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**Victims and Perpetrators: An Argument for  
Comparative Liability in Criminal Law**

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# Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law

Vera Bergelson

## Abstract

This article challenges the legal rule according to which the victim's conduct is irrelevant to the determination of the perpetrator's criminal liability. The author attacks this rule from both positive and normative perspectives, and argues that criminal law should incorporate an affirmative defense of comparative liability. This defense would fully or partially exculpate the defendant if the victim by his own acts has lost or reduced his right not to be harmed.

Part I tests the descriptive accuracy of the proposition that the perpetrator's liability does not depend on the conduct of the victim. Criminological and victimological studies strongly suggest that criminal liability may be properly evaluated only in the context of the victim-perpetrator interaction. Moreover, criminal law itself has a number of doctrines, such as consent, self-defense and (to some degree) provocation, which include victims' actions in the determination of perpetrators' liability.

Part II makes a normative claim that victims' actions should reduce or eliminate the perpetrator's liability in all appropriate cases and not merely in the context of a few distinct defenses. This claim draws on:

(a) the just desert principle which requires that individuals be punished only for the amount of harm caused by them and not by the victim himself;

(b) the efficiency principle, which requires that, in order to preserve the moral authority of criminal law, penal sanctions should not be overused and the law should develop in a dialogue with community perceptions of right and wrong;

(c)the consistency principle, which mandates that punishment-justifying considerations be applied systematically;

(d)the analysis of mitigating factors recognized at the penalty stage of a criminal trial; and

(e)considerations of fairness underlying the comparative liability reform in torts.

Part III proposes a basis for a theory of comparative liability in criminal law and suggests a method that makes it possible to distinguish between cases, in which the victim's conduct should provide the perpetrator with a complete or partial defense, and cases, in which the victim's conduct should be legally irrelevant. The author offers a unitary explanation to the defenses of consent, self-defense and provocation. That explanation lies in the principle of conditionality of rights. Pursuant to this principle, the perpetrator's liability should be reduced to the extent the victim, by his own acts, has changed the balance of rights between him and the perpetrator. The victim can do that either voluntarily, by waiving a right not to be harmed, or involuntarily, by forfeiting this right as a result of his unjustified attack on some legally recognized rights of the perpetrator.

The article concludes with comparative analysis of factors that may affect the determination of the scope of the perpetrator's liability. These factors include the magnitude of the affected rights of the perpetrator and the victim, the causative impact of their respective conduct, and their personal culpability.

# Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law

Vera Bergelson<sup>†</sup>

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## INTRODUCTION

A motorist driving ten miles per hour in excess of the speed limit hits and kills a pedestrian who intentionally threw himself in front of the car. Had the motorist not been speeding, he would have been able to avoid the collision. Is the motorist guilty of criminal homicide?

A man agrees to be killed and eaten by another man. Should his voluntary consent to the homicide be a factor mitigating the killer's criminal liability?

Two drivers participate in a drag race. One loses control of his car and is killed. The other one is charged with a homicide. Should the surviving driver's culpability be reduced because of the decedent's own recklessness?

After years of abuse, a woman lashes out and, during a non-violent confrontation, kills her husband. Should she be punished as severely as if there were no history of domestic violence?

In other words, should the victim's own acts ever be taken into account when we evaluate the criminal liability of the perpetrator? The law seems to be clear on the point: "Victim fault is not a defense, either partial or complete, to criminal liability."<sup>1</sup>

"Don't blame the victim" is probably one of the cornerstone maxims of Anglo-American jurisprudence.<sup>2</sup> But is that maxim true—does the law in fact ignore the victim's behavior in determining the level of the defendant's criminal liability? Even more importantly—*should* the law ignore it? And, if the answer depends on the circumstances, how should we decide when the victim's behavior is a mitigating factor and when it is irrelevant? To answer these questions, we need to integrate the victim into the theory of criminal law.

In recent years, as a result of the victims' rights movement, victims have become active participants in the American criminal justice system.<sup>3</sup> That development has

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1. *Beul v. ASSE Intern., Inc.*, 233 F.3d 441, 451 (7th Cir. 2000).

2. See, e.g., George P. Fletcher, *Corrective Justice for Moderns*, 106 *Harv. L. Rev.* 1658, 1673 (1993) ("The distinctive feature of criminal liability is that, in principle, the victim's contributory fault is irrelevant to liability.").

3. Today, thirty-two states have victims' rights amendments, and all states have victims' bills of rights that grant victims rights to notice of important

prompted new interest in the role of victims in criminal law. However, most academic discussions of victims have focused on their role in the criminal process rather than substantive criminal law.<sup>4</sup>

Moreover, as both legal and non-legal scholars agree, the substantive penal law has developed “without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment.”<sup>5</sup> Some authors have pointed out that there is a need for a comprehensive theory that would assign victims and perpetrators their proper places in each aspect of criminal law.<sup>6</sup> Despite a number of insightful works that have discussed victims in connection with various areas of criminal doctrine,<sup>7</sup> such a comprehensive theory is yet to be written. This article is a step in that direction. It takes the

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proceedings; participation in those proceedings, including victim impact statements at the time of sentencing; and restitution. See Aileen Adams & David Osborne, *Victims’ Rights and Services: A Historical Perspective and Goals for the Twenty-First Century*, 33 *McGeorge L. Rev.* 673, 675-76 (2002).

4. Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 *Buff. Crim. L. Rev.* 3, 3 (1999). But see Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 *Cal. L. Rev.* 1181 (1994) (arguing in favor of an efficiency-based regime of comparative criminal liability); Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims’ Rights*, 76 *Temple L. Rev.* 645 (2003) [hereinafter *Victim Wrongs*] (advocating a nonspecific victim liability defense as a response to the victim-oriented privatization trend in current criminal law); Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 *Buff. L. Rev.* 433 (2004) [hereinafter *Righting Victim Wrongs*] (examining victim liability defense from the perspective of theories of punishment).

5. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *Buff. Crim. L. Rev.* 51, 51 (1999). See also Stephen Schafer, *Victimology: The Victim and His Criminal* 5 (1977) (observing that, up until a few decades ago, “there has been virtually no consideration of the victim’s participation in the wrongdoing, or of any other interaction or interrelationship between criminal and victim”).

6. See Dubber, *supra* note 4, at 3 (opining that “any satisfactory solution to this problem will require a new integrated theory of penal law that assigns victim and offender their proper place in each aspect of penal law in light of that aspect’s purpose or purposes, as well as the general requirements of constitutionality and legitimacy”).

7. See, e.g., Markus Dirk Dubber, *Victims in the War on Crime* (2002); Fletcher, *supra* note 5; Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 *Buff. Crim. L. Rev.* 65 (1999) [hereinafter *Victims and Retribution*]; Bernd Schönemann, *The Role of the Victim within the Criminal Justice System: A Three-Tiered Concept*, 3 *Buff. Crim. L. Rev.* 33, 39-40 (1999) [hereinafter *Role of the Victim*].

position that victims may reduce their right not to be harmed either voluntarily, by consent, waiver or assumption of risk, or involuntarily, by an attack on some legally recognized rights of the perpetrator. If that happens, perpetrators should be entitled to a defense of complete or partial justification, which would eliminate or diminish their criminal liability.

The article consists of three parts. Part I challenges the accuracy of the proposition that the perpetrator's liability does not depend on the conduct of the victim. I start with a review of criminological and victimological research, which strongly suggests that criminal liability may be properly evaluated only in the context of the victim-perpetrator interaction. I then turn attention to criminal law itself and show that a number of criminal doctrines, such as consent, self-defense and provocation, do in fact include victims' actions in the determination of perpetrators' liability.

In part II, I make a normative claim that victims' actions should be considered a liability mitigator in all appropriate cases and not merely in the context of a few distinct defenses. My main arguments draw on:

- (a) the just desert principle, pursuant to which individuals should be responsible only for the amount of harm caused by them and not by the victim;
- (b) the efficiency principle, which requires that, in order to preserve the moral authority of criminal law, penal sanctions should not be overused and the law should develop in a dialogue with community perceptions of right and wrong;
- (c) the consistency principle, which mandates that punishment-justifying considerations be applied systematically;
- (d) the analysis of mitigating factors recognized at the penalty stage of a criminal trial; and
- (e) considerations underlying the theory of comparative liability in torts.

In part III, I propose a basis for developing a theory of comparative responsibility in criminal law and offer a method that allows us to determine when the victim's conduct should provide the perpetrator with a complete or partial defense and when it should be legally irrelevant. I



argue that there is a unitary explanation to the theories of consent, self-defense and provocation. That explanation lies in the principle of *conditionality of rights*, which should be recognized as a general principle of criminal law. Pursuant to this principle, the perpetrator's liability should be reduced to the extent the victim, by his own acts, has diminished his right not to be harmed. Finally, I analyze some factors that may be important for the determination of the scope of the perpetrator's liability, including the magnitude of the affected rights of the perpetrator and the victim; the comparative causative impact of their conduct; and their respective culpability.

## I. VICTIMS IN SOCIAL SCIENCES AND IN CRIMINAL LAW

### A. *Victims in Social Sciences*

For years, social scientists have been calling attention to the incomplete, decontextualized approach taken by the law—not only with respect to the victim-offender relationship but also to other aspects of criminal behavior relevant to the concept of personal responsibility, the overarching concept of criminal justice.<sup>8</sup> This narrowness has been the source of great frustration among social scientists whose work has been systematically excluded from the lawmaking process.<sup>9</sup> One of the major shortcomings of criminal law, in their view, is that penal statutes do not adequately reflect the variations of human interactions. A scholar has criticized criminal law because

It introduced abstraction as a domineering force, it introduced the rule of the paper, and it made criminal

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8. Craig Haney, *Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice*, in *America's Experiment With Capital Punishment* 351 (James R. Acker et al. eds., 1998) (“Among social scientists, at least, the criminal law is notorious for its extremely narrow focus on decontextualized criminal acts and what seem to be arbitrarily defined states of mind.”).

9. *Id.* “Much that a social scientist would want to know about the historical, social contextual, and even immediate situational influences on criminal behavior—knowledge that otherwise would be crucial to meaningfully analyze and truly understand the actions of a criminal offender—is deemed irrelevant by the criminal law.” *Id.*

justice merely the interpretative machinery of the printed law: the goddess *Justicia* probably was impartial and knew the law very well, but her blindfold deprived her of the sight of complex interactions, group characteristics, and social problems. The criminal-victim relationship, like many other aspects of crime, therefore remained unknown to her.<sup>10</sup>

The first systematic sociological studies of the criminal-victim relationship date back to the middle of the twentieth century. Benjamin Mendelsohn is generally recognized as the founder of a new discipline,<sup>11</sup> victimology, a branch of criminology<sup>12</sup> that focuses on the victim-offender relationship and the harm suffered by the victim as a result of the offense.<sup>13</sup> A practicing attorney, Mendelsohn conducted a questionnaire study of his clients and formulated a typology that encompassed several degrees of victim culpability, ranging from the “completely innocent victim” (e.g., a child) to the “victim who is guilty alone” (e.g., an attacker who is killed by the target in self-defense). Between these two extremes Mendelsohn placed the “victim with minor guilt,” the “victim as guilty as the offender,” and the “victim more guilty than the offender.”<sup>14</sup>

Another important figure in the history of victimology was Hans von Hentig who, approximately at the same time as Mendelsohn, suggested that there is an interconnection between “killer and killed, duper and dupe.” According to von Hentig, the victim is not just a passive figure but rather an “activating sufferer” who plays a part in the creation of the criminal act and who is barely considered by our legal system.<sup>15</sup> Von Hentig wrote:

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10. Schafer, *supra* note 5, at 25.

11. Daniel C. Claster, *Good Guys and Bad Guys* 160 (1992); Schafer, *supra* note 5, at 34-35.

12. Mendelsohn himself would probably object to this description. He argued in favor of separating victim-related factors of a crime from criminal-related factors into a new science parallel to criminology or even “the reverse of criminology.” See Schafer, *supra* note 5, at 35, citing Benjamin Mendelsohn, *The Victimology*, *Etudes Internationales de Psycho-Sociologie Criminelle*, 25-26 (July-Sept. 1956).

13. Andrew Karmen, *Crime Victims* 8 (2001).

14. See Schafer, *supra* note 5, at 36, citing Mendelsohn, *supra* note 12, at 105-07.

15. See Hans Von Hentig, *The Criminal and His Victim*, *Studies in the Sociobiology of Crime* 383-450 (1948).

I maintain that many criminal deeds are more indicative of a subject-object relation than of the perpetrator alone. There is a definite mutuality of some sort . . . . In the long process leading gradually to the unlawful result, credit and debit are not infrequently indistinguishable.<sup>16</sup>

Mendelsohn's and von Hentig's studies were followed by numerous other typologies that used sociological, psychological, biological, and other criteria to measure the level of a victim's susceptibility to, and involvement in, a criminal act.<sup>17</sup> A contemporary sociologist has commented that, "[b]y raising questions about victim proneness, vulnerability, and accountability, [the first victimologists] put forward a more complete but also more controversial explanation about why laws are broken and people get hurt."<sup>18</sup>

The essence of the controversy was the idea of shared responsibility, which implied that some victims as well as offenders did something wrong. Ever since the rise of the victims' rights movement in the 1970s, that idea and its implications have been hotly debated among victimologists. The "victim-blaming" and "victim-defending" tendencies clashed on a number of issues. However, as a recent influential work shows, victimologists cannot be simply divided into victim-blamers and victim-defenders. Advocates of both approaches often switch sides, depending on the facts of the case, the nature of the crime, and the parties involved.<sup>19</sup> The same people may criticize one group of victims (e.g., abusive husbands who get killed by their wives) but defend another (e.g., women who have been raped by acquaintances).

The victims' rights movement and the "discovery" of the victim by sociologists have resulted in an important change: crime victims stopped being invisible. The enormous volume of research data collected and analyzed by victimologists is an invaluable source of information

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16. *Id.* at 384.

17. See Schafer, *supra* note 5, at 41-47 (analyzing various victim typologies, including those authored by Ezzat Abdel Fattah, Thorsten Sellin and Marvin E. Wolfgang, Robert A. Silverman, Gilbert Geis, Hans Joachim Schneider and setting forth his own typology). See also Karmen, *supra* note 13, at 106-10 (reviewing some typologies of "shared responsibility").

18. Karmen, *supra* note 13, at 100.

19. *Id.* at 110-34.

regarding crime, community standards, values, ethics, prejudices, and allegiances.

The first comprehensive empirical study of “victim-precipitated” crimes focused on homicides committed in Philadelphia from 1948 to 1952.<sup>20</sup> The study showed that, in approximately 25% of all murders, the deceased was the first to use force, either by drawing a weapon, striking the first physical blow during an argument, or in some other way initiating violence.<sup>21</sup> Situations that resulted in violence included charges of infidelity, arguments over money, drunken brawls and confrontations over insults and “fighting words.”<sup>22</sup>

In the late 1960s, the National Commission on the Causes and Prevention of Violence (NCCPV) was formed to investigate the victim’s role in several types of street crime.<sup>23</sup> The Commission concluded that instances of victim-precipitated behavior<sup>24</sup> were not uncommon in cases of homicide and aggravated assault, less frequent but still empirically noteworthy in robbery, and least relevant in cases of rape.<sup>25</sup>

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20. See generally Marvin E. Wolfgang, *Patterns in Criminal Homicide* (1958).

21. Karmen, *supra* note 13, at 104.

22. *Id.* Here are some typical cases included in police reports:

A husband threatened to kill his wife then attacked her with a knife. In the ensuing struggle he fell on his own weapon and bled to death.

The person who ended up the victim was the one who had started a barroom shoving match. His friends tried to break up the fight, but he persisted. Finally the tide turned, and the aggressor was knocked down; he hit his head on the floor and died from his injuries.

A man demanded money that he believed was owed to him. The other man maintained that he had repaid the debt and, incensed over the accusation, drew a knife. The creditor pulled out a gun and shot him as he lunged.

*Id.*

23. See *id.* at 106 (reporting findings of the NCCPV based on police files from seventeen American cities regarding victims’ shared responsibility with the offender in murders, aggravated assaults, forcible rapes, and robberies).

24. Victim precipitation was defined as a situation in which, in the case of a homicide, the killed person was the first to resort to force; in the case of an aggravated assault, the seriously injured person was the first to use physical force or offensive language and gestures; in the case of an armed robbery, the victim “clearly had not acted with reasonable self-protective behavior in handling money, jewelry, or other valuables”; and, in the case of a rape, the victim “at first agreed to sexual relations, or clearly invited them verbally and through gestures, but then retracted before the act.” Karmen, *supra* note 13, at 106-07, citing National Commission on the Causes and Prevention of Violence, *Crimes of Violence* (1969), and D. Mulvihill et al., National Commission on the Causes and Prevention of Violence, *The Offender and His Victim* (Staff Report) (1969).

25. *Id.* See *id.* at 106-07 (showing that victim precipitation accounted for 22%

Further studies have expanded on the results of the NCCVP and other research.<sup>26</sup> Some researchers have found victim precipitation rates to be as high as 49 to 67% when victim precipitation was defined as any situation in which provocative behavior of the victim played an important role in the perpetrator's decision to act<sup>27</sup> or encouraged the offender into a progression of violence.<sup>28</sup> In an examination of homicides preceded by "hard drinking, weapon possession, insulting banter, and displays of physical toughness,"<sup>29</sup> a researcher concluded that "distinctions between victims and offenders are often blurred and [are] mostly a function of who got whom first, with what weapon, how the event was reported, and what immediate decisions were made by the police."<sup>30</sup>

In addition to theoretical constructs and investigations of reported crimes, victimologists conducted numerous polls of public opinion. The polls—predictably—discovered that people in general, and jurors in particular, assign significant weight to victims' behavior prior to the crime.<sup>31</sup> According to a famous study of juries, one of the main instances in which juries apply the power of nullification to acquit the defendant is when they take into account the contributory fault of the victim.<sup>32</sup> Moreover, research has shown that evidence of the victim's conduct affects all stages of a criminal proceeding:

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of all murders, 14% of all aggravated assaults, 11% of all robberies and 4% of all forcible rapes).

26. See generally R.N. Antilla, *Victimology: A New Territory in Criminology*, in *Victimology: A New Focus* 5-14 (Israel Drapkin & Emilio Viano eds., 1974); Hans Toch, *Violent Men* (1969); David B. Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtues of Tarasoff*, 2 *Int'l J.L. & Psychiatry* 1-28 (1979); Eric P. Baumer et al., *The Role of Victim Characteristics in the Disposition of Murder Cases*, 17 *Just. Q.*, 281, 297 (2000).

27. T. A. Silverman, *Victim Precipitation: An Examination of the Concept*, in *Victimology: A New Focus*, supra note 26, at 99-112.

28. N.H. Arison, *Victims of Homicide*, in *Victimology: A New Focus*, supra note 26, at 55-68.

29. Cluster, supra note 11, at 163.

30. Lynn A. Curtis, *Victim Precipitation and Violent Crime*, 21 *Soc. Probs.* 594, 597 (1974).

31. One reason people may "blame the victim" lies in their need to believe that the world is just and innocent people do not become victims of crime. Therefore, if a person is victimized, he must be partially responsible for his own plight. See generally Melvin J. Lerner, *The Desire for Justice and Reactions to Victims*, in *Altruism and Helping Behavior* 205 (Jacqueline Macaulay & Leonard Berkowitz eds., 1970).

32. Harry Kalven, Jr. & Hans Zeisel, *The American Jury 193-347* (1966).

Offenders who kill the victim in response to a physical attack are less likely to be prosecuted; if they are prosecuted, they are less likely to be indicted; and if they are indicted, they are less likely to be convicted of the most serious indictment charge rather than a reduced charge.<sup>33</sup>

When a homicide victim initiates violence, less blame is attributed to the offender, even when the situation does not support a claim of self-defense.<sup>34</sup>

It thus appears that sociological theories, factual findings and the views of the public all reflect the same intuition; i.e., the victim's own behavior matters. It is often a relevant "but for" cause and even a proximate cause of a crime. In other words, victims may be *partly responsible* for their own injury or loss. What about the law? Does it account for victims' conduct and does it weigh the fault of the defendant against the fault of the victim?

In private law, the answer is clearly "yes." In contracts, a material breach by one party serves as a complete defense to the following breach by the other. In torts, the closest relative to criminal law, long-established doctrines of comparative fault and assumption of risk<sup>35</sup> effectively provide that the scope of the defendant's liability depends on the injured party's own acts. The development of tort law doctrine from contributory fault to comparative fault has eliminated the unfairness of denying recovery to a partially faulty victim and marked a big step toward a more contextualized view of a victim-perpetrator interaction. Tort law's "no duty" rules, as applied to plaintiffs, guard against penalizing the victim in a situation in which the victim might have acted stupidly or reprehensibly but did not violate a legal duty.<sup>36</sup> For

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33. Baumer et al., *supra* note 26, at 303.

34. *Id.*

35. Under the recently adopted Restatement (Third) of Torts: Apportionment of Liability, § 3, the assumption of risk defense has been abolished as an independent doctrine that bars a faulty plaintiff's recovery and instead is integrated into the doctrine of comparative fault. See Restatement (Third) of Torts: Apportionment of Liability, § 3 cmt. c (1999).

36. See, e.g., *id.* at cmt. d (proposing plaintiff no-duty rules); *Hennessey v. Pyne*, 694 A.2d 691 (R.I. 1997) (holding that, by living near a golf course, a homeowner does not assume the risk of being injured by a negligent duffer); *Lynch v. Scheininger*, 744 A.2d 113 (N.J. 2000) (concluding that a woman cannot be charged with fault for conceiving a child even if she knows that, due to a physician's negligence, it is risky to do so); *Hutchinson ex. rel. Hutchinson v.*

instance, a driver has no duty to lock his car. Therefore, the fact that the plaintiff carelessly left his car keys in the ignition does not diminish his recovery against a car thief.

Criminal law, on the other hand, has explicitly rejected<sup>37</sup> the idea of contributory fault.<sup>38</sup> Courts are unanimous that, unless it is *the sole* proximate cause of the resulting harm, the victim's conduct is irrelevant.<sup>39</sup> This

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Luddy, 763 A.2d 826, 848-49 (Pa. Super. Ct. 2000) (holding that a victim of sexual assault had no duty to avoid being harmed and that even negligent defendant could not raise the plaintiff's comparative negligence as a defense). See also Dan B. Dobbs, *The Law of Torts* 503 (2001) (explaining that plaintiff no-duty cases are "cases in which the plaintiff has a liberty (or right) to be free from constraints imposed by the defendant"); Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 Colum. L. Rev. 1413, 1478-83 (1999) (advocating complete plaintiffs' no duty rule in civil rape cases).

37. See, e.g., *State v. Crace*, 289 N.W.2d 54, 59 (Minn. 1979) ("It is well settled that the contributory negligence of the victim is never a defense to criminal prosecution."). It has been said that there is a near universal rule that a victim's own negligence is not a defense in a criminal prosecution. See *People v. Tims*, 534 N.W.2d 675, 681 n.6 (Mich. 1995), citing *State v. Malone*, 819 P.2d 34 (Alaska Ct. App. 1991) (the victim's contributory negligence was no defense to criminal negligence); *People v. Lett*, 177 P.2d 47 (Cal. Ct. App. 1947) (the victim's contributory negligence was no defense to vehicular manslaughter); *People v. Maire*, 705 P.2d 1023 (Colo. Ct. App. 1985) (the victim's contributory negligence was no defense to vehicular homicide); *Deshazier v. State*, 271 S.E.2d 664 (Ga. Ct. App. 1980) (unless it was unforeseeable, the negligence of the victim is no defense in drunk driving homicide); *State v. Taylor*, 177 P.2d 468 (Idaho 1947) (the victim's contributory negligence was no defense to drunk driving vehicular manslaughter); *State v. Plaspohl*, 157 N.E.2d 579 (Ind. 1959) (the victim's contributory negligence was no defense to reckless homicide prosecution arising out of a drag race); *State v. Moore*, 106 N.W. 16 (Iowa 1906) ("contributory negligence, if shown, is never a defense or excuse for a crime"); *State v. Betts*, 519 P.2d 655 (Kan. 1974) (the victim's contributory negligence was not a defense to drunk driving vehicular manslaughter); *Wilson v. State*, 536 A.2d 1192 (Md. Ct. Spec. App. 1988) (the decedent's intoxication was not a defense to vehicular manslaughter); *State v. Kliegel*, 674 S.W.2d 64 (Mo. Ct. App. 1984) (the victim's negligence was no defense to vehicular manslaughter); *State v. Rotella*, 246 N.W.2d 74 (Neb. 1976) (the victim's negligence was no defense to vehicular homicide); *State v. Phelps*, 89 S.E.2d 132 (N.C. 1955) (the victim's negligence was no defense to vehicular homicide); *Williams v. State*, 554 P.2d 842 (Okla. Crim. App. 1976) (the victim's contributory negligence was not a defense to negligent homicide with a vehicle); *Commonwealth v. Long*, 624 A.2d 200 (Pa. Super. Ct. 1993) (the victim's intoxication was not a defense to homicide); *State v. Dionne*, 442 A.2d 876 (R.I. 1982) (unless it amounts to an independent intervening cause, the victim's conduct is irrelevant).

38. In this article, when used in connection with criminal law, the term "contributory fault" is used in its most general sense, as any act of the victim that precipitated the crime, and not as an antonym of "comparative fault."

39. See, e.g., *Tims*, 534 N.W.2d at 682 (holding that "defendant's conduct need only be 'a' proximate cause of death" over the dissent's view that, for defendant's conviction, his conduct has to sufficiently dominate the other contributing factors); *Dionne*, 442 A.2d at 887 (unless it amounts to an independent

declaration, however, is not quite accurate. Several criminal law doctrines do not fit within the declared paradigm. The most prominent among those are the doctrines of consent, self-defense, and provocation.

## *B. Victims in Criminal Law*

### 1. Consent

The victim's<sup>40</sup> consent to a perpetrator's act is one situation in which the victim's behavior dramatically changes the nature of the perpetrator's criminal liability. The law looks upon the same actions very differently depending on whether they are consensual or not:

What is called a "fond embrace" when gladly accepted by a sweetheart is called assault and battery when forced upon another without her consent; the act of one who grabs another by the ankles and causes him to fall violently to the ground may result in a substantial jail sentence under some circumstances, but receive thunderous applause if it stops a ball carrier on the grid-iron.<sup>41</sup>

In most instances, consent either negatives an element of the offense or justifies a nominally criminal act.<sup>42</sup> A person is not guilty of rape, kidnapping, theft, and many other serious crimes, if what he did was based on a legally

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intervening cause, the victim's conduct is irrelevant). Note, however, that victim compensation statutes provide compensation only to "innocent" victims. See Dubber, *supra* note 7, at 315-23 (discussing the meaning of innocence requirement in victim compensation statutes).

40. The term "victim" in the context of valid consent is somewhat of a misnomer; here it is used for the consistency of the terminology to mean an individual who has suffered either (i) no harm at all (that is the case when consent negatives an element of the offense) or (ii) an injury to person or property to which the individual consented (that is the case when consent is a defense). For example, no harm occurs in the case of consensual sex, whereas, when a participant of a boxing match is badly beaten, harm still occurs but it is justified by the boxer's consent.

41. Rollin Perkins, *Criminal Law* 962 (2d ed. 1969).

42. See, e.g., Model Penal Code § 2.11 (Official Draft and Revised Comments 1980) (providing that consent is a defense "if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense").



valid consent.<sup>43</sup> To be valid, consent has to be voluntary, i.e., freely given and informed.<sup>44</sup> Consent obtained by duress or fraud regarding the nature of the perpetrator's act does not count.<sup>45</sup> Certain groups of people (children, mentally ill, intoxicated) are deemed incapable of issuing valid consent to a specific agreement due to some internal deficiencies.<sup>46</sup> For example, minors' consent to sex is legally invalid.<sup>47</sup>

Yet, with respect to some acts, society does not recognize even the possibility of valid consent. A commentary to the Model Penal Code (MPC) lists a number of offenses to which an individual may not consent. The most prominent among them is homicide—the victim's consent to be killed is never a complete justification for the

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43. See *id.* § 2.11 cmt. 1 (noting that, for many crimes, including rape, false imprisonment and criminal trespass, “it is essential to the commission of the crime that there be an unwilling victim of the actor's conduct”). See also Leo Katz, *Ill-Gotten Gains* 147 (1996) (“If consented-to, the taking isn't theft, the intercourse isn't rape, the tackling isn't battery, even the killing may not be murder.”).

44. Consent may be treated differently, depending on whether it is a defense (e.g., consent to assault in a boxing match) or its absence constitutes an element of an offense (e.g., larceny, rape). See George P. Fletcher, *The Right Deed for the Wrong Reason*, 23 *UCLA L. Rev.* 293, 318-21 (1975) (arguing that, when the absence of consent is an element of an offense, even uncommunicated consent releases the actor from liability; however, when consent serves as a defense, the actor must be aware of it).

45. The law usually distinguishes between fraud in the factum (fraud regarding the fact itself) and fraud in the inducement (fraud regarding a collateral matter). Consent is legally invalid only in the first case. See, e.g., Perkins & Boyce, *Criminal Law* 1079 (3d ed. 1982). The authors explain:

If deception causes a misunderstanding as to the fact itself (fraud in the factum) there is no legally recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as any other consent, so far as direct and immediate legal consequences are concerned, if the deception relates not to the thing done but merely to some collateral matter (fraud in the inducement).

*Id.*

46. 3 Joel Feinberg, *The Moral Limits of Criminal Law: Harm to Self* 316 (1988) [hereinafter *Harm to Self*] (“If he is so impaired or undeveloped cognitively that he doesn't really know what he is doing, or so impaired or undeveloped volitionally that he cannot help what he is doing, then no matter what expression of assent he may give, it will lack the effect of genuine consent.”).

47. See, e.g., Model Penal Code § 213.1 cmt. 6 (Official Draft and Revised Comments 1980) (explaining that, at least for sex with pre-pubescent children, strict liability is appropriate because “[t]hey are plainly incapable of giving any kind of meaningful consent to intercourse and manifestly inappropriate objects of sexual gratification”).



perpetrator.<sup>48</sup> Other offenses include riot, escape, breach of the peace, bribery, and bigamy.<sup>49</sup>

Interestingly, the reasons for denying the defense of consent in the case of homicide have little in common with the reasons for denying the defense in the case of these other offenses. If we look closely at the group of offenses from riot to bigamy, it will be clear why consent may not work as a defense. There is simply no identifiable victim who would be able to give consent and thus legitimize the defendant's conduct. Or, put differently, the victim is the general public, and the general public has already spoken out by adopting a law proscribing the respective behavior.

Homicide is unlike that. There is a specific victim in each act of homicide, the person who was killed. Therefore, it is not the lack of a subject capable of waiving his rights that explains why homicide may not be consented to. The explanation is probably partly historical and partly pragmatic. Historically, it can be explained by the influence on criminal law of Christianity and Christian moral philosophy that did not view the life of an individual as his own.<sup>50</sup> Suicide was a crime; therefore, the victim of a consented killing was, in fact, the perpetrator's co-conspirator and accomplice. Naturally, consent of a co-felon did not suffice to obliterate the criminal nature of the act. This logic, however, does not work today since, in the overwhelming majority of states, suicide is no longer a crime.<sup>51</sup> Accordingly, there is a strong argument that

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48. See, e.g., 40 Am. Jur. 2d Homicide art. 105 (“[I]t is the rule that, in a prosecution for homicide, consent of the deceased is no excuse. The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable.”) (footnotes omitted); Model Penal Code § 2.11 cmt. 1 (Official Draft and Revised Comments 1980) (pointing out that consent to homicide “does not operate to prevent consummation of the crime”). See also 3 James Stephen, *A History of the Criminal Law in England* 16 (1883) (observing that consent to one's own death “is wholly immaterial to the guilt of the person who causes it”).

49. Model Penal Code § 2.11 cmt. 1 (Official Draft and Revised Comments 1980).

50. See 1 William Blackstone, *Commentaries On The Laws of England* 133 (1904) (noting that one's natural life, being “the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority”).

51. See 2 Wayne R. LaFare, *Substantive Criminal Law* § 15.6, 543 n.3 (2d ed. 2003) (“No state has a statute making successful suicide a crime.”). Suicide is apparently still a common law crime in Virginia, Rhode Island and, possibly, Illinois. See *Wackwitz v. Roy*, 418 S.E.2d 861, 864 (Va. 1992); *Clift v.*

assisting in a legal act should not be a crime either.<sup>52</sup>

The other explanation for invalidating consent to homicide is not entirely logical either. It deals with the fear of abuse and manipulation of people in a situation or state of mind when they are not capable of making rational choices of that magnitude. These concerns ought not to be lightly discarded.<sup>53</sup> It is, however, important to distinguish a rule from an abuse of that rule. The abuse is something

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Narragansett Television L.P., 688 A.2d 805, 808 (R.I. 1996); *Burnett v. People*, 68 N.E. 505, 509-11 (Ill. 1903).

The Supreme Court has held that there is no constitutionally protected right to commit suicide. See *Wash. v. Glucksberg*, 521 U.S. 702, 714; 736 (1997) (Ginsburg concurring) (“The Court frames the issue in [this case] as whether the Due Process Clause of the Constitution protects a ‘right to commit suicide which itself includes a right to assistance in doing so, . . . and concludes that our Nation’s history, legal traditions, and practices do not support the existence of such a right.’”). At the same time, the Court has held that an individual has a constitutionally protected right to refuse lifesaving hydration and nutrition. See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 279 (1990) (“[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”). It thus appears that the Constitution, as interpreted by the current Supreme Court, protects only some forms of suicide. Sadly enough, in this interpretation, it protects more barbaric forms (starving to death) and excludes more humane ones (a lethal injection).

52. In addition, a view according to which the right to life may be forfeited (where the death penalty is authorized by law) but not voluntarily alienated leads to a paradoxical result. A person wishing to die can achieve that only by murdering someone else and thus forfeiting the right that keeps him away from the desired death. And a person wishing to die with someone else’s help can receive that help but only from one person, his executioner. Joel Feinberg was right when he warned:

Those who believe in the inalienability of the right to life . . . might well think twice before enforcing its forfeitability. . . . Whenever the right in question can be thought of as burdensome baggage, it cannot be made inalienable *and* forfeitable without encouraging wrongdoing—the pursuit of relief through “error, fault, offense, or crime.”

Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 *Phil. & Pub. Aff.* 93, 112 (1978) [hereinafter *Voluntary Euthanasia*].

53. See *Glucksberg*, 521 U.S. at 731-32 (observing that “the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes”). See generally Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 *U. Rich. L. Rev.* 1 (1996) (opposing euthanasia and physician assisted suicide both on moral and practical grounds). The authors observe that “[i]llness is a quintessential state of vulnerability; it entails a loss of confidence in one’s body and one’s future.” *Id.* at 28. They also express concern that physicians may influence their patient’s choice. “Through their tone, the encouragement they provide or withhold, and the way they present the information available, physicians can often determine the patient’s choice.” *Id.* at 28-29 (emphasis and footnote omitted).

that is *not* the rule, that is *outside* of the rule. After all, anything, even a good thing, can be abused and turned into a bad thing, but this is not a reason to prohibit the good thing itself. Sexual abuse, for instance, is a bad thing but we do not criminalize sex because of that. In other words, when the reason for a law lies in uncertainty regarding the validity (voluntariness and rationality) of an individual's consent, the law should be directed at those uncertainties by demanding persuasive proof of the valid consent and not by taking away the right to give it.<sup>54</sup>

However, even without homicide, there remains a group of offenses to which a person may not consent.<sup>55</sup> That happens when the law makes the waived right inalienable or does not recognize it at all. For instance, one may not lawfully agree to be maimed or tortured to death.<sup>56</sup> To what extent these restrictions are justified is a question open for debate.

On the one hand, the liberal tradition with its emphasis on personal autonomy opposes criminal limitations on the decision-making power of rational adult citizens if their actions do not directly harm others.<sup>57</sup> On the other hand, considerations of human dignity support an intuition shared by many that not any consensual conduct

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54. See, e.g., Norman L. Cantor, A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, 26 Rutgers L. Rev. 228, 261 (1973) ("So long as careful attention is paid to the capacity of a person to request euthanasia, there is a large gap between voluntary euthanasia and involuntary elimination of social misfits."); Franklin G. Miller et al., Regulating Physician-Assisted Death, 331 New Eng. J. Med. 119, 120 (1994) (arguing in favor of legitimizing voluntary euthanasia upon adoption of "clear criteria, rigorous procedures, and adequate safeguards" protecting individuals' right to decide for themselves).

55. See Harm to Self, *supra* note 46, at 172 (listing, among prohibited two-party transactions, agreed-upon surgical mutilation, drug sales, bigamy, and prostitution).

56. Voluntary Euthanasia, *supra* note 52, at 104-10, 118-23 (distinguishing mandatory, duty-like rights from discretionary rights).

57. See e.g., John Stuart Mill, On Liberty, ch. IV, ¶¶ 10-11 (1869).

Whenever . . . there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law. But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.

Id.

should be permitted.<sup>58</sup> A recent German case in which the victim responded to an Internet ad for a “young well-built man who wants to be eaten”<sup>59</sup> may serve as an example of such problematic consent. Resolving this dilemma is beyond the scope of this article. It may be worth noting, however, that normally society is more justified in criminalizing harmful behavior that, arguably, serves no rational purpose. In this sense, one’s decision to avoid the pain and suffering of an advanced terminal disease by consenting to homicide is distinguishable from one’s wish to have a part of his body cut off and fried as a snack.<sup>60</sup>

Regardless of where the law draws the line of recognized consent, courts have a duty to determine that consent has been given voluntarily. The more risky is the conduct and the more irrevocable is the risked harm, the greater degree of voluntariness should be required.<sup>61</sup> Particularly dangerous or irreparable decisions (e.g., consensual homicide) may even be presumed involuntary until proven otherwise.<sup>62</sup>

Naturally, if the victim’s consent is legally invalid (either because society does not recognize an individual’s right to consent to a certain act or because consent is not fully voluntary), it does not exonerate the perpetrator. In all other circumstances, voluntary consent of the victim should, and usually does, serve as a defense to the perpetrator’s actions. Even when harm is as grave as death, the victim’s cooperative conduct often reduces the perpetrator’s criminal liability. For example, the victim’s consent is viewed as a mitigating circumstance for the purposes of capital punishment both by the MPC and the

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58. See e.g., Meir Dan-Cohen, *Harmful Thoughts* 150 (2002) (arguing that the main goal of criminal law, mandated by the dignity principle, is to defend the unique moral worth of every human being).

59. See e.g., Michael Cook, *Moral Mayhem of Murder on the Menu*, *Herald Sun* (Melbourne, Australia), Jan. 15, 2004, at 17.

60. *Id.*

61. See *Harm to Self*, *supra* note 46, at 117-21.

62. *Id.* at 124-27.

In the cases of “presumably nonvoluntary behavior,” what we “presume” is either that the actor is ignorant or mistaken about what he is doing, or acting under some sort of compulsion, or suffering from some sort of incapacity, *and* that if that were not the case, he would choose not to do what he seems bent on doing now.

*Id.* at 124.

majority of jurisdictions that impose the death penalty.<sup>63</sup>

In sum, in all instances where (a) there is an identifiable victim (b) capable of giving legally valid consent and (c) in fact, voluntarily consenting to a perpetrator's act that infringes on some legally recognized right of the victim, the law, at least partially, takes that consent into account to reduce the perpetrator's liability.

## 2. Self-Defense

A whole group of defenses (self-defense, defense of another and defense of property) are based on the unlawful harm about to be inflicted on the defendant by the putative victim. Is the aggressor-victim the proximate cause of his own death or injury? Certainly not. The perpetrator quite intentionally chose to use preventive force, including deadly force, against the perceived harm or threat of harm. Nevertheless, all state laws as well as the MPC completely exonerate the perpetrator who reasonably defended himself or another. Since this group of defenses is based on a single rationale, this article focuses on self-defense as a characteristic representative of the group.

What a person may do in self-defense depends to a large degree on what the aggressor attempted to do to that person; i.e., the scope of justified behavior is fundamentally

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63. See *infra* notes 189-197 and the accompanying text. In addition, the MPC, as well as the codes or common law of most states, regards assistance in a suicide as a lesser offense than murder. Cf., e.g., Model Penal Code §§ 210.2, 210.5 (Official Draft and Revised Comments 1980) (murder is a felony of the first degree whereas causing or aiding suicide is a felony of the second degree). See also Pain Relief Promotion Act of 1999, H.R. Rep. No. 106-378, pt. 1, at 4 n.11 (1999). Numerous states treat assisting a suicide as manslaughter rather than murder. See, e.g., Alaska Stat. § 11.41.120(a)(2) (Michie 2002) (defining intentionally aiding another to commit suicide as manslaughter); Ariz. Rev. Stat. § 13-1103(A)(3) (2001) ("A person commits manslaughter by . . . [i]ntentionally aiding another to commit suicide"); Ark. Code Ann. § 5-10-104(a)(2) (Michie 1997) (treating purposefully causing or aiding another to commit suicide as manslaughter); Cal. Penal Code § 401 (West 1999) (distinguishing assisted suicide from murder); Colo. Rev. Stat. § 18-3-104 (West 1999) (treating intentionally causing or aiding another to commit suicide as manslaughter); Conn. Gen. Stat. § 53a-56(2) (2001) ("A person is guilty of manslaughter in the second degree when . . . he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide."); Haw. Rev. Stat. Ann. § 707-702(1)(b) (Michie 2003) ("A person commits the offense of manslaughter if . . . [h]e intentionally causes another person to commit suicide.).

determined by the acts of the victim. For instance, the use of deadly force is only permitted in the face of death, serious injury, forcible rape, or kidnapping.<sup>64</sup> However, it would be clearly inappropriate to use deadly force in an attempt to prevent a car theft. In allocating rights between the person acting in self-defense and the victim-aggressor, the law looks at the conduct of both parties. The majority of the states, for example, deny the initial aggressor the right to defend himself even when his minor attack was met by a grossly excessive response.<sup>65</sup>

What matters for self-defense is the kind of threat posed by the victim-aggressor, not his moral or legal culpability. Thus, an unoffending party may be justified if he kills a child or an insane assailant attacking him with a handgun.<sup>66</sup> He may be also justified if he kills a person who attacks him in mistaken self-defense, erroneously believing that she is about to be attacked by him. Moreover, he may be justified even if he kills a sleepwalking aggressor, i.e., someone who has committed no voluntary act at all.<sup>67</sup> Of course, each of these cases assumes that no less drastic alternative was available.

Although a person may be justified in killing an innocent *aggressor*, he is never justified in killing an innocent *bystander*—even if this is the only way to save his own life. In fact, he may not defend himself against a deadly aggressor, if by doing so he will have to kill an innocent bystander.<sup>68</sup> These examples show that what distinguishes permissible self-defense from impermissible is the actions of the victim—the defendant's liability depends on whether or not the victim has attacked him.

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64. See Model Penal Code § 3.04(2)(b) (Official Draft and Revised Comments 1980).

65. See Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* § 5.7(e) (2d ed. 1986).

66. See, e.g., George Fletcher, *Rethinking Criminal Law* § 10.5, at 869-70 (1978); George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *Isr. L. Rev.* 367, 375 (1973) (arguing that self-defense killing of innocent aggressors is justified); Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 *Ethics* 252, 256-85 (1994) (discussing various justificatory theories of killing an innocent aggressor in self-defense).

67. See discussion in section III.B.2 below.

68. See Larry Alexander, *Propter Honoris Respectum: A Unified Excuse or Preemptive Self-Protection*, 74 *Notre Dame L. Rev.* 1475, 1482 (1999) [hereinafter *Unified Excuse*].

The case of innocent aggressors should be distinguished from the case of innocent actors who are mistakenly perceived by the defendant as aggressors. All criminal codes grant a mistaken defender the defense of justification, so long as the mistake was “reasonable.”<sup>69</sup> In addition, many states recognize “imperfect self-defense” and partially excuse actors who killed another under an unreasonable belief that the circumstances justified the killing.<sup>70</sup> The MPC justifies all acts of self-defense, reasonable or unreasonable, based on mistaken but sincere beliefs, although the defender may be liable for the negligent or reckless use of force if his beliefs were held negligently or recklessly.<sup>71</sup>

In my view, it is more appropriate, however, to characterize any mistaken self-defense as excused rather than justified.<sup>72</sup> Justification means that, in addition to

69. *Id.* at 1483.

70. See Joshua Dressler, *Understanding Criminal Law* 231 (3d ed. 2001) (discussing imperfect self-defense).

71. Model Penal Code § 3.09(2) (Official Draft and Revised Comments 1980).

72. See, e.g., Fletcher, *Rethinking Criminal Law*, *supra* note 66, at 696-97, 762-69 (arguing that even a reasonable mistake regarding the presence of justifying conditions negates justification); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 *Colum. L. Rev.* 199, 239-40 (1982) (arguing that mistaken self-defense should be treated as an excuse rather than a justification); Unified Excuse, *supra* note 68, at 1483-84 (supporting Robinson’s argument). Alexander has persuasively argued that mistaken self-defense may not be viewed as a justification:

If this were not the case—if, instead, the law took seriously its characterization of the mistaken self-defender as “justified” and his use of force as legally “privileged”—a third party, seeing A about to employ force against an innocent B because of a mistaken belief that B was attacking him, would be justified in coming to the mistaken A’s rather than the innocent B’s aid. Indeed, on one reading of the Model Penal Code, B himself could not use self-defensive force against A because A’s use of force against B would be “privileged.”

*Id.* at 1484 (footnote omitted).

For an opposite view, see, e.g., Kent Greenawalt, *Distinguishing Justifications From Excuses*, 49 *Law & Contemp. Probs.* 89, 102 (1986) (arguing that “the actor’s blameless perception of the facts ought to be sufficient to support a justification”); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897, 1909-09 (1984) (arguing that a reasonable mistake should be justified because the actor’s harmful conduct was warranted); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 *UCLA L. Rev.* 61, 92-95 (1984) (critiquing Fletcher’s theory of justification and excuse for, among other things, denying justification to a reasonably mistaken actor). See also Thomas Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 *J. Crim. L. & Criminology* 277, 289-90 (1986) (proposing an



having the required state of mind, the actor was *objectively right* in what he did, whereas excuse focuses on the actor's inability to make the right choice under the circumstances and forgives him for the wrong he has committed. The victim's conduct may be a mitigating consideration primarily under the justificatory rationale—we look to the victim's conduct to determine whether the defendant was right in his response to it. Specifically, in self-defense, we assign the responsibility for the resulting harm to the aggressor. But if the defendant made a mistake and there was no aggressor, how can we say that the defendant was “right”?

Certainly, we cannot blame a defendant who, through no fault of his, lacked the necessary information. Due to the cognitive impairment, he was not a fully responsible agent, just like children or the insane, through no fault of theirs, are not fully responsible agents. For the same reason, consent given by minors, mentally-ill, or ill-informed individuals is legally invalid. A reasonably-mistaken person is perhaps the most sympathetic kind of a defendant. However, our understanding of his predicament does not change the fact that we exculpate him due to his objectively limited understanding of the circumstances, assuming that he would have behaved differently had he known the true facts.

For this reason, I believe it is conceptually more accurate to analyze mistaken self-defense as excuse rather than justification. Although the perpetrator may have numerous grounds for mitigating his fault, both justificatory and excusatory, only the actual attack by the victim presents grounds for moral approval (or at least acceptance but not merely forgiveness) of the perpetrator's act. Accordingly, only proper self-defense is discussed in this article.

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alternative way of treating reasonable mistakes as “justified wrongs”); Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 *Wake Forest L. Rev.* 707, 766-71 (1990) (attempting to reconcile Greenawalt's and Dressler's views with those of Fletcher and Robinson and proposing a theory of responsibility that treats reasonable mistakes as an excuse but denies wrongfulness of the actor's conduct).

### 3. Provocation

The defense of provocation, or “heat of passion,”<sup>73</sup> is another illustration of the impact the victim’s behavior may have on the perpetrator’s criminal liability. This defense mitigates what otherwise would be murder to manslaughter and is available to someone who killed in the heat of passion following a serious provocation. This partial defense is incorporated in all state laws as well as the MPC.

This defense has been the subject of ongoing academic debate as to why the law treats a killing more leniently when it is provoked. Do we reduce the defendant’s punishment because of his subjective state of mind (“extreme mental or emotional disturbance,” using the words of the MPC<sup>74</sup>) or because the victim’s own wrongful acts make the victim partially responsible for the suffered harm<sup>75</sup>; i.e., is this defense a partial excuse or a partial justification?<sup>76</sup> In this section, I argue that provocation is largely (although not exclusively) a partial defense of justification. Therefore, this is another circumstance in which the existing law takes the victim’s behavior into account when determining the perpetrator’s criminal liability.

We need to start with a more general question, however. What does it mean to say *partial* justification? Normally, justified conduct is that which “the law does not

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73. See Model Penal Code §210.3(1)(b) (Official Draft and Revised Comments 1980) (“Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”). See also id. §210.3 cmt. 3 (noting that the MPC has significantly enlarged “the class of cases which would otherwise be murder but which could be reduced to manslaughter under then existing law because the homicidal act occurred in the ‘heat of passion’ upon ‘adequate provocation.’”).

74. Id. §210.3(1)(b).

75. See John Langshaw Austin, A Plea for Excuses, 57 Proc. Aristotelian Soc’y. 1, 2-3 (1956-1957), reprinted in Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Process* 750 (7th ed. 2001) (“Is [the provoker] partly responsible, because he roused a violent impulse or passion in me, so that it wasn’t truly or merely me acting ‘of my own accord’ (excuse)? Or is it rather that, he having done me such injury, I was entitled to retaliate (justification)?”).

76. See id. (“In the one defence, . . . we accept responsibility but deny that it was bad: in the other, we admit that it was bad but don’t accept full, or even any, responsibility.”).

condemn, [and] even welcomes.”<sup>77</sup> It is “a good thing, or the right or sensible thing, or a permissible thing to do.”<sup>78</sup> When conduct is justified, the message the law sends is clear: you did the right (or at least a permissible) thing; if ever in similar circumstances, you may do it again.<sup>79</sup> That message works well for *complete* defenses of justification, such as self-defense or necessity. But what is the message contained in a *partial* justification? May you do what you did again? The answer is certainly “no,” since a partial defense only mitigates but does not completely eliminate the wrongfulness of a criminal act.

That answer has led some scholars to reject the very possibility of a partial justification. If certain conduct is wrongful, how can it be justified, even partially, asks Suzanne Uniacke.<sup>80</sup> In Uniacke’s view, a partial defense can only be excusatory.<sup>81</sup> I disagree with that argument. The fact that, despite a valid defense, we still condemn the defendant’s act means only that his defense is partial; it does not determine the nature of the defense.

Much more persuasive is Douglas Husak in his analysis of defenses in the context of theories of punishment. It is usually accepted that “justifications and excuses are *desert-based* rationales for reducing the severity of the defendant’s sentence.”<sup>82</sup> A complete justification reduces the wrongfulness of an act, whereas a complete excuse reduces the blameworthiness of an actor, in both instances to such a degree<sup>83</sup> that the actor’s

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77. H.L.A. Hart, *Punishment and Responsibility* 13 (1968).

78. John Langshaw Austin, *A Plea for Excuses*, in *Freedom and Responsibility* 6 (Herbert Morris ed., 1961).

79. For contrasting views as to whether justification applies only to the “right” or also to the “tolerable” conduct, see, e.g., George Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 *UCLA L. Rev.* 1355, 1358-59 (1979) (arguing that conduct that is merely permissible or tolerable is not justified); and Dressler, *supra* note 72, at 81-87 (arguing that justification should apply to the “tolerable” as well as the “right” conduct).

80. Suzanne Uniacke, *Permissible Killing: The Self-Defense Justification of Homicide* 13 (1996).

81. *Id.* at 14 (opining that the fact that a successful plea of provocation results in conviction of an offense is sufficient to identify provocation as an excuse).

82. Douglas N. Husak, *Partial Defenses*, 11 *Can. J.L. & Jurisprudence* 167, 169 (1998).

83. Even in cases of complete justification, wrongfulness of an act may be above zero. See, e.g., *id.* at 172 (“No one who believes that killings in self-defense are completely justified need suppose that the quantum of wrongfulness in all such killings is equivalent to that in, say, scratching one’s head.”).

behavior does not merit punishment.<sup>84</sup> That same logic applies to partial defenses, only the degree to which the wrongfulness of an act or the culpability of an actor is reduced does not eliminate liability altogether; instead the liability is mitigated.<sup>85</sup> A partial justification, therefore, renders the *act less wrongful* and a partial excuse renders the *actor less blameworthy* compared to what they would have been in the absence of the mitigating circumstance.<sup>86</sup>

In light of that, is provocation a partial justification or a partial excuse? For the majority of scholars who have addressed the subject, it is the latter.<sup>87</sup> Joshua Dressler who, over the course of twenty years, has authored a number of insightful writings analyzing the defense of provocation and arguing against its abolition,<sup>88</sup> maintains that society places too high a value on human life to justify, even partially, an intentional killing of a mere wrongdoer.<sup>89</sup>

This conclusion is rather doubtful. There are circumstances when the law partially justifies a homicide based on something done by the decedent prior to death. For example, assisted suicide is a lesser offense than murder under both the MPC and the codes or common law of most states.<sup>90</sup> The victim's consent to, or participation

84. *Id.* at 170.

85. *Id.*

86. *Id.*

87. See, e.g., Uniacke, *supra* note 80, at 13 (noting that the usual interpretation of provocation is excusatory); V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. Pa. L. Rev. 1691, 1717 (2003); Kyron Huigens, *Homicide in Aretaic Terms*, 6 Buff. Crim. L. Rev. 97, 132 (2002) (noting the shift towards treating provocation as a partial excuse); Dubber, *supra* note 4, at 12 (noting that American law treats provocation as a partial excuse).

88. See, e.g., Joshua Dressler, *Rethinking Heat of Passion*, 73 J. Crim. L. & Criminology 421 (1982) [hereinafter *Rethinking Heat of Passion*]; Joshua Dressler, *Provocation: Partial Justification or Partial Excuse*, 51 Mod. L. Rev. 467 (1988); Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. Crim. L. & Criminology 726 (1995); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 Minn. L. Rev. 959 (2002) [hereinafter *Why Keep the Provocation Defense?*]. But see Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 22-24 (1984) (arguing that provocation defense should be abolished because provoked killing is not substantively different from other intentional killing).

89. *Rethinking Heat of Passion*, *supra* note 88, at 458. See also Uniacke, *supra* note 80, at 13 (completely rejecting justificatory rationale of provocation and criticizing Dressler for "conced[ing] too much to the claim that provocation functions as a partial justification").

90. See *supra* note 63 and the accompanying text.

in, the homicide is a mitigating factor for the purposes of capital punishment both under the MPC and the laws of the majority of death penalty jurisdictions.<sup>91</sup> Therefore, the high value assigned to human life is not by itself a sufficient reason to deny partial justification to the defense of provocation.

Another of Dressler's arguments is more compelling. He observes that if the "heat of passion" defense is to be explained in justificatory terms, "it must also be recognized that the title of the defense is then a misnomer."<sup>92</sup> Indeed, "[u]nder a justificatory theory, it is not the defendant's mental state but Victim's conduct, which primarily explains the rule. To be consistent, passion should not be required."<sup>93</sup>

It is true that the name "heat of passion" reflects only the subjective component of the defense—the defendant's temporary volitional impairment.<sup>94</sup> However, its other name, the defense of provocation, focuses more on the objective picture of the crime: it is the provocation by the victim that is central to the defense. Anyway, as interesting as linguistic evidence can be, "what's in a name?"<sup>95</sup>

It is perhaps more important to acknowledge that a defense does not have to be based on a single underlying principle. A product of historical tradition, political compromise, and changing cultural norms, the law often combines elements of more than one rationale. A justification defense may include an excusatory component. For example, to invoke a justification defense of necessity, the defendant has to prove, *inter alia*, that he (subjectively) believed his conduct to be necessary to avoid harm to himself or another and that the harm he caused is

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91. See *infra* notes 189-197 and the accompanying text. See also a recently proposed Indiana bill that would allow certain offenders (those sentenced to at least two hundred years or life imprisonment without parole) petition a court for the death penalty instead of incarceration, available at <http://www.in.gov/legislative/bills/2004/PDF/FISCAL/SB0492.001.pdf>.

92. Rethinking Heat of Passion, *supra* note 88, at 458.

93. *Id.*

94. That is equally true for the MPC version of the defense which focuses on the "extreme mental or emotional disturbance" of the defendant "for which there is reasonable explanation or excuse." Model Penal Code § 210.3(1)(b) (Official Draft and Revised Comments 1980).

95. William Shakespeare, *Romeo and Juliet* Act 2, Scene II (Brian Gibbons ed., 1997).

(objectively) less than the harm or evil he was able to avoid.<sup>96</sup> The presence of a subjective component does not, however, strip necessity of its justificatory nature.

The same is true with respect to the partial defense of provocation. It certainly includes a subjective component (the defendant's state of reduced self-control). However, the only emotions that are taken into account are "anger, rage, resentment, or terror"<sup>97</sup> directed at the putative victim, i.e., emotions *responsive* to an offense upon the defendant.<sup>98</sup> A number of codes, following the broader MPC version not limited to specific states of mind, require an objectively "reasonable explanation or excuse"<sup>99</sup> for the defendant's emotional disturbance. Why would the law require a reasonable explanation for the unreasonable behavior (killing)? Partly as evidence of true loss of self-control. However, if the only rationale for the mitigating defense were excusatory, it should also be available to any defendant who can prove honest but unreasonable rage (just as imperfect self-defense is available to a person who honestly but unreasonably believes that circumstances

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96. Model Penal Code § 3.02(1) (Official Draft and Revised Comments 1980). For example, if the defendant, lost in the mountains, broke into an empty house because he heard on the radio about a severe weather change, he would be entitled to the defense of necessity. If, however, he broke into the same house unaware of the impending weather change, he would not be able to use the defense despite that the weather did, in fact, change and his illegal act may, in fact, have saved his life. But see Paul Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 266, 288-91 (1975) (arguing that claims of justification should prevail regardless of the actor's state of mind). See also Fletcher, *supra* note 44, at 318-21 (arguing that justification presupposes proper intent).

97. See 40 Am. Jur. 2d, Homicide, § 49 (stating that emotions that mitigate a murder to voluntary manslaughter include "anger, rage, resentment, or terror sufficient to obscure the reason of ordinary man").

98. Responsive acts in general have less determinative value in criminal law than independent acts. A responsive intervening cause (an act that occurs in reaction or response to the wrongdoer's prior wrongful conduct) usually does not break the chain of causation and relieve the initial wrongdoer of criminal responsibility, unless the response was highly abnormal or bizarre. See Dressler, *supra* note 70, at 190.

99. Model Penal Code § 210.3(1)(b) (Official Draft and Revised Comments 1980). See Ark. Code Ann. § 5-10-104(a)(1) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-54a(a) (West 2001); Del. Code Ann. § 641 (2003); Haw. Rev. Stat. Ann. §707-702(2) (Michie 2003); Ky. Rev. Stat. Ann. §507.020(1)(a) (Michie 1999); Mont. Code Ann. §45-5-103(1) (2003); N.Y. Penal Law § 125.25(1)(a) (McKinney 2003); N.D. Cent. Code § 12.1-16-01(2) (2003); Or. Rev. Stat. §163.135(1) (2003); Utah Code Ann. § 76-5-203(4)(a)(i) (2003).

justify the killing).<sup>100</sup> The fact that the law asks not only how badly the actor was distressed but also *why* he was so badly distressed<sup>101</sup> implies that the rationale for the defense lies in the *source* of provocation, not merely the actor's disturbed state of mind.

Consider *People v. Spurlin*.<sup>102</sup> In that case, the defendant killed his wife after an intense argument over their mutual infidelities, and then killed their sleeping nine-year-old son. Assuming that Spurlin was entitled to the defense of provocation for the killing of his wife, should he have been able to claim the same defense for the killing of their child? If we believe in the excusatory "heat of passion" rationale, the answer should be "yes." Indeed, what proves the lack of self-control better than a deadly attack directed at an innocent child?

Yet, many of us would probably feel uncomfortable with that answer. After all, the intentional killing of an innocent unoffending person is an absolute taboo in the Anglo-American legal tradition. In the famous case of *Regina v. Dudley and Stephens*,<sup>103</sup> two starving men, after twenty days in a lifeboat and nine days without food, killed a boy to save their lives by feeding on his flesh. At the trial for murder, they raised necessity as their defense. Despite the court's empathy for "how terrible the [defendants'] temptation was; how awful the suffering,"<sup>104</sup> the court rejected their claim, saying that there is no defense to taking the life of another "when that other is neither attempting nor threatening [to take] yours, nor is guilty of any illegal act whatever towards you or anyone else."<sup>105</sup> Today as well, no American state recognizes necessity as a full or partial defense to murder.<sup>106</sup>

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100. See e.g., Dressler, *supra* note 70, at 231.

101. See 40 Am. Jur. 2d Homicide, § 111 ("Extreme emotional distress without legally recognized provocation will not reduce murder to manslaughter."). See also *MacEwan v. State*, 701 So. 2d 66, 69-70 (Ala. Crim. App. 1997).

102. 156 Cal. App. 3d 119 (1984).

103. 14 Q.B.D. 273 (1884), reprinted in [1881-5] All. E.R. Rep. 61.

104. *Id.* at 67.

105. *Id.* at 64.

106. See Kadish & Schulhoffer, *supra* note 75, at 825 (noting the explicit rejection of necessity as a defense to homicide by both statutes and commentators). See also LaFave & Scott, *supra* note 65, § 5.4(c) (citing no cases in which necessity has been allowed as a defense to the murder of a third party); 40 Am. Jur. 2d Homicide, §115 (noting that as a general matter "neither duress, coercion, nor compulsion are defenses to murder").

Similarly, in the vast majority of states, duress does not exonerate<sup>107</sup> or mitigate<sup>108</sup> the intentional killing of an innocent. Finally, a person may not defend himself against a deadly attack if, while doing so, he has to kill an innocent party. If I am attacked by a killer and my only chance to survive is by throwing a hand grenade at him, I still may not do that, if the grenade will also kill even one innocent bystander.<sup>109</sup>

Comparing necessity, duress, and self-defense with the “heat of passion,” I can’t help but wonder: if all sorts of overwhelming emotions (such as despair, temptation, fear of imminent death) do not reduce perpetrators’ culpability for killing an innocent, why should rage provoked by someone else? If we deny mitigation to a man who shot his victim because of the fear induced by a third party,<sup>110</sup> how can we grant it to a man who bludgeoned a sleeping child to death because of the rage induced by a third party? And if we cannot grant it, we have to reject the excusatory rationale as the sole ground for the partial defense of provocation, as, in fact, courts and legislatures of a number of states have done pursuant to the doctrine of “misdirected retaliation.”<sup>111</sup>

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107. 40 Am. Jur. 2d, Homicide, § 115 (“It is generally held that neither duress, coercion, nor compulsion are defenses to murder.”) (footnotes omitted). See also *Schertz v. State*, 380 N.W.2d 404 (Iowa 1985); *State v. Chism*, 436 So. 2d 464 (La. 1983); *State v. McCartney*, 684 So. 2d 416, 425 (La. Ct. App. 3d Cir. 1996) (noting that the defense of compulsion is unavailable in murder prosecutions); *State v. Weston*, 219 P. 180, 185 (Or. 1923) (stating that “[f]ear, duress or compulsion due to the act of another, seems to be considered no excuse for taking the life of a third person”); *State v. Nargashian*, 58 A. 953, 955 (R.I. 1904) (stating that no justification for murder is present when a defendant undertakes a voluntary course of action).

108. 40 Am. Jur. 2d, Homicide, § 115 (stating that duress does not mitigate murder to manslaughter). See *United States v. LaFleur*, 971 F.2d 200, 206 (9th Cir. 1991) (holding that duress cannot mitigate first degree murder to manslaughter); *State v. Rocheville*, 425 S.E.2d 32, 35 (S.C. 1993) (finding that duress cannot serve to reduce murder to manslaughter).

109. See, e.g., *Banks v. State*, 955 S.W.2d 116 (Tex. App. 1997) (holding that even when a party would be justified in using force against an assailant, no such justification extends to an innocent third party who is recklessly killed). See also *Unified Excuse*, *supra* note 68, at 1482.

110. See *LaFleur*, 971 F.2d at 206 (concluding that “consistent with the common law rule, a defendant should not be excused from taking the life of an innocent third person because of the threat of harm to himself”).

111. At least ten states by statute (Alaska, Arizona, Colorado, Delaware, Illinois, Missouri, Ohio, Pennsylvania, Texas, Wisconsin) and another fifteen by case law (California, Georgia, Kansas, Louisiana, Maryland, Minnesota, New Mexico, Nebraska, Oklahoma, Rhode Island, South Carolina, Tennessee,



The doctrine of misdirected retaliation denies provocation mitigation in cases in which the victim did nothing to provoke the attack. In most American jurisdictions, the defense of provocation requires that the homicide occur as a result of the victim's own provocation.<sup>112</sup> This common law view of provocation clearly derives from the justification principle. It assumes

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Vermont, Virginia, Wyoming) authorize mitigation from murder to a lesser offense only if the provocative act is attributable to the victim, the victim's accomplice, or the intended victim. See Ariz. Rev. Stat. § 13-1103(A)(2) (victim only); Ohio Rev. Code Ann. § 2903.03(A) (victim only); S.C. Code Ann. § 16-3-20(C)(b)(8) (victim only); Mo. Rev. Stat. § 565.002(7) (victim or accomplice); Tex. Penal Code Ann. § 19.02(2) (victim or accomplice); Ill. Comp. Stat. § 9-2(1) (victim or intended victim); 18 Pa. Cons. Stat. § 2503 (a)(1), (2) (same); Alaska Stat. § 11.41.115(a) (same); Colo. Rev. Stat. § 18-3-103(3)(b) (same); Wis. Stat. Ann. § 939.44(1)(b) (same). See also *Foster v. State*, 444 S.E.2d 296, 297 n.2 (Ga. 1994) (“[I]t appears that the voluntary manslaughter statute OCGA § 16-5-2(a) should be construed so as to authorize a conviction for that form of homicide only where the defendant can show provocation by the homicide victim.”); *State v. Follin*, 947 P.2d 8, 16-17 (Kan. 1997) (determining that trial court appropriately declined to extend instruction on manslaughter when defendant killed a non-provoking victim); *State v. Charles*, 787 So. 2d 516, 519 (La. App. 3 Cir. 2001) (“Case law requires that there be some act or series of acts by the victim sufficient to deprive a reasonable person of cool reflection.”); *Tripp v. State*, 374 A.2d 384, 389 (Md. Ct. App. 1977) (“Except for rare instances of ‘transferred intent,’ where one aims at A, misses and hits B by mistake, a defendant seeking to extenuate an intentional killing upon the theory that he killed in hot-blooded rage brought on by the provocative acts of his victim is limited to those killings where the victim is the provocateur.”); *State v. Auchampach*, 540 N.W.2d 808, 1815 (Minn. 1995) (“[A] defendant’s emotional state alone is not sufficient to mitigate murder to manslaughter; rather, the words and acts of a victim must have been enough to provoke a person of ordinary self-control.”); *State v. Bautista*, 227 N.W.2d 835, 839 (Neb. 1975) (indicating that a jury instruction on provocation is only appropriate when the victim caused the provocation); *Kruecheck v. State*, 702 P.2d 1267, 1269 (Wy. 1985) (“[T]he heat of passion, anger, rage, or hot blood ‘must have been entertained toward the person slain, and not toward another.’”); *People v. Steele*, 47 P.3d 225, 240 (Cal. 2002) (“But it does not satisfy the objective, reasonable person requirement, which requires provocation by the victim.”); *State v. Gutierrez*, 541 P.2d 628, 631 (N.M. Ct. App. 1975) (accepting rule against allowing provocation defense for killing persons other than the provoker); *Hawkins v. State*, 46 P.3d 139, 146 (Okla. Crim. App. 2002) (“[M]anslaughter . . . requires adequate provocation *on the part of the deceased* toward the defendant, not some implied provocation on the part of a third person sitting in a car a considerable distance away.”); *State v. Winston*, 252 A.2d 354, 358 (R.I. 1969) (“[A]n essential element of [voluntary manslaughter] is the presence of provocation offered by the person slain.”); *Arnold v. Commonwealth*, 560 S.E.2d 915, 919 (Va. Ct. App. 2002) (“While it is true that ‘malice and heat of passion are mutually exclusive,’ we have held that where it is not the victim of the crime who invoked the defendant’s heat of passion, there was no evidence to support a finding of heat of passion.”).

112. See, e.g., 2 Charles E. Torcia, *Wharton’s Criminal Law* § 156 (15th ed. 1994); LaFave & Scott, *supra* note 65, § 7.10(g).

that, even though the defendant acted under the “heat of passion,” his guilt may be reduced only with respect to the victim who is *partially responsible* for his unhinged emotional state.<sup>113</sup>

Under the MPC, it does not matter who provoked the offender.<sup>114</sup> The commentaries to section 210.3(1)(b) provide that the offender’s emotional distress does not have to arise from some “injury, affront, or other provocative act”<sup>115</sup> attributable to the deceased. Although several states have provisions modeled after section 210.3(1)(b),<sup>116</sup> this does not mean that they automatically reject the doctrine of misdirected retaliation. Quite often states adopt the text of an MPC provision but reject a position expressed in the commentary. For example, the MPC language regarding duress and necessity has been very influential among the states; however, the view (expressed in the commentaries) extending these defenses to prosecution for murder is followed, in the case of necessity, by none of the states, and, in the case of duress, by very few.

Similarly, some states that describe provocation in terms of “extreme mental or emotional disturbance” at the same time, either by statute or by case law, reject the MPC approach authorizing mitigation for the killing of a non-provoker.<sup>117</sup> In *Spurlin*, for instance, the court admitted that the California Penal Code is silent on the source of

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113. H.L.A. Hart & Tony Honore, *Causation in the Law* 58 (2d ed. 1985) (“It is . . . an integral part of the idea of provocation that one person arouses another’s passions and *makes* him to lose his normal self-control.”).

114. Model Penal Code § 210.3(1)(b) (Official Draft and Revised Comments 1980) (defining manslaughter as a homicide which would otherwise be murder when it is “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”).

115. *Id.* § 210.3, cmt. 5(a). “By eliminating any reference to provocation in the ordinary sense of improper conduct by the deceased, the MPC avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter.” *Id.*

116. See *supra* note 99 and accompanying text.

117. See, e.g., Del. Code Ann. tit. 11, § 641 (2003) (providing that “emotional distress is not reasonably explained . . . when there is no causal relationship between the provocation, event or situation which caused the extreme emotional distress and the victim of the murder”). See also *State v. Stewart*, 624 N.W.2d 585, 590-91 (Minn. 2001) (the state statute was based on the MPC; however, the court noted that “a heat of passion that provokes an assailant to kill the provocateur will not necessarily satisfy the subjective or objective elements of heat-of-passion manslaughter as to other victims,” and concluded that the situation at bar was such a case).

provocation. Nonetheless, citing common law principles and interpretations of those principles adopted by several other jurisdictions, the court concluded that, for the provocation defense to be available, “the deceased must be the source of the defendant’s rage or passion.”<sup>118</sup>

In sum, the partial defense of provocation includes elements of both excusatory and justificatory rationales. The emphasis most states put on the objectively reasonable explanation of the defendant’s rage indicates, however, that the source of provocation is crucial for mitigation, i.e. that it is the *act* that is less wrongful, not simply the *actor* that is less culpable. Moreover, the doctrine of misdirected retaliation can be explained only in terms of a partial justification. It is the behavior of the victim that partially justifies the offense. That does not mean that it is right to kill a provoker, only that it is less wrong to kill a provoker than to kill an innocent victim. Therefore, the provocation defense, just like defenses of consent and self-defense, is at least partially based on the victim’s conduct.

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The foregoing review of consent, self-defense, and provocation shows that the rule according to which the victim’s conduct is irrelevant to the perpetrator’s liability has exceptions so broad that it can hardly be called a rule. In cases of consent, self-defense, and provocation, the law reduces or completely eliminates the perpetrator’s liability based on the acts of the victim immediately prior to the perpetrator’s harmful act toward that victim. This inevitably raises a normative question: should not the law, as a coherent system of norms, apply the principle of victims’ contributory fault across the board? Part II provides general arguments in favor of regarding the conduct of the victim as a factor affecting the criminal liability of the offender.

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118. Spurlin, 156 Cal. App. 3d at 126.

## II. NORMATIVE ARGUMENT: WHY VICTIMS' CONDUCT SHOULD BE RELEVANT TO PERPETRATORS' LIABILITY

### A. *Punishment Argument*

The first reason to consider the role of the victim in the committed offense is a sense that, at least in some circumstances, it affects the liability of the offender and the punishment she should receive. As Michael Moore has correctly pointed out, “the role of the victim of crime . . . is to be ascertained by thinking through the theory of punishment.”<sup>119</sup> Conceptually, theories of punishment fall into two large groups, retributive and utilitarian. For a retributivist, punishment is justified because the offender deserves it; for a utilitarian, it is justified if it promotes some societal good.<sup>120</sup>

#### 1. Retributivist Argument

The dominant theory of punishment underlying Anglo-American criminal doctrine is retributivism, according to which punishment is justified by the desert of the offender.<sup>121</sup> Although other goals, such as deterrence, incapacitation, and rehabilitation may affect penal policies, the fundamental principle of criminal law is, and should be, “just desert.” Otherwise, the state would be justified in punishing an innocent as long as that brings about a net social gain.<sup>122</sup> The priority of the just desert principle is not only theoretical. Research on the psychology of justice shows that the community’s principles of punishment are

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119. Victims and Retribution, *supra* note 7, at 65-66.

120. See, e.g., Kent Greenawalt, Punishment, in *Encyclopedia of Crime and Justice* 1336 (Sanford H. Kadish ed., 1983) (explaining that “a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purposes that the punishment serves”).

121. Immanuel Kant, *The Philosophy of Law* 195-96 (W. Hastie ed., 1887) (“Juridical punishment can never be administered merely as a means of promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.”).

122. Michael Moore, *Law and Psychiatry* 239 (1984) (arguing that a consistent utilitarian would have to punish an innocent look-alike instead of a skyjacker who cannot be caught if that would deter skyjacking).

largely retributive<sup>123</sup> and that people explicitly name retributivism as the philosophy that should govern punishment in our society.<sup>124</sup>

In the retributive system of justice, a person may not be punished unless her wrongdoing was accompanied by a culpable mental state<sup>125</sup> with respect to the wrongdoing.<sup>126</sup> In addition, many scholars agree that “it’s not culpability alone that counts in determining desert. . . . Rather, the amount of harm caused determines the seriousness of the wrong done, and the amount of wrong done does affect desert.”<sup>127</sup>

The bond between harm and just desert is recognized both in our law and morality.<sup>128</sup> We decide whether people deserve praise or punishment based, in part, on the end results of their actions. A sprinter who almost won the race does not deserve the same medal as the sprinter who,

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123. See, e.g., John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 *Law & Hum. Behav.* 659 (2000).

124. See Mark Warr & Mark Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21 *J. Res. Crime & Delinq.* 95, 99-101 (1984).

125. *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”).

126. *Victims and Retribution*, supra note 7, at 87.

127. *Id.* The opposing school of thought maintains that the amount of harm is irrelevant to the perpetrator’s desert: why should one be punished less severely only because, quite fortuitously, her attempted offense failed or caused less harm than it could? See, e.g., Hart, supra note 77, at 131 (“Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?”); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 *J. Crim. L. & Criminology* 679, 697 (1994) (arguing that allowing wrongdoing an independent moral significance is irrational). The debate over the moral and legal significance of the resulting harm has a long history and still continues. See, e.g., Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 *BYU L. Rev.* 553, 556 (1986) (remarking that “little progress has been made toward a solution of this issue in the last two hundred years”); Kadish, supra, at 679 n.2 (noting that, in fact, the issue is more than thousand years old—“Plato tried to explain the lesser punishment for a failed attempt to kill as an expression of gratitude to the gods”). For the insightful analysis of advocated positions on both sides of the debate, see, e.g., Michael Moore, *Placing Blame* 191-247 (1997).

128. Kadish, supra note 127, at 701. Sanford H. Kadish has conceded that,

While in principle it’s difficult to find good reasons for making desert turn on chance, here’s the rub: most of us do in fact make judgments precisely of this kind. Doesn’t it seem natural for a parent to want to punish her child more for spilling his milk than for almost spilling it, more for running the family car into a wall than for almost doing so?

*Id.* at 688.

in fact, came first. Similarly, a driver who almost hit a pedestrian does not deserve the same punishment as a driver who did, in fact, hit and kill someone.

Many criminal law doctrines implicitly or explicitly draw on the moral significance of harm. Take the defense of necessity. The perpetrator who invokes this defense is guilty of violating a legal (and often moral) norm. Nonetheless, she may be completely absolved of criminal liability if her *prima facie* offense was committed in order to avoid a greater harm or evil.<sup>129</sup> If harm had no independent moral significance, the actor who has made the right choice and, say, saved lives of several mountaineers by breaking into a deserted house would not be justified in what she did.

The moral significance of harm makes the attribution of harm essential to the idea of just desert.<sup>130</sup> If the victim is completely innocent and there is no other independent intervening cause, it is clear that the perpetrator is responsible for *all* the harm. But what about a victim who was at least as instrumental as the offender in causing the resulting injury or loss? Consider, for example, the victim who was a willing participant in a fatal drag race, or the victim who killed herself while playing a game of Russian roulette.<sup>131</sup> Is it fair to say that, although there were two equally reckless participants, the defendant caused *all* the harm?

In *Commonwealth v. Atencio*,<sup>132</sup> three friends, Marshall, Atencio, and Britch, played Russian roulette:

First, Marshall examined the gun, saw that it contained one cartridge, and after spinning it on his arm, pointed it at his head, and pulled the trigger. Nothing happened. He handed the gun to Atencio, who repeated the process, again without result. Atencio passed the gun to the deceased, who spun it, put it to his head, then pulled the trigger. The

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129. See, e.g., Model Penal Code § 3.02 (Official Draft and Revised Comments 1980).

130. *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (“If a jury is to assess meaningfully the defendant’s moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant”).

131. *Kalven & Zeisel*, *supra* note 32, at 243-44.

132. 189 N.E.2d 223 (Mass. 1963).

cartridge exploded, and he fell over dead.<sup>133</sup>

Both Marshall and Atencio were convicted of manslaughter in the death of Britch. The appellate court recognized that Britch's voluntary participation in the game would bar a civil action.<sup>134</sup> In a criminal prosecution, however, Britch's contributory recklessness was ignored because of the state interest "that the deceased should not be killed by the wanton or reckless conduct of himself or others."<sup>135</sup> The problem with this argument is that it essentially sacrifices the principle of just desert for the benefit of net social gain. Under the court's logic, the state would be justified in punishing an innocent if that would deter undesirable social behavior. Hence, this outcome contradicts a cornerstone principle of criminal law which allows courts to impose sanctions only when an actor is guilty of an offense.

Clearly, not all cases of the victim's negligent or even reckless behavior should reduce the offender's blameworthiness. The fact that a victim may not have behaved cautiously enough does not and should not diminish the criminal liability of a rapist or a thief. I will discuss these issues in part III.C.3. For now it is sufficient to note that, in principle, there are circumstances in which the requirements of fair and proportionate punishment mandate that the offender's liability be evaluated in light of the victim's own behavior.

## 2. Utilitarian Argument

Whereas retributivism provides a non-consequentialist basis for punishment, various utilitarian theories view punishment as a means to achieving societal goals<sup>136</sup>—detering the offender from committing future crime (specific deterrence), deterring others from crime (general deterrence), isolating and incapacitating the offender (incapacitation), and rehabilitating the offender

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133. *Id.* at 224.

134. *Id.*

135. *Id.*

136. See, e.g., Greenawalt, *supra* note 120, at 1336 (explaining that "a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purposes that the punishment serves").

(rehabilitation). Although not supporting a view that criminal justice should be governed by consequentialist considerations, I nevertheless recognize that they represent *a value*, and therefore should be promoted to the extent that doing so does not interfere with the just desert principle.

In the utilitarian world, the main criterion for determining whether a certain measure is warranted is its efficiency, economic or non-economic. Two distinct efficiency arguments may be made in favor of incorporating comparative responsibility in criminal law—one, dealing with the reduction of costs of crime, and the other dealing with the increase of moral authority of criminal law.

*a. Economic Efficiency Argument*

Crime imposes economic costs on society both in terms of losses and precautionary measures against it. One way to minimize those costs is to create incentives for potential victims to be more cautious.<sup>137</sup> Alon Harel has proposed a system of comparative fault under which crimes against careless victims will be punished less severely. As a result, criminals will be more inclined to commit crimes against careless victims because that will subject them to a lesser penalty.<sup>138</sup> Criminals' preference will, in turn, influence the behavior of potential victims. "Potential victims will be disposed to take better precautions given that criminals will be less likely to commit crimes directed at cautious victims."<sup>139</sup>

What is troublesome in Harel's theory is that he does not seem to differentiate between two victims—one guilty of attacking an innocent person and the other guilty of merely walking late at night. Moreover, it may well be that

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137. See Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 Cal. L. Rev. 1181, 1193 (1994).

Efficiency requires the distribution of the costs of precautions between the state and potential victims in a way that minimizes the total costs of crime.

Without appropriate incentives, potential victims will invest less in precautionary measures than is socially optimal. That is, potential victims will expose themselves to risks which are unjustified from the perspective of efficiency.

Id.

138. Id. at 1196.

139. Id. at 1197.



it is easier to influence people's everyday routine (e.g., going out late) rather than prevent certain antisocial behavior. In that case, based on Harel's logic, the law should reflect that discrepancy by punishing a mugger or rapist of a late-night walker less severely than their victim who was defending herself against an unprovoked attack.

I agree with Harel that criminal law should adopt a regime of comparative liability. However, I disagree with his utilitarian reasoning, which completely subordinates moral considerations to efficiency. The system of comparative liability advocated in this article significantly differs from the one proposed by Harel.

#### *b. Increase of Moral Authority of Criminal Law*

To be effective, criminal law must enjoy moral credibility. That may be achieved only if the distribution of criminal liability is seen as just.<sup>140</sup> This, in turn, requires that criminal law (i) is not over-used (and therefore devalued), and (ii) assigns "liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment."<sup>141</sup>

#### (i) Reducing Criminal Sanctions Argument

An excessive use of criminal sanctions may reduce the deterring effect of the law, since the internalization of the rules of criminal law requires a strong moral condemnation of the proscribed conduct by the law-abiding members of the community.<sup>142</sup> Consequently, the inflationary use of

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140. See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453, 477 (1997) (arguing that "the criminal law must earn a reputation for (1) punishing those who deserve it under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less"); Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 5-7 (1995) (arguing that community views are important, from both the retributivist and the utilitarian perspectives, to what criminal law rules ought to be).

141. Robinson & Darley, *The Utility of Desert*, *supra* note 140, at 457.

142. Bernd Schünemann, *The Future of the Victimological Approach to the Interpretation of Criminal Law: The Use of Victimological Considerations as a Comprehensive, Regulative Principle for Limiting the Scope of Certain Crimes*, in *Victimology in Comparative Perspective* 150 (K. Miazawa, M. Ohya eds., 4th ed.

criminal law may cause the condemnation to eventually wear thin and vanish.<sup>143</sup>

To avoid that outcome, a German scholar, Bernd Schünemann, has advocated a restrictive approach to interpreting penal statutes urging to reject criminal sanctions in certain circumstances when the victim neither deserves nor needs protection.<sup>144</sup> This rule of interpretation, known in Germany as *Viktimodogmatik*, was to be applied only to “relationship offenses,” such as fraud, and not to violent crimes.<sup>145</sup> Decisions about when victims do not need or deserve protection were to be made based on the statistical findings of victimologists.<sup>146</sup>

Schünemann’s work was an important contribution toward a more realistic, contextualized vision of the crime. At the same time, his proposal was limited in a few important respects. The first limitation is normative and relates to the fact that, for Schünemann, courts should pay attention to victims’ conduct mainly because that would result in the reduced use of criminal sanctions. Thus, if it turns out that *Viktimodogmatik* does not have the desired effect, the rule would have to be abandoned, even though it results in more fair verdicts.

The second limitation lies in the procedural nature of Schünemann’s proposal. Making victims’ conduct merely a part of a rule of interpretation leaves almost unlimited discretion to each interpreter and may lead to inconsistent verdicts. In contrast, I believe that the conduct of the victim should be regarded as a full or partial defense incorporated in substantive criminal law.

Another problem with Schünemann’s proposal is that it applies only to a small group of non-violent offenses, in which the victim was not diligent enough to protect her own interests. It is not clear why the victim’s fault should be given weight only in this context. Shouldn’t the victim who initiated the game of Russian roulette be at least as responsible for her lot as a gullible victim who failed to double-check a fraudster’s information?

Finally, decisions about what victims do not need or

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1986).

143. *Id.* at 150-51.

144. *Id.* at 152.

145. See *Role of the Victim*, *supra* note 7, at 39-40.

146. See Schünemann, *supra* note 142, at 150-51, 158.

deserve legal protection should not be based on victimological studies. Statistical information may be helpful in identifying particularly frequent or vulnerable victims in order to educate and protect them from crime. This information, however, may not determine the level of liability of a particular defendant. In order to preserve justice in a specific case, a defendant must be judged for what she did to her victim, not for what a statistical defendant did to a statistical victim. Schünemann would have to agree with this principle in order to preserve his goal of efficiency based on internalization of moral norms by the community. In general, although I do not see the reduction of criminal sanctions as the reason for adding the victim's conduct into the liability equation, I agree with Schünemann that such reduction is likely to follow and to make the reformed criminal law more efficient and morally influential.

(ii) Respecting Community Standards Argument

Paul H. Robinson and John M. Darley have made an innovative argument in favor of changing the foundation of desert-based liability—from the system built on principles of moral philosophy to the system built upon the community's shared principles of justice.<sup>147</sup> The authors suggest that such a system would enjoy high moral authority, and that authority could be used for creating moral norms and ensuring compliance with them.<sup>148</sup> While not following Robinson and Darley in their utilitarian revision of the rationale for justice, I share their view that it is generally a good thing when the law does not clash with moral perceptions of the community.

The famous Kalven and Zeisel study of American juries shows that public intuitions and jury verdicts do not follow the law regarding contributory fault of the victim.

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147. Robinson & Darley, *The Utility of Desert*, supra note 140, at 456.

148. *Id.* at 457.

The criminal law can have a second effect in gaining compliance with its commands. If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor.

*Id.*

According to the study, jurors consistently acquit the offender or convict her of a lesser offense if the victim contributed to her own injury.<sup>149</sup> For example, jurors acquitted defendants charged with negligent automobile homicide where the “deceased driver may also have been negligent,”<sup>150</sup> where the “[v]ictim, who drank to excess, walked or staggered across the road,”<sup>151</sup> and where “[d]efendant traveled too fast, but woman (deceased) may have darted into path.”<sup>152</sup> Changing the law to reduce the offender’s liability because of the faulty conduct of the victim would certainly bring it in accord with the public opinion.

At the same time, a law is not necessarily good simply because it mimics the public opinion.<sup>153</sup> Public views on the allocation of responsibility for rape are well known for their unfairness to the victim. “She got herself raped” read one of the slogans at a demonstration protesting against guilty verdicts issued in a gang-rape case.<sup>154</sup> Numerous polls have pointed out that the public has redefined the crime of rape “in terms of its notions of assumption of risk.”<sup>155</sup> Juries in rape cases do not limit their deliberations to the only legally relevant issue—consent of the victim. Instead, they “closely, and often harshly, scrutinize . . . the female complainant and [are] moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.”<sup>156</sup> The “contributory behavior” of the victim sufficient for the defendant’s acquittal or conviction

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149. Kalven & Zeisel, *supra* note 32, at 242-57. That study was based on questionnaires filled out by 555 judges presiding, in sum, over 3576 criminal jury trials. The judges were asked, among other things, how they would decide each case over which they presided had it been tried before them without a jury. *Id.* at 45, 50-51.

150. *Id.* at 244.

151. *Id.*

152. *Id.*

153. See Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 *Hofstra L. Rev.* 635, 653-59 (2000) (discussing the complexity of the connection between community views and punishment rationales).

154. Sydney H. Schanberg, *We Should Be Outraged at All Rapes*, N.Y. *Newsday*, Apr. 28, 1989, at 94.

155. Kalven & Zeisel, *supra* note 32, at 254.

156. *Id.* at 249. In Kalven and Zeisel’s study, only three out of forty-two defendants charged with simple rape were convicted of it. *Id.* at 253. The judge’s disagreement with the jury verdict on the major charge approached 100%. *Id.* at 253-54.

of a lesser offense has included drinking,<sup>157</sup> wearing sexy clothes,<sup>158</sup> flirting<sup>159</sup> or having a prior relationship with the defendant.<sup>160</sup> One of the most extensive studies of citizen perceptions of rape found that 66% of the polled population believed that women's behavior or appearance provokes rape, and 34% believed that women should be held responsible for preventing their own rape.<sup>161</sup>

Should these public views be incorporated into law? If the law, according to Robinson and Darley, should assign "liability and punishment according to the principles of

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157. In the Kalven and Zeisel study, judges reported unwarranted acquittals where:

- the assault happened at a beer drinking party ("[t]he jury probably figured the girl asked for what she got");
- victim had a few beers before "she entered a car with defendant and three other men and was driven to cemetery where act took place"; and
- victim who was "drinking but not drunk" accepted a ride back home from a man she just met at dance hall; "rape occurred in lonely wooded area."

See *id.* at 249-51.

158. "In 1989, a circuit court jury in Florida acquitted 26-year-old Steven Lord of abducting a 22-year-old woman at knife point and repeatedly raping her. The jury based its finding partly on the fact that she was wearing a lace miniskirt without underwear. In explaining the decision of the three-man, three-woman jury, foreman Roy Diamond said: 'We felt she asked for it for the way she was dressed.'" Mary Nemeth et al., *Chilling the Sexes: Women's Growing Militancy About Harassment and Date Rape Alarms Many Men*, *MacLean's*, Feb. 17, 1992, at 42, 44. See also Mark A. Whately, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis*, 1 *Aggression & Violent Behav.* 81, 91 (1996) (summarizing in a meta-analysis of various studies, that a rape victim in revealing clothing is held more responsible than a victim dressed otherwise and a less "respectable" rape victim is held more responsible than is a victim with "good" character).

159. See Kalven & Zeisel, *supra* note 32, at 250 (reporting a judge's explanation of acquittal: "[w]oman involved went to public dance and was picked up by defendant. Then went to night club and permitted defendant to take her home over unfrequented road").

160. See *id.* (reporting acquittals where victim and defendant were formally married and considered reconciliation, as well as where victim and defendant may have had sexual relations before, despite the "savage" character of rape).

161. See Hubert S. Feild & Leigh B. Bienen, *Jurors and Rape: A Study in Psychology & Law* 54 (1980). See also Joyce E. Williams & Karen A. Holmes, *The Second Assault: Rape and Public Attitudes* 118 (1981) (conducting a cross-cultural survey of attitudes toward rape, in which most respondents, including victims, named women's behavior and/or appearance as the second (after the perpetrator's mental illness) most frequent cause of rape). A 1991 telephone survey of five hundred Americans found 38% of men and 37% of women believed that a woman is partly to blame for her own rape if she dresses seductively. See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 *St. John's L. Rev.* 979, 995 n.58 (1993) (citing Telephone Survey of 500 Adult Americans by Yankelovich Partners, Inc., for Time/CNN (May 8, 1991)).

justice that the community *intuitively uses to assign liability and blame*,<sup>162</sup> we may end up with a “mini-skirt” defense to the crime of rape. As opposed to Robinson and Darley, I do not see a community’s beliefs as a self-sufficient foundation for justice. A rape victim is not, and should not be, responsible for rape even if the community believes otherwise.<sup>163</sup> However, Robinson and Darley are perceptive in paying close attention to public views. Both criminal law and community norms are parts of the same social discourse, and, unless criminal law addresses existing discrepancies, it would be perceived as divorced from real life, too abstract and irrelevant.<sup>164</sup>

Moreover, as Robinson and Darley correctly point out, criminal law plays an important role in shaping the social consensus necessary for sustaining moral norms.<sup>165</sup> Discussing the dialogue between the law and public opinion, Robinson and Darley wrote:

We have seen the process at work recently in enhancing prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence. It has also been at work in diluting existing norms against homosexual conduct, fornication, and adultery. While it is difficult to untangle how much the criminal law reform followed and how much it led these shifts, it seems difficult to imagine that these changes could have occurred without the recognition and confirmation that comes through changes in criminal law legislation, enforcement, and adjudication.<sup>166</sup>

In contrast, by excluding an issue from the legal discourse, the law loses an opportunity to influence the social discourse. If people’s everyday experience tells them that in some circumstances the victim is almost as guilty as the

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162. Robinson & Darley, *The Utility of Desert*, supra note 140, at 456.

163. See discussion infra notes 341-42 and the accompanying text.

164. Haney, supra note 8, at 351 (criticizing criminal law for ignoring “most of the racial, socioeconomic, and social psychological differentials that play such a crucial role in the etiology of crime in our society” and arguing that “this myopic focus probably also has been at the root of much injustice in the criminal system”).

165. Robinson & Darley, *The Utility of Desert*, supra note 140, at 473. In a diverse society that role may be particularly important. See *id.* at 457 (noting that “in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences”).

166. *Id.* at 473-74.

person on trial, and at the same time the law completely denies that, jurors have no guidance from the law.

When jurors blame the victim of rape, it is partly because the law does not offer them a way to distinguish her “fault” from that of the victim of a drag race. As a result, jurors deliver unfair and inconsistent verdicts, and the law misses an opportunity to shape new social consensus on sexual misconduct and women’s rights. In addition, the law loses its moral authority in general: it is not likely that people in borderline situations would turn for guidance to the system of rules that they perceive as unfair. It is, therefore, crucial for maintaining the moral authority and efficiency of criminal law to provide a meaningful theory of comparative fault, such that would directly address the community’s perceptions and judgments and offer a workable method for evaluating the liability of offenders and victims.

### *B. Consistency Argument*

To take a simple example, if in every single state the defense of provocation reduces the perpetrator’s liability for killing an offending victim, why do most states have no similar defense for assault or battery? Indeed, only a couple of states allow for a lesser form of assault to be charged when the victim provoked the attack or the defendant acted in the heat of passion,<sup>167</sup> and only a few more states allow provocation to serve as a mitigating factor at sentencing once a defendant has been convicted of assault.<sup>168</sup>

Furthermore, the MPC provides that “simple assault is a misdemeanor unless committed in a fight or scuffle

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167. See Ohio Rev. Code Ann. §2903.12 (Anderson 2001) (reducing a charge from felonious assault to aggravated assault in case of serious provocation by the victim); Ky. Rev. Stat. § 508.040 (Michie 1999) (allowing a reduction in charge when an assault is committed under extreme emotional disturbance); Mo. Rev. Stat. §565.060 (1999) (allowing a charge of second degree assault instead of first degree assault if the defendant acted under “sudden passion arising out of adequate cause”); Colo. Rev. Stat. 18-3-202(2)(a) (West 1999) (reducing first degree assault from a class three to a class five felony if committed in the heat of passion); Colo. Rev. Stat. 18-3-203(2)(a) (West 1999) (reducing second degree assault from a class four to a class six felony if committed in the heat of passion).

168. See Alaska Stat. § 12.55.155(d)(6) (Michie 2002); La. Code Crim. Proc. Ann. art. 894.1(24), (26) (West 1997); N.C. Gen. Stat. §15A-1340.16(e)(8) (2002); Tenn. Code Ann. §40-35-113(2) (2003); Wash. Rev. Code Ann. §9.94A.535(1)(a) (West 2001).

entered into by mutual consent, in which case it is a petty misdemeanor.”<sup>169</sup> That language generally applies to an altercation, in which both parties were to some degree at fault and which did not result in serious injuries.<sup>170</sup> However, very few states have followed the MPC.<sup>171</sup> Some states, while adopting the general language of the provision, did not include the mitigation afforded by the MPC.<sup>172</sup> Other states explicitly rejected mutual combat as a defense.<sup>173</sup>

Take one more example. All states and the MPC criminalize intentional destruction of another person’s property.<sup>174</sup> Section 3.10 of the MPC provides limited justification to “seizure or destruction of, damage to, intrusion on or interference with property of another,”<sup>175</sup> if these actions would be protected by a defense or privilege recognized in the law of torts or property. Neither tort nor property law, however, recognizes the defense of

169. Model Penal Code § 211.1(1) (Official Draft and Revised Comments 1980).

170. See, e.g., *State v. Friedman*, 996 P.2d 268, 272 (Haw. 2000) (confirming that a quarrel during which participants were pushing each other and slapping on each other constituted “mutual affray”).

171. Haw. Rev. Stat. Ann. §707-712 (Michie 2003) (charging third degree assault as a misdemeanor, unless resulting from a fight or scuffle in which case it is a petty misdemeanor); Neb. Rev. Stat. § 28-310 (1989) (following the MPC); N.H. Rev. Stat. Ann. 631:2-a (1996) (following the MPC); N.J. Stat. Ann. § 2C:12-1 (West 2003) (following the MPC); 18 Pa. Cons. Stat. § 2701 (1998) (following the MPC); Vt. Stat. Ann. tit. 13, § 1023 (following the MPC).

172. See Miss. Code Ann. § 97-3-7 (1999) (closely following MPC § 211.1 but containing no provision for mutual combat); Mont. Code Ann. § 45-5-201 (2003) (same); S.D. Codified Laws § 22-18-1 (2001) (same).

173. See N.C. Gen. Stat. § 14-33(a) (1983) (specifically punishes assault the same way regardless of whether the assault arose as a result of mutual combat or not); Utah Code Ann. § 76-5-104 (2003) (specifically states that mutual combat is not a defense to assault).

174. See, e.g., Ga. Code Ann. § 16-7-21 (2003) (criminal trespass) & § 16-7-23(a)(1) (criminal damage to property in the second degree); Kan. Crim. Code Ann. § 21-3720 (West 1999) (criminal damage to property); La. Rev. Stat. Ann. § 14:56 (1997) (simple criminal damage to property); N.C. Gen. Stat. § 14-127 (willful and wanton injury to real property) & § 14-160 (willful and wanton injury to personal property); W. Va. Code Ann. § 61-3-30 (Michie 2000) (injury to or destruction of property). See also Model Penal Code § 220.3(1)(b) (Official Draft and Revised Comments 1980) (providing that a person is guilty of criminal mischief, if he purposely or recklessly tampers with tangible property of another so as to endanger person or property).

175. Model Penal Code § 3.10 (Official Draft and Revised Comments 1980). See also *id.* § 310, Explanatory Note (explaining that in this area the penal law must on the whole accept and build upon the privileges recognized in torts and property, except in rare situations where a penal law departure from the civil law position is made clear).



provocation. Thus, under the MPC, it may not serve as a partial defense for destructive or intrusive actions against property of another.

In a few limited circumstances, provocation has been successfully raised as a defense to the charge of malicious destruction of property.<sup>176</sup> However, state penal codes carry no statutory provisions to that effect. Instead, the applicability of the defense is based on how some courts have interpreted the requirement of malice. In these decisions, most of which are quite old, courts have concluded that provocation defeats malice, thereby constituting a defense against malicious mischief or malicious destruction of property.<sup>177</sup> Other courts have opined that malice “is a chameleonic term, taking on different meanings according to the context in which it is used.”<sup>178</sup> These courts are more likely to believe that provocation may negate malice only in the context of homicide.<sup>179</sup>

In recent years, only one jurisdiction has explicitly allowed provocation as a defense to malicious destruction of property.<sup>180</sup> In *Brown v. United States*, the District of Columbia appellate court reversed a conviction that stemmed from an incident in which the defendant smashed the front windows and door of her mother’s house in an

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176. See, e.g., *Thomas v. State*, 30 Ark. 433, 435 (1875) (malicious mischief not committed when the act was done under provocation); *Mosley v. State*, 28 Ga. 190, 192 (1859) (injuries inflicted upon personal property in a passion, or under reasonable provocation, stand on different footing); *State v. Martin*, 53 S.E. 874, 876 (N.C. 1906) (malicious mischief is not committed when such act is prompted or done under the influence of sudden aroused passion). In each of these cases, provocation completely exonerated the defendant, a result quite different from its usual effect.

177. See cases cited *supra* note 176.

178. *Richmond v. State*, 623 A.2d 630, 633 (Md. App. 1993).

179. *Id.* at 634 (holding that “mitigation that will reduce one offense to another is a concept peculiar to criminal homicide cases”).

180. See *Brown v. United States*, 584 A.2d 537 (D.C. App. 1990). For contrary treatment of the same issue, see, for example, *Denny v. State*, 486 S.E.2d 417, 420 (Ga. App. 1997) (holding that “standard charges on provocation do not pertain to property offenses”); *State v. Bourg*, 615 So. 2d 957, 961 (La. Ct. App. 1st Cir. 1993) (holding that harassment of the defendant by the victim was not a defense to a charge of aggravated criminal damage to property). The District of Columbia also authorizes the defense of provocation, in the unemployment compensation context, to employees’ misconduct resulting in their termination. See *Georgia-Pacific Corp. v. Employment Div.*, 533 P.2d 829 (D.C. App. 1975); *Williams v. District Unemployment Compensation Bd.*, 383 A.2d 345, 350 (D.C. 1978).



effort to get inside and take custody of her runaway son.<sup>181</sup> The appellate court concluded that the trial court erred in not allowing the defendant to introduce evidence of provocation:

We cannot say that an ordinary, reasonable person, after searching for her son for ten days only to learn that he was staying with her own mother and that her own mother had not only failed to inform her of her son's whereabouts but also refused to return the boy to the custody of his own parent, could not have been so impassioned by these circumstances as to lose her self-control and, acting without reflection, destroy windows and a door in an attempt to get into her mother's house and retrieve her lost son.<sup>182</sup>

According to the court, since malice was an element of the offense and provocation negates malice, provocation was a proper defense.<sup>183</sup> Moreover, the court said in dicta that provocation should be available whenever an offense involves malice, e.g., in cases of malicious disfigurement and malicious interference with a contract.<sup>184</sup> This approach, however, is atypical. In most instances, the defense of provocation is allowed only in the prosecution for homicide.

That brings about a rather absurd result—criminal law grants a partial defense to a killer provoked by a victim. Yet, if the justifiably outraged actor, instead of shooting, slapped the victim on her face (assault) or threw a valuable vase on the floor (destruction of property), in the majority of jurisdictions, there would be no similar mitigation. How can it be reasonably explained that a more grave injury is partially justified by the offensive behavior of the victim, whereas a lesser injury is not? As a matter of both logic and public policy, this is an unsatisfactory outcome.

### *C. Penalty Argument*

Although the victim's comparative fault is ignored at the liability stage of the trial, it comes back as a mitigating

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181. 584 A.2d at 544.

182. *Id.* at 543-44.

183. *Id.* at 539.

184. *Id.* at 539, n.2. But see *Richmond v. Maryland*, 623 A.2d 630, 633-34 (Md. App. 1991) (rejecting provocation in a mayhem case).

factor during the sentencing stage. For instance, the Federal Sentencing Guidelines 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.”<sup>185</sup> The Model Sentencing and Corrections Act lists among mitigating factors a situation when “the defendant acted under strong provocation.”<sup>186</sup> The MPC gives the court a discretionary authority to substitute probation for prison when “the victim of the defendant’s criminal conduct induced or facilitated its commission.”<sup>187</sup> Presently, twenty-three states and the federal government recognize the victim’s participation in the crime or consent to the criminal conduct as a mitigating factor.<sup>188</sup>

The victim’s participation in, or consent to, a homicide is generally recognized as a mitigating factor for capital sentencing purposes.<sup>189</sup> The MPC explains:

If a murder victim plays a role in bringing about his own death, either by participating in dangerous conduct (e.g., playing Russian roulette or joining in the commission of a violent felony), or by consenting to the homicidal act (e.g., in the context of a mercy killing), the judge or jury may wish to consider this conduct when sentencing the offender who is

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185. Federal Sentencing Guidelines, 18 U.S.C. § 5K2.10 (1999).

186. Model Sent. and Corr. Act § 3-108, 10 U.L.A. 396 (2001).

187. Model Penal Code § 7.01 (2)(e) (Official Draft and Revised Comments 1980).

188. See Ala. Code § 13A-5-51(3) (1994); Cal. Penal Code § 190.3(e) (West 1988); Fla. Stat. Ann. § 921.141(6)9c) (West 1985); 720 Ill. Comp. Stat. Ann. § 5/9-1(c)(3) (Smith-Hurd Supp. 1993); Ind. Code Ann. § 35-50-2-9(c)(3) (Michie 1993); Ky. Rev. Stat. Ann. § 532.025(b)(3) (Michie 1990); Md. Code Ann. § 413(g)(2) (Supp. 1993); Miss. Code Ann. § 99-19-101(6)(c) (Supp. 1993); Mo. Ann. Stat. § 565.032(3)(3) (West Supp. 1993); Mont. Code Ann. § 46-18-304(5) (1987); Neb. Rev. Stat. § 29-2523(2)(f) (1989); Nev. Rev. Stat. Ann. § 200.035(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5 (1996); N.J. Stat. Ann. § 2C:11-3 (West 2003); N.M. Stat. Ann. § 31-20A-6 (Michie 1978); N.C. Gen. Stat. § 15A-2000(f)(3) (1983); Ohio Rev. Code Ann. § 2929.04 (Anderson 2001); 42 Pa. Stat. Ann. § 9711(e)(6) (West Supp. 1993); S.C. Code Ann. § 16-3-20(C)(b)(3) (Law. Co-op. Supp. 1993); Tenn. Code Ann. § 39-13-204(i)(3) (1991); Va. Code Ann. § 19.2-264.4(B)(iii) (Michie 1990); Wash. Rev. Code § 10.95.070 (2001); Wyo. Stat. Ann. § 6-2-102(j)(iii) (Michie Supp. 1993); 18 U.S.C. § 3592(a)(7) (1999).

189. See, e.g., Model Penal Code § 210.6(4)(c) (Official Draft and Revised Comments 1980) (it is a mitigating factor when “[t]he victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act”).



legally responsible for causing the death.<sup>190</sup>

Twenty-four of the thirty-two death penalty jurisdictions listing statutory mitigating factors include the victim's conduct as a relevant mitigating consideration under some circumstances.<sup>191</sup> Eighteen states<sup>192</sup> closely

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190. *Id.* at Commentaries, at 140-141. Mitigating factors for capital sentencing purposes recognized under the MPC are:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- (f) The defendant acted under duress or under the domination of another person.
- (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
- (h) The youth of the defendant at the time of the offense.

*Id.* § 210.6(4). The same factors or their variations permeate most state death penalty statutes. See James R. Acker & Charles Lanier, In Fairness and Mercy: Statutory Mitigation Factors in Capital Punishment Laws, 30 *Crim. L. Bull.* 299, 313-33 (1994). Other factors present in some state statutes are: (i) absence of intent to commit a murder; (ii) the offender's lack of future dangerousness or likelihood of rehabilitation; (iii) cooperation with authorities; (iv) the fact that another defendant equally culpable in the crime will not be punished by death; and (v) the fact that the act of the defendant was not the sole proximate cause of the victim's death. *Id.* at 333-37.

191. Acker & Lanier, *supra* note 190, at 320 (listing thirty-one jurisdictions). By now, there are thirty-two such jurisdictions, including federal legislation. See 18 U.S.C.S. § 3592(a)(7) (1999); Ala. Code § 13A-5-51(3) (1994); Ariz. Rev. Stat. § 13-703(G) (2001); Ark. Code Ann. § 5-4-605 (Michie 1997); Cal. Penal Code § 190.3(e) (West 1999); Colo. Rev. Stat. Ann. § 18-1.3-1201(4) (West 1999); Conn. Gen. Stat. § 53a-46a(d) (2001); Fla. Stat. Ann. § 921.141(6)(c) (West 2001); 720 Ill. Comp. Stat. 5/9-1(c)(3) (1993); Ind. Code Ann. § 35-50-2-9(c)(3) (West 1998); Ky. Rev. Stat. Ann. § 532.025(2)(b)(3) (Michie 1999); La. Code Crim. Proc. Ann. art. 905.5 (West 1997); Md. Code Ann. § 2-303(h)(2)(ii) (2002); Miss. Code Ann. § 99-19-101(6)(c) (West 1999); Mo. Rev. Stat. § 565.032(3)(3) (1999); Mont. Code Ann. § 46-18-304(1)(e) (2003); Neb. Rev. Stat. § 29-2523(2)(f) (2003); Nev. Rev. Stat. Ann. § 200.035(3) (Michie 2001); N.H. Rev. Stat. Ann. § 630:5(VI)(h) (1996); N.J. Stat. Ann. § 2C:11-3(5)(b) (West 2003); N.M. Stat. Ann. § 31-20A-6(E) (Michie 1978); N.Y. Crim. Proc. Law § 400.27(9) (McKinney 1994); N.C. Gen. Stat. § 15A-2000(f)(3) (1983); Ohio Rev. Code Ann. § 2929.04(B)(1) (Anderson 2001); Or. Rev. Stat. § 163.150(1)(c)(A) (1997); 42 Pa. Cons. Stat. § 9711(e)(6) (1998); S.C. Code Ann. § 16-3-20(C)(b)(3) (Law. Co-op. 2003); Tenn. Code Ann. § 39-13-204(j)(3) (2003); Utah Code Ann. § 76-3-207(4) (2003); Va. Code Ann. § 19.2-264.4(B)(iii)

follow the language of the MPC, which allows mitigation when “[t]he victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.”<sup>193</sup> In three other jurisdictions, only the victim’s consent to, but not participation in, the defendant’s homicidal act qualifies as a statutory mitigating factor.<sup>194</sup> Four more states consider whether “the victim was a willing participant in the defendant’s conduct,”<sup>195</sup> “[w]hether the victim of the offense induced or facilitated it,”<sup>196</sup> or list factors similar to the MPC’s.<sup>197</sup>

This discrepancy in how the role of the victim is evaluated at the liability stage and the sentencing stage of a trial is unwarranted. Admittedly, these two stages serve different purposes. The first one—the subject of penal codes and criminal trials—concerns the definition of

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(Michie 2003); Wash. Rev. Code § 10.95.070(3) (2001); Wyo. Stat. Ann. § 6-2-102(j)(iii) (Michie 1993).

192. Acker & Lanier, *supra* note 190, at 320. See also Ala. Code § 13A-5-51(3) (1982); Cal. Penal Code § 190.3(e) (West 1988); Fla. Stat. Ann. § 921.141(6)(9)(c) (West 1985); 720 Ill. Comp. Stat. 5/9-1(c)(3) (West Supp. 1993); Ind. Code Ann. § 35-50-2-9(c)(3) (Michie 1993); Ky. Rev. Stat. Ann. § 532.025(b)(3) (Michie 1990); Md. Code Ann. art. 27, § 413(g)(2) (Supp. 1993); Miss. Code Ann. § 99-19-101(6)(c) (Supp. 1993); Mo. Ann. Stat. § 565.032(3)(3) (West Supp. 1993); Mont. Code Ann. § 46-18-304(5) (1987); Neb. Rev. Stat. § 29-2523(2)(f) (1989); Nev. Rev. Stat. Ann. 200.035(3) (Michie 1992); N.C. Gen. Stat. § 15A-2000(f)(3) (1983) (specifically requiring the victim’s voluntary participation in the defendant’s homicidal conduct); 42 Pa. Cons. Stat. Ann. § 9711(e)(6) (West Supp. 1993); S.C. Code Ann. § 16-3-20(C)(b)(3) (Law. Co-op. Supp. 1993); Tenn. Code Ann. § 39-13-204(i)(3) (1991); Va. Code Ann. § 19.2-264.4(B)(iii) (Michie 1990); Wyo. Stat. Ann. § 6-2-1304(j)(3) (Michie 1991); Wyo. Stat. Ann. § 6-2-102(j)(iii) (Michie Supp. 1993). No reference is made to the victim’s conduct as a potential mitigating factor in the death penalty laws of Arizona, Arkansas, Colorado, Connecticut, Louisiana, Oregon, or Utah. See Acker & Lanier, *supra* note 190, at 320-21. However, both Colorado and Louisiana have statutory mitigating factors to the effect that the offender reasonably believed that there was a moral justification or extenuation for his conduct, and the homicide victim’s conduct may be relevant to such circumstances. *Id.*

193. Model Penal Code § 210.6(4)(c) (Official Draft and Revised Comments 1980).

194. See Acker & Lanier, *supra* note 194, at 320-21. See also N.H. Rev. Stat. Ann. § 630:5(VI)(h) (Supp. 1993); Wash. Rev. Code Ann. § 10.95.070(3) (West Supp. 1993); 21 U.S.C.A. § 848(m)(9) (West Supp. 1993).

195. N.M. Stat. Ann. § 31-20A-6(E) (Michie 1990).

196. Ohio Rev. Code Ann. § 2929.04(B)(1) (Anderson 1993).

197. See N.J. Stat. Ann. § 2C:11-3(c)(5)(b) (West Supp. 1993) (“The victim solicited, participated in or consented to the conduct which resulted in his death.”); S.C. Code Ann. § 16-3-20(C)(b)(8) (Law. Co-op. Supp. 1993) (including the MPC’s victim participation or consent provision and also a separate circumstance that considers whether “[t]he defendant was provoked by the victim into committing the murder”).



culpable conduct and the adjudication of guilt. The second one concerns the consequences of conviction for the offender.<sup>198</sup> However, as has been correctly pointed out, “we are accustomed to thinking about the criminal law, and the procedures for enforcing it, as divided into two separate stages. Only rarely do we acknowledge that the conventional separation of these stages into compartments is highly misleading.”<sup>199</sup>

There have been attempts to separate the functions performed at the two stages of a criminal trial. For example, Paul H. Robinson has written in an insightful article about functions of criminal law:<sup>200</sup>

While the first step in the adjudication process, the liability function, requires a simple yes or no decision as to whether the minimum conditions for liability are satisfied, this second step, the grading function, requires judgments of degree. It must consider such factors as the relative harmfulness of the violation and the level of culpability of the actor.<sup>201</sup>

I agree with Robinson that recognizing three separate functions of criminal law—rule articulation, liability assignment, and grading—is, indeed, “a useful way in which to analyze and organize criminal law doctrine.”<sup>202</sup> My disagreement relates to an attempt to assign each function to a specific stage in a criminal adjudication process. In my view, the grading function, the one requiring judgments of degree, goes through all stages of crime prevention, guilt adjudication, and penalty assignment.

For example, before a judge or jurors come to a simple yes or no decision in a case of involuntary homicide, they

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198. Gerald E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 10 Fed. Sent. Rep. 25, \*1 (1997).

199. *Id.*

200. See generally Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 Nw. U. L. Rev. 857 (1994) (arguing that penal codes and courts often confuse three primary functions of criminal law: announcing ex ante the rules of conduct (the rule articulation function), determining ex post whether an actor’s violation is blameworthy and deserves condemnation as criminal (the liability assignment function), and deciding on the appropriate amount of punishment (the grading function)).

201. *Id.* at 857.

202. *Id.*

would have to consider the *degree* of the defendant's fault. The difference between regular recklessness and recklessness manifesting extreme indifference to the value of human life translates into the difference between manslaughter and murder.<sup>203</sup> The magnitude of risk and the extent to which that risk was justifiable determines the choice between no liability, negligent homicide, and manslaughter.<sup>204</sup> Therefore, a yes-or-no answer is a result of consideration of a number of questions involving "the relative harmfulness of the violation and the level of culpability of the actor,"<sup>205</sup> which means that the grading function is continuously applied throughout the guilt adjudication stage.

This view finds support in one of the most important sections of the MPC, the one explaining its purposes.<sup>206</sup> Those purposes are combined in two separate subsections—one deals with the definition and grading of offenses (i.e., the adjudication of guilt), whereas the other addresses the sentencing and treatment of offenders (i.e., the penalty). It is the former subsection that sets forth the goal to distinguish between serious and minor offenses. An official comment explains that the provisions included in that subsection "not only serve to describe the conduct that the penal law makes criminal but also reflect a legislative grading of offenses, differentiating serious and minor derelictions and, within each class, offenses of greater or lesser gravity."<sup>207</sup> That strongly suggests that various fault- and harm-related considerations should be reviewed at the guilt adjudication stage and should affect not only the defendant's punishment but also the offense or the grade of the offense of which she is convicted.

Should the same considerations be reviewed twice—at both stages of a criminal trial? Robinson persuasively argues that considerations relevant at the guilt adjudication stage should be revisited at the penalty stage.<sup>208</sup> For instance, excuse defenses serve the liability

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203. Model Penal Code §§ 210.2 & 210.3 (Official Draft and Revised Comments 1980).

204. Id. §§ 210.3 & 210.4.

205. Robinson, *supra* note 200, at 857.

206. Model Penal Code § 1.02 (Official Draft and Revised Comments 1980).

207. Id. § 1.02 cmt. at 20.

208. See Robinson, *supra* note 200, at 907.

function by assuring that criminal liability not be imposed unless the actor could have been reasonably expected to avoid the violation.<sup>209</sup> If elements of a defense are present but, say, do not reach the required magnitude, the defense fails. To give an example, a failed duress defense may mean that, while some coercion was present, it was not sufficient to render the actor completely blameless for the violation. Does it follow, however, that the actor who fails to prove a duress defense is as blameworthy as one who commits the same offense with no coercion whatsoever? While the degree of mitigation may not be dramatic, most people would likely distinguish the two cases.<sup>210</sup>

The fact that there are numerous factors significant to both stages of a criminal trial raises several questions: Why are some of the factors relevant to sentencing also included in the adjudication of guilt process while other ones are not? Why does “extreme mental or emotional disturbance” or duress affect both the defendant’s verdict and her punishment whereas the defendant’s young age or good criminal record is reviewed only at her sentencing?<sup>211</sup> Finally, how does the victim’s participation in the criminal act fit into this picture?

Addressing a capital trial, the Supreme Court has defined the issue for the penalty stage as the determination of the defendant’s “culpability,” “responsibility,” “blameworthiness,” or “desert.”<sup>212</sup> Unfortunately, not only are these terms often used interchangeably but it is also far from clear what exactly they mean.<sup>213</sup> If they are used in the same sense as at the liability stage, then it is inexplicable why any factors relevant to the defendant’s culpability, responsibility, blameworthiness, or desert are excluded from consideration at the liability stage. If, on the other hand, these terms have different meanings when used in connection with a penalty, what are they?

In a very interesting article, Kyron Huigens shows

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209. *Id.*

210. *Id.*

211. See Model Penal Code §§ 210.3(b), 2.09, 210.6(4) (Official Draft and Revised Comments 1980).

212. Kyron Huigens, *Rethinking the Penalty Phase*, 32 *Ariz. St. L.J.* 1195, 1195 (2000).

213. *Id.*



that the word “culpability” has been invoked in connection with the penalty phase of a capital trial in two different ways—as “fault in wrongdoing” and as “eligibility for punishment.”<sup>214</sup> For example, a minor role of a defendant in the committed crime or the lack of intent to kill is a fault mitigator, whereas the offender’s young age is an eligibility mitigator.<sup>215</sup>

Fault mitigators differ from eligibility mitigators in several important respects. One is that fault is not only a necessary condition for punishment, but is also an affirmative, justifying reason to punish.<sup>216</sup> “Eligibility, in contrast, is only ‘a necessary condition for punishment.’ We do not suppose that a person’s being possessed of ordinary capabilities is an affirmative, justifying reason to punish him.”<sup>217</sup> Another important difference is that fault is an aspect of wrongdoing, and eligibility is not. Rules that govern eligibility for punishment are not correlated to criminal law’s conduct rules.<sup>218</sup>

If we look from that perspective at the victim’s conduct as a relevant mitigating consideration, it would be clear that it is a fault mitigator like “extreme mental or emotional disturbance” or duress, and not an eligibility mitigator like the defendant’s young age or good criminal record. Not only *may* we, but we *should* punish an offender who killed an innocent, unoffending victim. In the same way, not only *may* we, but we *should* acquit a defendant who killed an attacking victim in legitimate self-defense. The corresponding conduct rules prohibit killing of a non-aggressor and permit necessary self-defense.

Then, if the victim’s conduct is a fault factor, why is it not considered at the stage at which all other fault is considered? How can we satisfy the requirement of just desert if we ignore the magnitude of the offender’s fault when deciding whether she is guilty or innocent? The only logical solution to this problem is to consider fault (as

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214. Id. at 1196.

215. See id. at 1228 (explaining that the defendant’s lack of “intent to kill and her minor role as an accomplice are mitigators which can be translated into converse forms, as offense elements or aggravating factors. The matter of her age is a mitigator which does not have any such converse forms”).

216. Id. at 1251.

217. Id.

218. Id. at 1252.

opposed to eligibility) mitigators, including the conduct of the victim, at both stages of the criminal trial.

Pursuant to the advocated approach, all fault mitigators should be first assessed at the liability stage. If, although present, they do not reach the threshold required to eliminate or reduce the *liability* of the offender, they may be considered again—at the penalty stage—in order to reduce the *penalty*.<sup>219</sup> In fact, this approach is already followed in capital cases with respect to certain mitigators. For example, the “extreme mental or emotional disturbance” of the defendant is first considered at the guilt stage (as a factor reducing murder to manslaughter), and then, if the argument has not succeeded, again, just for the purposes of punishment. For the correct determination of the actor’s responsibility, the conduct of the victim should be evaluated the same way, both in capital and appropriate non-capital cases.

One might ask: why does it matter at what stage of the trial a mitigator is considered as long as it reduces the defendant’s punishment? There are several reasons why it matters. First, conviction of a crime is by itself a form of punishment, a social stigma and an obstacle to a successful life.<sup>220</sup> For that reason alone, a particular offense imputed to the defendant should reflect the amount of wrong done by her. If the perpetrator deserves to be convicted of a lesser offense, it is unfair to convict her of a more serious crime, regardless of the imposed sentence.<sup>221</sup>

In addition, the disconnect between the amount of fault presupposed by a particular offense and the actual amount of the defendant’s fault may send a confusing message to the community and lead to inconsistent

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219. A more radical proposal would be to turn the menu of discrete offenses into a continuous percentage-based system of criminal responsibility. Thus, say, instead of making a black-and-white determination of defendant’s criminal responsibility for a particular offense, the jury would be able to find him 62% guilty, and the punishment would be assigned accordingly. This discussion, however, is far beyond the scope of this article.

220. See, e.g., Model Penal Code § 1.02 cmt. at 20 (Official Draft and Revised Comments 1980) (recognizing that, “in its effect on the offender’s status in society, the law delineating . . . distinctions [between serious and minor offenses] has an impact second only to that which establishes that proscribed conduct will be criminal”).

221. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975) (acknowledging that criminal law “is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability”).

verdicts. It is well known, for instance, that jurors do consider the fault of the victim but, in the absence of a cohesive theory of comparative responsibility, they often have to choose between all-or-nothing options. As a result, some offenders receive more severe verdicts than they deserve, while others, due to the jurors' exercise of the power of nullification, walk away unpunished.<sup>222</sup>

Notably, jurors recognize the difference between reducing the defendant's liability and reducing only her punishment. For example, as Kalven and Zeisel have shown, in almost 30% of all criminal trials included in their study, the judge would have decided the issue of guilt differently than the jury.<sup>223</sup> Yet at the penalty stage, the discrepancy between the judge's and the jury's decisions amounted only to 4%.<sup>224</sup> Moreover, with respect to the determination of guilt and the proper charge, the jury would be six-and-a-half times more likely than the judge to show leniency; at the same time, there is very little disagreement between the judge's and the jury's penalty decisions.<sup>225</sup> That proves that the general public assigns more importance to proper adjudication of one's guilt than to the punishment alone.

Finally, although sentencing guidelines often authorize mitigation of the offender's punishment due to the victim's faulty conduct, in reality this factor may not be used much. For instance, according to the Sourcebook of Federal Sentencing Statistics, in 2001, the victim's conduct was cited as a reason for mitigation in only .2% of all federal cases in which the sentence to the defendant was reduced below the range set forth in the federal sentencing guidelines.<sup>226</sup> This number seems somewhat low even

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222. See, e.g., Kalven & Zeisel, *supra* note 32, at 243 (reporting jurors' acquittal of the defendant involved in a fatal drag race with the victim). The judge explained his disagreement with the verdict: "Because the jury did not follow the charge of the court, they saw some evidence of contributory negligence on part of the person assaulted. Contributory negligence is no defense in the laws of this state to criminal actions." *Id.*

223. Kalven & Zeisel, *supra* note 32, at 62 (study shows that, taken together, cases with disagreement on guilt (19.1%), hung juries (5.5%) and disagreement on charge (5.2%) equal 29.8% of all included cases). It is worth noting that out of that 30%, the judge would be more lenient in only 4% of cases. *Id.*

224. *Id.*

225. *Id.* (at the penalty stage, judge is more lenient than the jury in 1.5% of cases, whereas jurors are more lenient than the judge in 2.5% of cases).

226. United States Sentencing Commission, 2001 Sourcebook of Federal Sentencing



considering that the majority of federal cases involve “victimless” crimes, and almost 75% of all downward departures from the guidelines happen in drug-trafficking and immigration cases.<sup>227</sup>

For all these reasons—maintaining fairness, accuracy, and consistency of verdicts; respecting prevalent community expectations; and ensuring consistency between different stages of criminal adjudication—it is necessary to consider the victim’s conduct as a fault mitigator at the liability stage of the trial.

#### *D. Torts Argument*

The development of the theory of comparative fault in torts provides more support to the argument that the conduct of the victim is a relevant factor in the assessment of the perpetrator’s criminal liability. Undoubtedly, criminal law and tort law differ in some significant respects—the former is public while the latter is private. The former punishes those who wrong society, in order to impose “just deserts” upon the wrongdoer and deter others from engaging in similar behavior. The latter provides a remedy to individuals or entities harmed by other individuals or entities, in order to make them whole.<sup>228</sup>

Nevertheless, criminal law and torts share a lot. First, they have a common origin—there was no distinction between torts and crimes in early English law.<sup>229</sup> This common ancestry is reflected in many core concepts essential to both theories. Requirements of harm,<sup>230</sup> violation of a social norm,<sup>231</sup> and causation<sup>232</sup> are among

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Statistics, Table 25 (2001), available at <http://www.uscc.gov/ANNRPT/2001/tab2425.pdf>.

227. See *id.* at Table 27, available at <http://www.uscc.gov/ANNRPT/2001/table27.pdf>. The departures included in this calculation do not include those granted for the substantial assistance to the prosecution.

228. Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 *Buff. Crim. L. Rev.* 679, 679-80 (1990).

229. See generally Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 *La. L. Rev.* 1, 2 (1970) (“Any distinction between crime and tort was unknown.”).

230. See Claire Finkelstein, *New Perspectives And Legal Implications: Is Risk A Harm?*, 151 *U. Pa. L. Rev.* 963, 965 (2003) (“While both tort and criminal law recognize that there are harms that should not generate liability, harm appears to be at least a necessary condition for liability in both areas.”).

231. See Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 *Wash. & Lee L. Rev.* 475, 519 (2002) (“Although tort law thus moved

them. Moreover, as far as punishment is concerned, the “line between criminal law and tort law is blurred by the imposition in tort actions of punitive damages, which address the moral culpability of the tortfeasor,”<sup>233</sup> and by restitution statutes adopted in a substantial number of states. Restitution statutes provide for monetary compensation by an offender to the victim of a crime<sup>234</sup> and fundamentally rest on the tort principle that the wrongdoer should “restore” the victim to her status quo ante.<sup>235</sup> There is a good reason, therefore, to consider some arguments related to the development of the concepts of perpetrator liability and victim’s fault in the law of torts.

The historical evolution of the concept of responsibility in torts was marked by a “progression away from the harsh and arbitrary common law rules of contributory negligence and joint and several liability toward the principle of comparative fault among all who contributed to the injury.”<sup>236</sup> The rule of contributory negligence, for example, completely barred recovery to a plaintiff who was at fault, no matter how slightly compared to the defendant.<sup>237</sup> The rule grew out of the common law doctrine of the unity of the cause of action, according to which an injury was a single event and could not be logically divided.<sup>238</sup>

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away from the criminal law, it remains rooted in seeking to punish those who violate societal norms.”).

232. See Jerome Hall, *General Principles of Criminal Law* 254-57 (2d ed. 1960) (discussing similarities and differences in how causation is understood in criminal law and tort law).

233. Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 *Alb. L. Rev.* 579, 582 (1997). See also *Smith v. Wade*, 461 U.S. 30, 51 (1983) (noting that punitive damages are appropriate where defendant’s conduct is willful, wanton, or malicious, or demonstrates a reckless indifference to the rights of others or an evil motive).

234. Andrea G. Nadel, Annotation, *Statutes Providing For Governmental Compensation For Victims Of Crime*, 20 *A.L.R. 4th* 63 (2003) (“In an endeavor to assist in recovery from the damaging personal consequences of crime, a substantial number of states have adopted programs making provisions by statute for payment of compensation to victims of crimes or to their dependents.”).

235. Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid To Victims Of Terrorist Attacks*, 40 *Brandeis L.J.* 83, 88 (2001).

236. Gregory C. Sisk, *Comparative Fault And Common Sense*, 30 *Gonz. L. Rev.* 29, 30 (1994).

237. *Id.* at 31 (“If a plaintiff was at fault in part, she had to be treated as at fault in whole, and this contributory negligence barred recovery.”).

238. William L. Prosser, *Joint Torts and Several Liability*, 25 *Cal. L. Rev.* 413, 418 (1936/37) (explaining that, pursuant to the concept of the unity of the cause of action, “the jury could not be permitted to apportion the damages, since there was



Prior to the 1970s, the overwhelming majority of states adhered to the rule of contributory negligence. In the past thirty years, however, there has been a dramatic shift to comparative negligence, accomplished through judicial decisions and legislative enactments. At present, forty-six states employ one form or another of comparative negligence which allows fault to be apportioned among all parties responsible for the injury or loss.<sup>239</sup>

It is instructive to review some of the reasons cited in state supreme court opinions in favor of changing the rule. Numerous decisions criticize the contributory negligence doctrine as harsh,<sup>240</sup> inequitable and unjust,<sup>241</sup> opposed to interests of justice and fair play,<sup>242</sup> and “draconian in operation.”<sup>243</sup> One of the main arguments against the old rule is that its application produced an “all or nothing” result: the defendant was either liable for full damages or totally relieved of responsibility.<sup>244</sup> Even though the harshness of the rule was mitigated by various exceptions,<sup>245</sup> they still did not alleviate the general unfairness of the all-or-nothing approach.<sup>246</sup> In the words of a commentator, “[t]he stark impression left by this ‘all or nothing’ process simply defied reality and, hence, offended one’s ordinary sense of justice.”<sup>247</sup>

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but one wrong”).

239. Comparative Negligence Law and Practice, § 1-1[4] (Matthew Bender & Company, Inc. 2003), available at LEXIS (noting that contributory negligence remains to be the rule only in a small geographic cluster of jurisdictions: Alabama, the District of Columbia, Maryland, North Carolina, and Virginia).

240. *Goetzman v. Wichern*, 327 N.W.2d 742, 746 (Iowa 1982); *Scott v. Rizzo*, 634 P.2d 1234, 1241 (N.M. 1981).

241. *Wichern*, 327 N.W.2d at 752; *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 882 (W. Va. 1979).

242. *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).

243. *Bradley*, 256 S.E.2d at 884.

244. *Kaatz v. State*, 540 P.2d 1037, 1047 (1975); *Wichern*, 327 N.W.2d at 747; *Rizzo*, 634 P.2d at 1241.

245. See, e.g., Restatement (Second) of Torts §§ 479-84 (1984) (excluding from the contributory fault rule (i) intentional or reckless injury; (ii) nuisance; (iii) strict liability offense; (iv) violation of a statute; and (v) situation when defendant had the last clear chance to avoid injury).

246. See David Sobelsohn, *Comparing Fault*, 60 Ind. L.J. 413, 413 (1985) (noting that the development of exceptions helped to alleviate the harshness of the contributory negligence rule but did nothing to ameliorate its unfairness to the parties in individual cases, since recovery was still had on all-or-nothing basis).

247. Comparative Negligence Law and Practice, *supra* note 239, at §1-1[5][b].

In addition, a number of courts rejected the contributory negligence rule because jurors rebelled at applying it,<sup>248</sup> thus violating their oaths to follow instructions<sup>249</sup> and detracting from public confidence in the law.<sup>250</sup> About a decade before the rapid spread and adoption of comparative negligence, one commentator observed that there is “something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow.”<sup>251</sup>

All these arguments can be repeated almost verbatim with respect to the consideration of victims’ fault in criminal law. Is it not unfair to assign all the responsibility for an injury to one party, the offender, and completely ignore the victim’s contribution? Does not this practice simply defy the reality and, hence, offend one’s ordinary sense of justice? Social scientists for years have voiced these concerns. As one of them has pointed out, it is

[A]bsurd that, whenever a crime occurs, the entire blame is placed on the offender without taking a dynamic view of the crime from every angle, and without considering, among other things, any precipitative or causative behavior by the victim that may have eventually affected the development or concept of the crime. Criminal responsibility has become one-directional.<sup>252</sup>

The argument that there may be a serious problem with a law that goes against community convictions is also applicable to the victim’s fault in criminal law, as an earlier discussion shows.<sup>253</sup> Serving on a jury may be the only formal point of contact with the judicial system for many, if

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248. See, e.g., *Alibrandi v. Helmsley*, 314 N.Y.S.2d 95, 97 (N.Y. Sup. Ct. 1970) (stating, “as every trial lawyer knows, the jury would likely have ignored its instructions on contributory negligence and applied a standard of comparative negligence”).

249. *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973); *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981); *Wichern*, 327 N.W.2d at 749.

250. *Li*, 532 P.2d at 1231.

251. Frank E. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 Fla. L. Rev. 135, 151 (1958).

252. Schafer, *supra* note 5, at 20.

253. See discussion *supra* in section II.A.2(b)(ii).

not most, of society's members.<sup>254</sup> From that perspective, a law that consistently causes jurors to apply their power of nullification is troubling.<sup>255</sup>

Recent developments in torts law raise new questions applicable to criminal law doctrine as well. Adopted in 2000, the Restatement (Third) of Torts: Apportionment of Liability provides for apportionment of all personal injury claims "regardless of the basis for liability."<sup>256</sup> In other words, it allows for the apportionment of liability between negligent and intentional actors. The new rule reflects a powerful new trend. In the last decade, many state courts and legislatures addressed the issue of intentional/negligent comparative fault, including allocation of fault between a plaintiff and a defendant.<sup>257</sup>

The Restatement acknowledges that apportionment of liability between an intentional tortfeasor and a negligent victim presents special problems.<sup>258</sup> In its final draft, the Restatement took no position on that issue, reserving it for the developing "substantive law."<sup>259</sup> One of the Reporters explained:

[W]e originally did think that plaintiff's negligence should be a reduction to intentional torts. There is a growing and emerging body of case law that supports that. . . . and of the cases where courts have faced this issue over the last 10 years or so, as courts have started to recognize this issue, they have more frequently than not recognized plaintiff's negligence as a defense to an intentional tort. Nevertheless,

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254. See Maloney, *supra* note 251, at 151.

255. *Id.* at 152 ("The disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law.")

256. Restatement (Third) of Torts: Apportionment of Liability, § 1 (1999).

257. Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 *Notre Dame L. Rev.* 355, 367 (2003) ("Courts in at least twenty-two states have recently faced questions about comparison of defendants' intentional and negligent fault. State legislatures have faced similar questions. Moreover, a number of state courts have examined comparison of intentional and negligent fault between plaintiffs and defendants.") (footnotes omitted).

258. Restatement (Third) of Torts: Apportionment of Liability, § 1 cmt. c at 7 (1999).

259. *Id.* at 8.



this is an emerging area.<sup>260</sup>

Traditionally, the harsh contributory fault rule did not apply to intentional torts.<sup>261</sup> When courts and legislatures adopted the comparative responsibility instead of the contributory fault doctrine, they largely ignored intentional torts.<sup>262</sup> Thus, the issue is still open, and courts<sup>263</sup> and commentators<sup>264</sup> provide arguments and propose solutions that may be helpful for deciding analogical questions in criminal law.

In the view of many courts and scholars, the main reason to use comparative fault in most types of intentional tort cases is simple: it is fair to do so.<sup>265</sup> It is widely believed that “persons are responsible for their acts to the extent their fault contributes to an injurious result.”<sup>266</sup> Accordingly, to the extent the injurious result is attributable to an act of another, the offender should not bear responsibility for it. This logic is, to a large degree, applicable to both criminal and civil responsibility.

The Reporter’s Notes indicate that there are circumstances when the plaintiff’s conduct may be a

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260. The American Law Institute, 1999 Proceedings, 76th Meeting, at 34 (1999) (remarks of Prof. Powers).

261. Restatement (Third) of Torts: Apportionment of Liability, § 1 cmt. c at 7 (1999).

262. *Id.*

263. See, e.g., *Comeau v. Lucas*, 455 N.Y.S.2d 871, 873 (N.Y. App. Div. 1982) (comparing disruptive behavior of plaintiff with intentional assault by defendant); *Bonpua v. Fagan*, 602 A.2d 287, 288-89 (N.J. Super. Ct. App. Div. 1992) (comparing negligence of plaintiff in provoking fight with defendant’s intentional battery); *Barth v. Coleman*, 878 P.2d 319, 322-23 (N.M. 1994) (comparing negligence of plaintiff with negligence of defendant and intentional assault by other); *Morris v. Yogi Bear’s Jellystone Park Camp Resort*, 539 So. 2d 70, 77-78 (La. Ct. App. 1989) (comparing intentional rapist with negligence of 13-year-old victim). But see *McLain v. Training and Dev. Corp.*, 572 A.2d 494, 496-97 (Me. 1990) (refusing to compare defendant’s responsibility for assault and battery with contributory negligence of plaintiff); *Kelzer v. Wachholz*, 381 N.W.2d 852, 854 (Minn. Ct. App. 1986) (refusing to compare fault of plaintiff with intentional trespasser); *Cartwright v. Equitable Life Assurance Soc’y*, 914 P.2d 976, 996-98 (Mont. 1996) (refusing to compare plaintiff’s negligence with defendant’s fraud).

264. See, e.g., *Bublick*, supra note 257; Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 Vand. L. Rev. 121 (1993); *Sisk*, supra note 236; *Sobelsohn*, supra note 246, at 442.

265. See Hollister, supra note 264, at 127.

266. Friedrich K. Juenger, *Brief For Negligence Law Section of the State Bar of Michigan in Support of Comparative Negligence as Amicus Curiae*, *Parsons v. Construction Equipment Company*, 18 Wayne L. Rev. 3, 50 (1972).

comparative defense against an intentional tort—e.g., when the plaintiff’s, as well as the defendant’s, conduct was intentional or when the defendant honestly but unreasonably believed that her conduct was privileged.<sup>267</sup> In order to distinguish cases in which the plaintiff’s failure to use reasonable care is relevant from those in which it should be ignored, the Restatement proposes that courts develop “substantive liability rules, often called ‘no duty’ rules, to cover certain types of plaintiff conduct, such as a claim that a victim of a sexual assault dressed provocatively, a claim involving domestic violence,”<sup>268</sup> or a claim by a “mugger that the victim was negligent for being out too late at night or for wearing too much jewelry.”<sup>269</sup> Under those rules, “a plaintiff who starts a fight in a bar should be treated differently from a plaintiff who walks into a dangerous neighborhood and is assaulted.”<sup>270</sup> The “no duty” rules offer a workable model for distinguishing relevant and irrelevant faulty conduct of the victim in criminal cases as well. I discuss that further in section III.3(c) below.

Finally, the Restatement articulates criteria that may be considered for allocating responsibility among parties—fault and causation.<sup>271</sup> The fault factors in this comparison include the character and nature of each person’s risk-creating conduct, the circumstances surrounding the conduct, each person’s abilities and disabilities, and each person’s intent, awareness of, or indifference to the risks.<sup>272</sup>

To summarize, tort law and criminal law are based on many similar principles. In the past thirty years, tort law has experienced a significant change. It has abandoned the artificial all-or-nothing approach to liability and adopted a theory of comparative fault that recognizes that more than

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267. Restatement (Third) of Torts: Apportionment of Liability, at §1, cmt. c, Reporter’s Notes at 13 (1999).

268. *Id.* at 14.

269. *Id.* at 13.

270. *Id.* § 3 cmt. d at 53.

271. *Id.* § 8. Similar criteria are central in the Uniform Comparative Fault Act. See Uniform Comparative Fault Act, 12 U.L.A. 33, § 2(b) (1981 Supp.) (“In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.”).

272. Restatement (Third) of Torts: Apportionment of Liability, at §8 cmt. c at 117 (1999).

one person may be responsible for an injury or loss. Moreover, in recent years, courts and academics have confronted the issue of comparative responsibility between an intentional tortfeasor and a faulty victim, developing rules and criteria that allow situations in which the victim's fault reduced the defendant's liability to be distinguished from those in which it was irrelevant. That last development is particularly important because intentional torts, with their focus not only on the compensation of harm but also on punishment and deterrence, are particularly close to criminal law. Tort law, which in the past had been the target of many of the same criticisms as criminal law today, has reformed itself while criminal law continues to ignore the gap between its one-dimensional doctrine of responsibility and the understanding of responsibility shared by social sciences, moral philosophy, and the community. The comparative responsibility reform in torts provides both arguments and criteria for conducting a similar reform in criminal law.

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In this part, I provided some general arguments why, under certain circumstances, viewed systematically, criminal law should reduce the offender's liability due to the faulty conduct of the victim. My main arguments included:

- (a) The just desert argument. Under the principle of just desert, individuals should be responsible only for the amount of harm they caused. Accordingly, to the extent the victim is responsible for a portion of the harm, the offender's liability should be reduced;
- (b) The efficiency argument. The law should be efficient. I do not view that principle as the ultimate organizing consideration of criminal law and utilize it only to the extent that it does not contradict the just desert principle. Accordingly, I do not rely on the economic efficiency line of reasoning. On the other hand, I agree with arguments that, in order to be efficient, the law should (i) not overuse criminal sanctions, and (ii) develop in a dialogue with community perceptions of right and wrong. In that sense, it is important to recognize that the community (acting through jurors) has already incorporated comparative fault

into criminal law. To maintain a fair and lawful system of criminal justice, a theory of comparative fault must be worked out to guide people in their decision making;

- (c) The consistency argument. The law is a system in which various rules are interdependent. To be consistent, the law must treat similar states of affairs in a similar fashion. At this point, the law recognizes the victim's fault as a mitigating circumstance in a number of specific situations, and, at the same time, refuses to recognize it as a general principle. That leads to illogical, incoherent, and unfair decisions;
- (d) The penalty argument. The victim's fault is a valid penalty mitigator in a number of circumstances. Since the victim's fault is a "fault mitigator," it should be allowed at the guilt adjudication stage, and not only at the penalty stage; and
- (e) The torts argument. Tort and criminal law doctrines have significant similarities. Tort theory has recognized the principle of comparative responsibility and continues to broaden the scope of its application. The comparative responsibility reform in torts supplies arguments and criteria for conducting a similar reform in criminal law.

These arguments make a general claim that the victim's conduct *may* be a relevant consideration in determining the perpetrator's criminal liability. The next part suggests a method for distinguishing situations in which the victim's conduct is, in fact, relevant from those in which it should be legally irrelevant, i.e., proposes a basis for developing a theory of comparative responsibility in criminal law.

### III. TOWARD A UNIFYING THEORY OF COMPARATIVE LIABILITY

#### A. *The Underlying Principle: Rights and Wrongs*

It is recognized that the perpetrator's liability depends not only on an act of wrongdoing committed with certain culpability but also on a violation of some kind of a legal

and moral norm.<sup>273</sup> Most norms of criminal law are rights-based rather than duty-based.<sup>274</sup> Namely, in non-victimless crimes, part of what makes the perpetrator's act offensive is *a violation of a victim's right*<sup>275</sup>—the more serious the violation, the more serious the offense.

Conversely, a voluntary act (whether intentional, reckless, or negligent) that harms the victim but does not violate his rights, is usually not subject to criminal liability. For example, I did not invite someone to my party. That could happen by mistake, even an unreasonable, negligent mistake, or on purpose. The uninvited person may be harmed—her reputation and social status may suffer, she may lose certain career opportunities presented at the party, or she may endure a monetary loss due to the purchases and other expenditures made in the anticipation of the party. Despite all of those harms, tangible and intangible, subjective and objective, I am clearly not liable for them, because I have not violated any legal right of that person.

Now let's revisit the theories of consent, self-defense and provocation. What is common to all of them? In all three theories, the victim did something that abridged his *right not to be harmed* and, therefore, completely or partially *justified* the actor by eliminating or reducing his responsibility for the harm. That suggests a unitary explanation to the three theories, an explanation that takes into account actions of both the perpetrator and the victim. Moreover, that suggests a general principle of criminal law that needs to be recognized across the board, not just sporadically, in connection with a few historically defined defenses. The essence of that principle is that *the criminal liability of the perpetrator should be reduced to the extent the victim, by his own acts, has diminished his right not to be harmed by the perpetrator*. The following discussion illustrates what happens to the victim's rights in situations of consent, self-defense, and provocation.

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273. Victims and Retribution, *supra* note 7, at 70.

274. *Id.* at 71-72 (“An example of a duty-based norm is the duty not to be cruel to animals; an example of a rights-based norm is that protecting the right of a person to her own bodily integrity on which is based the duty of everybody else not to violate that integrity.”).

275. See *id.* at 69 (explaining that a criminal wrongdoing involves a violation of a norm, and “[v]ictims come in as part of the content of those norms”).

B. *Victims' Rights in Situations of Consent, Self-Defense and Provocation*

1. Consent

Consent presents the most straightforward scenario. The victim voluntarily *waives* his right to a certain freedom that he otherwise would enjoy. For example, one may not limit my freedom of movement by locking me up in his apartment, unless I agree to that. By agreeing, I waive, for a certain period of time, my right to move freely. In addition, whether I realize that or not, I assume the risk that I may not like being all alone in an empty apartment, that I may suddenly remember important business I have to attend to, or even that I may have a hard time getting out in a case of a fire.

In other words, I may be objectively hurt by my consent and I may subjectively regret it. Nevertheless, my rights have not been violated; therefore, the person who locked me in is guilty of no wrongdoing. As the famous maxim goes, "a person is not wronged by that to which he consents."<sup>276</sup> If a rational adult individual has a legally recognized right and is the only one to be directly harmed by waiving it, the liberal tradition, with its emphasis on free will and personal autonomy, demands that his consent (and the corresponding right to make a bad choice) be respected by society, and the actor who causes that individual consensual harm be completely justified.<sup>277</sup> In fact, with a few exceptions that have been discussed earlier, that is the current law.<sup>278</sup>

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276. *Volenti non fit injuria*. See Terence Ingman, *A History of the Defense of Volenti Non Fit Injuria*, 26 *Jurid. Rev.* 1, 8-9 (1981).

277. See, e.g., *id.* at 172.

When B requests that A do something for (or to) him that is directly harmful or dangerous to B's interests, or when the idea originates with A and he solicits and receives B's permission to do that thing, then (in either case) B can be said to have consented to A's action. If nevertheless the criminal law prohibits A from acting in such cases, it invades B's liberty (by preventing him from getting what he wanted from A) or his autonomy (by depriving his voluntary consent of its effect).

278. See discussion *supra* in section I.B.1.

## 2. Self-Defense

In the case of self-defense, the victim-aggressor does something similar to what the consenting victim does. By attacking an unoffending person, the victim-aggressor *gives up* his right to bodily integrity, and possibly even his right to life.<sup>279</sup> Most philosophical explanations of self-defense implicitly or explicitly draw on the idea of the aggressor's forfeiture of rights<sup>280</sup>—"at the moment a homicidal aggressor puts another life in jeopardy, his own life is forfeit to his threatened victim."<sup>281</sup> Without a foundation of this kind, it is difficult to explain why the defendant is justified in killing a deadly aggressor, i.e., why the life of one person is preferable to the life of another.

The concept of forfeiture has an intuitive appeal when we think of a paradigmatic case of a culpable aggressor attacking an innocent victim. That appeal slightly fades, however, when we apply the same theory to an innocent aggressor. Aggressors may be innocent because of a valid legal defense—excuse (e.g., duress, insanity, or minority)<sup>282</sup> or justification (e.g., self-defense).<sup>283</sup> Moreover, innocent

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279. See, e.g., Dressler, *supra* note 70, § 18.04[B][1], at 234 (citing a typical non-utilitarian consideration that "a defensive killing is justifiable because the aggressor, by his culpable act of threatening an innocent person's life, forfeits his right to life").

280. See, e.g., Uniacke, *supra* note 80, at 194 ("Something akin to a theory of forfeiture of rights is necessary to the justification of homicide in self-defense: it is necessary to the justification of self-preferential killing"); Nancy Davis, *Abortion and Self-Defense*, 13 *Phil. & Pub. Aff.* 175, 202 (1984) (stating that unjust aggressors "have in some sense done something that has weakened, forfeited or undermined their prior claims to moral parity" with persons they attack).

281. *Voluntary Euthanasia*, *supra* note 52, at 111.

282. See, e.g., Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, *supra* note 66, at 371 (showing that the right of self-defense may be used against innocent as well as to culpable aggressors). Fletcher's well-known hypothetical goes as follows:

Imagine that your companion in an elevator goes berserk and attacks you with a knife. There is no escape: the only way to avoid serious bodily harm or even death is to kill him. The assailant acts purposively in the sense that he means further his aggressive end. He does act in a frenzy or in a fit, yet it is clear that his conduct is non-responsible. If he were brought to trial for his attack, he would have a valid defense of insanity.

*Id.*

283. In the majority of states, mistaken self-defense is a justification. But see Robinson, *supra* note 72, at 239-40 (arguing that mistaken self-defense should be treated as an excuse rather than a justification); *Unified Excuse*, *supra* note 68, at 1483-84 (supporting Robinson's argument).

aggressors may have committed no criminal act at all.

Consider the case of Mrs. Cogdon who, in a somnambulistic state, killed her daughter Pat with an axe.<sup>284</sup> Mrs. Cogdon was charged with murder but acquitted because “the act of killing was not, in law, regarded as her act at all.”<sup>285</sup> Now, what if before the first fatal blow fell, Pat woke up and tried to defend herself—would she be justified if, after all other attempts failed, she shot her mother to death? The answer is yes. But how can we say that Mrs. Cogdon, who reportedly adored her daughter, has forfeited her right to life without even waking up?

One way out of this conundrum is to regard the hypothetical killing of Mrs. Cogdon not as justifiable but rather as excusable homicide, i.e., to claim not that Pat was right in killing her mother but that Pat was wrong, yet we understand her predicament and forgive her. This position has been cleverly advocated by Laurence A. Alexander:

We can sympathize with and excuse a person who uses deadly force to fend off innocent aggressors, but we cannot say that it is right for him to do so. Attack by innocent aggressors is better characterized as a case of duress that excuses homicide, not a case of Wrong that justifies it.<sup>286</sup>

At the first glance, Alexander’s suggestion seems attractive. It allows setting apart killings of villainous and innocent aggressors. However, it also leads to two major conceptual problems. The first one deals with innocent bystanders, the second one with the defense of another.

If we are willing to excuse the intentional killing of an innocent aggressor, that has to be because we focus entirely on the emotional upheaval of the attacked. But, from that perspective, there is no difference between an innocent aggressor and an innocent bystander. By that logic, we have to excuse intentional killing of an innocent bystander too. In fact, we have to excuse intentional killing of *any number of innocent bystanders*, if such sacrifice appears to the perpetrator necessary for his personal survival. It is

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284. Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 *Res Judicatae* 29, 29-30 (1951).

285. *Id.*

286. Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 *Wayne L. Rev.* 1177, 1187 (1987).



unlikely that many of us would find this solution morally acceptable.

The other problem is the following: one of the differences between justification and excuse is that excuse is always personal, whereas justification means an objectively better choice.<sup>287</sup> Therefore, a person may not benefit from someone else's excuse but may benefit from someone else's justification.<sup>288</sup> The defense of another extends to a third party the justification of self-defense available to the attacked person. If we view Pat's defensive killing of her mother as merely excusable, that would mean that no one else would be able to save Pat's life by killing Mrs. Cogdon. That outcome does not seem right.

Moreover, as a general matter, the excusatory interpretation of self-defense destroys the basis for the defense of another. Traditionally, a third party defender is said to "stand in the shoes" of the person in danger.<sup>289</sup> If the attacked person were merely excused in his self-defense, the third party would be entitled neither to that excuse (excuse is always personal) nor to the justification based on the extension of self-defense (why should he, if the victim of the attack is not?). One way to authorize a third party's intervention would be by granting him a personal excuse too. Then the law would consider the defender's actions wrong but would excuse his violent reaction to the witnessed attack. A major problem with this proposition is that it makes it absolutely irrelevant on whose side the third party intervenes, the attacker or the attacked. The defense of another thus loses any sense.

Alexander deals with this dead-end outcome by suggesting that "third parties may intervene only pursuant to a lesser evils calculus"<sup>290</sup>; thus, according to Alexander,

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287. Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, in *Justification and Excuse in the Criminal Law* 341, 360 (Michael Louis Corrado ed., 1994) (explaining that excuses are individual and justifications are general, i.e., "an excuse does not reach others who perform similar acts, but a valid justification would apply to anyone else in similar conditions").

288. See Fletcher, *Rethinking Criminal Law*, supra note 66, § 10.5, at 868-69 ("Thinking of necessary defense as an excuse limits the options of third parties to intervene; thinking of the defense as a variation of lesser evils should generate a universal right to intervene and further the greater good.").

289. See LaFave & Scott, supra note 65, at §5.8(b) (discussing traditional view of "alter ego" rule which treats right to defend another as coextensive with the other's right to defend himself).

290. Alexander, supra note 286, at 1187-88.

when an innocent victim is outnumbered by innocent aggressors, a third party may intervene only on the side of the aggressors.<sup>291</sup> For example, if two people attack me because they mistakenly but reasonably believe that I am about to attack them, they are innocent aggressors. I may use any necessary force to defend myself. However, if a bystander, who has been watching the entire incident and knows that the two aggressors are wrong, decides to intervene, he would be able to do so only on the side of the aggressors. Could that be right? If I am attacked by a group of violent maniacs who clearly qualify for the defense of insanity, a Good Samaritan may only help *them* to finish *me*? I agree with Alexander that “[t]his conclusion will leave some readers very unhappy.”<sup>292</sup>

This analysis brings us back to the starting point—self-defense (other than mistaken self-defense)<sup>293</sup> requires some kind of a justificatory, and not merely excusatory, rationale that explains how, by becoming an aggressor, a person reduces his claim to life. A recent work by Suzanne Uniacke supplies this missing link. Her persuasive theory of self-defense is somewhat alternative to the classic understanding of forfeiture.<sup>294</sup> Under her theory, a person does not *lose* his rights by becoming an aggressor. Instead, individual rights *are limited* from the outset: “[o]ur possession of the right to life is conditional, the condition relevant to the justification of self-defense being that we not be an unjust immediate threat to another person.”<sup>295</sup>

Uniacke’s theory is very relevant to the position advocated in this paper—that the wrongfulness of the perpetrator’s acts may be understood only in the context of the perpetrator-victim relationship. Indeed, what lies in the foundation of self-defense is a balancing theory of rights, which presumes that originally everyone has equal rights not

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291. *Id.* at 1188 (concluding that, when two innocent aggressors attack one innocent victim, third parties may intervene only on the side of the aggressors, “at least if, assumedly, a proper balancing of short and long-term interests would declare their two lives more important than the victim’s one life sufficiently often to warrant an instrumental rule to that effect”).

292. *Id.*

293. See discussion *supra* note 72 and the accompanying text.

294. Uniacke, *supra* note 80, at 194-231 (explaining that the use of force in self-defense is justified because the victim’s right to life is conditional on not being an unjust immediate threat to another person’s life or proportionate interest).

295. *Id.* at 197.

to be attacked, harmed or killed by others, and that the scope of an individual's rights is directly related to how he treats similar rights of others.<sup>296</sup> Killing an aggressor (including an innocent aggressor) is, therefore, permissible because his attack on the right to life of an unoffending person triggers the condition which reduces his own right to life.

### 3. Provocation

In provocation, we see the continuation of the same theme. A perpetrator reacts, or rather overreacts, to an offensive attack on his rights by killing the offender. The violated right of the perpetrator, however, is less significant than the right to life—it is either the right to physical integrity and liberty or the right to be free from certain emotional distress. Traditionally, the “paradigms of misbehavior”<sup>297</sup> that warranted the reduction of the perpetrator's liability were: (1) an aggravated assault or battery; (2) mutual combat; (3) commission of a serious crime (chiefly violent or sexual assault) against a close relative of the defendant; (4) illegal arrest; and (5) observation of one's spouse's adultery.<sup>298</sup> Because the violated right of the perpetrator is not as essential as the right he violates, the perpetrator is not completely exonerated of his offense. Instead, his liability is reduced from murder to manslaughter.

In his analysis of provocation, Dressler finds the proposition that a provoking victim “forfeits his right to life (or, incoherently, forfeits part of his life), or that a private aggrieved individual may unilaterally determine that another human being ‘sort of’ deserves death or that his life does not count as much as another's—morally objectionable.”<sup>299</sup> Let's take Dressler's concerns one by one.

True, the traditional theory of forfeiture may not work

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296. See Judith Jarvis Thomson, *Self-Defense*, 20 *Phil. & Pub. Aff.* 283, 302 (1991) (suggesting that what makes it permissible to kill deadly attackers “is the fact that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them”).

297. *Brown v. United States*, 584 A.2d 537, 540 (D.C. Ct. App. 1990).

298. Model Penal Code § 210.3 cmt. 5(a) at 57-58 (Official Draft and Revised Comments 1980).

299. *Why Keep the Provocation Defense?*, *supra* note 88, at 969.

in all circumstances; just as it does not work in all cases of self-defense. One type of case that does not fit into the traditional paradigm is mistaken provocation, in which the defendant strikes someone who has not violated any of his rights. That could happen due to the defendant's misinterpretation of either the victim's acts or his own rights. Just like cases of mistaken self-defense, these cases should be viewed only through the prism of the excusatory rationale; i.e., if the defendant's fault is mitigated, that happens for reasons other than the conduct of the victim.

As for the more conventional cases of provocation, such as aggravated assault or battery, some version of forfeiture of rights, or assumption of risk, or conditional rights<sup>300</sup> seems much more acceptable. Of course, normally, the rights the offender risks or forfeits should be on a comparable scale with the rights he attacks. Only to that extent is the defendant justified in his responsive strike. This is why provocation is merely a partial defense. And, like any partial justification, it does not make the defendant's offense right, it only reduces its wrongfulness relative to what it would have been had the victim not lost some of his rights by violating the rights of the defendant. As Andrew J. Ashworth has observed, "[t]he claim implicit in partial justification is that an individual is to some extent morally justified in making a punitive return against someone who intentionally causes him serious offense."<sup>301</sup>

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300. Uniacke herself would not agree with that because she does not believe in partial justification and regards provocation as an excuse only. See Uniacke, *supra* note 80, at 13 (concluding that provocation is an excuse and not justification).

301. Andrew J. Ashworth, *The Doctrine of Provocation*, 35 *Cambridge L.J.* 292, 307 (1976). I would not limit provocation to an intentional offense, however. An actor may be provoked by an assault caused recklessly or negligently, e.g., when the victim injured the defendant or killed a close relative of the defendant in an accident caused by the victim's reckless or negligent driving. Moreover, even if the victim were justified in his risky driving (e.g., because he was taking a very sick person to a hospital), the rationale for the provocation defense would still apply. The defendant who, due to the victim's careless driving, suffered an injury or witnessed the death of a close relative and in response hit the victim, causing the victim's death, would still be entitled to the defense of provocation. See, e.g., *New Jersey v. Madden*, 294 A.2d 609, 622 (N.J. 1972) (stating in dicta that in the event a close relative of the victim of a battery witnessed the beating, they would have a plausible defense of provocation); *Pennsylvania v. Jenkins*, 26 Phila. 177, 185 (1993) (stating that viewing harm being inflicted on a crippled parent would be sufficient to provoke a reasonable person).

Dressler's second concern is that, by viewing provocation through the theory of comparative rights, we are giving individuals the license to kill. I wonder whether, in making this claim, Dressler does not overlook the difference between a backward-looking defense and a forward-looking authorization of an otherwise prohibited act. That difference was highlighted in *Public Committee Against Torture v. State of Israel*.<sup>302</sup> The Supreme Court of Israel rejected the proposition that, in exceptional situations, the General Security Service (GSS) may use physical means in an interrogation of suspected terrorists.<sup>303</sup> At the same time, the court did not foreclose the possibility that, if criminal charges are brought against GSS interrogators, they may be able to claim the defense of necessity.<sup>304</sup> The court thus drew the line between "potential liability of GSS investigators"<sup>305</sup> and inferring "the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of 'necessity.'"<sup>306</sup>

Similarly, there is a meaningful difference between authorizing an individual to "unilaterally determine that another human being "sort of" deserves death" and objectively and retroactively considering the degree to which the defendant's actions were justified.

### *C. How Can Victims' Conduct Mitigate Perpetrators' Liability?*

#### 1. Principle of Conditionality of Rights

The analysis of the consent, self-defense, and provocation theories demonstrates a common principle underlying all three defenses and perhaps criminal law in general—the *principle of conditionality of our rights*. By that principle, a person may lose some rights due to his own actions. If that happens, the perpetrator may not be guilty of violating the rights that have been lost.

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302. H.C. 5100/94 (Sept 6, 1999), available at <http://www.derechos.org/human-rights/mena/doc/torture.html>.

303. Id.

304. Id.

305. Id.

306. Id.

The right not to be harmed is a fundamental human right and, as such, may very rarely, if ever, be lost completely; it, however, may be reduced. By that, I do not mean that the right not to be harmed may suddenly drop from 100% to 70%. Instead, I view the right not to be harmed as a bunch of stick-like rights—not to be killed, not to be injured, not to be deprived of liberty, property etc. A person's actions may trigger the loss of some of those specific rights and, in this sense, reduce the overall right not to be harmed.

Accordingly, a person who, with the owner's consent, destroyed a valuable piece of property, has violated no rights of the owner and is usually guilty of no offense.<sup>307</sup> And a person who, while acting in self-defense, applied more force than reasonably necessary, is responsible only for that "extra" force because the attacker has lost his right not to be attacked at all, but retained a right not to be attacked with a disproportionate amount of force.<sup>308</sup>

This conclusion, naturally, leads to an important question: how can victims lose their rights to life, liberty, or property? Do car owners lose their right not to have their cars stolen by leaving keys in the ignition? Do women lose their right not to be raped by wearing mini-skirts?

Some scholars believe that victims are to blame for any misfortune that happens to them. For instance, a criminologist Heinrich Applebaum has argued that unless the police start cracking down on the victims of criminal acts, the crime rate in this county will continue to rise.<sup>309</sup> In his view, the people who are responsible for crime are the victims: "They walk down a street after dark, or they display jewelry in their store window, or they have their cash registers right out where everyone can see them. They seem to think that they can do this in the United

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307. Except in a situation in which the law views a right as inalienable, and, therefore, does not recognize an individual's right to consent. See, e.g., Fletcher, *supra* note 287, at 370-71 (discussing conflict between personal autonomy and competing social interests).

308. See, e.g., Model Penal Code § 3.09(2) (Official Draft and Revised Comments 1980) (providing that a defendant who was negligent or reckless in using force may not use self-defense and similar defenses under Article 3 in prosecution for negligence or recklessness).

309. See Karmen, *supra* note 13, at 135 (citing an interview with Prof. Applebaum originally published in the Washington Post, Feb. 4, 1969).

States and get away with it.”<sup>310</sup> Therefore, Applebaum’s solution to the problem was to hold victims responsible:

I say throw the book at anybody who’s been robbed. They knew what they were getting into when they decided to be robbed, and they should pay the penalty for it. Once a person has been a victim of crime and realizes he can’t get away with it, the chances of his becoming a victim again will be slim.<sup>311</sup>

Comparable views have been expressed by legal practitioners and academics alike. For example, Mike Tyson’s lawyer, in a typical assumption of risk argument, contended that, because Tyson’s propensity for violence was a common knowledge, “to date him was to consent to sex.”<sup>312</sup> Alon Harel, on the other hand, explained his position by considerations of economic efficiency and argued that “protection of careless victims is a particularly costly enterprise and consequently we may have to sacrifice some of the protection granted to careless victims.”<sup>313</sup> To the extent that conclusion felt uncomfortable, Harel advised “not to think primarily of the controversial rape cases,”<sup>314</sup> to focus instead on numerous morally acceptable situations, and expand the principle in accordance with our moral beliefs.<sup>315</sup>

Not thinking about an uncomfortable issue is not an option, however, if we are to build the principle of comparative liability into the structure of criminal law. Moreover, Harel’s suggestion to expand the comparative liability principle “in accordance with our moral beliefs” does not provide any guidance as to what exactly should be done. In a diverse society like ours, moral beliefs differ considerably, and their formation is often affected by developments in criminal law.<sup>316</sup>

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310. *Id.*

311. *Id.*

312. Tyson Takes the Count, *Nation*, Mar. 2, 1992, at 253.

313. Harel, *supra* note 137, at 1228.

314. *Id.* at 1229.

315. *Id.*

316. See, e.g., Robinson & Darley, *The Utility of Desert*, *supra* note 140, at 473-74 (arguing that the criminal law’s role as a “contributing mechanism by which the norm-nurturing process moves forward” is particularly important in a multicultural society which does not have a “a stable pre-existing consensus on the contours of condemnable conduct”).

In contrast, the *conditionality of rights* principle provides both the methodology and specific answers to the question of how the victim's conduct may reduce the perpetrator's criminal liability. Pursuant to that principle, there are two relevant inquiries: (i) what rights did the parties possess prior to the criminal encounter? and (ii) has the victim reduced his rights, voluntarily or involuntarily?

The first question includes legal as well as factual considerations. The answer to it depends on whether the law recognizes that a particular individual is entitled to a particular right under particular circumstances. This issue has been already discussed in connection with the victim's ability to give valid consent.<sup>317</sup> Among other things, it has been noted that the law may deny certain rights either completely (e.g., the right to enter into incestuous relations) or to some groups of citizens (e.g., the right of minors to sexual intercourse). Naturally, if the victim does not possess the relevant right (or the right is deemed inalienable), he may not reduce it either. In that case, the victim's conduct should not affect the perpetrator's liability. However, laws that deny people liberty or property rights are rather rare. The following discussion relates to the second inquiry, namely, to the victim's reduction of legally recognized rights.

## 2. Voluntary Reduction of Rights

Provided the victim had relevant alienable rights, he may reduce or waive them by consent.<sup>318</sup> To be valid, consent has to be freely given and rational.<sup>319</sup> To the extent the voluntary and rational nature of consent can be ensured, there is a strong argument for not punishing a

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317. See *supra* discussion in section I.B.1.

318. See, e.g., Judith Jarvis Thomson, *The Realm of Rights* 348-53 (1990) [hereinafter *Realm of Rights*] (discussing various forms of consent, e.g., those providing the consent-receiver with claims, privileges or discretion). See also *Harm to Self*, *supra* note 46, at 172-343 (discussing types of effective and defective consent).

319. See, e.g., *Voluntary Euthanasia*, *supra* note 52, at 122-23 (stating that an individual's choice has to be "fully informed, well considered, and . . . fully voluntary") (emphasis omitted). See also *Harm to Self*, *supra* note 46, at 172-88 (discussing various forms of consent, such as inferred consent, dispositional consent, prior consent, subsequent consent, tacit consent, and hypothetical rational consent).



person who caused harm pursuant to the valid consent of the victim.<sup>320</sup> Such arguments have often been made in connection with assisted suicide.<sup>321</sup>

Assumption of risk is a form of consent.<sup>322</sup> Specifically, it constitutes express or implied consent to undertake a certain risk of harm.<sup>323</sup> Implied consent is given by, or may be imputed to, the victim when he undertakes a substantial risk of harm—whether recklessly, negligently, or even non-culpably (e.g., in a situation when the dangerous conduct may be justified or excused by the circumstances).<sup>324</sup> The less conscious the victim's decision to engage in a dangerous activity is, the more appropriate it may be to treat his behavior as an involuntary, rather than a voluntary, reduction of rights.

The requirements for the valid assumption of risk are essentially the same as for consent in general. Under the tort law, in order to be effective, consent must be given for the particular, or substantially the same, conduct of the

320. Fletcher, *supra* note 287, at 770.

321. See, e.g., Voluntary Euthanasia, *supra* note 52, at 122-23 (pointing out that, although in fact there may be no reliable way to prove that an individual's decision to take his life was completely voluntary, it is important to recognize such possibility).

At least such a consistent antipaternalistic strategy would keep us from resorting, like Sam Adams, to the peculiar idea of a "gift" that cannot be declined, given away, or returned, and would enable us to avoid the even more peculiar notion that the right to life of an autonomous person is not really his own at all, but rather the property of his creator.

*Id.* at 123.

322. See generally John Mansfield, *Informed Choice in the Law of Torts*, 22 *La. L. Rev.* 17 (1961) (discussing difference between assumption of risk and consent in torts). Mansfield wrote:

Consent is the right term to use when the plaintiff was willing that a certain event occur, probably some conduct on the part of the defendant, because he desired an invasion of a normally protected interest. Ordinarily he will believe that the invasion is substantially certain to follow the event, and the term consent focuses on his belief in the certainty of the invasion. Assumption of risk is the right term to use when the plaintiff was willing that a certain event occur, but he neither desired an invasion of a normally protected interest nor did he suppose that such an invasion was substantially certain to result. The focus is on the uncertainty of the result from the plaintiff's point of view.

*Id.* at 31.

323. Restatement (Second) of Torts § 496a cmt. c (1965) (discussing the meaning of assumption of risk). See also Kenneth W. Simons, *Assumption Of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 *B.U. L. Rev.* 213 (1987) (analyzing assumption of risk as a fully preferred option).

324. Restatement (Second) of Torts § 496C cmts b-g (1965).

actor.<sup>325</sup> “Thus consent to a fight with fists is not consent to an act of a very different character, such as biting off a finger, stabbing with a knife, or using brass knuckles.”<sup>326</sup> Similar criteria applied to a criminal case would explain why consent to date Mike Tyson may not be viewed as consent to rape, just as consent to fighting may not be viewed as consent to being stabbed with a knife.<sup>327</sup>

Conversely, if the scope of otherwise valid consent matches the scope of the parties’ actions, the consent of the victim should be regarded as a liability mitigator.<sup>328</sup> Examples of situations in which this principle should be applied include those where defendants are held liable for a death resulting from a duel, a fatal round of Russian roulette, or a drag race, i.e., cases in which we can speak about the victim’s explicit consent to or disregard of substantial risk. The mitigating argument would be particularly strong in a situation in which the defendant was not a direct cause of the deadly accident. Consider *Commonwealth v. Peak*.<sup>329</sup> In that case, three buddies, John Young, George Ramsey, and Charles Peak, “after discussions in two barrooms, agreed to race their cars.”<sup>330</sup> Young lost control of his car and was killed in an accident. There were no other casualties.<sup>331</sup> Ramsey and Peak were

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325. See *id.*, § 892a cmt. c.

326. *Id.*

327. The issue of consent in the context of sexual offenses has received in recent years significant attention by states’ courts and legislatures, academics and general public. Criteria for what amounts to such consent are still in the state of flux but conceptually the principle is clear—a sexual act, without specific consent to it, is rape. See generally Heidi M. Hurd, *The Moral Magic of Consent*, 2 *Legal Theory* 121 (1996); Larry Alexander, *The Moral Magic of Consent (II)*, 2 *Legal Theory* 165 (1996); Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998); David P. Bryden, *Redefining Rape*, 3 *Buff. Crim. L. Rev.* 317 (2000); Anne M. Coughlin, *Sex and Guilt*, 84 *Va. L. Rev.* 1 (1998); Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 *Clev. St. L. Rev.* 409 (1998); Susan Estrich, *Rape*, 95 *Yale L. Rev.* 1087 (1986); George C. Thomas III, *Realism About Rape Law: A Comment on “Redefining Rape,”* 3 *Buff. Crim. L. Rev.* 527 (2000).

328. Cf. *Restatement (Second) of Torts* § 892C (1965) (recognizing consent to crime for purposes of defendant’s liability).

329. 12 Pa. D. & C.2d 379 (1957).

330. *Id.* at 380.

331. *Id.* at 380-81. Naturally, if the victim-competitor kills not only himself but also a non-participating third party, the defendant may be held liable for that latter death through theories of complicity or joint criminal conduct. See, e.g., *State v. McFadden*, 320 N.W.2d 608, 610 (Iowa 1982) (observing that aiding and

found guilty of involuntary manslaughter of Young.<sup>332</sup>  
The court opined:

Defendants by participating in the unlawful racing initiated a series of events resulting in the death of Young. Under these circumstances, decedent's own unlawful conduct does not absolve defendants from their guilt. The acts of defendants were contributing and substantial factors in bringing about the death of Young.<sup>333</sup>

It seems fair that the victim's own unlawful conduct should not completely absolve defendants from their guilt. The question is: their guilt for what? Ramsey and Peak are certainly guilty of violating the law prohibiting speeding contests but are they guilty of killing Young? Wasn't it Young himself who agreed to participate in the race? Wasn't it his own lack of judgment or poor driving skills that cost him his life? Some courts, after struggling with similar questions, have found no liability because the defendants' conduct was not the direct cause of the victim's death.<sup>334</sup> But is it fair to say that the defendants bear no responsibility for what happened?

A more realistic and fair approach would be to apportion responsibility among all parties who have contributed to the criminal outcome, i.e., to hold Ramsey and Peak liable for the death of Young but reduce their level of liability. For instance, if negligent homicide is a felony of the third degree,<sup>335</sup> Ramsey's and Peak's participation in a dangerous activity that resulted in

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abetting and joint criminal conduct are vicarious liability theories, and that they are sufficient to convict the defendant for the death of a third party). These theories, while completely appropriate in respect of the death of a bystander, are not applicable to the death of a co-competitor because a standard involuntary manslaughter statute requires the death of "another person." See *id.* at 610 (observing that "[o]bviously, [the victim-competitor] could not have committed involuntary manslaughter with respect to his own death"). In addition, under the MPC and in jurisdictions that follow the MPC, victims may not be convicted as accomplices. See Model Penal Code § 2.06(6)(a) (Official Draft and Revised Comments 1980).

332. Peak, 12 Pa. D. & C.2d at 381.

333. *Id.* at 382.

334. See, e.g., *Commonwealth v. Root*, 170 A.2d 310, 314 (Pa. 1961) (holding that "the defendant's conduct was not a sufficiently direct cause of the competing driver's death to make him criminally responsible therefore").

335. See, e.g., Model Penal Code § 210.4(2) (Official Draft and Revised Comments 1980) ("Negligent homicide is a felony of the third degree").

negligent homicide could bring them the conviction of a misdemeanor. In fact, the MPC already has a provision that may be used for that purpose. Section 211.2 prohibits reckless conduct that “places or may place another person in danger of death or serious bodily injury.”<sup>336</sup> Convicting Ramsey and Peak under that section would reflect the level of their fault better than either finding them guilty of homicide by twisting the concept of proximate causation or relieving them of any responsibility.

### 3. Involuntary Reduction of Rights

In an involuntary case, the criterion for determining whether a victim has lost any of his rights is imbedded in the very principle of conditional rights. The corollary of having a right is that someone owes the right-holder a duty.<sup>337</sup> If I have a right to life, you may not kill me. If you try to kill me, you violate your duty to me, and thus lose moral parity with me. That loss of moral parity reduces your right to inviolability and allows me to disregard it *to the extent necessary to protect my right to life*.<sup>338</sup> That is a case of complete justification. Overstepping these boundaries in cases of imperfect self-defense (either by exceeding the level of force reasonably necessary for the defense or by not following other requirements of a valid exercise of self-defense) or provocation results only in partial justification of the perpetrator.<sup>339</sup> In contrast, in cases of mistaken self-defense and provocation (i.e., when the defendant strikes someone who has not violated any of his rights), the conduct of the victim provides offenders with no justification at all (although it may provide them

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336. Model Penal Code § 211.2 (Official Draft and Revised Comments 1980). See also Finkelstein, *supra* note 230, at 987-90 (arguing that imposition of risk is a harm to the person on whom it is inflicted).

337. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* 38 (Walter Wheeler Cook ed., 1919) (observing that “if X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place”). See also *Realm of Rights*, *supra* note 323 (discussing Hohfeld’s constructs in application to the moral theory).

338. See, e.g., Uniacke, *supra* note 80, at 198 (arguing that “the aggressor sacrifices something morally weighty when he becomes an unjust immediate threat; and if he does not forfeit the right to life itself, then he forfeits moral parity in respect of that right”).

339. In addition, the provoker’s loss of certain rights may be explained by the theory of the assumption of risk. See discussion *infra* in section III.C.5.c.

with an excuse).<sup>340</sup>

The *conditionality of rights* approach provides a practical and logical algorithm for distinguishing relevant and irrelevant elements of the victim's conduct. For example, it makes it plainly clear that a woman may not reduce her right not to be raped by wearing sexy clothes, having a drink with the offender, being involved in a prior relationship with him, or even agreeing to some intimacy.<sup>341</sup> She does not reduce her rights simply because the offender has no corresponding right that she do not do any of these things.<sup>342</sup> The inherent limitation on the victim's involuntary reduction of rights, therefore, is: *the offender's liability may be mitigated by the conduct of the victim only if the offender has the right that the victim does not behave that way*. If that language were explicitly included in jury instructions, jurors would have a much better guide as to what factors may or may not weigh on the determination of the perpetrator's guilt.

To summarize, the principle of *conditionality of rights* provides a theoretical basis for the argument that the perpetrator's liability may be properly evaluated only in the context of the entire crime, which must include the conduct of the victim as well as the perpetrator. This principle also allows juries to distinguish situations in which the victim's conduct is irrelevant from those in which the victim's conduct should mitigate the perpetrator's liability. The former are situations in which the victim has

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340. See discussion supra note 72 and the accompanying text and section III.B.3.

341. See, e.g., Beul, 233 F.3d at 451 ("It is not a defense to a charge of rape that, for example, the victim was dressed provocatively, or drunk, or otherwise careless in the circumstances in which the rape occurred.")

342. In addition, since the excusatory rationale of provocation requires that the perpetrator act impulsively, in an immediate response to an offense, a rapist (just like a torturer) should not be entitled to this defense even upon a traditional provocation such as a physical attack. Cf., *Sensobaugh v. State*, 244 S.W. 379, 379 (Tex. App. 1922) (denying defense of provocation to defendant who maimed his wife's lover without the intent to kill). Perhaps, for clarity sake, statutes should explicitly exclude sexual offenses from the application of the defense of provocation. Some statutes already do that for purposes of penalty mitigation. For example, Federal Sentencing Guidelines authorize a sentence reduction in the case of a wrongful conduct by the victim. See Federal Sentencing Guidelines, 18 U.S.C. § 5K2.10 (1999). This provision, however, does not apply to sexual offenses. *Id.* See also Alaska Stat. §§ 12.55.155(d)(7), 11.41.410-470 (Michie 2002) (denying, in sexual offense cases, otherwise available penalty mitigation for victim provocation).

not waived his rights voluntarily or involuntarily. People may not lose their rights involuntarily if they have not violated a duty to the perpetrator. This last consideration is analogous to the “no duty” rule in the tort law. There is no legal duty that requires people to lock their cars, or not walk down a street after dark, or dress conservatively.<sup>343</sup>

As Fletcher has well observed, “this is what it means to be a free person, and the criminal law protects this freedom by not censuring those who expose themselves, perhaps with less than due care, to risks of criminal aggression.”<sup>344</sup>

#### 4. Factors Important to Mitigation

The voluntary or involuntary reduction by the victim of his rights provides a ground for mitigating or eliminating the perpetrator's liability. The inevitable question in this regard is *to what extent* should the perpetrator's liability be reduced? An answer to this question involves weighing 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 (including the nature of their conduct, the knowledge possessed by the participants, their respective capacities to avoid harm, the significance and value of purposes sought by their activities, the foreseeability and magnitude of the risk, and other factors).<sup>345</sup> Depending on the specifics of each particular case, different considerations may be more or less important.

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343. See George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. Rev. 347, 356 (1996), [hereinafter *Domination in Wrongdoing*].

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

Id.

344. Id.

345. See Sisk, *supra* note 236, at 40-41 (discussing similar factors considered by the Supreme Court of Louisiana in *Watson v. State Fire & Casualty Insurance Company*, 469 So. 2d 967 (La. 1985), a tort action for wrongful death arising out of a hunting accident).

*a. The Magnitude of the Affected Rights*

The question presented here includes two inquiries: does the law recognize the affected perpetrator's right? and what is the comparative value assigned by the law to that right and to the right of the victim violated by the offense? For example, I have a legally recognized right not to be slapped on the face. This right, like any right to bodily integrity, is quite high in the hierarchy of rights, and the violation of this right may subject the offender to a criminal punishment.<sup>346</sup> Thus, if I overreact as a result of being slapped, I would be partially justified. I would be more justified if I only slap the offender back, and less justified if I kill the offender.

In contrast, adultery is not criminally punishable in most states.<sup>347</sup> Whatever claim I may have that my husband not cheat on me,<sup>348</sup> this claim has very little legal ground.<sup>349</sup> Accordingly, if I kill my husband upon witnessing his infidelity, my justification argument would be significantly less persuasive than in the previous example. That is not to say I will not have a provocation claim. My claim, however, will be based predominantly on the excusatory rationale.<sup>350</sup>

If we adopt this approach, the recognized triggers of provocation would no longer represent a list of equally-valued historical incidents that "have no better reason for

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346. Under the MPC, a simple assault is a misdemeanor and an aggravated assault is a felony of the third or second degree. See Model Penal Code § 211.1 (Official Draft and Revised Comments 1980).

347. See, e.g., Martin J. Siegel, For Better or For Worse: Adultery, Crime & the Constitution, 30 J. Fam. L. 45, 49-54 (1991-92) (pointing out that majority of states have now decriminalized adultery, and remaining laws are rarely enforced).

348. The legal right to spousal fidelity may be found in the fact that, even in those states that have decriminalized adultery, it still provides grounds for divorce. See 24 Am. Jur. 2d, Divorce And Separation, § 59.

349. Some states have excluded spousal infidelity from the list of events providing legal grounds for provocation. See e.g., Md. Code, 1957, Art. 27, § 387A ("The discovery of one's spouse engaged in sexual intercourse with another person does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter when the killing was provoked by that discovery.").

350. Certain claims may not be recognized as excuses either. For instance, there is a strong argument that an act of rape may not be viewed as an instant, uncontrollable response to being slapped or otherwise offended. See *supra* note 342.

[existence] than that so it was laid down in the time of Henry IV.”<sup>351</sup> Instead, jurors would view any instances of provocation from the perspective of violation of the perpetrator’s rights. Accordingly, the triggering event would not be decided on a hit-or-miss basis but would be given different weight, and the extent of the offender’s justification would depend, in part, on the place of the offended right on the continuum of currently recognized rights.

It is important to highlight that the hierarchy of rights and their violations is to be determined from the objective point of view, not from the individual preferences of the victim. Some may argue that harm is in the eye of the victim, and accordingly, the injuries or losses that the victim likes least are most harmful, and the harms the victim can tolerate most are least harmful.<sup>352</sup> Yet the preference-based scale of rights and harms inevitably produces absurd results, as Leo Katz’s elegant hypotheticals show.

In one of them, a man is about to rape a woman. At the last moment, the woman pleads: “I would rather die than be violated,” so he obligingly kills her.<sup>353</sup> At his trial, the defense argues that although the defendant is certainly guilty of a heinous crime, his punishment should be no more severe than a punishment for a rape.<sup>354</sup> After all, the victim herself preferred murder to rape, i.e., regarded it as a lesser harm. In another of Katz’s hypotheticals, the perpetrator rapes the woman despite her desperate plea to take her life instead. At the trial, the prosecutor demands the death penalty for the defendant. He argues that although ordinarily the death penalty may not be imposed in a case of rape, this case of rape is worse than murder: didn’t the victim herself feel so?

It is highly unlikely that either argument would succeed. Partly, this is because the “victim cares only

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351. Oliver W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897) (opining that “[it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past”).

352. Katz, *supra* note 43, at 147.

353. *Id.*

354. *Id.*



about one dimension of the perpetrator's activities—the expected harm,<sup>355</sup> whereas criminal law cares about harm as one of several criteria of culpability.<sup>356</sup> And partly, this is because the meaning of harm in criminal law is not limited to each victim's idiosyncratic perception of harm.<sup>357</sup> Criminal law embodies a uniform hierarchical set of moral and legal principles, based on the values assigned by society to specific rights.

*b. Comparative Causation*

The question of responsibility is closely tied to the problem of causation. One scholar has proposed a non-specific victim liability defense in which causation plays an essential role. The defense envisioned by Aya Gruber would apply in the circumstances when the victim's wrongful conduct "caused the defendant to commit the charged offense"<sup>358</sup> which he was otherwise "not predisposed" to commit.<sup>359</sup> Despite my strong support for a criminal defense based on the victim's conduct, I find both requirements conceptually flawed.

The condition that the defendant not be *predisposed* to commit the offense is objectionable like any penalty directed not at a criminal act but rather at an actor's propensity for crime or violent thoughts. If a court takes this condition seriously, it will have to deny the defense to a woman who escaped rape by shooting her attacker simply because she was *predisposed* to kill any SOB who tries to rape her.

Still more problematic is the way Gruber treats causation. Only if the victim had *caused* the defendant to commit the offense, would the defense apply. Even leaving alone the doubtful proposition that one may *cause* another free and independent person to commit a crime,<sup>360</sup> there

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355. *Id.* at 151.

356. *Id.*

357. See 1 Joel Feinberg, *The Moral Limits of Criminal Law: Harm to Others* 188 (1984) (discussing that criminal law protects a "standard person" from standard forms of harm to "standard interests").

358. *Victim Wrongs*, *supra* note 4, at 652.

359. *Id.*

360. Gruber herself concedes:

Admittedly, this is quite conceptually prickly when the intervening event is the operation of the defendant's own free will, because it can slip down a

remains a bigger issue: why shouldn't the defense apply, at least partially, when both the defendant and the victim contributed to the harmful outcome? Is it fair and realistic to impose full causative responsibility on one party?

All our experience tells us that causation is almost never an all-or-nothing issue. Many factors work together to bring about a result.<sup>361</sup> Thus, in the words of Judith Jarvis Thomson, it is “no wonder it has seemed such a hard problem to work out the truth-conditions for ‘X is the cause of Y’—for it is doubtful that ‘X is the sole cause of Y’ can ever be true.”<sup>362</sup> Yet criminal law has chosen to ignore the causative role of the victim and instead has attributed the entire responsibility for harm to the defendant who was just a “but for” cause and a proximate cause of the victim’s injury or loss. To overcome this simplistic model, the law needs to adopt a comparative approach to causation, not stay with a black-and-white dichotomy and merely shift the entire burden from the perpetrator to the victim as Gruber proposes.

Can the causative importance of various events ever be compared? There is a view that denies that possibility. Under that view, causation is not a relative concept; it either exists or it does not, and if it does exist, one may not speak of degrees of causation.<sup>363</sup> If certain events were necessary to produce a result, it is impossible to tell which event was more necessary.<sup>364</sup> Thus, if “it took malaria-

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slope into speculative arguments about the operation of the human mind and the human will. One is forced to confront the issue of whether one human being’s act can truly ever “cause” another person to do anything.

Id. at 717-18.

361. See, e.g., Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 *Chi.-Kent L. Rev.* 579, 579 (1987) (“It will never be the case that injury could occur without the plaintiff, such that the defendant is entirely causally responsible.”).

362. Judith Jarvis Thomson, *Causality and Rights: Some Preliminaries*, 63 *Chi.-Kent L. Rev.* 471, 477 (1987).

363. See Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 *La. L. Rev.* 343, 346 (1980).

364. See, e.g., John Stuart Mill, *A System of Logic* 214 (8th ed. 1874), quoted in Robert N. Strassfeld, *Causal Comparisons*, 60 *Fordham L. Rev.* 913, 919 (1992) (“no ‘condition’ of a result has a ‘closer relation’ to that result than another, since each is ‘equally indispensable to the production of the consequent’”); J.L. Mackie, *The Cement of the Universe: A Study of Causation* 128 (1980) (“[i]f two factors are each necessary in the circumstances, they are equally necessary”); Kelman, *supra* note 361, at 579 (arguing that “there is no obvious way to distinguish, on purely causal grounds, the relative causal contributions of two wholly necessary

bearing mosquitoes and the spread of Christianity to undo the Roman Empire, the mosquitoes were as necessary as the Christians and neither is paramount to the other.”<sup>365</sup>

Although it is sometimes difficult to distinguish the determinative cause among other causes, nevertheless, in many contexts, we compare events as being more or less important for certain consequences.<sup>366</sup> The following examples demonstrate our everyday experience in comparing the significance of various events:

We might wish to say, for instance, that Lenin’s participation in the Bolshevik Revolution was a more important cause of its success than was Stalin’s, or that the absence of a skilled labor force is a more important cause of economic backwardness than is limited natural resources. Or, we might have reason to say that James is happier today than he was last week partly because he earned an A on his torts exam, but more because his love life has improved.<sup>367</sup>

Scholars have suggested various ways to compare the importance of contributing causes in torts.<sup>368</sup> Some of these methods, although not completely importable to penal theory, may serve as models for developing a comparative theory of causation in criminal law.<sup>369</sup> Among those are: counterfactual similarity, the “necessary element of a sufficient set,” and relative responsibility.

The method of counterfactual similarity “involves using imaginative alternatives to the actual course of events to determine whether something similar to the event would have occurred in the absence of a particular

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parties”).

365. See Strassfeld, *supra* note 364, at 919 (citing E. White, *Why Rome Fell* (1927)).

366. See, e.g., Sisk, *supra* note 236, at 42-49 (discussing comparative causation).

367. Strassfeld, *supra* note 364, at 920 (citing examples from works by Martin and Nagel).

368. For an in-depth discussion of causation in torts, see Symposium on Causation in the Law of Torts, 63 *Chi.-Kent L. Rev.* 397, 397-680 (1987).

369. Such theory is clearly beyond the scope of this article. Here, I merely intend to show that various theories of causation in the law of torts allow for comparison of causative impacts attributable to the perpetrator and the victim; and looking at these theories, I search for criteria that may be used to develop a theory of comparative causation in criminal law.

cause.”<sup>370</sup> Robert N. Strassfeld provides the following illustration of this method:

The change in James’ love life was a more important cause of his current happiness than was his torts grade, since had James not earned an A on his torts exam, his mood would more closely approximate his current level of happiness than it would had his love life not improved.<sup>371</sup>

Under the “necessary element of a sufficient set” test, “a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence.”<sup>372</sup> This method does not offer a mechanism for comparing multiple causes; it is valuable however, in eliminating non-causes and limiting the circle of responsible parties.

Finally, under the relative responsibility method, the more important of two causes is the one that is more responsible for their effect. The term “responsible” in this context means something other than making the biggest factual difference toward the occurrence of an event.<sup>373</sup> It is instead “the statement of a moral and legal conclusion that a particular cause ought to be held more accountable than other causes for the effect. It is an unabashedly normative interpretation of more important cause, and it bears a close kinship to traditional notions of proximate cause.”<sup>374</sup>

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370. Sisk, *supra* note 236, at 43. This method has its limitations. See, e.g., Thomson, *supra* note 362, at 482 (showing that the counterfactual analysis does not work in a situation, in which there is more than one cause sufficient and certain to produce the harm). For example, if there are two fires, each sufficient and certain to burn the plaintiff’s house, we cannot say that “but for” the fire which reached and burned it first, the house would not have been ruined because the second fire would have burned it anyway. See Moore, *supra* note 127, at 349 (analyzing Thomson’s theory of causation).

371. Strassfeld, *supra* note 364, at 937.

372. Richard W. Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1735, 1790 (1985) (emphasis deleted). The phrase “a set” permits a plurality of sufficient sets. *Id.*

373. See Hart & Honore, *supra* note 113, at 66 (observing that both in legal usage and in ordinary speech causation means more than just “but for” factual connection; “it is a disguised way of asserting the ‘normative’ judgment that he is responsible in the first sense, i.e., that it is proper or just to blame or punish him or make him pay.”).

374. Strassfeld, *supra* note 364, at 937.

The outlined approaches capture important aspects of how we attribute causal weight to various events. We measure the importance of a cause by (i) the difference it makes (“necessary element of a sufficient set” and counterfactual similarity) and (ii) the legal and moral weight we assign to different types of behavior (relative responsibility). The famous case of *Stephenson v. State*<sup>375</sup> provides good material for showing how these considerations may work.

In that case, the victim, Madge Oberholtzer, took poison after being kidnapped, beaten, humiliated, and nearly raped.<sup>376</sup> She was denied medical help by her kidnapper and eventually died.<sup>377</sup> In summary, factors that contributed to Madge Oberholtzer’s death apparently were: “shock, loss of food, loss of rest, action of the poison on her system and her lack of early treatment.”<sup>378</sup> “According to medical testimony, it was unlikely that any one factor would have resulted in death on its own.”<sup>379</sup>

The jury found the defendant guilty of second-degree murder, and the Supreme Court of Indiana affirmed the verdict.<sup>380</sup> Some commentators have harshly criticized that decision, which, in their view, undermined the requirement of proximate causation by holding Stephenson responsible for an intervening act of the victim.<sup>381</sup> However, if we recognize the principle of comparative causation, that decision would be much more convincing. The question of liability would not be reduced to physical acts of the victim and the perpetrator. Instead, the jurors would be instructed to evaluate all evidence in order to determine (a) whether Madge Oberholtzer’s death would have occurred in the absence of (i) her actions and (ii) the defendant’s actions, and (b) who is more accountable for her death.

As for the first question, the jurors would be likely to conclude that Stephenson’s actions were at least as important a cause of Madge Oberholtzer’s death as her own—but for him, she would not have taken the poison.

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375. 179 N.E. 633 (Ind. 1932).

376. *Stephenson*, 179 N.E. at 636.

377. *Id.*

378. *Id.* at 645.

379. *See id.* at 646-47.

380. *Id.* at 637.

381. *See, e.g.,* Comment on *Stephenson*, 31 Mich. L. Rev. 659, 668-74 (1933).

More importantly, even after she took the poison, she still could be saved had he not denied her medical treatment.<sup>382</sup>

As for the second question, the jurors would have to compare the legal and moral significance of cold-blooded, premeditated criminal acts committed by Stephenson and hysterical, semi-rational acts of Madge Oberholtzer committed in response to the attack she had suffered. They would also have to include into the calculation the fact that Stephenson had not just the moral, but also the legal duty to rescue his victim—he was the one who created peril<sup>383</sup> and who took her to a place of isolation where other people could not help her.<sup>384</sup> If the question of causation were regarded this way, the Supreme Court of Indiana would have a much stronger legal basis to affirm the conviction and conclude that “[t]o say that there is no causal connection between the acts of appellant and the death of Madge Oberholtzer, and that the treatment accorded her by appellant had no causal connection with the death of Madge Oberholtzer would be a travesty on justice.”<sup>385</sup>

### c. *Comparative Culpability*

In some instances, the comparative culpability of the participants may affect the value of their rights and the seriousness of encroachments on those rights. The clearest example is provocation. Partly, the rationale for why provoking victims (at least, culpable victims) lose certain

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382. For a discussion as to whether an omission may *cause* harm, see, e.g., Michael Moore, *Act and Crime* 28-31, 276-78 (1993) (arguing that omissions do not cause harm; by omission a person does not make the world worse; he only fails to make it better); Thomson, *supra* note 362, at 493-95 (suggesting that, even though an omission does not change things and, therefore, does not by itself cause anything, it is appropriate to hold a person who violated a duty to act responsible for the harm). For example, a signalman whose failure to pull a lever resulted in a train crash is the cause of the harm.

Perhaps we can say that although his not pulling the lever did not cause anything at all, still *he* caused the crash in that there was an event or a state of affairs (the state of affairs consisting in the track’s aiming leftward at 4:10, for example) such that he caused everything it caused in that he was both capable of preventing it, and under a duty to do so.

*Id.* at 495.

383. See LaFave, *supra* note 51, at 315 (concluding that defendant has duty to rescue the victim when defendant is at fault in creating the situation of danger).

384. See *id.*

385. Stephenson, 179 N.E. at 649.

rights may be found in the theory of consent, specifically in the assumption of risk. By hitting you, I assume the risk that you may hit me back and that, being angered by the undeserved offense, you may hit me harder than I have hit you.

That semi-voluntary rationale may mandate a somewhat different treatment of innocent aggressors in situations of provocation compared to self-defense. As we have seen in the case of self-defense, the culpability of the victim is irrelevant.<sup>386</sup> The very fact that, if not stopped, the victim will violate the most essential rights of an innocent party triggers the condition that makes the victim lose his rights.<sup>387</sup> That may be different in a provocation scenario.

Since the offender is not presented with a risk to his life, we may choose not to recognize *as a justifying event* (or give reduced weight to) provocation by innocent victims, just as we often do not recognize the consent of certain groups of people (e.g., minors) as valid. For example, it is offensive when someone intentionally spits on you, and we can easily understand that such provoking conduct, coming from an adult man, may partially justify a violent response. It is, however, significantly less offensive when the offender is a young child. Accordingly, the level of mitigation to which an offender may be entitled should reflect that. Similarly, negligent or reckless behavior that normally reduces the victim's right not to be hurt may be given little or no weight if the victim was a minor or incompetent and the perpetrator was aware of that. For example, if a child is injured while playing Russian roulette with an adult, the court should deny the defendant's assumption of risk argument.

Moreover, the level of the provoker's culpability should probably be taken into account in any case of mitigation based on the victim's provocative conduct. There is clearly a difference in how we perceive the liability of an actor who killed his victim after being physically attacked by an

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386. See *Realm of Rights*, supra note 318, at 366-71 (arguing that, in the case of self-defense, the fault of the attacker is irrelevant). Thomson points out a truly puzzling fact that we “*can* be unlucky enough to find ourselves in a situation in which something other than ourselves, something other even than government, has made us cease to have rights we formerly had.” *Id.* at 371.

387. *Id.* at 371.

intentional actor as opposed to a merely negligent actor.<sup>388</sup>

This principle should be taken into account in other circumstances as well. When the perpetrator and the victim are equally culpable (e.g., in cases of drag racing, duelling, or Russian roulette) the conduct of the victim should be a stronger mitigator than in cases when the perpetrator is more culpable than the victim (e.g., in a case of a car crash, in which the perpetrator drove recklessly whereas the victim was merely negligent).

In determining the respective culpability of the perpetrator and the victim, jurors may be instructed to compare the nature of the participants' conduct; their respective capacities to avoid harm; the significance and value of purposes sought by their activities; and the foreseeability and magnitude of the risk they took. For example, if a fatal car crash happened because the perpetrator exceeded the speed limit and hit the victim's car parked in the middle of a highway, the level of mitigation of the perpetrator's liability may depend on a number of facts. It would be higher if the perpetrator was in a rush to deliver a sick child to a hospital, whereas the victim took an impromptu nap at the wheel after a few shots of whiskey. And it would be lower if the perpetrator was hurrying home for a favorite television show, whereas the victim had suffered a heart attack in his car. These are, of course, extreme examples serving only to demonstrate how individual culpability can change the liability equation.

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In this part, I suggested that defenses of consent, self-defense, and provocation are examples of a general principle of criminal law, the principle of *conditionality of rights*. Pursuant to that principle, criminal liability of the perpetrator should be reduced to the extent that the victim, by his own acts, has diminished his right not to be harmed. The victim may reduce his right not to be harmed either voluntarily, by consent, waiver, or assumption of risk, or involuntarily, by an attack on some legally recognized rights of the perpetrator. The reduction of the victim's

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388. Cf. Fletcher, *supra* note 287, at 858 (observing, in the context of self-defense, that the "factor that skews the balancing in favor of the defender is the aggressor's culpability in starting the fight").



right not to be harmed correlates with the reduction of the perpetrator's liability. Of course, the perpetrator's liability is not determined solely by the rights of the victim. There are circumstances when society does not recognize either voluntary or involuntary reduction of the victim's rights. These circumstances, however, are quite limited. In most instances, if we take two identical cases that differ only in one aspect, namely the extent of violation of the victim's rights, the defendant liable for a lesser violation should be entitled to a lesser punishment.

Factors relevant to the determination of the perpetrator's liability may include the magnitude of the affected rights of the perpetrator and the victim, the relative causative roles played by the perpetrator and the victim, and their comparative culpability (including the nature of their conduct, the knowledge possessed by the participants, their respective capacities to avoid harm, the significance and value of purposes sought by their activities, the foreseeability and magnitude of the risk, and other factors).

#### CONCLUSION

Criminal law maintains that victims' faulty conduct is no mitigator to perpetrators' liability. However, upon close examination, this declaration is only partially correct. Furthermore, to the extent it is correct, it produces legal rules that are in direct conflict with factual findings by social scientists, public perceptions of right and wrong and developments in other areas of law, such as torts. Considerations of fairness and effectiveness mandate that criminal law integrate victims into its theory of liability. If a victim by her own actions has reduced her right not to be harmed, the defendant should be allowed to raise that as an affirmative defense at the trial.

In some circumstances, the victim's conduct would provide a complete justification, whereas in other circumstances it would only mitigate the defendant's liability. In any event, the defendant would bear the burden of production. As for the burden of persuasion, it may be more appropriate to follow the MPC approach and allocate it to the prosecution, unless specified otherwise.<sup>389</sup>

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389. See Model Penal Code § 1.12(2)(a) (Official Draft and Revised Comments

This revision of criminal law doctrine is sorely needed to reflect the realities of human interaction and bring the theory of liability in accord with the principle of just desert. Such a reformation would ultimately result in a substantially more consistent, fair, and effective body of criminal law.

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1980). Consent to killing may serve as an example of a situation in which the burden of persuasion should be imposed on the defendant.