument does little to explain why a gunman who tried to murder someone would give up simply because he missed once. Presumably, the gunman in Posner’s example intended to murder his victim despite the criminal consequences of doing so; in other words, it was “worth it” for him to kill, even in light of the increased criminal sanctions for the completed offense of murder.<sup>25</sup> While surely some of the individuals who attempt criminal offenses have a “change of heart” after failing the first time, Posner’s theory would only apply to the, likely rare, individual who had a half-hearted change of mind (i.e., who would *not* attempt the offense again if there were a difference in punishment between an attempt and the completed crime, but *would* attempt it again if the punishment for the two crimes was the same).

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22. See, e.g., Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 982 (2008) (“Empirical investigations indicate that increases in the certainty of punishment are more effective deterrents than increases in the severity of punishment.”); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) (finding that “evidence in support of the deterrent effect of various measures of the certainty of punishment is far more convincing and consistent than for the severity of punishment”). But see Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2004) (suggesting that in certain circumstances, including the public’s general aversion to risk, uncertain penalties may lead to greater deterrence).

23. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Schulhofer, *supra* note 4, at 1519.

24. Posner, *supra* note 23, at 1218.

25. In very limited circumstances, differential punishment could serve to deter an offender who attempted an offense but then had a “change in calculus” (such that they would rather accept the lower punishment that comes with an attempt than the higher punishment for the completed offense). However, such undoubtedly rare scenarios clearly cannot justify our regime of differential punishment writ large.

A more fundamental flaw in this argument, however, is that it overlooks the powerful incentives that an offender has to desist from a criminal course of action even under a regime of equal punishment.<sup>26</sup> To begin with, many jurisdictions offer complete or partial defenses to those who abandon criminal conduct that would otherwise constitute an attempt before the crime is completed.<sup>27</sup> Furthermore, continuing a criminal course of action increases an offender's chances of being apprehended, as it is far more likely culpable behavior will be uncovered and investigated if it leads to real-world harm than if it is abandoned before any such harm has occurred. Finally, even if the criminal law did not mete out more punishment when an offender's actions bring about a statutory harm, such harms often render offenders liable for civil damages. These non-criminal incentives to desist from criminal conduct are more than adequate at providing marginal deterrence, even in the absence of differential punishment.

A third deterrence-based justification for differential punishment, offered by Jerome Michael and Herbert Wechsler in their 1937 paper *A Rationale of the Law of Homicide*, holds that differential punishment provides substantially the same deterrent value as would punishing all instances of the underlying conduct, and comes at a lower practical cost than punishing attempts equally as completed offenses.<sup>28</sup> The core assumption of this argument is that an individual contemplating a criminal act looks to the penalty for the completed, as opposed to the attempted, crime when deciding whether to act. That is, offenders are significantly and systematically over optimistic; they are so certain they will be successful that they look only to the penalty for the completed crime when deciding whether to *try* to commit an offense.

However, as with the previous "marginal incentives" justification, this argument is subject to the immediate and obvious shortcoming that it only applies to intentional crimes. It assumes offenders are optimistic, which would imply that non-intentional

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26. See Schulhofer, *supra* note 4, at 1520 (arguing that continuing a criminal course of action increases the chances of apprehension and the probability of facing liability at tort law, and prevents an offender from receiving the complete defense to an attempt that results from abandonment of a criminal scheme).

27. See, e.g., MODEL PENAL CODE § 5.01(3) (AM. LAW INST., Proposed Official Draft 1962). However, this defense is only available in a limited number of circumstances. *Id.* § 5.01(4):

[R]enunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose.

Cf. Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117, 122 n.18 (1997) (suggesting an interpretation of the MPC for which Posner's attempter would not be able to renounce his attempt).

28. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1295 (1937).

offenders envision that they will *not* cause any harm, and would thus look primarily to the penalty for the *result-less* crime when deciding whether to engage in culpable behavior. Furthermore, even in the case of intentional crimes, there is scant empirical support that "optimism bias" applies to those contemplating criminal actions,<sup>29</sup> and it would be irrational to suggest that the punishment of attempts never deters prospective offenders. To wit, if attempts were not punished at all, a man considering committing a crime, such as murder, could rest assured that either he would succeed in murdering his target or get off scot-free for the attempt. At most, then, this theory suggests that the criminal justice system can substantially deter intentional crimes without punishing attempts as severely as it does completed offenses.<sup>30</sup>

A fourth and final deterrence-based argument in favor of differential punishment is that juries would refuse to convict offenders who did not cause harm if they were to be sentenced as harshly as are those who did. This argument was contemplated in the commentary to the fourth draft of the Model Penal Code ("MPC"), which stated:

[J]uries will not lightly find convictions that will lead to the severest types of sentences unless the resentments caused by the infliction of important injuries have been aroused. Whatever abstract logic may suggest, a prudent legislator cannot disregard these facts of life in the enactment of a penal code.<sup>31</sup>

However, this argument, too, quickly falls apart under closer scrutiny. As a general matter, the only inchoate crimes for which the "severest types of sentences" are currently imposed are attempts.<sup>32</sup> Yet, at present, such offenses are punished nearly as harshly (and in some jurisdictions, just as harshly) as are completed crimes,<sup>33</sup> apparently without fear of widespread jury nullification. In contrast, the "baseline" punishment for reckless and negligent behavior in a system of equal punishment would likely not be so severe as to provoke fears of jury nullification. For example, it is extremely unlikely under a regime of equal punishment that a legislature would determine that all drunk

29. See Teichman, *supra* note 21, at 1700. The bias was famously documented in Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

30. To be clear, in a world of limited law enforcement resources, this might justify more frequently prosecuting cases in which harm actually occurs, both because there is better evidence of their commission and because punishing them will have a stronger signaling effect. But this does not explain why one would give offenders who do not cause harm less punishment if criminal charges against them are actually being pursued.

31. MODEL PENAL CODE § 2.03 cmt. at 134 (AM. LAW. INST., Tentative Draft No. 4, 1955).

32. For instance, attempted murder is typically punished far more severely than is reckless endangerment.

33. In states that follow the MPC, attempts are punished equally with completed crimes. There is an exception to this proposition in the case of the death penalty, which, when available at all, is only applicable in the case of murders and not attempted murders.

drivers should be punished as severely as those convicted of vehicular homicide currently are.<sup>34</sup> Of course, such a regime might prove unsatisfactory to certain jury members—because they would think it too *lenient* on offenders that actually cause harm. But juries cannot exercise their power of nullification to increase a sentence, and thus the MPC's concern would be inapplicable.<sup>35</sup>

Furthermore, while the frequency with which jury nullification occurs is notoriously difficult to calculate, the best estimates are that nullification occurs in only about four percent of criminal cases,<sup>36</sup> and less than ten percent of criminal cases come in front of a jury in the first place.<sup>37</sup> Thus, even if juries were marginally more likely to nullify under a regime of equal punishment (which we think is unlikely), resting the justification for differential punishment on the fear of nullification would be a severe overreaction.

Taken either together or separately, none of these four deterrence-based arguments in favor of differential punishment is ultimately persuasive. Moreover, even if the reader finds some merit in any of these arguments, they still fall far short of justifying the enormous role that results currently play in determining criminal punishments. Critically, nearly all of the deterrence-based arguments for differential punishment are addressed toward intentional offenses. But, as we have already explained, the existence of statutory harm generally has only a minimal impact on the sentencing of intentional crimes, whereas it can profoundly affect the level of punishment a non-intentional offender receives. Especially given the fact that offenders are seldom familiar with the sentence a given offense carries,<sup>38</sup> and that

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34. While a risk must be “substantial and unjustifiable” to qualify as criminally negligent or reckless, it certainly does not have to be more probable than not as a general matter. MODEL PENAL CODE § 2.02(2) (AM. LAW INST., Proposed Official Draft 1962). Therefore, most people who act recklessly do not bring about harm. Thus, under a regime of equal punishment, the uniform sentence accompanying offending conduct would presumably be closer to the current level for the resultless crime than to the completed crime.

35. In fact, juries are not always made aware of the sentence that will flow from conviction before returning their verdicts. See Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223 (2010); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91.

36. Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. REV. 1103, 1109 (“[S]cholars estimate that jury nullification happens in about 4% of cases.”).

37. See *Criminal Trials*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> (last visited July 23, 2017) [<https://perma.cc/LV8F-259V>] (“More than 90 percent of defendants plead guilty rather than go to trial.”).

38. For an excellent discussion of the implications of offenders' general lack of knowledge about what is and is not criminalized, as well as of how severely crimes are punished, see Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).

increasing the severity of punishment beyond a relatively low threshold has limited marginal deterrence value,<sup>39</sup> it seems clear that deterrence provides little support for the proposition that differential punishment is either justified or desirable.

### B. Retribution

Another commonly cited justification for punishment is *retribution*—the “application of deontological ethics to criminal justice.”<sup>40</sup> Retributivism relies on the basic premise that criminal offenders should be made to suffer, in the form of criminal punishment, in “payment” for their crimes.<sup>41</sup> Through administering retributive punishment, the criminal justice system also expresses society’s moral condemnation of the offender. Thus, in accordance with a retributive theory of justice, criminal punishment should be coextensive with (or at least constrained by) a criminal’s moral desert. In order for retributivism to justify differential punishment, therefore, an offender must be more culpable when his actions bring about statutory harm than if he had engaged in the same behavior, and yet the statutory harm had not occurred. As we will argue, this is not the case.

While the basic intuition that punishment serves as “payment” for crime is both “ancient and widely-held,”<sup>42</sup> retributivism has its clearest roots in the work of eighteenth-century philosopher Immanuel Kant. In *The Metaphysics of Morals*, Kant argued that criminal punishment “can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must be inflicted upon him only *because he has committed a crime . . . in proportion to his inner wickedness.*”<sup>43</sup>

Following in the Kantian tradition, modern day proponents of retributive justice see the act of punishment as a normative obligation:

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39. See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 4–5 (2014), <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes#> [<https://perma.cc/B96L-UT7W>] (finding that increasing already substantial sentences has little to no general deterrence effect). Of course, simply keeping offenders in prison longer achieves some deterrence by incapacitating dangerous individuals, as discussed *infra* Section I.C.

40. Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 715 (2008).

41. See, e.g., John Cottingham, *Varieties of Retribution*, in RETRIBUTION 3, 3 (Thom Brooks ed., 2014).

42. *Id.*

43. IMMANUEL KANT, THE METAPHYSICS OF MORALS 105–06 (Mary Gregor ed., Cambridge Univ. Press 1996) (1797).

“[w]e do injustice if we fail to punish criminals, because they then do not receive what they deserve.”<sup>44</sup>

Even if one does not accept the Kantian rationale for retributivism, it is possible to justify retributive punishment on *expressive* grounds. According to proponents of the expressivist view, a central purpose of criminal punishment is for the state to authoritatively express society’s moral condemnation of criminal behavior.<sup>45</sup> Thus, in the words of Dan Kahan, “[t]he proper retributive punishment is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies.”<sup>46</sup> Expressive theories, therefore, can provide a positive rationale for retributive punishment coextensive with an offender’s moral culpability, but do not require the conclusion that retributivism is an inherent moral imperative.<sup>47</sup>

Ordinarily, we deem an agent morally culpable only for those actions of hers that are under her control.<sup>48</sup> Accordingly, the feature of criminal action that renders it subject to judgments of culpability in the first place is that the criminal *chose* to act in such a way.<sup>49</sup> Consider the criminal doctrines of the “act requirement” and the “insanity” and “duress” defenses:<sup>50</sup> these doctrines codify the principle that only sufficiently agential actions are properly subject to moral and legal censure. When we punish criminal offenders differently based on the results of their actions,<sup>51</sup> therefore, we seem to violate this deeply held moral conviction that “*ought* implies *can*,” and thus that culpability should not be based on something outside of an actor’s control.

Why, then, in the words of H.L.A. Hart, “should the accidental fact that . . . [a] harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally

44. Thom Brooks, *Retributivism*, in *RETRIBUTION*, *supra* note 41, at 83, 85.

45. See, e.g., JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996).

46. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 602 (1996).

47. As we will discuss in Part II, there are expressive theories that are not coextensive with offenders’ culpability and thus may be able to justify differential punishment. See, e.g., JEAN HAMPTON, *THE INTRINSIC WORTH OF PERSONS* 108–51 (2007).

48. This sentiment was expressed by Kant, who wrote that “[t]he good will is not good because of what it effects or accomplishes . . . it is good only because of its willing.” IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* § 1 para. 3 (Lewis White Beck trans., Library of Liberal Arts 2d ed. 1989) (1785).

49. Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 688 (1994).

50. For a cogent discussion of these doctrines and the role of voluntariness in the criminal law, see generally Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545 (2013).

51. See Binder, *supra* note 40, at 716 (“Once the actor has culpably imposed a risk, the wrongful and culpable act is complete. The results of his act are often out of his hands.”).



wicked?”<sup>52</sup> This quandary is known as the “problem of moral luck”<sup>53</sup> and has led most philosophers and legal theorists to the conclusion that retributivism cannot justify differential punishment.<sup>54</sup>

However, a small minority of theorists has attempted to “solve” the problem of moral luck by insisting that criminal offenders are, in fact, more culpable in cases where their actions bring about harmful results. Four types of justifications are generally given for such a view.

First, some theorists appeal to an allegedly widely held intuition that “more punishment is deserved in cases where . . . [harm results] than in cases where it does not.”<sup>55</sup> The most prominent formulation of this argument comes from philosopher Michael Moore. In his book *Placing Blame*, Moore builds an argument for differential punishment out of three claims about people’s attitudes with regard to causing harm: (1) most people believe that an offender “deserves more punishment for having killed [a victim] than he would if he had unsuccessfully tried to kill [that victim]”; (2) most people experience a “feeling of greater guilt . . . when they succeed in *causing* (versus *trying for* or *risking*) bad results”;<sup>56</sup> and (3) most people tend to focus on the possible results of a course of action, rather than saying to themselves, “[i]t does not matter how my choice comes out, so long as I make a reasonable choice without any culpable intention.”<sup>57</sup> Moore goes on to argue that “[t]he principle whose truth best explains this mass of judgments in particular cases is of course the principle that [causing a harmful result] independently determines the extent of our just deserts, along with culpability.”<sup>58</sup>

52. HART, *supra* note 19, at 131.

53. Thomas Nagel, *Moral Luck*, in MORTAL QUESTIONS 24, 26 (Canto ed. 1991) (“Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck.”).

54. Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 935 (2000) (“[A]ttempts and successes should be regarded not only as equally culpable, but also as equally blameworthy and punishable . . . .”); Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2192 (1994) (“Capable of acting on our own beliefs and desires, we expect to be held criminally responsible only for our decisions to disobey the law and not for the workings of fate.”); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 383 (“Results should not matter to desert, because good reason in general and legal rules in particular can fully and directly influence only intentional action. Results are properly objects of celebration and regret, but only actions should be objects of moral praise and blame.”); Schulhofer, *supra* note 4, at 1514 (arguing that punishment of criminal harm based on retributivism is “anti-rational”).

55. MOORE, *supra* note 5, at 225.

56. *Id.* at 230 (emphasis added). This argument is known as the “remorse analogy.” See, e.g., R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY 189–90 (1990).

57. MOORE, *supra* note 5, at 229–32.

58. *Id.* at 226.

However, this argument from “intuition” fails to adequately address the problem of moral luck. First, the “intuitive judgment” represented in (1) “cannot claim anything approaching widespread appeal.”<sup>59</sup> Suppose, for example, that Albert and Ben each shoot at their bosses, intending to kill.<sup>60</sup> Holding all else constant, it does not intuitively seem that it should matter in assessing Albert’s and Ben’s comparative moral culpability if Albert’s bullet hit his boss dead-on and Ben’s bullet only grazed his boss’s arm, or if Albert’s boss miraculously recovered in the hospital from her head wound, while Ben’s boss unexpectedly succumbed to a fatal arm infection. Furthermore, though some empirical studies indicate that many people *do* support greater punishment for those offenders that bring about harmful results, these people by and large do *not* believe those offenders to have done something more wrongful.<sup>61</sup> To the extent that this intuition does in fact exist, then, the justification for it appears to be non-retributive in nature.<sup>62</sup>

Second, the jump from “self-regarding” to “other-regarding” judgments in propositions (2) and (3) is equally problematic. The guilt we feel when we cause harm to others may have little to do with the self-ascription of culpability, but instead be an expression of empathy towards our victims.<sup>63</sup> For example, if I am driving down the road at a reasonable speed while exercising reasonable diligence, I may nevertheless feel “guilty” if a child unexpectedly jumps in front of my car and is hurt, even if I (correctly) judge that I have not done anything “wrong.”<sup>64</sup> Similarly, the fact that we prospectively focus on the risk of harm occurring when making decisions about how to act does not give us any reason to think that whether harm results is an appropriate basis for punishing others. While it may very well be appropriate to condition moral and legal culpability on criminal offenders’ *prospective*

59. Schulhofer, *supra* note 4, at 1515.

60. *Id.*

61. See Fiery Cushman, *Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment*, 108 *COGNITION* 353, 375–78 (2008).

62. As we explain in Section II.A, this judgment might be an expression of sympathy for the victim rather than an additional condemnation of the offender.

63. We will discuss empathy towards victims *infra* Section II.A. See also Binder, *supra* note 40, at 732:

[T]o the extent we are more disappointed in ourselves when we cause harm rather than imposing unjustifiable risk, it is largely because of our decreased ability to delude ourselves into minimizing the risk we carelessly imposed. But insofar as our relative complacency about our own harmless wrongdoing results from self-serving self-deception, it has no moral weight and provides no justification for punishing harmless wrongdoers less than harmful ones.

64. See Herbert Morris, *Nonmoral Guilt*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 220 (Ferdinand Schoeman ed., 1987).

*assessment* of the probability that their conduct will bring about harm, it is an altogether different thing to say that we should condition culpability on the *actual occurrence* of those harms. Taken together, the “intuitive judgments” of (1)–(3), regardless of whether they are widely held, fall short of justifying the inclusion of moral luck into a theory of retribution.

A second line of argument, advanced by Moore in *Placing Blame*, appeals to the problem of determinism. This argument begins with the premise that “if luck is inconsistent with desert, it is a problem that applies far more broadly than to results alone.”<sup>65</sup> That is to say, if we are not culpable for the results of our actions because they are physically determined (and therefore beyond our control), nor too should we be held culpable for: (1) our ability to “[e]ffectuate [our] [c]hoices, [i]ntentions, and [p]lans” through action<sup>66</sup>—insofar as our somatic system dictates our bodily movements; (2) our capacity to make choices about how to act<sup>67</sup>—insofar as these are determined by the neural correlates of thought; or (3) our “character” that leads us to act harmfully in the first place<sup>68</sup>—insofar as this, too, is determined by our neurochemistry. According to this line of thought, “the concept of moral luck may seem to imply that any criterion for desert will be a matter of luck and moral and legal responsibility will be obliterated.”<sup>69</sup> Thus, claims Moore, in order to avoid the “trap” of moral skepticism, we must abandon the idea that causal determinism is incompatible with legitimate attributions of culpability and accept a normative function for moral luck in our theory of retributive justice.<sup>70</sup>

This argument also fails to circumvent the problem of moral luck. As Stephen Morse and others have pointed out, the system of criminal law must necessarily presuppose a “compatibilist”<sup>71</sup> view with regard to free action.<sup>72</sup> According to the compatibilist view, what makes an action “free” (and thus subject to moral and criminal judgment) is

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65. Morse, *supra* note 54, at 380 (citing MOORE, *supra* note 5, at 233–46).

66. MOORE, *supra* note 5, at 234 (emphasis removed).

67. *Id.* at 239.

68. *Id.* at 243.

69. Morse, *supra* note 54, at 381.

70. See MOORE, *supra* note 5, at 246.

71. For a well-known account of compatibilism, see DANIEL C. DENNETT, *BRAINSTORMS: PHILOSOPHICAL ESSAYS ON MIND AND PSYCHOLOGY* (1978).

72. Morse, *supra* note 54, at 383:

The criminal law operates within the realm of practical reason. Within that realm, only the compatibilist view provides a potentially satisfactory answer to how action can be distinguished from endowment, opportunity, and results; and thus makes sense of the intuition that luck—commonly understood as determined events that are morally arbitrary—should not matter to desert.

not that the actor possesses some sort of godlike “libertarian” free will outside of the laws of physics, but rather that the actor has “the capacity to grasp and be guided by reason.”<sup>73</sup> Compatibilism allows us to separate those actions that give rise to criminal culpability (such as murdering one’s husband for the *reason* that he is having an affair) from those that do not (such as killing one’s husband in the course of having an involuntary seizure or some other non-reason-based “automatistic” behavior<sup>74</sup>), even if both types of actions are ultimately “determined” by the laws of physics. Therefore, since “reasons can guide only the action and not the ultimate outcome,”<sup>75</sup> free action is properly subject to moral scrutiny and ascriptions of culpability, while results are not.

Some theorists have also tried to justify the inclusion of results into a retributive theory of punishment by analogizing punishment to a moral “lottery.”<sup>76</sup> This argument, first advanced by philosopher David Lewis, suggests that so long as a criminal offender is aware of the “odds” of receiving severe result-based punishment in advance, there is nothing unjust in determining his punishment on the basis of chance.<sup>77</sup> Accordingly, it is fair to treat an offender who causes harm as if he had “assumed the risk” of a variable penalty when he chose to behave culpably.<sup>78</sup>

However, this response, too, fails to show that results meaningfully bear on moral culpability. Even if Lewis is right that it is not unfair to impose a “chancy” punishment for a “chancy” crime (and even if we make the unlikely assumption that offenders always know the odds of receiving result-based punishment in advance),<sup>79</sup> this alone does not provide any positive justification for doing so. The fact, if true, that it does not violate norms of “fairness” to use lottery-style punishments against a criminal offender does not entail that such punishments track the extent of his moral culpability. Furthermore, even if differential punishment is *permitted* from a retributivist point of view, it does not follow that it is required of us, or that “we have

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73. *Id.* at 382.

74. See Neil Levy & Tim Bayne, *Doing Without Deliberation: Automatism, Automaticity, and Moral Accountability*, 16 INT’L REV. PSYCHIATRY 209 (2004).

75. Morse, *supra* note 54, at 383.

76. See David Lewis, *The Punishment That Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 58 (1989).

77. *Id.* at 63–67; see also MOORE, *supra* note 5, at 203 (“[I]nstead of seeking to eliminate vagueness in legal predicates . . . we should attach remedies to such predicates that match them in their vagueness.”). There is, however, no good reason to think that all criminal offenders are aware of the various levels of risk that they will face, each of a number of variable possible punishments at the time they offend.

78. Binder, *supra* note 40, at 730.

79. MOORE, *supra* note 5, at 203.

affirmatively justified this choice among permitted approaches to punishment.”<sup>80</sup>

Finally, some commenters have suggested that an added measure of punishment is warranted when an offender brings about a harmful result, not because the offender has done anything more culpable, but because the offender experiences “undeserved gratification” as a result of having succeeded in bringing his criminal design to fruition.<sup>81</sup> This theory, of course, is only relevant with regard to intentional offenses. Indeed, non-intentional offenders will generally be *worse* off by virtue of having caused an unintended harmful result—i.e., the typical drunk driver who accidentally runs over an innocent pedestrian would strongly prefer not to have done so, and not just because having caused the pedestrian harm will render him eligible for an increased measure of criminal punishment.

Even for intentional offenses, however, the “undeserved gratification” theory falls far short of a compelling explanation for the practice of differential punishment. To the extent that an intentional offender is enriched, in a monetary sense, by completing his own criminal offense—for instance, by successfully robbing his victim of her valuables—there are various legal mechanisms outside of criminal punishment (such as asset forfeiture and disgorgement) available to return the offender to the economic position he enjoyed before committing the offense. And to the extent that the “undeserved gratification” in question is an increase in psychological well-being associated with bringing about one’s desired result, this, too, lacks adequate explanatory power to account for the practice of differential punishment. First, it is debatable whether an offender’s *ex post facto* satisfaction with his past behavior is a legitimate subject of retributive punishment at all (mere thoughts, unaccompanied by additional action, generally do not incur scrutiny from the criminal law). And, second, even if it were the case that combating such psychological satisfaction was a proper basis for enhanced punishment, the practice of differential punishment sweeps far too broadly to accomplish this limited aim. While some intentional offenders undoubtedly feel gratified on account of having, for instance, killed their neighbor, many other offenders come to regret their behavior, wishing instead that their criminal courses of action had failed. If differential punishment were truly explained by an “undeserved gratification” theory, one might expect that repentant

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80. Binder, *supra* note 40, at 730–31. At most, a moral lottery should provide an outer limit (a negative constraint) on what an offender can be justly punished for.

81. See *id.* at 733–35 (discussing the undeserved gratification argument and reinterpreting it “as a display of respect for victims”).

offenders would fall outside of its scope. But the added measure of punishment attributable to having completed an offense is imposed on repentant offenders, as well, because whether an offender is subject to differential punishment turns exclusively on whether the offender brings about a statutory harm, not the offender's subsequent attitude toward having done so.

Ultimately, none of these arguments successfully undermine the idea that two actors who behave in the same manner with the same mental state are equally culpable for their actions, even if only one of those offenders' actions brings about a statutory harm.

### C. Incapacitation

Another widely accepted justification for criminal punishment is the *incapacitation* of dangerous offenders.<sup>82</sup> Under this theory, the criminal justice system should identify and isolate dangerous offenders in order to protect society from future crimes.<sup>83</sup> In order to justify differential punishment in reference to incapacitation, therefore, it must be the case that, holding action and mental states constant, those offenders whose actions lead to harmful results pose a greater risk to society than those whose do not. We argue that this is not the case.

Consider our earlier hypothetical offenders Albert and Ben, who each shoot at their bosses intending to kill them. Imagine that Albert hits and kills his boss, while Ben misses his boss, who subsequently escapes to safety. Assuming that the offenders are otherwise identical in all respects that would tend to indicate their level of dangerousness (i.e., they have the same firearm, the same level of firearm expertise, and the same motive, etc.), there is no apparent reason to believe that Albert is more dangerous than Ben, and consequently no greater need to incapacitate him.<sup>84</sup>

By and large, those who advance incapacitation as a justification for differential punishment do not dispute this point. Rather, these theorists offer some variation on a "dangerousness theory": given that the criminal justice system may lack objective indicia of an offender's dangerousness, the most effective means of distinguishing dangerous from non-dangerous offenders is to look to whether an offender actually

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82. Of course, incapacitation is not without controversy. For instance, many Kantians disagree with all utilitarian theories of punishment.

83. See, e.g., 18 U.S.C. § 3553(a)(2)(C) (2012).

84. In fact, we might even think there is a more urgent need to incapacitate *Ben*, given that he may want to murder his still-living boss.

caused harm in a given case.<sup>85</sup> Though it seems inherently problematic to base an assessment of an individual's dangerousness on a single data point, the dangerousness theory rests on the tenable proposition that the class of offenders who cause harm are statistically more likely to be harmful than the class of offenders who do not.<sup>86</sup> For instance, the average drunk driver who killed a pedestrian was probably driving more dangerously, and is therefore more likely to hurt someone in the future, than was the average drunk driver who did not.

Yet, even if these statistical assumptions are valid, there are at least two foundational issues with the dangerousness theory as a justification for differential punishment. First, like any rough proxy, it is necessarily over- and underinclusive in that it unnecessarily lengthens the sentence of many offenders who pose little risk to society, while failing to incapacitate many truly dangerous offenders. Second, causation of harm is far from the best (and, indeed, is likely a very poor) measure of any individual offender's dangerousness<sup>87</sup>—prior criminal history, mental health, or even demographic information like age, gender, and race, would likely be stronger proxies for likelihood of future criminal behavior.<sup>88</sup>

Consider again the scenario with Albert and Ben, yet imagine this time that Albert is an otherwise meek law professor who has never used a firearm before, whereas Ben is a sociopath with extensive firearms training. A rational observer who was aware of their respective backgrounds should conclude that Ben is more dangerous than Albert, despite the fact that Albert (and not Ben) happened to succeed in killing his boss. Yet the dangerousness theory would suggest that we have greater reason to incapacitate Albert than Ben. Innumerable

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85. See, e.g., ROGER W. HAINES, JR., FRANK O. BOWMAN, III, & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK: 2007 EDITION § 2B1.1, at 348–49 (2006) (“Actual loss is primarily a measure of harm to the victim. It is also an imprecise proxy for culpable mental state and social dangerousness insofar as actual loss must be foreseeable to the defendant.”); Posner, *supra* note 23, at 1194; Note, *Why Do Criminal Attempts Fail? A New Defense*, 70 YALE L.J. 160, 166 (1960) (“The much lower degree of punishment meted out to attempters represents, in part, an unarticulated recognition that the person who tries and fails is often less dangerous than the person who succeeds in his criminal purpose.”).

86. Schulhofer, *supra* note 4, at 1589 (“It is statistically inevitable that those who have caused harm will on the average have created higher risks, in terms of circumstances of which they should have been aware, than those who did not cause harm.”).

87. For certain minor offenses (such as trespassing and traffic violations), causation of harm might in fact be the strongest available proxy for an offender's culpable action and mental state. In other words, detecting culpable behavior and mental states in respect to these offenses in the absence of the statutory harm occurring may be so difficult that it is not worth law enforcement resources to pursue given the limited risk such behavior actually imposes. For further discussion, see *infra* Section IV.B.

88. Of course, using some of these proxies, such as race and gender, might violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

hypotheticals could be drawn that lead to similarly counterintuitive conclusions.

Why, then, should the causation of harm automatically subject offenders to often vast increases in punishment? Supporters of the dangerousness theory have not provided anything approaching a satisfactory answer to this question.

#### *D. Rehabilitation*

A final offender-facing justification for punishment is the *rehabilitation* of criminal offenders. Insofar as those who have committed crimes have deviated from acceptable societal standards, the penal system might function as a tool to bring them back in line with social norms.<sup>89</sup> If rehabilitation is to justify differential punishment, then, it must be the case that those offenders who cause harm require more extensive rehabilitation than those that do not. This might be the case either because those offenders most in need of rehabilitation are more likely to succeed in bringing about harm, or because causing harm *itself* affects offenders in such a way that leads them more urgently to require rehabilitation. Ultimately, however, neither of these considerations properly provide a basis for differential punishment.

First of all, there is no reason to think that the amount of harm an offender causes through a given course of action is a good proxy for his need for rehabilitation. There is an absolute dearth of evidence in both the legal and psychological literature to support this link, and, in any event, there are likely far stronger proxies for how much rehabilitation an offender needs than whether he brings about a statutory harm. As Schulhofer points out, “[t]he proper disposition for purposes of . . . rehabilitation would presumably turn on the defendant’s background, personality, psychological problems, and related factors, [and] not even in part on whether harm was caused.”<sup>90</sup> Thus, the issue of how much rehabilitation a specific offender needs is much better handled on a case-by-case basis than by a regime of differential punishment.

More importantly, even if it were the case that offenders who caused harm were more in need of rehabilitation, there is overwhelming evidence suggesting that longer prison sentences do not, in fact, rehabilitate offenders. The often-traumatic experience of spending time

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89. For a description of American criminal law’s one-time use of, and ultimate rejection of, rehabilitation as a justification for punishment, see Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1–6 (2003).

90. Schulhofer, *supra* note 4, at 1601.



in prison does not decrease recidivism rates and is generally understood to be counterproductive to the goal of reintegrating offenders into society. As Richard Nygaard argues, “[m]ost criminal offenders who change for the better do so in spite of prison not because of it.”<sup>91</sup> Indeed, while rehabilitation was once one of the primary stated goals of the American criminal justice system,<sup>92</sup> federal criminal law now explicitly forbids judges from sentencing offenders to additional prison time for the purpose of rehabilitating them.<sup>93</sup>

Rehabilitation does not provide an adequate justification for differential punishment. Even if it were the case, which is doubtful, that offenders who cause harm require greater rehabilitation, longer sentences would be an ineffective, and indeed likely counterproductive, means of doing so. If the criminal justice system truly sought to rehabilitate offenders, courts could order proven methods of rehabilitation, such as special psychological counseling or diversionary programs, to offenders who needed them. However, in the status quo, it seems impossible to defend differential punishment based on the alleged rehabilitative aim of punishment.

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As Schulhofer wrote in 1974, “[a] policy so pervasive and important as the law’s emphasis upon results might reasonably be expected to stand upon some fairly weighty reasons capable of coherent explanation.”<sup>94</sup> Yet as we have shown, none of the attempts by scholars in the last few decades to justify such a regime based on the various offender-facing justifications for punishment—deterrence, retribution, incapacitation, and rehabilitation—have ultimately proved successful. Therefore, we must look elsewhere for a justification for differential punishment.

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91. Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic’s View*, 102 DICK. L. REV. 355, 362–63 (1998).

92. See, e.g., Alschuler, *supra* note 89.

93. 18 U.S.C. § 3582 (2012):

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

94. Schulhofer, *supra* note 4, at 1514.

## II. VICTIM-FACING JUSTIFICATIONS FOR PUNISHMENT

While offender-facing justifications for punishment provide no basis for differentiating criminal punishment based on whether or not a statutory harm occurs, there is another set of justifications for punishment that might be capable of doing so. Unlike offender-facing theories, which focus exclusively on facts about offenders and their conduct, these justifications look to the effects that criminal conduct has on victims. That is, these justifications recognize that criminal acts are not committed in a vacuum, but instead often have a dramatic impact on those against whom they are perpetrated, and posit that the criminal justice system should take the interests of victims into account when determining how much to punish criminal offenders.

We will refer to these theories as *victim-facing justifications* for punishment. Though this Article is the first to formally recognize this category as such, the idea that victims' interests should factor into criminal punishment occasionally appears in both case law and academic commentary, and has been a central focus of the "victims' rights" movement.<sup>95</sup> When this idea does appear, it usually falls into one of two broad categories: The first category is composed of various expressive theories of punishment—that is, theories that suggest that punishment *sends a message*, and the content and weight of that message might appropriately vary with whether and how severely a victim is harmed by criminal conduct. The second category is made up of those theories that posit that the state should, for one reason or another, channel victims' desires for revenge by increasing offenders' punishment commensurate with the harm that their victims have been made to suffer.

Both of these victim-facing justifications reflect a judgment that, at times, the degree of punishment warranted by offender-facing justifications might seem "insufficient" in light of the harm that a victim has suffered. As a result, these victim-facing justifications make the strongest case in favor of differential punishment when an offender engages in conduct that implicates relatively modest offender-facing justifications for punishment, but greatly harms his victim(s). These theories are able to explain, therefore, why differential punishment's impact is far greater with respect to non-intentional offenses than intentional offenses, because for non-intentional offenses the scope of the harm and the wrongfulness of an offender's behavior are likely to

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95. See MARLENE YOUNG & JOHN STEIN, OFFICE FOR VICTIMS OF CRIME, THE HISTORY OF THE CRIME VICTIMS' MOVEMENT IN THE UNITED STATES (2004), [https://www.ncjrs.gov/ovc\\_archives/ncvrvw/2005/pg4c.html](https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg4c.html) [<https://perma.cc/ZJ9T-QGDD>].

diverge most widely. Accordingly, both of these categories of victim-facing justifications, if they are valid reasons to punish, are at least to some extent capable of justifying the practice of differential punishment.

### A. *Victim-Facing Expressive Theories of Punishment*

The first set of victim-facing justifications for criminal punishment is made up of various *expressive* theories of punishment. Many commentators have suggested that an important feature of punishment is that it expresses public outrage at criminal offenses.<sup>96</sup> In the words of Joel Feinberg,

[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is afflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.<sup>97</sup>

Certainly, some of the expressive function of criminal punishment relates to the offender's moral culpability, and does not have anything directly to do with the victim. Therefore, when we punish a criminal offender, part of what we are doing may be "express[ing] the *judgment* . . . of the community that what the criminal did was wrong."<sup>98</sup> In this sense, expressive theories of punishment are related to the retributive theories of punishment discussed in Part I.<sup>99</sup> To the extent that the expressive goal of criminal punishment merely tracks an offender's moral culpability, then, such offender-facing expressivism does not (as we have already shown with regard to retributivism) justify differential punishment.

However, some expressive theories look beyond the moral desert of the offender and explicitly take the victim and her situation into account when determining the appropriate measure of punishment. In other words, victim-facing expressive justifications "focus[] on the victim and her dignity rather than [solely] on the perpetrator breaching

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96. FEINBERG, *supra* note 45, at 98 ("That the expression of the community's condemnation is an essential ingredient in legal punishment is widely acknowledged by legal writers.")

97. *Id.*

98. *Id.* at 100 ("At its best, in civilized and democratic countries, punishment surely expresses the community's strong *disapproval* of what the criminal did. Indeed, it can be said that punishment expresses the *judgment* (as distinct from any emotion) of the community that what the criminal did was wrong.")

99. Indeed, some proponents of the expressive theory of punishment consider themselves to be retributivists. See, e.g., Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* (1990).

the law.”<sup>100</sup> As Guyora Binder explains, “we punish harm not only in order to express something to the offender and about the offender, but also to express something to the victim and about the victim to others.”<sup>101</sup> Thus, expressive theories of punishment are capable of “transcend[ing] doing justice to the offender”<sup>102</sup> by also “communicat[ing] a dose of institutional solidarity with the victim.”<sup>103</sup>

Several proponents of such theories argue that the central expressive value embodied in punishment is the imposition of “equality” between victim and offender. For example, George Fletcher argues that “[a] criminal act establishes a particular relationship” between an offender and victim, whereby the offender “gains a form of dominance that continues after the crime has supposedly occurred.”<sup>104</sup> Thus, according to Fletcher, “[t]he function of arrest, trial, and punishment is to overcome this dominance and reestablish the equality of victim and offender.”<sup>105</sup> Similarly, Jaime Goti argues that “[p]unishment thwarts [this] imbalance and, conversely, [failure to punish] secures continuing dominance” of the offender over the victim.<sup>106</sup>

On a similar note, some commentators have suggested that the expressive function of punishment takes the form of a duty, owed to victims of crime, by the state.<sup>107</sup> According to this view, the failure to punish criminal offenders for the harm that they have inflicted upon their victims “becomes a means of acquiring indirect responsibility for the crime.”<sup>108</sup> This alleged duty stems from the state’s supposedly authoritative role as an expositor of social values.<sup>109</sup>

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100. Jaime Malamud Goti, *Equality, Punishment, and Self-Respect*, 5 *BUFF. CRIM. L. REV.* 497, 504 (2002).

101. Binder, *supra* note 40, at 733.

102. *Id.*

103. Goti, *supra* note 100, at 499.

104. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *BUFF. CRIM. L. REV.* 51, 57 (1999).

105. *Id.* at 58.

106. Goti, *supra* note 100, at 498.

107. Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward A Retributivist Theory of International Criminal Law*, 9 *BUFF. CRIM. L. REV.* 273, 283 (2005) (“The state’s duty to punish offenders is owed to the victim of crime.”).

108. Fletcher, *supra* note 104, at 63; *id.* at 61 (“The basic sentiment is that allowing crimes to go unpunished somehow repeats the evil. It is as though the government and the entire society becomes complicit in the occurrence of the crime.”).

109. Goti, *supra* note 100, at 499–500 (“It follows that to attach an equalizing effect to punishment presupposes that the courts’ decisions are authoritative: that verdicts be perceived as reflecting the truth about the facts as well as the right choice of rules and principles to judge these facts.”); *id.* at 504 (“[Crime victims] sense of worthlessness and shame demands a ‘political remedy,’” and “[o]nly public admission by authoritative institutions that [the victims] were wronged will legitimize [them] in [their] own eyes, and punishment of [offenders] . . . is the clearest and strongest statement to that effect.”).

Perhaps the most popular and well-known victim-facing expressive theory of punishment, developed by Jean Hampton in the late 1980s, takes this form and bears explaining in greater detail.<sup>110</sup> Hampton's theory begins with the proposition that all members of society possess "intrinsic, equal, and 'permanent'" value.<sup>111</sup> Furthermore, she claims that our behavior is inherently expressive of how much we value each other, such that when we treat people in a manner inconsistent with the proposition that they possess equal value, we are "in effect denying that [they] really ha[ve] that value."<sup>112</sup> If we truly value crime victims as coequal members of society, Hampton argues, we are obligated to refute the false claims<sup>113</sup> made by criminal offenders about their value. Otherwise, we are complicit in the offender's wrongdoing, "communicat[ing] to the victim and to the wider society the idea that such treatment, and the status it attributes the victim, are appropriate."<sup>114</sup>

In order to refute the offender's false claim of superiority over the victim, Hampton suggests that we "inflict on a wrongdoer something comparable to what he inflicted on the victim."<sup>115</sup> Doing so equalizes the social status of offender and victim and rejects the proposition that the offender is entitled to treat the victim in a way that denies her value. Moreover, by allowing the victim to thereby "master" the offender, the wrongdoer is "defeated in a way that makes the relative value of victim and wrongdoer apparent" for all to see.<sup>116</sup> As such, Hampton argues, criminal punishment is a necessary method of honoring all of society's members as equals.

A more general way of conceiving of the victim-facing expressive value of punishment is to say that, even if the state punishes an offender to the full extent justified by offender-facing theories of punishment, it may nevertheless fail to punish the offender sufficiently

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110. Hampton laid out this theory most prominently in HAMPTON, *supra* note 47, at 108–50; JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111–61 (1988); and Hampton, *supra* note 99, at 20.

111. By this, Hampton means something not dissimilar to the Declaration of Independence's famous proclamation that "all men are created equal"—that people have, in some sense, innate and equivalent value merely by virtue of being human. HAMPTON, *supra* note 47, at 121. Hampton locates this egalitarian commitment, alternately, in notions of individual autonomy, political liberalism, Kantianism, and Christianity.

112. HAMPTON, *supra* note 47, at 123.

113. This statement is false because everyone, under Hampton's view, in fact has equal intrinsic value.

114. HAMPTON, *supra* note 47, at 133.

115. MURPHY & HAMPTON, *supra* note 110, at 128.

116. HAMPTON, *supra* note 47, at 141; *see also* MURPHY & HAMPTON, *supra* note 110, at 128 ("While nobly intentioned, other means of affirming a victim's status (such as throwing a parade in her honor) fail to erase the 'evidence of [the victim's] inferiority relative to the wrongdoer.'").

to be *respectful* in light of the harm that the victim has suffered. Consider Chris, a drunk driver who hits an innocent pedestrian, Danielle, paralyzing her from the waist down. Holding Chris's behavior and mental state constant, had he not hit Danielle he would be guilty simply of the crime of driving under the influence ("DUI"). DUI laws typically permit only a few months' incarceration and, in practice, usually do not result in any jail time whatsoever. But despite the fact that the penalties for drunk driving presumably reflect the full extent of the offender-facing justifications for punishing Chris,<sup>117</sup> it seems potentially disrespectful in light of Danielle's paralysis to let Chris off with only a modest fine. Victim-facing expressive justifications for punishment seek to impose harsher sentences in such situations in order to avoid this type of disrespect.

It is straightforward to see, then, that if victim-facing expressive theories of punishment are valid they are capable of justifying differential punishment in many cases.<sup>118</sup> For each of the theories considered above, the amount of expressive punishment required increases with the amount of harm done to the victim, holding constant the offender's behavior and mental state. Take Jean Hampton's status-based expressive theory: for offenses where no harm is inflicted on a victim, no victim has had their status degraded in a way that requires an additional measure of punishment to rebut the offender's false claim of superiority over the victim. In other words, "[o]nly when [the victim] is subjected to unredressed harm is he or she" subjected to "status degradation" requiring a strong expressive response.<sup>119</sup> In this way, victim-facing theories of expressive punishment seem to *require* a practice of differential punishment to achieve their goals.

### *B. Vengeance-Based Theories of Punishment*

The second set of victim-facing justifications for criminal punishment posits that it is either permissible or required for the state to mete out an extra measure of punishment in response to victims' desire for revenge. This notion, that the state should channel victims'

117. This is because his underlying behavior is the same in both scenarios, which is all that matters for offender-facing justifications for punishment.

118. Of course, like the other theories discussed in this Article, expressivism is not without its detractors. See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1364 (2000).

119. Binder, *supra* note 40, at 736. Relatedly, one might be concerned that, by succeeding in committing an offense, an offender has received an undeserved status enhancement. This unwarranted enhancement, too, would be successfully rebutted by a reimposition of status equality between offender and victim. For the possibility that criminal attempts also force a victim into status degradation, see *infra* note 198.

desire for “eye for an eye” retaliation, has proven to be at once one of the most durable and most controversial justifications for criminal punishment. And, as a number of commentators have suggested, the increasingly influential “victims’ rights” movement has been motivated in large part by some victims’ desire to utilize the criminal justice system for just such vengeful motives.<sup>120</sup> As we will demonstrate, vengeance, if justified as an end in itself or as an instrumental means toward some other goal, is also potentially capable of justifying differential punishment.

First, there are those who believe vengeance is a justified end in itself; that victims of crime are entitled to a right of retaliation of some kind against their offenders. This sentiment pervades popular culture: from Alexandre Dumas’s *The Count of Monte Cristo* to Sergio Leone’s Spaghetti Westerns, audiences are meant to cheer the protagonist’s quest for revenge without demanding that his every action comport with some carefully reasoned moral calculus. Furthermore, some argue that vengeance is central to “our very human moral psychology,” informing our commonsense notions of justice.<sup>121</sup> These scholars contend that revenge for its own sake is an accepted and deep-rooted social norm that should be reflected in the norms of our criminal justice system as well.<sup>122</sup>

Others have sought to justify institutionalized revenge on the ground that victims “require[ ] a measure of vengeance for closure.”<sup>123</sup> Thus, the state might be justified in prioritizing victims’ desire for vengeance over avoiding an additional imposition of punishment on offenders,<sup>124</sup> as victims, unlike offenders, are often free of any wrongdoing in relation to an offense. While the empirical literature is mixed as to the question of whether vengeance actually leads to better long-term mental health outcomes for victims, at least some studies

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120. See, e.g., Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 994 (1985) (“Recent victim’s rights proposals appear to be driven more by the retaliatory view of retribution than by the moral aspect of retribution.”).

121. Ken Levy, *Why Retributivism Needs Consequentialism: The Rightful Place of Revenge in the Criminal Justice System*, 66 RUTGERS L. REV. 629, 656 (2014) (“Specifically, our desire to achieve retributive justice—just deserts—is not *sui generis* but is itself motivated by a deeper desire, the desire for revenge.”).

122. See, e.g., SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* (1983).

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

124. Robert C. Solomon, *Justice and the Passion for Vengeance*, in *WHAT IS JUSTICE?* 253 (Robert C. Solomon & Mark C. Murphy eds., Oxford Univ. Press 2d ed. 2000) (1990) (“[I]f punishment no longer satisfies vengeance, if it ignores not only the rights but the emotional needs of the victims of crime, then punishment no longer serves its primary purpose . . . .”); see also Bruce Ledewitz & Scott Staples, *No Punishment Without Cruelty*, 4 GEO. MASON U. C.R.L.J. 41, 56 (1993) (“People who have been wronged, and who feel victimized, have a right to a level of revenge that will help assuage their victimization.”).

purport to show that, under appropriate circumstances, retaliation can help victims to achieve closure.<sup>125</sup>

Of course, the idea that revenge for its own sake is a legitimate goal of the criminal law is not without its detractors. Anyone familiar with the adage “an eye for an eye leaves the whole world blind” is aware that revenge has often, and forcefully, been characterized as outdated, primitive, and barbaric.<sup>126</sup> And, in fact, the great majority of legal academics and moral philosophers are critical of vengeance for precisely these reasons.<sup>127</sup>

Yet regardless of whether one accepts the proposition that channeling victims’ vengeance is a desirable end in itself, some scholars and jurists suggest that it can be justified as a means of preventing vigilante action on behalf of aggrieved crime victims. As Justice Stewart argued in his concurrence in the landmark death penalty case *Furman v. Georgia*, “channeling [the instinct for revenge] in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”<sup>128</sup> Without appeasing the public desire for revenge, these commentators argue, we might descend into “wild justice,” whereby victims engage in extralegal means to exact revenge.<sup>129</sup> Revenge may be, therefore, a necessary feature of any politically viable criminal justice system.<sup>130</sup>

Unsurprisingly, such consequentialist arguments for channeling vengeance also have many prominent detractors. Some theorists dispute the notion that it is necessary for the state to channel victims’ vengeance in order to prevent mob justice. Schulhofer, for example,

125. See, e.g., Eric Jaffe, *The Complicated Psychology of Revenge*, ASS’N PSYCHOL. SCI. (Oct. 2011), <http://www.psychologicalscience.org/index.php/publications/observer/2011/october-11/the-complicated-psychology-of-revenge.html> [https://perma.cc/QS38-E3ND] (discussing and compiling the psychological literature addressing the effects of vengeance on the mental health of victims).

126. As Robert Nozick notes, we should be highly skeptical of a practice rooted in the “pleasure [of witnessing] the suffering of another.” ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 367 (1981).

127. See, e.g., JONATHAN GLOVER, *RESPONSIBILITY* 145 (1970); Herbert Morris, *Persons and Punishment*, in *PUNISHMENT* 75 (Joel Feinberg & Hyman Gross eds., 1975); NOZICK, *supra* note 126, at 376. But see JACOBY, *supra* note 122; Solomon, *supra* note 124.

128. 408 U.S. 238, 308 (1972).

129. See JACOBY, *supra* note 122. Of course, if the public’s attitudes towards revenge itself changed, vengeance-based punishment would no longer be a necessary feature of the criminal justice system under this view.

130. Guyora Binder goes as far as to suggest that the channeling of victims’ vengeance is a political obligation of the state. See Binder, *supra* note 40, at 727:

[I]n asserting a monopoly on retaliatory force, the state deprives individuals and groups of the option of securing their own dignity. In so doing, the state undertakes an obligation to each individual to act on his or her behalf. . . . This promise to retaliate on the victim’s behalf is crucial in persuading the individual to transfer her loyalty from the rivalrous group, clan, gang, or sect to the unitary state.



claims that “[p]enalties we consider appropriate for other reasons would almost certainly satisfy enough of the appetite for vengeance to forestall private retaliation,” because “the ‘breaking-point’ level of punishment, below which mob violence could become a problem, is probably rather low.”<sup>131</sup> Other theorists claim that preventing vigilantism is “not even a *prima facie* justifying reason for punishment,”<sup>132</sup> because such concerns are entirely outside of the proper purview of the criminal law.

Nevertheless, if one accepts, for any of the above reasons, that the state should channel victims’ vengeance, it, too, can serve as a justification for engaging in differential punishment.<sup>133</sup> This is because revenge, even more so than the victim-facing expressive theories, is a justification for punishment that is inherently proportional to the results of criminal action, as a victim’s desire for revenge naturally increases with the scope of the harm she has been made to suffer. As Steven Eisenstat explains, “[r]ecompose, getting satisfaction, matching like with like, giving what’s coming to the wrongdoer, equalizing crime and punishment, an eye for an eye; each of these synonyms for revenge implies the proportionality of the scales of justice.”<sup>134</sup> Thus, in a criminal justice system that channels victims’ desire for vengeance, we would expect that whether a harmful result occurs would inform the magnitude of an offender’s punishment. Much like with the expressive theories outlined above, therefore, institutionalized revenge, if it is a valid justification for criminal punishment, can help explain and justify a regime of differential punishment.

### C. Who Qualifies as a Victim?

#### 1. Direct vs. Secondary Victims

Before concluding our discussion in this Part, it is essential that we make clear that we take “victim” in this Article to mean only the person (or group of persons) who is the *object* of a crime: the “direct victim.” That is, it is only in regard to these direct victims of criminal offenses that victim-facing justifications might serve to justify

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131. Schulhofer, *supra* note 4, at 1511–12. However, this might not be the case in the Chris-Danielle scenario explored above. See *supra* Section II.A.

132. MOORE, *supra* note 5, at 89–90 n.14.

133. See, e.g., Henderson, *supra* note 133, at 1000 (“Thus, the only rationale for the criminal sanction with which emphasizing the particular harm is consistent is that of retaliation.”).

134. Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim’s Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1136 (2004) (quoting MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 10 (1998)).

differential punishment.<sup>135</sup> In adopting this definition, we join the commentary to the Federal Sentencing Guidelines in asserting that the “term ‘victim’ is not intended to include indirect or secondary victims.”<sup>136</sup> Determining who the victim of an offense is will generally be a straightforward exercise in statutory interpretation, asking to whom a statutory harm was *done*. Thus, the victim of a murder is the deceased, whereas “the victim of a robbery is the person robbed.”<sup>137</sup> Of course, some criminal offenses do not have an “object,” and thus have no direct victim (i.e., drug possession offenses), which is an issue we will return to in Part III.<sup>138</sup>

With our definition of victimhood, we do not mean to deny that people other than the object of a statutory harm can be “victimized” in some sense by a criminal offense—in the case of murder, the victim’s friends may mourn her death, her children be rendered motherless, and her employer suffer economic burdens due to her absence. Without diminishing the pain and misfortune these individuals may experience, these “secondary victims” are irrelevant for the purposes of differential punishment.<sup>139</sup>

Although perhaps not intuitive, this is necessarily the case. To see why, consider the crime of murder: whether an offender becomes eligible for the higher penalties that in many jurisdictions accompany murder (as opposed to the crime of attempted murder) depends solely

135. This definition closely resembles that in the sixth edition of *Black’s Law Dictionary*. There is actually significant debate as to the proper scope of victimhood in the criminal law. The Federal Rules of Criminal Procedure define victims simply as “person[s] directly and proximately harmed as a result of the commission of . . . an offense.” FED. R. CRIM. P. 1 advisory committee’s note to 2008 amendments (citing 18 U.S.C. § 3771(e) (2012)). In perhaps the most thorough treatment of the issue, Andrew Nash has proposed the definition:

A victim is a person, capable of suffering injury, who has suffered an adequate injury that was directly and proximately caused by the defendant’s criminal conduct, and whose injury was not a consequence of the person’s own criminal conduct nor a consequence of the person’s consent to participate in the defendant’s criminal conduct.

Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419, 1457 (2008).

136. U.S. SENTENCING GUIDELINES MANUAL, § 3D1.2 cmt. n.2 (U.S. SENTENCING COMM’N 2004).

137. BLACK’S LAW DICTIONARY 1567 (6th ed. 1990).

138. See *infra* Section III.A. Importantly, victim-facing justifications for punishment apply equally to deceased people, so long as they are the object of a criminal offense (such as in a homicide, or when a victim dies of natural causes before his offender is sentenced). First, expressive punishment is perfectly capable of validating the social standing, or showing respect to the memory, of a deceased person. Moreover, most understandings of the concept of revenge allow for dead people to be avenged by others—indeed, this may be the paradigmatic case of vengeance. Similarly, the need to prevent vigilantism may be especially strong when the victim of a crime dies as the result of a criminal offense.

139. *But see* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049 (2012) (claiming the relevant class of victims for determining an offender’s punishment should be expanded to include certain secondary victims).

upon whether he causes the death of another person (the statutory harm for the crime of murder). Put another way, regardless of whether the victim of the murder was a friendless, childless hermit or a beloved community leader with a wife and kids, the offender is equally guilty of the crime of murder if he kills the victim and equally guilty of the crime of attempted murder if he tries and fails to do so.<sup>140</sup> In fact, this is true even if the victim is universally reviled, such that there are countless secondary *beneficiaries* of her demise!<sup>141</sup> The lack of any necessary connection between the existence or quantity of secondary victims, on the one hand, and the offense committed, on the other, definitively shows that secondary victims do not factor into differential punishment.

Put differently, although the commission of a criminal offense may legitimately aggrieve “secondary victims,” the harms that they experience are a priori not statutory harms, as they are not included in the statutory prerequisites for the crime. This is far from a hair-splitting distinction—a central commitment of the criminal law is that offenses must be statutorily defined and proven beyond a reasonable doubt before a defendant can be punished for them.<sup>142</sup> That is, if a secondary victim were the object of an offender’s action in some statutorily prohibited way, she would be a direct, and not a secondary, victim. And, in fact, people are harmed by the behavior of others *constantly* in ways not recognized by the criminal law.<sup>143</sup> Regardless of one’s normative conclusions on this issue, it is clear as a descriptive matter at least that only direct victims are relevant for the purposes of explaining the practice of differential punishment.

## 2. Society as Victim?

While our definition of “victim” limits the category to the person(s) that incur the statutory harm in question (i.e., the direct victim(s) of the offense), some jurists and commentators have also suggested that, in certain cases, society *itself* might be considered the “victim” of a criminal offense. But while the notion that society can be

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140. There are exceptions to this rule for certain classes of victims, such as “official victims,” but the purpose of these provisions is to deter offenders from attacking law enforcement and other government officials, not to recognize secondary victims.

141. Consider the hit TV show *Dexter*, whose title character only kills other dangerous criminals. Though society plausibly benefits from the demise of Dexter’s victims, he would still be guilty of their murders if he were ever caught. *Dexter* (Showtime 2006–2013).

142. For instance, the Rule of Lenity provides that even if a given course of conduct is *already* criminalized, a defendant should not be punished for violating it if the application of the statute to his case was ambiguous.

143. Both administrative and civil law help fill the gap between the behaviors that harm others and the behaviors that are currently criminalized.

victimized by criminal conduct may sound familiar to some readers, this notion is greatly under-theorized, and commentators often mean very different, and at times confusing, things when invoking it.

For example, the term “crimes against society” is sometimes used interchangeably with the popular phrase “victimless crimes” (a category of crimes that includes many regulatory offenses).<sup>144</sup> In other instances, the notion of society as a victim is invoked in the criminal law, not as a claim about the literal victimization of society, but merely as a placeholder that serves some procedural purpose.<sup>145</sup> Although there are no prominent theories clearly articulating such views, crimes for which society is taken to be the victim could also include (1) particularly heinous offenses, such that the “public at large” is in some sense victimized by their commission; or (2) criminal offenses that target objects of cultural or national importance, such that “civilized society” itself is somehow the target of the offense.<sup>146</sup> Yet despite the differences between these views, we will argue below that theories of “societal victimhood,” as a class, play no role in justifying or explaining differential punishment.

Our explanation begins by noting that, even if a coherent general theory of societal victimhood could be articulated, any such theory would necessarily have to employ one of two broad conceptions of “society.” Under the first view, society is merely an aggregation of its individual members, such that “society” is the victim of an offense when many (or all) of its individual members are harmed by it. Alternatively, under the second view, society is conceived of as a distinct metaphysical entity that itself can be directly victimized by criminal offenses, over and above the individual victimization of its constituent members. However, as we will show, both of these views are fundamentally unsuited to explaining or justifying the practice of differential punishment, because, under either view, society cannot serve as a direct victim of a criminal offense to which victim-facing justifications for punishment can reasonably apply.

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144. For example, the National Incident-Based Reporting System categorizes “crimes against society” as “prohibition[s] against engaging in certain types of activity; they are typically victimless crimes . . .” *Crimes Against Persons, Property, and Society*, UNIF. CRIME REPORTING PROGRAM: NAT’L INCIDENT-BASED REPORTING SYSTEM 1 (2012), <https://ucr.fbi.gov/nibrs/2012/resources/crimes-against-persons-property-and-society> [https://perma.cc/L284-PXQE] [hereinafter NIRB Fact Sheet].

145. For example, the section on grouping criminal counts in the Federal Sentencing Guidelines states that “[f]or offenses in which there are no identifiable victims . . . society at large is the victim.” U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt. n.2 (U.S. SENTENCING COMM’N 2004).

146. For a discussion of the criminal prohibitions attending the destruction of Native American cultural patrimony, see Roberto Iraola, *A Primer on the Criminal Penalty Provisions of the Native American Graves Protection and Repatriation Act*, 28 AM. INDIAN L. REV. 431 (2004).

a. *The "Aggregation" View of Society*

Consider first the aggregation view of societal victimhood, which holds that what it means for society to be victimized by a criminal offense is that criminal conduct can have harmful effects that reverberate throughout society. The "victimization" of society under this aggregation view cannot explain differential punishment, however, because the offenses it might reasonably apply to do not actually have "society" as their direct victim. Instead, as we will show, this notion of society is used as a stand-in to describe situations in which an offense creates, or threatens to create, diffuse secondary victimizations of the individuals that make up society. Because secondary victimizations, for reasons described above, cannot explain differential punishment as a descriptive matter, the aggregation view of society fails as a candidate to explain or justify differential punishment.

To illustrate this point, let us take for an example the 1968 assassination of civil rights leader Dr. Martin Luther King, Jr. Because Dr. King's murder unquestionably had a profound impact on countless members of American society (as it was intended to), some might consider his assassination "a crime against society." However, the far-reaching societal ramifications of Dr. King's death had no bearing whatsoever on the particular offense that his assassin, James Earl Ray, was charged with and ultimately convicted of: namely, murder.<sup>147</sup> Instead, what determined that Ray would be charged with, and ultimately convicted of, the crime of murder was the fact that his bullet proved lethal to Dr. King. That is, if Ray's bullet had not killed Dr. King, he could not have been convicted of murder, no matter how evil his intentions; alternatively, if he had killed someone other than Dr. King, even if that individual did not have the same importance to society, he would still be guilty of the same crime of murder. Thus, in light of the fact that a "killing" was both necessary and sufficient for Ray to be convicted of murder, it follows that Dr. King, and not the thousands of his grieving supporters, was the "object" of the statutory harm of Ray's offense from the perspective of the criminal law. From this, we can see that a conception of societal victimhood as an aggregation of its members' secondary victimizations necessarily fails to explain our regime of differential punishment as a descriptive matter.<sup>148</sup>

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147. For Mr. Ray's obituary, which recounts his assassination of Dr. King, see Lawrence Van Gelder, *James Earl Ray, 70, Killer of Dr. King, Dies in Nashville*, N.Y. TIMES (Apr. 24, 1998), <http://www.nytimes.com/1998/04/24/us/james-earl-ray-70-killer-of-dr-king-dies-in-nashville.html?pagewanted=all> [https://perma.cc/8UHF-FHM3].

148. In the event of hate crimes, which Dr. King's assassination would likely be classified today, the group of intended victims would not be society but rather the members of the specific

For another example, consider Ellen, a construction mogul whose recklessness in constructing her new Los Angeles factory causes enough chemical sludge to spill into a nearby river that she violates a criminal prohibition against contaminating a municipal water supply. In this scenario, some might claim that Ellen's offense was done to "society" (under the "aggregation" view), insofar as it risked harm to *everyone* in the community—i.e., to all water drinkers in Los Angeles. However, this application of the aggregation view also fails to explain or justify differential punishment.

In the first place, saying that the object of Ellen's pollution was "all of the water drinkers in Los Angeles" strains beyond the breaking point any reasonable conception of what it means for an individual to be an object of an offender's action. In fact, it seems far more natural to say that Ellen's offense simply *had no object at all* (in that it was not directed at, or "done to," anyone in particular). More concretely, the sort of "crime against society" that Ellen is guilty of under the anti-pollution statute is a crime of *risk-creation*.<sup>149</sup> As a result, whether or not Ellen is guilty of the completed offense in question depends entirely upon whether the statutory harm comes about (i.e., that the water becomes polluted), and *not* whether anyone actually drinks the polluted water or, if they do, ends up being harmed by it. In other words, any downstream health consequences suffered by Los Angeles residents are secondary harms of Ellen's offense, which do not need to be proven at trial in order for Ellen to be convicted under the anti-pollution statute.<sup>150</sup> In fact, Ellen would be guilty of the completed offense even if the municipality successfully employed water decontamination measures that negated all possible risk that the polluted water could ultimately harm anyone, as the "statutory harm" of contaminating the water supply would still would have occurred even if it was immediately remedied.

Put differently, while Ellen's offense raises the *prospect* of harm befalling any number of individuals, there is no direct victim of the

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gender, racial, or ethnic group singled out by the offender (in this case, African Americans). See Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 314 (2005):

Though all would be justified in expressing outrage and disgust [at racist policies targeted toward African Americans], only one group could properly express resentment. There was only one party in interest, only one group with its own grievance to litigate, and only members of one group had standing to bring suit. Racial segregation was not merely wrongful in the abstract; it was a wrong inflicted upon African-Americans.

149. Risk-creation alone, without an accompanying harm, is not generally considered to be a criminal harm, or at least not one that triggers differential punishment. For additional discussion, see *infra* note 202.

150. That is, unless Ellen could be charged with a *separate* offense for which these individuals would be direct victims.

offense itself, as no one need actually be affected by Ellen's behavior for the offense to have been committed. Of course, it is possible that Ellen could be convicted under a separate statute of an offense that requires that individuals end up *actually* being poisoned by the contaminated water—but in that case, the poisoned individuals, and not society in the aggregate, would be the direct victims of that separate offense.

What both of these examples illustrate, therefore, is that "society," as understood under the aggregate view, can never be the direct victim or "object" of a criminal offense. Rather, the aggregate view of "societal victimhood" inevitably boils down to an account of numerous "secondary victimizations," which, as explained above, are simply irrelevant to differential punishment as a descriptive matter.

### *b. The "Metaphysical" View of Society*

Theories of societal victimization that presuppose a more abstract and robust conception of "society" are similarly unsuited to justifying the practice of differential punishment. Under this type of "metaphysical" view, society is regarded as a social construct that is itself capable of being directly victimized by crime, over and above the victimization of its constituent members. An account of "societal victimization" under a "metaphysical" view of society would not suffer from the same infirmity as the aggregation view—insofar as harming society in the metaphysical sense would not merely amount to widespread "secondary victimizations." However, even if one were to accept a robust "metaphysical" view of societal victimhood, one still would not be able to justify differential punishment by applying the various victim-facing theories to it. This is because applying victim-facing justifications for punishment to society itself would require one to rely on misguided, and ultimately incoherent, analogies between the needs and characteristics of society and ordinary human victims.

To illustrate, consider a private art gallery owner who violates a criminal statute forbidding the destruction of "culturally significant works of art" by lighting Picasso's *Les Femmes d'Alger* (which she recently acquired from MoMA) on fire. Because the gallery owner owns the painting, if there is any direct victim of the offense it would appear to be society itself—one might, for instance, call it an attack on "Western Civilization." That is, unlike the crime of murder that James Earl Ray was charged with—for which the fact that "society" was harmed was incidental, rather than necessary, for the commission of the offense—the statutory harm specified in the gallery owner's crime specifically references the way in which society is ostensibly harmed by

it (i.e., it is necessary for conviction that the artwork be “culturally significant”).<sup>151</sup>

Yet even if the best way to characterize the direct victim of the gallery owner’s crime (to the extent there is one) is to call it “society,” this still would not justify differential punishment with respect to such offenses. This is because, as we have argued above, differential punishment can only be justified in reference to victim-facing theories. And “society,” unlike ordinary human victims of crime, does not require, nor benefit from, either expressive or vengeance-based punishment. So while the offender-facing justifications for punishing the gallery owner (e.g., that her behavior was wrongful, that she should be deterred from similar future acts, and that she may need incapacitation and rehabilitation) remain entirely valid, the victim-facing justifications that might otherwise explain the practice of differential punishment do not apply to crimes where “society” is ostensibly the direct victim.<sup>152</sup>

Consider first the vengeance-based justifications: it is unclear what it would mean for society, in this metaphysical sense, to “desire” vengeance. As we explained in Section II.B, vengeance only makes sense insofar as it stems from some basic human psychological *desire*, such that channeling victims’ revenge might promote their psychological wellbeing in instances where offender-facing justifications would otherwise not justify “sufficient” punishment to satisfy such desires. However, this consideration does not apply if society itself is taken to be the direct victim of a crime, because society (understood as an abstract conceptual entity) does not have “desires,” nor does it possess a “mind” such that it would be intelligible to discuss its mental health. Put simply, it seems bizarre to attribute a literal “desire for vengeance” onto an abstract social construct.<sup>153</sup> Moreover, even if society *could* somehow “desire” vengeance, it would make no sense to say that society should support an institution of differential punishment in order to prevent *its own* vigilantism, because a metaphysical entity obviously cannot engage in extralegal vigilante action. Vengeance-based theories of punishment, once untethered from

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151. We might therefore characterize the statutory harm in Ray’s offense (i.e., King’s death) as a “private” statutory harm, insofar as it is specific to King, while the statutory harm in the gallery owner’s crime (i.e., the destruction of a culturally important artwork) is “public” in nature, insofar as it speaks to the crime’s impact on society as a whole.

152. This is not to say that crimes like the gallery owner’s could not potentially *harm* society in some special way, or that we might not want to punish the art gallery owner an extra measure because her action was directed at *society itself*. But rather, as we will show, neither vengeance-based nor expressive differential punishment is warranted regardless of the validity of such concerns.

153. See, e.g., Ned Block, *Troubles with Functionalism*, in PERCEPTION AND COGNITION 261 (C. Wade Savage ed., 1978).



the human element that makes them comprehensible, cease to make sense when the abstract metaphysical construct of "society" is taken to be the victim of a crime. Accordingly, vengeance-based victim-facing justifications for punishment cannot reasonably extend to crimes where society is the direct victim.

Victim-facing expressive theories of punishment, the only other possible justification for the practice of differential punishment, are also incapable of justifying differential punishment when "society" itself is the purported victim of a criminal offense. To understand why, it is first important to re-emphasize the distinction between offender-facing and victim-facing expressive theories of punishment. *Offender-facing* expressive theories generally justify criminal punishment either as a means of expressing society's condemnation of an offender's conduct, or as a means of reaffirming the importance of abiding by society's criminal laws.<sup>154</sup> Given the importance of Picasso's paintings to our society's cultural heritage, therefore, one might think that there are particularly strong reasons to punish the gallery owner in order to express condemnation of her decision to burn the painting, as well as to condemn her blatant disregard of the criminal prohibition against doing so. And such a position would seem entirely reasonable in this case.

However, these offender-facing expressive justifications for punishing the gallery owner, like all offender-facing justifications for punishment, are concerned exclusively with the gallery owner's *behavior* (i.e., the act of burning the painting), rather than the *results* of her behavior (i.e., the fact that the painting was actually destroyed). That is, as we demonstrated in Part I in our discussion of retributivism, society simply has no basis for expressing greater moral condemnation of the gallery owner who successfully burns a painting than the gallery owner who tries, but fails to do so.<sup>155</sup>

Unlike offender-facing expressive theories, however, *victim-facing* expressive theories of punishment are concerned with the *results* of an offender's actions on his victim(s), rather than exclusively with his behavior. According to these victim-facing expressive theories, the state, in its role as the authoritative expositor of social values, punishes offenders in order to express respect to victims and to reaffirm their social value.<sup>156</sup>

But applying this rationale to society itself yields bizarre results. That is, it is hard to know what it would mean for the state to need to

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154. See, e.g., Kahan, *supra* note 46, at 602 ("But it is also possible to use the expressive view to inform desert. . . . The proper retributive punishment is the one that appropriately expresses condemnation and reaffirms the values that the wrongdoer denies.").

155. See *supra* Section I.B.

156. See *supra* Section II.A.

punish an offender in light of the harm she has caused to society—beyond what is warranted, for example, by the offender-facing justifications for punishing the gallery owner for her behavior—in order to reaffirm the value of, or show respect to, *society as a whole*. Generally, victim-facing expressive punishment serves to re-establish equality between an offender and victim after the offender has demeaned the victim. But criminal offenses obviously cannot create the same concerns about “equality” between an individual and society itself that they do between offenders and individual victims. More generally, it is unclear that it is even possible for an individual offender to successfully diminish society’s value *in its own eyes* (whatever that could possibly mean). And, indeed, there do not appear to be any proponents in the academic literature of such a strange view of expressive punishment.

Therefore, while the gallery owner’s crime implicates strong offender-facing justifications for punishment, victim-facing expressive theories simply do not make sense as applied to the limited class of offenses for which “society,” rather than any more discrete individual or group of individuals, might be considered the direct victim of a criminal offense. Accordingly, even if the subject of “societal victimization” ultimately receives more robust treatment in the academic literature, it will nevertheless remain the case that “society,” understood under either the aggregation or metaphysical view, is not the type of “victim” capable of justifying the practice of differential punishment.

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Unlike offender-facing justifications for criminal punishment, victim-facing justifications provide a possible theoretical avenue through which to explain the institution of differential punishment in the American criminal justice system. And this makes intuitive sense: only theories that take the interests of victims into account will be able to justifiably condition punishment on whether harm befalls those victims.

The importance of this point must not be overlooked: while the reader may not accept as legitimate the various expressive and vengeance-based theories of punishment outlined above, they are the *only* theories capable of justifying differential punishment. If one rejects them, one must also reject the conclusion that the practice of differential punishment is rationally justifiable.

### III. WHERE DIFFERENTIAL PUNISHMENT IS UNJUSTIFIED

As we demonstrated in Part II, victim-facing justifications for punishment, if valid, are capable of justifying differential punishment with respect to at least some offenses. Moreover, because offender-facing justifications for punishment are categorically incapable of justifying differential punishment, as demonstrated in Part I, differential punishment can *only* be justified, if at all, by these victim-facing justifications.

Yet even if one accepts the validity of one or more of the victim-facing justifications, it is necessarily the case that such justifications will not apply to every criminal offense. That is, in many instances, there will be no victim who stands in an appropriate relation with the offender such that either expressive or vengeance-based theories are available to explain the practice of differential punishment. In these instances, we argue, differential punishment is categorically unjustified.

In this Part, we examine three broad categories of offenses for which it is inappropriate to apply a regime of differential punishment. The first category consists of those offenses for which there is no “object”—that is, no direct victim—of the offense. The second category is composed of offenses for which there is an object, but for which that “victim” either consented to or was otherwise culpable for the commission of the offense. A final category of offenses is that for which there is an identifiable, non-culpable victim, but for which that victim explicitly disavows her interest in both expressive and vengeance-based punishment on her behalf. What unites each of these three categories is their deviation from the “paradigm” criminal offense, where a hostile offender directly victimizes an innocent and aggrieved individual. While the victim-facing justifications for punishment are equipped to explain differential punishment in such cases, they are inapplicable to the types of offenses explored in this Part.

#### *A. Crimes for Which There Is No “Object”*

The first class of criminal offenses for which there is no justification for differential punishment is made up of those offenses for which there is no “object,” and thus no direct victim for whom victim-facing justifications for punishment might apply. As we demonstrated in Part II, the only possible justifications for differential punishment are victim-facing—those predicated on some consideration relating to the harm suffered by victims. Yet, for certain crimes, such as illegal gambling, drug possession, and failure to obey traffic laws, as well as a

myriad of other regulatory offenses,<sup>157</sup> there is no readily identifiable direct victim to validate the application of victim-facing justifications. These behaviors are criminalized because of their aggregate “antisocial” effects, not because any individual instance of their commission will necessarily lead to harm befalling some victim.<sup>158</sup> It stands to reason, then, that only offender-facing justifications for punishment are available for such “antisocial” crimes, and differential punishment is categorically unwarranted.

Consider, for example, an arms dealer, Frank, who is caught smuggling prohibited weapons into the country by the U.S. Border Patrol, which seizes all of the weapons just on the American side of the U.S.-Canadian border.<sup>159</sup> Though, as a legal matter, Frank has completed the offense of “smuggling” (because he has successfully brought prohibited weapons into the country), his offense has not created any obvious victims (given that the weapons were seized before they had the opportunity to do any harm). It is true, of course, that an influx of weapons into a community can often cause significant harm and pose serious risks to the members of that community.<sup>160</sup> However, the “statutory harm” associated with the crime of weapons smuggling is merely the result that the prohibited weapons *enter* the country—whether any harm to the community associated with the presence of those weapons actually materializes is irrelevant to whether the crime

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157. For an overview and discussion of regulatory offenses, many of which are considered *mala prohibita*, see Mireille Hildebrandt, *Justice and Police: Regulatory Offenses and the Criminal Law*, 12 *NEW CRIM. L. REV.* 43 (2009).

158. Rebecca S.T. Khalil, *Protecting the Victims of “Victimless” Crimes*, NAT’L CRIME VICTIM LAW INST. 1 (Summer 2011), <http://law.lclark.edu/live/files/15299-protecting-the-victims-of-victimless-crimes> [<https://perma.cc/ACR2-EQD2>] (“It is sometimes said that ‘victimless’ crimes are those that violate the ordered functioning of society in general, as opposed to those that directly harm individuals.”). The reader may be tempted to characterize these types of “antisocial” crimes as somehow victimizing society itself, although the authors find it far more natural to think that such crimes are simply not “done to” anyone at all, and thus have no direct victims. See NIRB Fact Sheet, *supra* note 144, at 1 (categorizing certain offenses as crimes against society). Moreover, the vast majority of these objectless offenses make a far weaker case for societal victimization than those discussed in Section II.C do, since they are not “directed” or “targeted” at society in the way Dr. King’s assassination or the burning of the Picasso painting were. See *supra* Section II.C. But in any event, as demonstrated in Section II.C, even if one were to adopt a view that these are “crimes against society,” “society,” in either the aggregate or metaphysical understanding of that term, cannot serve as a victim in regard to which the victim-facing justifications for punishment can reasonably apply. See *supra* Section II.C.

159. For an example of a federal offense that Frank could be charged with, see 18 U.S.C. § 545 (2012), which prohibits knowingly bringing any merchandise that is illegal in the United States across the borders through any method.

160. This risk that such behavior poses to the community is presumably why doing so is a crime in the first place.

has been completed.<sup>161</sup> In other words, any “downstream” consequences that may result from Frank’s behavior function as “secondary harms,” which play no role in determining whether or not Frank is guilty of smuggling.

Moreover, in many cases, the criminal law creates an entirely different classification of offense when the behavior underlying an objectless crime *does* end up seriously harming some individual. Consider again our drunk driver Chris. If Chris drives home under the influence of alcohol without hitting anyone, he is merely guilty of drunk driving, a crime that has no direct victim, and to which victim-facing justifications for punishment would therefore not apply. Yet, if Chris happens to hit and kill Danielle on his way home, thereby “directly victimizing” her, he can be charged with a different offense—vehicular homicide—to which victim-facing justifications for punishment *do* apply in light of the statutory harm of Danielle’s death.<sup>162</sup> The fact that Chris is deemed to have committed an entirely different offense once he brings about a statutorily specified criminal harm underscores the point that punishment for “antisocial” offenses, such as drunk driving, is justified entirely by offender-facing concerns like deterrence, retribution, incapacitation, and rehabilitation.

Thus, for objectless crimes in which no direct victim exists for whom it makes sense to express sympathy or channel vengeance, differential punishment is simply without justification, as no victim-facing justifications are available.

### *B. Consent and Shared-Culpability Crimes*

Another category of offenses for which differential punishment is unjustified is composed of those offenses for which the victims themselves have consented to the commission of the offense, or are otherwise culpable for the offense in some way. Even though these crimes have an “object,” in that they are “done with” or “done to” someone, it is inappropriate to punish offenders for these crimes based on the victim-facing justifications for punishment. That is because, as we will explain below, these victims lack the requisite “standing” in order to have their vengeance channeled or to receive the “status

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161. That is to say, differential punishment in this situation is triggered solely by the fact that the weapons *actually* enter the United States—if Frank were stopped on the Canadian side of the border instead, he would have merely attempted the offense.

162. For a list of the penalties an offender can receive in each state for vehicular homicide for which he was intoxicated, see *Penalties for Drunk Driving Vehicular Homicide*, MOTHERS AGAINST DRUNK DRIVING 1 (May 2012), [http://www.madd.org/laws/law-overview/Vehicular\\_Homicide\\_Overview.pdf](http://www.madd.org/laws/law-overview/Vehicular_Homicide_Overview.pdf) [https://perma.cc/6JPP-Z6EQ].

benefits” of expressive punishment in the way that non-consenting, non-culpable victims might.<sup>163</sup> In her book *Victims’ Rights and Victims’ Wrongs*, Vera Bergelson makes a related argument to the effect that a victim’s consent to, or shared-culpability for, an offense can “abridge[ ] his right not to be harmed and, therefore, completely or partially justif[y] the [offender] by eliminating or mitigating the [offender’s] responsibility for the harm.”<sup>164</sup> Our theory thus provides a theoretically satisfying means of actualizing that intuition: we should not apply a regime of differential punishment to offenses for which a victim consents or has unclean hands.

### 1. Consent Crimes

For some crimes, such as assisted suicide,<sup>165</sup> sale of narcotics,<sup>166</sup> and the smuggling of illegal immigrants,<sup>167</sup> the “objects” of the criminal offense (i.e., the deceased patient, the recipient of the narcotics, and the undocumented migrants, respectively) are not really “victims,” as we ordinarily understand that term, because they consented to the criminal act that was “done to them.” As we will argue, differential punishment is not appropriate for such “consent crimes,” because victim-facing justifications for punishment do not apply to willing objects of criminal acts.

It is essential to note that our claim that victim-facing justifications for punishment do not extend to “consent crimes” only applies when the object of the crime fully and validly consents to the criminal act in question. The crime of statutory rape, for example, would not count as a “consent crime,” because minors are not able to

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163. One might think that, in certain circumstances, victim-facing justifications might be reduced, but not eliminated entirely, due to a victim’s consent, forgiveness, or culpable conduct. In these circumstances, our framework might suggest that a judge *reduce* the measure of differential punishment for an offense, but not eliminate it entirely. Presenting a more fine-grained framework that discusses the application of our framework to these particular circumstances is beyond the scope of this Article. As an interesting point of comparison, this discussion closely mirrors the debate between the comparative and contributory negligence approaches to determining liability in tort law.

164. VERA BERGELSON, *VICTIMS’ RIGHTS AND VICTIMS’ WRONGS: COMPARATIVE LIABILITY IN CRIMINAL LAW* 61 (2009) (emphasis omitted).

165. For example, see Tennessee’s assisted suicide law. TENN. CODE ANN. § 39-13-216(a) (West 2017) (“A person commits the offense of assisted suicide who . . . [i]ntentionally provides another person with the means by which such person directly and intentionally brings about such person’s own death . . .”).

166. For example, see Minnesota’s sale of a controlled substance statute. MINN. STAT. ANN. § 152.023(1) (West 2017) (“A person is guilty of controlled substance crime in the third degree if . . . the person unlawfully sells one or more mixtures containing a narcotic drug . . .”).

167. For a discussion of the role of “victims” in immigrant trafficking offenses, see Nash, *supra* note 135, at 1454–56.

give legal consent to sexual acts with older persons.<sup>168</sup> Similarly, an individual who agrees to illegally sell her kidney under duress has not “consented” to the criminal sale of a bodily organ, as her consent to the sale was not freely given.<sup>169</sup> Importantly, what excepts these two scenarios from being considered consent crimes is *not* that these activities are illegal—because, of course, all consent crimes are illegal—but rather that the “consent” itself is defective in such a way so as not to discharge the viability of victim-facing justifications for punishment.<sup>170</sup>

Yet, in many instances, individuals who are the objects of a criminal offense *do* properly consent to the criminal act in question, and are thus not “victimized” by it in a way that triggers victim-facing justifications for punishment. For example, if George sells Harold marijuana, Harold is the “object” of George’s crime of narcotics distribution (in that George sold the drugs *to* Harold). However, it would be odd to say that Harold was the “victim” of George’s crime, such that victim-facing justifications for punishment are warranted on Harold’s behalf.

To better illustrate this point, consider first the expressive theories of punishment: a person who validly consents to the commission of a criminal offense for which he is the object of the statutory harm both “deserves” less of a showing of respect in relation to the offense than would an entirely innocent victim, and has not been “demeaned” in the same way that he would have been had he not consented. To use our above example, it would be bizarre to say that society *owes* it to Harold to punish George over and above what would be warranted by the offender-facing justifications for punishing George in order to recognize any “harm” that Harold might have suffered by coming into possession of the marijuana. To put it in terms of Hampton’s theory of expressive punishment,<sup>171</sup> because his transaction with Harold was consensual, George has not made any “false statement” in need of correcting concerning his social value relative to Harold’s.

Similarly, it seems intuitive that a “victim” who has validly consented to an offender’s behavior is not entitled to have his vengeance

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168. See, e.g., Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1441 (2013) (clarifying that minors cannot legally give consent to sex with older persons).

169. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (2000).

170. For two attempts to create a workable version of consent for the purposes of the criminal law, see Rubenfeld, *supra* note 168 and SCHULHOFER, *supra* note 169.

171. See *supra* Section II.A.

“channeled” with respect to that behavior. That is, whatever appeal “eye-for-an-eye” revenge may have in the ordinary course of criminal behavior is extinguished when the victim himself consents to the (nevertheless illegal) taking of his eye. As Bergelson argues, “I may be objectively hurt by my consent and I may subjectively regret it. Nonetheless, my rights have not been violated.”<sup>172</sup> Moreover, in the vast majority of cases, the objects of such “consensual crimes” will not even *desire* vengeance in the first place. There is no reason, for instance, to suppose that an individual who has voluntarily sold her kidney on the black market would want to “avenge” the loss of her kidney; nor should the law recognize any such desire.<sup>173</sup>

Despite the fact that such crimes do not necessarily “victimize” anybody in particular, consent crimes may have serious detrimental effects on society in the aggregate.<sup>174</sup> An illegal sale of a bodily organ, for example, may benefit both parties to the sale in a given instance, but may nevertheless lead to an undesirable state of affairs if such transactions became the norm.<sup>175</sup> Thus, important offender-facing justifications such as deterrence and retribution may still remain valid with regard to such offenses.<sup>176</sup> Yet, because victim-facing justifications do not apply, differential punishment is not appropriate for crimes to which “victims” give full and free consent.

## 2. Shared-Culpability Crimes

Victim-facing justifications for punishment also do not apply (or are at least diminished) in instances where the victim herself shares a substantial degree of culpability for causing the statutory harm that she has suffered. In the context of tort law, this notion is reflected in the affirmative defenses of contributory negligence and unclean hands,

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172. BERGELSON, *supra* note 164, at 62.

173. To reiterate, in a case where someone was coerced or duped into selling their kidney, this rationale would not apply because the consent would not have been fully and freely given.

174. For instance, see NIRB Fact Sheet, *supra* note 144, at 1, which categorizes prostitution as a crime against society instead of a crime against a person. For a discussion of why society cannot serve as a victim in regards to which victim-facing punishment can be justified, see Section II.C.

175. For evidence that this is already occurring, see Julie Bindel, *Organ Trafficking: A Deadly Trade*, TELEGRAPH (July 1, 2013, 7:00 AM), <http://www.telegraph.co.uk/news/uknews/10146338/Organ-trafficking-a-deadly-trade.html> [<https://perma.cc/7ELD-TXVW>].

176. Bergelson helpfully suggests a distinction between two groups of offenses, one in which “the *act itself* does not violate a prohibitory norm,” such as having sex with another person, but is criminalized “only because of the absence of consent,” and a second category of offenses, such as murder, for which the underlying behavior is “*bad per se*,” even if consent is given. BERGELSON, *supra* note 164, at 62–63. For the former category of offenses, punishment will no longer be warranted if consent is given, whereas justifications for punishment will persist in the latter category even in the event the victim consents.



which deny plaintiffs relief when they have contributed to, or otherwise behaved unethically in relation to, the subject matter of a suit.<sup>177</sup> In the criminal law context, a victim might similarly have unclean hands if he was a coconspirator in the offense, if he unreasonably provoked the offender, or if he culpably contributed to the harm he suffered at the offender's hands in some other way.<sup>178</sup> In a related vein, Bergelson has advocated for a regime of "comparative criminal liability," under which an offender's punishment would turn on "numerous factors, such as the magnitude of the affected rights of the perpetrator and the victim; the respective causative roles played by the perpetrator and the victim; and their relative culpability."<sup>179</sup> In this Article, we focus on the narrower idea that, where the direct victim of a criminal offense has unclean hands, differential punishment will be inappropriate because the victim-facing justifications for punishment will not apply.

To demonstrate this, let us first consider again the expressive theories of punishment: for similar reasons as was the case with consent crimes, a person who culpably contributes to the criminal offense committed against him seems both to deserve less of a showing of respect in relation to the offense than would a totally innocent victim, and has not been demeaned by the commission of that offense to the same extent he would have been had he not had unclean hands. Put differently, an offender seems to make a weaker "statement" about his own value relative to a victim's when that victim's behavior contributed to his own suffering. Moreover, as with a "victim" who consented to the crime perpetrated against him, a victim who is himself culpable in part for the harm he suffers is not entitled to have his vengeance channeled by the state. Additionally, in many cases, such victims might even *desire* vengeance less, because they understand and accept the role that they played in bringing about the harm that they have suffered.

Take, for instance, Ivan and Joe, two drivers drag racing at night through the streets of Miami.<sup>180</sup> When a two-lane road abruptly narrows into one lane, Ivan's car strikes Joe's, causing Joe's car to crash into a

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177. For a recent overview of these doctrines and their continued vitality in the civil law context, see T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2010).

178. Andrew Nash has suggested a definition of victim that would exclude objects of criminal offenses who consented to, or whose only criminal action caused, the crime to be committed against them. Nash, *supra* note 135, at 1457. To a certain extent, such considerations are already present in criminal sentencing: the Federal Sentencing Guidelines, for instance, provide that "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (U.S. SENTENCING COMM'N 2004).

179. BERGELSON, *supra* note 164, at 141.

180. Bergelson draws on a similar hypothetical in illustrating her theory of comparative criminal liability. *See id.* at 2, 99.

ditch off the side of the road, killing Joe instantly. Here, Ivan's reckless driving behavior certainly warrants scrutiny from the criminal law—his decision to drag race down narrow roadways is highly culpable, should be deterred, and raises questions about his need for incapacitation and rehabilitation. Moreover, a terrible and entirely foreseeable result (i.e., Joe's death) resulted from Ivan's behavior. But it is much less clear that Joe deserves either a channeling of vengeance or a showing of expressive punishment given his own culpable contribution to his demise.

First, it seems odd to say that Joe is entitled to have the state channel his "vengeance" against Ivan, given that Joe was driving recklessly in the same race that Ivan was. That is, Joe may have, to a certain extent, "assumed the risk" of harm befalling him when he behaved as culpably as he did. Similarly, the fact that Joe and Ivan engaged in the same behavior might render it less imperative to express the message that society deems it unacceptable for Ivan to have "treated" Joe the way that he did. After all, Ivan and Joe were both equally reckless in disregarding the threat to each other's lives during the race, and the fact that Ivan killed Joe, as opposed to the other way around, was simply a matter of chance. In short, victim-facing justifications for punishment do not provide any compelling reason to impose an additional quantum of punishment against Ivan in this scenario.

Of course, one might think that a victim's culpable behavior might similarly reduce the *offender-facing* justifications for punishment—and in some cases this may be true. However, even in most cases where a victim acts with unclean hands, it still remains the case that offenders have behaved wrongfully, should be deterred from behaving in such a way in the future, and may need to be incapacitated or rehabilitated in light of their actions. Furthermore, if a victim's behavior was so extreme as to fully negate the offender's culpability for her actions, the law often affords the offender an affirmative defense (such as the familiar claim of self-defense),<sup>181</sup> excusing the offender from punishment entirely. So while a victim's unclean hands may in some cases diminish offender-facing justifications for punishment, a victim's shared culpability for a crime committed against her much more strongly and systematically weighs on the validity of victim-facing justifications available for that crime.<sup>182</sup>

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181. See MODEL PENAL CODE § 3.04 (AM. LAW INST., Proposed Official Draft 1962) ("Use of Force in Self-Protection").

182. It makes sense, of course, that facts about the *victim* and his behavior would weigh more systematically on victim-facing justifications than on offender-facing justifications for punishment.

A complete taxonomy of situations in which courts should find that a victim's shared culpability for the offense committed against him vitiates the desirability of differential punishment is beyond the scope of this Article. Such determinations should be fact-specific inquiries made on a case-by-case basis. But as we have demonstrated, courts should, as a general matter, look to whether the victim's own culpability negates the appropriateness of punishing the offender based on each of the victim-facing justifications for punishment in determining when the practice of differential punishment should be abandoned due to a victim's unclean hands.<sup>183</sup>

### *C. Crimes for Which the Victim Desires to Show the Offender "Mercy"*

Finally, differential punishment is also unwarranted when there is a non-consenting, non-culpable direct victim of a criminal offense, but that victim explicitly disavows expressive and vengeance-based punishment on her behalf. Put simply, when a victim desires to show her offender "mercy" in this way, the victim-facing justifications for punishment no longer serve any legitimate function. In other words, it no longer makes sense to speak of vindicating a victim's interests through an added measure of punishment when that victim herself has made clear that she has no such interests to vindicate. Commentators and scholars have long debated the proper role a victim's mercy should play in the sentencing of criminal offenders, with suggestions ranging from no effect whatsoever to a substantial commutation of an offender's sentence.<sup>184</sup> Our Article suggests that the proper answer to this question is that a showing of mercy on the part of a victim should extinguish that portion of an offender's sentence that is predicated on victim-facing justifications for punishment (i.e., that which is attributable to differential punishment). We will demonstrate this point by again going through the various victim-facing justifications for punishment to see how they would apply to victims who desire mercy for their offenders.

First, when a victim desires to show mercy to an offender, it makes no sense to talk about "channeling that victim's desire for

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183. A related issue crops up in cases that look to whether an offender commits felony murder if a coconspirator is accidentally killed during the commission of an enumerated felony. *See, e.g.*, *United States v. Tham*, 118 F.3d 1501, 1511 (11th Cir. 1997) (finding defendant guilty of felony murder with respect to an accidental self-inflicted killing of a coconspirator during an arson); *People v. Ferlin*, 265 P. 230 (Cal. 1928) (finding a defendant not guilty in similar circumstances).

184. *See, e.g.*, MURPHY & HAMPTON, *supra* note 110; Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 338 (2007); Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737 (2012).

vengeance,” because there is no such desire. A victim’s desire to show mercy to an offender is simply incompatible with a need on the part of the state to punish that offender as an expression of the victim’s desire for revenge. Similarly, in an instance where a victim “forgives” the offender, there is no risk of vigilante action on the part of that victim that the state would need to forestall through extra punishment. It may be the case that, even when the victim “forgives” the offender, others (such as the victim’s friends and family members) may still want to take vigilante action. However, to punish an offender based on third parties’ desire for vengeance (in direct conflict with the victim’s wishes) seems both morally dubious and repugnant to the basic values of American criminal jurisprudence.<sup>185</sup> As we have alluded to earlier, it is only statutory harm to direct victims themselves, not emotional harm or sympathy on the part of others, that plays a role in explaining differential punishment as a descriptive matter.<sup>186</sup> If it were the case that the practice of differential punishment was meant to forestall vigilantism by third parties vindicating their own interests, separate from the interests of victims themselves, this feature of the criminal law would be difficult to explain.

Some readers might intuitively think that expressive victim-facing justifications for punishment would persist even when the victim does not desire expressive punishment. That is, one might initially think that it is still necessary to “show respect” to victims by punishing offenders even when that is not what those victims themselves want. Relatedly, one might even be concerned that a victim who forgives their offender would be thought of as “weak” in some quarters. We argue, however, that this is a misguided view.

The thrust of our argument is illustrated well by the 1989 murder of Judge Robert Smith Vance at his home in Mountain Brook, Alabama. Judge Vance’s killer, Walter Leroy Moody, Jr., was given the death penalty over the protestations of Vance’s widow and an established public record showing that Judge Vance was a lifetime opponent of capital punishment.<sup>187</sup> While the state court that convicted

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185. In other words, the criminal justice system starts to resemble mob justice at the point it merely serves the vengeful desires of the populace writ large.

186. See *supra* Section II.C. Again, this is because third-party emotional harms, unlike direct harms to victims, are not contemplated in the statutory definitions of crimes.

187. MICHAEL MELLO, *DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT* 46 (1997) (“Robert Vance’s *personal* opposition to capital punishment was genuine and heartfelt. The judge’s son has written that ‘my father . . . did not believe that the death penalty was a proper form of punishment.’”); *Judge Gives Letter Bomber Death Sentence*, N.Y. TIMES (Feb. 11, 1997), <http://www.nytimes.com/1997/02/11/us/judge-gives-letter-bomber-death-sentence.html> [<https://perma.cc/L295-RXML>]. The authors would like to thank Howard Shapiro, the lead federal prosecutor in the Moody trial, for bringing this case to our attention.

Moody certainly had strong offender-facing reasons for punishing him, the fact that the death penalty in Alabama is only available for murder, and not attempted murder,<sup>188</sup> means that only victim-facing justifications were available to justify Moody's execution.<sup>189</sup> Yet it seems morally and rationally dubious to maintain that the best way to show *respect* to Judge Vance's legacy was to betray one of his most deeply held moral principles. In essence, the Moody case illustrates how imposing additional punishment on an offender on the victim's behalf (but in contradiction of the victim's *actual wishes*) risks re-victimization and undermines the purpose of expressive punishment.<sup>190</sup>

This basic insight also holds when applied to other expressive theories of punishment. Under Jean Hampton's theory, for example, the state engages in expressive punishment in order to reinstitute equality between offender and victim—that is, punishment “masters” the offender “in a way that makes the relative value of victim and wrongdoer apparent” for all to see.<sup>191</sup> But an offender need not *actually* be punished on the victim's behalf in order for this message to be clearly sent. A victim arguably sends an even *stronger* message of her mastery over the offender (and an express refutation of her own inferiority) by “turning the other cheek,” such that the victim holds the offender's fate in her hands, but chooses a more compassionate route by opting for merciful treatment.<sup>192</sup> In fact, Hampton herself suggested that a victim's mercy might justifiably reduce the need to punish an offender, though she proposed no means of determining by how much.<sup>193</sup>

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188. That is, all offender-facing justifications for punishing Moody would have been present even if his attempt to kill Judge Vance had failed. *Crimes Punishable by the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/crimes-punishable-death-penalty> (last visited July 27, 2017) [<https://perma.cc/PC7L-4V3M>] (showing that Alabama only applies the death penalty for intentional murders in conjunction with certain aggravating factors).

189. *Id.*

190. Another set of concerns might arise, as in Judge Vance's case, where a victim has died and is unable to express a preference as to whether the victim-facing justifications for punishment should apply in her case. In such instances, the default should be to presume that the victim *does* desire a showing of expressive punishment and a channeling of his vengeance, as the victim-facing justifications for punishment also apply to deceased victims. However, there might be cases where it is appropriate for an offender to be shown mercy (and not to be punished in light of victim-facing justifications) even when his victim is deceased. One approach would be for courts to consider evidence of a victim's wishes made while the victim was still alive (such as preferences expressed in the victim's will or Judge Vance's anti-capital punishment writings). Alternatively, courts could borrow a concept from civil law and designate a successor in interest to the victim, who could be endowed with the right to decide on the victim's behalf whether mercy should be shown to the offender.

191. HAMPTON, *supra* note 47, at 141; *see also* MURPHY & HAMPTON, *supra* note 110, at 128 (“While nobly intentioned, other means of affirming a victim's status (such as throwing a parade in her honor) fail to erase the evidence of [the victim's] inferiority relative to the wrongdoer.”).

192. *See* Bibas, *supra* note 184, at 338.

193. *See also* MURPHY & HAMPTON, *supra* note 110.

Of course, as was the case with “consent crimes,” it is essential that a victim’s disavowal of the victim-facing justifications only be recognized when it is genuine and uncoerced. Otherwise, offenders might place undue pressure on victims to “show mercy” and thereby reduce the offender’s sentence, further imperiling such victims. For some categories of crimes (such as domestic violence), there might also be concerns about an abusive physical or psychological relationship between the offender and victim that would call into question the legitimacy of the victim’s showing of mercy.<sup>194</sup> Although a full and adequate treatment of these concerns is beyond the scope of this Article, courts could perhaps conduct voluntariness hearings,<sup>195</sup> which are already in widespread use for other purposes in the criminal justice system, before accepting a victim’s showing of mercy.

Importantly, however, a victim’s disavowal of the victim-facing justifications for punishment will generally have no effect on the extent of offender-facing justifications for punishing the offender. For instance, a victim’s subsequent decision to show mercy can have no “backwards-looking” moral valence with regard to the offender’s criminal action, and thus no bearing on retributive justice. Similarly, the fact that a victim desires neither expressive nor vengeance-based punishment neither increases nor reduces the imperative to deter future criminal behavior.<sup>196</sup> As will be further discussed in Part IV, the proper response to a victim’s showing of mercy is merely to remove that portion of an offender’s punishment attributable to differential punishment—that is, to not punish the offender for causing the harm that the victim has absolved him of.

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As we have shown, victim-facing justifications for punishment do not apply to all criminal offenses. In cases where criminal offenses do not have an “object,” where the victim is either consenting to or culpable for the offense, or where the victim disavows any expressive or vengeance-based punishment on her behalf, victim-facing justifications do not apply, and differential punishment is thus unwarranted. In Part IV, we will discuss how to apply the insights developed in the first three

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194. Such concerns are raised in other areas of law. See, e.g., Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).

195. See Comments, *An Examination of the Right to a Voluntariness Hearing*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 30 (1972).

196. This is all just to say that an ex post facto showing of mercy does not bear retroactively on the nature of an offender’s behavior.

Parts of this Article and demonstrate the impact that these changes would have on the American criminal justice system if implemented.

#### IV. APPLYING THE FRAMEWORK

In Part III, we demonstrated that the victim-facing justifications for punishment, which are the *only* available justifications for differential punishment, do not apply to all criminal offenses. In this final Part, we describe how these insights might be applied in practice. As suggested in Part I, the approach we propose is to punish offenders in the types of cases discussed in Part III only for criminal behavior within their control, and not for any statutory harms that ultimately result from their actions.

Generally, this means that in the case of “intentional crimes,” a lack of victim-facing justifications for punishment would necessitate punishing such offenses only as severely as we would punish attempts to commit those offenses. Similarly, in the case of non-intentional crimes, a lack of victim-facing justifications for punishment will necessitate punishing offenders only to the extent that they would have been punished had the statutory harm not occurred (which might, for example, entail punishing involuntary manslaughter as if it were reckless endangerment).<sup>197</sup>

As one might anticipate, our approach would have a much greater impact on the punishment of non-intentional crimes than it would for intentional offenses. This is because the difference in punishment between completed intentional offenses and attempts is usually much smaller than that between completed reckless crimes and prohibitions against reckless behavior.<sup>198</sup> This result is entirely appropriate, we argue, given that there are abundant offender-facing justifications for punishing attempts, while there are generally far weaker offender-facing justifications for punishing non-intentional offenses. In other words, only victim-facing justifications for punishment can account for the severe sentences accompanying many non-intentional offenses, such as involuntary manslaughter, in comparison to the much lighter punishment associated with “pure” recklessness offenses, such as reckless endangerment.

Of course, there are a great number of factors that might work in practice to influence an offender’s sentence in any given case beyond the occurrence of a statutory harm, such as his past criminal history,

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197. For those who reject the validity of victim-facing justifications altogether, the analysis in this Part should apply to *all* crimes, not just those discussed in Part III.

198. Many jurisdictions follow the Model Penal Code’s approach of punishing attempts equally as severely as completed intentional offenses.

the specific facts of his offense, and even the psychological profile of his sentencing judge.<sup>199</sup> However, in this Part, we are only concerned with the question of differential punishment: Should offenders become eligible for harsher punishments when their actions bring about a statutory harm? A broader discussion of other features of criminal sentencing is beyond the scope of this Article.

### A. Intentional Offenses

In the case of intentional offenses to which victim-facing justifications do not apply, rejecting a regime of differential punishment would require completed offenses to be punished only as severely as are attempts of those offenses. As a legal matter, an offender who intentionally engages in criminal action, but who does not bring about the statutory harm necessary for its completion, is guilty of *attempting* that crime.<sup>200</sup> Because the added measure of punishment attributable to the statutory harm occurring in intentional crimes that fit into one of the categories discussed in Part III is unjustified, such crimes should be punished as attempts rather than as completed offenses. This is not to say, though, that such offenders should be *charged* with (or convicted of) attempted crimes. Rather, we are merely suggesting that their crimes be punished as such. This recommendation follows from our analysis in the first three Parts of this Article, because attempts give rise to all of the same offender-facing justifications as completed offenses (because they can implicate identical behavior and mental states<sup>201</sup>), but do not give rise to victim-facing justifications for punishment (because no statutory harm occurs as the result of an attempt).<sup>202</sup>

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199. Factors as esoteric as when a judge last ate can influence a defendant's precise sentence. See *I Think It's Time We Broke for Lunch...*, *ECONOMIST* (Apr. 14, 2011), <http://www.economist.com/node/18557594> [<https://perma.cc/9QPB-XEDN>] (detailing how judges more often give harsher sentences when hungry). For an overview of post-conviction sentencing enhancements, see, for example, Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 *GEO. MASON L. REV.* 303 (2009).

200. See MODEL PENAL CODE § 5.01 (AM. LAW INST., Proposed Official Draft 1962).

201. While attempts and completed crimes can be committed with different underlying behavior, they do not have to be. For a given completed crime, one can generally imagine an attempted offense with identical behavior.

202. It might be objected at this point that even inchoate offenses (such as attempts) can implicate many of the same worries that animate victim-facing justifications for punishment. However, this position reflects a misunderstanding about the victim-facing justifications for punishment. These justifications justify differential punishment only when the degree of punishment justified by offender-facing justifications is insufficient in light of the statutory harm, either to express an appropriate level of respect to the victim or to satisfy the victim's legitimate desire for vengeance. Yet for inchoate crimes such as attempts, there is no harm to victims above and beyond the offender's culpable behavior that gives rise to such justifications. That is, to the



The effect that our proposal would have on the punishment of intentional crimes to which victim-facing justifications do not apply varies between jurisdictions. In some jurisdictions, including those that follow the Model Penal Code, there is currently no difference in the punishments available for attempted and completed intentional offenses.<sup>203</sup> As a consequence, our proposal would not affect the punishment of intentional crimes in those jurisdictions. In other jurisdictions, however, completed intentional offenses are punished more severely than are attempts. Significantly, the death penalty, where it is available at all, is only available for completed capital offenses, and not attempts of those offenses.<sup>204</sup>

Whether a jurisdiction imposes differential punishment for intentional crimes can thus be seen as reflecting an implicit judgment on the part of lawmakers that the degree of punishment justified by offender-facing concerns will always be sufficient to satisfy victims' interests in their offenders' punishment.<sup>205</sup> In jurisdictions where there *is* differential punishment in regard to intentional offenses, however, our proposal would reduce the punishment for completed intentional offenses to which victim-facing justifications do not apply down to the level at which attempts are punished (and, consequently, take the death penalty off the table in some jurisdictions).

### *B. Non-Intentional Offenses*

As with intentional offenses, non-intentional criminal offenses for which an offender's actions bring about a statutory harm, but with regard to which victim-facing justifications do not apply, should be punished as if the statutory harm did not occur. Unlike with intentional offenses, however, virtually all jurisdictions strongly differentiate the severity of punishment for non-intentional criminal acts depending on whether the offender caused a statutory harm.<sup>206</sup> Unfortunately, determining how to punish non-intentional offenses to which victim-facing justifications do not apply is less straightforward than was the case with intentional offenses. Ultimately, this determination should depend both upon the nature of the statutory harm and on whether the

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extent that an attempted crime sends a disrespectful message to the victim, this message is within the offender's control and thus weighs directly on the offender's culpability.

203. See MODEL PENAL CODE § 5.01 (AM. LAW INST., Proposed Official Draft 1962).

204. See *supra* notes 188–189.

205. In fact, our theory provides a possible justification for the sizable number of states that do not follow the Model Penal Code's example and still differentiate punishment between attempts and completed crimes.

206. For instance, involuntary manslaughter is, without exception, punishable by more severe sentences than is reckless endangerment.

underlying behavior giving rise to the completed offense is independently criminalized.

First, we propose that non-intentional criminal offenses for which the statutory harm is “serious bodily injury or death,” but for which victim-facing justifications do not apply, be punished only as severely as is reckless endangerment. Reckless endangerment is a crime that punishes behavior that threatens to cause serious bodily injury or death, but which does not ultimately bring about that result.<sup>207</sup> Thus, reckless endangerment captures the same offender-facing justifications as result-based offenses like involuntary manslaughter, with the only difference being that the latter offense requires the occurrence of a statutory harm (i.e., a victim’s death).<sup>208</sup>

Second, for certain non-intentional offenses, the underlying behavior giving rise to the completed offense is independently criminalized regardless of whether a statutory harm materializes. For

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207. See MODEL PENAL CODE § 211.2 (AM. LAW INST., Proposed Official Draft 1962) (“A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.”).

208. Note that there are two possible ways to conceive of the role that “risk” plays in the crime of reckless endangerment, each of which might have different implications for our theory. According to the first, and in our opinion more plausible, view, whether or not an offender has “created a risk” is a function of his behavior. That is to say that the crime of reckless endangerment targets behavior that is itself culpably risky, as opposed to any contingent result of that behavior that is outside of the offender’s control. This view does *not* necessitate a regime of differential punishment for the crime of reckless endangerment, because all elements of the offense—including the “creation of risk”—are within the offender’s control. As such, the punishment for the crime of reckless endangerment, understood in this way, is fully explicable in terms of the various offender-facing justifications for punishment.

If, on the other hand, “risk creation” is treated as an objective phenomenon, as opposed to a feature of an offender’s behavior, then the element of “risk creation” would seem to function as a statutory harm beyond the offender’s control. However, this interpretation would lead to a highly implausible view about the crime of reckless endangerment and the state’s goals in criminalizing it. First, as we have argued at length in Part I, offender-facing justifications for punishment cannot explain differentiating punishment based on results outside of an offender’s control. Yet, it seems obvious that there are strong offender-facing justifications implicated by behavior that risks life and limb (e.g., the need to deter such behavior). Moreover, as argued in Part II, mere risk to an individual (especially a victim who is not the intentional target of an offender’s behavior) is insufficient to implicate the various victim-facing justifications for punishment. That is, there is no reason to think that an individual would feel particularly demeaned by or vengeful against someone who did not cause (or even intend to cause) him harm. Furthermore, it is also unclear in the first instance that there is any principled conceptual distinction between behavior that creates risk and behavior that *may* create risk. That is, behavior that “risks creating a risk” is itself “risky” behavior. Thus, it is more intelligible to conceive of the crime of reckless endangerment as one prohibiting risky conduct rather than as one aimed at prohibiting the abstract “harm” of “risk creation.” Indeed, the Model Penal Code and states that follow its example explicitly endorse the view that risk need not be created in this “abstract” sense for the crime of reckless endangerment to have been committed. However, if despite this one nevertheless maintains that reckless endangerment is a prohibition against “objective risk creation” rather than “risky behavior” (and is thus only explicable in terms of victim-facing justifications for punishment), then offenders should not be punished at all when such justifications do not pertain, however counterintuitive this implication might be.

these offenses, the completed offense should be punished only as severely as would be the underlying “conduct offense” (e.g., driving under the influence or unlawfully discharging a firearm<sup>209</sup>). These conduct offenses generally target behaviors that are deemed so undesirable that the state has sufficient offender-facing justifications to punish them even when they do not bring about harmful results.

It will sometimes be the case both that the behavior underlying a particular offense is independently criminalized and that the statutory harm resulting from that behavior is serious bodily injury or death. For example, imagine that Kate shoots Lucas in a public park, with his consent, as part of a performance art installation that Lucas is putting on, thereby recklessly killing him.<sup>210</sup> As a consequence, Kate is charged with involuntary manslaughter. Because Lucas fully and freely consented to Kate’s actions, victim-facing justifications for punishment do not apply to the resultant statutory harm of his death.<sup>211</sup> Thus, Kate should be sentenced only as severely as she would have been had she committed the offenses of reckless endangerment and unlawful discharge of a firearm. These conduct offenses reflect all of the offender-facing justifications that apply to Kate’s behavior, but because they do not require the occurrence of a statutory harm (e.g., Lucas’ death), they persist even though, given Lucas’ consent, victim-facing justifications do not apply to Kate’s offense.

There are also a number of non-intentional offenses for which the underlying behavior is not criminalized unless it leads to a statutory harm. Thus, when victim-facing justifications for punishment do not apply to such offenses, there is no basis for punishing offenders for them at all. While this may seem like an extreme application of our theory, it is important to keep in mind that these are necessarily offenses for which the statutory harm does *not* involve serious bodily injury or death, and for which the underlying behavior is *not* deemed sufficiently undesirable to be independently criminalized.

For an example of such a case, take Mary, who, while recklessly hitting golf balls on her front lawn, slices a ball through her neighbor Nina’s window. She is soon thereafter caught by a security guard employed by Nina, who turns Mary over to the police, leading to her

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209. For example, see Arizona’s Unlawful Discharge of Firearms statute. ARIZ. REV. STAT. ANN. § 13-3107(A) (2017) (“A person who with criminal negligence discharges a firearm within or into the limits of any municipality is guilty of a class 6 felony.”).

210. This hypothetical is based on Chris Burden’s art installation titled *Shoot*. See Natalie Finn, *Artist Chris Burden Dies at 69: Created “Urban Light” Street Lamp Installation at LACMA; Was Shot, Nailed to a Car for His Craft*, E! NEWS (May 11, 2015, 2:28 PM), <http://www.eonline.com/news/655572/artist-chris-burden-dies-at-69-created-urban-light-street-lamp-installation-at-lacma-was-shot-nailed-to-a-car-for-his-craft> [https://perma.cc/WG67-2KP3].

211. See *supra* Section III.B.

being charged with the misdemeanor offense of “Reckless Damage or Destruction” of another’s property.<sup>212</sup> Upon learning of Mary’s arrest and impending prosecution, Nina expresses a desire to show mercy towards Mary. In this instance, because victim-facing justifications for punishing Mary no longer apply (as a result of Nina’s “mercy”), there is no longer any basis for punishing Mary. This is because Mary’s behavior—hitting golf balls with reckless disregard of the risk that one will cause damage to another’s property—is not independently criminalized, and would thus not have given rise to criminal charges against Mary had her golf ball not broken Nina’s window in the first place.

Finally, a special case is presented by certain regulatory offenses, such as traffic violations, for which there is both no “object” of the offense—it is not “done to” anyone—and no conduct offense criminalizing the underlying behavior, but for which the underlying behavior poses sufficient risks that it should be prohibited.<sup>213</sup> For this narrow set of offenses, the failure to independently criminalize the behavior underlying them is undoubtedly a product of the reality that detecting such undesirable behavior in the absence of the statutory harm occurring would be impractical. For instance, it might be functionally impossible to know if someone was driving without regard to whether they were breaking the speed limit if they were not, in fact, speeding.

As a matter of pure theory, this is not a reason to engage in differential punishment—in the possibly rare cases where we could be *certain* that an offender had engaged in the underlying behavior (e.g., driving without regard to whether one is speeding) without causing the statutory harm, we would have sufficient offender-facing justifications for punishing him equally as harshly as an offender who did bring about the statutory harm. In an ideal world, therefore, such crimes would be redefined solely in terms of the undesirable conduct they seek to prohibit, without regard to whether a statutory harm occurs. Until such conduct offenses are created, however, it may be necessary to punish offenders in these circumstances on the basis of whether a statutory harm occurs even though no victim-facing justifications for punishment are applicable. In light of the obvious offender-facing justifications at play with these offenses, it would likely be unacceptable to allow them to go unpunished entirely.

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212. For an example of a jurisdiction that punishes this offense, see Reckless Damage or Destruction, TEX. PENAL CODE ANN. § 28.04(a) (West 2017), providing that “[a] person commits an offense if, without the effective consent of the owner, he recklessly damages or destroys property of the owner.”

213. See *supra* Section I.A.

Leaving this minor wrinkle aside, discarding differential punishment for non-intentional offenses to which victim-facing justifications do not apply would have a dramatic impact on the punishment of such offenders. This broad impact is warranted, however, by the fact that much of the justification for punishing non-intentional crimes in the first place stems from resultant statutory harms beyond offenders' control.<sup>214</sup> Some readers might feel that the degree of punishment recommended by our approach would not be sufficiently severe to reflect all of the offender-facing justifications implicated by serious non-intentional offenses. For instance, some might find it unduly lenient to only punish Kate for the crimes of reckless endangerment and unlawful discharge of a firearm in the hypothetical discussed above, given the extremely irresponsible nature of her conduct. However, even if this were the case, the proper remedy would be to increase the penalties for the underlying conduct offenses, not to engage in differential punishment when no victim-facing justifications apply.

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In this Part, we have laid out the basic framework for how to apply the insights generated in Parts I through III to both intentional and non-intentional criminal offenses. Our general proposal is that completed offenses to which victim-facing justifications for punishment do not apply should be punished only as severely as they would have been had no statutory harm occurred. While it is beyond the scope of this Article to fully delineate exactly how this methodology would apply to every conceivable set of offenses, future scholarship should further develop the practical application of our theory.

#### CONCLUSION

In this Article, we have offered a general theory of differential punishment that draws a distinction between offender-facing and victim-facing justifications for punishment. As we have demonstrated, only the latter set of theories is capable of justifying the practice of differential punishment. We have also identified three categories of offenses to which victim-facing justifications do not apply, and in regard to which all parties should agree that differential punishment is categorically unwarranted. Perpetrators of completed criminal offenses for which there is no "object," for which the victim consents to or shares

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214. See *supra* Parts I, II.

culpability for the criminal offense, or for which the victim desires to show mercy to the offender should be punished as if their actions had failed to bring about any statutory harms.

Applying our theory would significantly reduce the severity of many offenders' punishments, helping to combat the problem of over-incarceration that plagues the American criminal justice system today. Significantly, this reduction in punishment would not come at the cost of any of the offender-facing justifications for punishment—such as deterrence, retribution, incapacitation, or rehabilitation—or over the objection of innocent, aggrieved crime victims. Future work should focus on how our theory might apply to other areas of the criminal law, such as circumstance elements, sentencing enhancements, and the collateral consequences of conviction.

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