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Conditional Rights and Comparative Wrongs:
More on the Theory and Application of
Comparative Criminal Liability

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Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability

Vera Bergelson

Abstract

This article continues to develop an argument in favor of comparative criminal liability started in “Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law,” (<http://law.bepress.com/rutgersnewarklwps/fp/art19/>) *Buff. Crim. L. Rev.* 385 (2005). The essence of my argument is that people’s rights are not static but depend on their actions, and 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.

In this second piece, I respond to the commentaries by Dean Hurd and Professors Harel, Husak and Simons. At the same time I further develop the theory of comparative criminal liability by focusing mainly on three groups of issues:

conceptual questions involving the underlying theory of rights; application of the principle of conditionality of rights to particular areas of criminal law (e.g., assumption of risk, contributory negligence, attempts and endangerment, and multiple perpetrators); and practical implementation of the defense of comparative criminal liability.

Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability

Vera Bergelson[†]

Dean Hurd and Professors Harel, Husak, and Simons have raised a number of interesting questions in connection with my argument for comparative criminal liability pursuant to which the victim's conduct should be taken into account for proper determination of the perpetrator's liability.¹ In "Victims and Perpetrators," I suggested that our rights are not static but depend on our actions. Based on that principle, which I called the principle of conditionality of rights, 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.

This article is an attempt to further develop the proposed theory of comparative criminal liability while addressing the most important issues brought up by the commentators. These issues can be divided into three

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1. See Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 *Buff. Crim. L. Rev.* 385 (2005) [hereinafter *Victims and Perpetrators*].

groups: conceptual questions involving the underlying theory of rights, application of the principle of conditionality of rights to particular areas of criminal law, and practical implementation of the advocated defense of comparative criminal liability.² Before I turn to these issues, however, I would like to address some general misunderstandings and make clear what I do *not* argue.

FIRST, contrary to what Simons³ and Hurd⁴ seem to think, I do not argue that, in order to reduce the perpetrator's liability, the victim has to be at fault. True, a faulty victim (e.g., a vicious aggressor) is the most persuasive example of why we should view the criminal act as an interaction. However, my thesis is broader. I maintain that the victim's *conduct*, faulty or not, may affect the criminal liability of the perpetrator, if that conduct changes the balance of rights and duties between the perpetrator and the victim.

One does not have to be at fault to change the legal relationship between oneself and another person. Consent is an example of a voluntary no-fault change of status: using Hurd's words, it "turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party."⁵ As for an involuntary no-fault example, we can think of a person whose nonculpable actions have put another in a position of peril—e.g., a driver who, through no fault of his own, hits a pedestrian. Despite his lack of

2. The first group of issues is discussed in paras. 1-3; the second group of issues is discussed in paras. 4-8; and the third group of issues is discussed in para. 9 of this article.

3. Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 *Buff. Crim. L. Rev.* 541, 543-44; 545 (2005) (first arriving at an erroneous conclusion that I consider victim's fault necessary to reduce the perpetrator's culpability and then citing examples from my article that contradict this conclusion).

4. Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal that Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 *Buff. Crim. L. Rev.* 503, 507, 507 n.5 (2005) (redefining my argument regarding victim's contributory responsibility in categories of faulty behavior).

5. *Id.* at 504.

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fault, the driver cannot simply drive off; he has suddenly acquired a duty of care with respect to that pedestrian.

In other words, culpability is irrelevant to the existence or magnitude of the wrongdoing (although it is certainly relevant to the determination of responsibility).⁶ Moreover, *if* the victim is at fault, the comparative analysis of the perpetrator's and the victim's culpability is appropriate, among other tests, to determine their comparative responsibility for the harm and, accordingly, the extent to which the perpetrator's liability should be reduced. I discuss that in more detail in section III.C.4 of my article.⁷

SECOND, I do not argue that the victim's conduct is the *only* ground that may provide full or partial justification for an infringement on the victim's rights.⁸ That would certainly be incorrect. The victim's rights may be overridden although the victim did nothing to lose or reduce them. The obvious example is the balance of evils, which provides justification to the perpetrator who infringed on the rights of the victim in order to preserve either some more important rights of other people or equally important rights of a larger group of people. The principle of conditionality of rights, according to which the victim's conduct may affect the perpetrator's liability, is just one principle among other ones capable of affecting people's rights.

6. See Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 334 (1997).

Causing harm to another without justification is sufficient for wrongdoing, but it is not sufficient for responsibility. Responsibility requires, in addition, that the wrongdoer be culpable. That X violated Y's rights with his action, and that X thereby did wrong, is one question; whether X is responsible because he did so culpably, is another and separate question which has nothing to do with causing Y harm.

Id. at 334-35.

7. See *Victims and Perpetrators*, supra note 1, at 475.

8. See Alon Harel, *Victims and Perpetrators: The Case against a Unified Theory of Comparative Liability in Criminal Law*, 8 *Buffalo Crim. L. Rev.* 489, 493 (2005) (observing that the principle of conditionality of rights applies only to cases in which the victim's actions, and not the state of affairs brought about by the victim's or someone else's actions, affect the perpetrator's duties toward the victim).

THIRD, I do not argue that the principle of conditionality of rights “is a natural extension of the traditional ‘heat of passion’ doctrine, which partly justifies an actor who responds violently to certain types of unjustified provocation.”⁹ I wonder whether Simons might have confused two independent arguments—one, analytical, based on the theory of rights,¹⁰ and the other, more specific, calling for consistency of legal rules.¹¹ The defense of provocation, or “heat of passion,” due to its dual nature (combination of justification and excuse) and merely mitigating character, only partially embodies the principle of conditionality of rights. Unlike that defense, the principle of conditionality of rights is entirely justificatory in nature; it provides support for both full and partial defenses; and it does not require provocative actions on the part of the victim or violent actions on the part of the perpetrator.¹²

FOURTH, I do not argue that the defense of comparative criminal liability can be only partial. I am not sure what led Husak to this conclusion,¹³ but I most certainly intended the opposite when I repeatedly said throughout the article that “[i]n some circumstances, the victim’s conduct would provide a complete justification, whereas in other circumstances it would only mitigate the defendant’s liability.”¹⁴

9. Simons, *supra* note 3, at 553.

10. See *Victims and Perpetrators*, *supra* note 1, at 462-65.

11. See *Victims and Perpetrators*, *supra* note 1, at 432-35.

12. For example, a tenant is completely justified if he paints the entire house black upon obtaining his landlord’s consent to use any color he wishes. Even if that act reduces the market value of the house and even if the landlord regrets his unwise decision the very moment he sees the result (i.e. the landlord is objectively and subjectively harmed), the tenant is completely justified in what he did because the landlord has transferred to him the power to choose the color for the house.

13. Douglas Husak, *Comparative Fault in Criminal Law: Conceptual and Normative Perplexities*, 8 *Buff. Crim. L. Rev.* 523, 531 (2005).

Of course, Bergelson does not want victim fault to function as a complete defense, but rather as a fault mitigator. Her thesis that victim fault should provide a partial rather than a complete defense led to her previous assertion that victim fault results in a reduction rather than in a total forfeiture of rights.

14. *Victims and Perpetrators*, *supra* note 1, at 487.

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Both consent and self-defense can serve as complete exculpation or partial mitigation, depending on the facts. For example, self-defense is a complete justification for homicide if the defendant applied reasonably necessary force in order to protect his own life against the victim's attack. However, if the defendant exceeded what was reasonably necessary under the circumstances, he should be entitled only to mitigation of his criminal liability. As I explain in my article, in that case, he should be responsible for the "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.¹⁵

In fact, out of the recognized applications of the principle of conditionality of rights, only the defense of provocation is partial by design. Consent, assumption of risk, and self-defense can be "perfect" or "imperfect," but provocation is always "imperfect" in the sense that it applies only to situations in which the defendant has overstepped the boundaries of behavior warranted by the actions of the victim. I doubt that Husak would object to the partial nature of the defense of provocation.

With these clarifications, I turn to some of the issues raised by the commentators. I am pleased that all four of them seem to agree with my general thesis that there are circumstances when the victim's conduct must be taken into consideration in order to determine fairly the magnitude of the perpetrator's criminal liability. I can only second Husak in that "anyone who contends that victim fault is and ought to be irrelevant in all cases simply does not know what he is talking about."¹⁶ In the rest of this article, I discuss certain specific implications of this thesis.

15. Victims and Perpetrators, *supra* note 1, at 466.

16. Husak, *supra* note 13, at 523.

I. WHAT DO CONSENT, SELF-DEFENSE, AND PROVOCATION
HAVE IN COMMON?

My general claim is that by his acts a person (A) can change the balance of rights between himself and another (B), and thereby either eliminate B's criminal liability or at least reduce the seriousness of B's wrongdoing. I am grateful to Harel for bringing up Wesley Newcomb Hohfeld's typology and showing where the principle of conditionality of rights fits into it.¹⁷ That my argument indirectly draws on Hohfeld's vision of rights is beyond doubt: it is impossible today to talk about rights without taking into account Hohfeld's classic work.¹⁸ Moreover, in building my proposal, I employ theories of rights, among others, of Judith Jarvis Thomson and Joel Feinberg who in turn have absorbed and expanded Hohfeld's ideas.

Considering this well-established intellectual tradition, to which all four of my commentators have made valuable contributions, I am somewhat puzzled that Harel¹⁹ and Simons²⁰ refuse to see the conceptual link between the doctrines of consent, self-defense, and, to some degree (since it is only in part a defense of justification), provocation. While these doctrines apply to different circumstances, they have a similar effect on one's rights and, through that, on the attribution of harm and imposition of liability.

17. Harel writes:

As such this principle identifies circumstances in which a person can unilaterally create, extinguish, or transform obligations imposed on another person. A right to change the normative status of others is a right labeled by Hohfeld a power (or ability). Under Hohfeld's characterization, stating that a person A has a power (or ability) to X implies that A is capable of changing the legal (or moral) rights of others.

Harel, *supra* note 8, at 491.

18. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning, and Other Legal Essays* (Walter Wheeler Cook ed., 1923).

19. Harel, *supra* note 8, at 496 ("I can see nothing useful in lumping the power a person has to extinguish duties owed to her by consent together with the power she has to extinguish duties owed to her by attacking other people.")

20. Simons, *supra* note 3, at 544 (claiming that it is "both unhelpful and misleading" to suggest that a single principle "explains and justifies these three exceptions as well as Bergelson's proposed expansion of the three categories").

To have a right means to have a certain moral and/or legal status that defines the scope of freedoms and obligations between the right holder and others. People can terminate or suspend their rights and thereby change these freedoms and obligations. In one of her essays, Thomson reviews various ways in which people may cease to have rights.²¹ Among those are consent, waiver, and forfeiture. Each of them functions to transfer privileges, claims, and powers from the right holder to others.

Consent, for example, may exist in the form of giving permission, which extends privileges and claims to the consent receiver. If A tells B, "Feel free to eat this salad," A both gives B the privilege of eating the salad and promises not to interfere with B's exercising this privilege.²² Consent may also extend powers. If A tells B, "Do whatever you want with this salad," A gives B the power to become the salad owner, to make someone else the salad owner, or to abandon the salad altogether.²³ Even without going into details, it is clear that by giving consent a person at the very least waives the right that certain things not be done to him or his property.

Forfeiture of a right has the same effect: a person gives up the right that certain things not be done to him. Forfeiture may happen without fault, e.g., by choosing not to exercise a right. More often, however, examples of forfeiture involve fault. Take one used by Thomson: B villainously acts in a way that, if no one interferes, will constitute a violation of a claim of A's.²⁴ Thomson concludes that if A can defend himself against B's violation of his claim only by causing B harm, then A has a privilege of doing so because, by his own acts, B has divested himself of a claim against A.²⁵

21. Judith Jarvis Thomson, *Ceasing to Have a Right*, in *The Realm of Rights* 348 (1990).

22. *Id.* at 348, 352.

23. *Id.* at 352-53.

24. *Id.* at 361.

25. *Id.* at 361-62.

In other words, A's consent to B's doing certain things and A's violation of B's rights allowing B to act in self-defense have one and the same effect: A ceases to have a right; therefore, B violates no right of A. Is there a good reason for "lumping . . . together"²⁶ specific defenses that (i) originate from the same theory of rights; (ii) are, using Harel's words, examples of victim-specific powers; and (iii) have the same effect on the rights and duties of the participants of an interaction? I would think so.

II. RIGHTS: LIMITED OR REDUCED?

A significant portion of Husak's comment is devoted to the discussion of what he calls "conceptual perplexities" in connection with the principle of conditionality of rights. Husak raises a valid question about the general theory of rights that would support that principle. Suggesting an inconsistency in my approach, Husak presents the principle of conditionality of rights as a case of specification (which, as I hope to show in a moment, it is not), and then successfully attacks his own erroneous supposition.

I am grateful to Husak for this misunderstanding—it gives me an opportunity to better define my views and explore certain nuances of which I did not think before. Thus, I would like to reply not to Husak's interpretation of my proposal but instead to his original question: how does the principle of conditionality of rights fit into a broader theory of rights? For the lack of space, this reply is inevitably just a road map.

Husak is correct that I do not view people's rights, even the most fundamental ones (like the right to life or bodily security), as absolute.²⁷ If they were absolute, we would be morally and legally paralyzed every time two identical absolute rights (for example, rights to life of two different persons) clashed.²⁸ The principle of conditionality

26. Harel, *supra* note 8, at 496.

27. Husak, *supra* note 13, at 526-27.

28. For an excellent discussion of why rights are not absolute, see, e.g., Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 *Phil. & Pub.*

of rights explicitly recognizes the non-absolute character of rights by providing that one may lose or reduce them due to his own right-altering conduct, e.g., by consent or an attack on rights of others.

Since I do not view rights as absolute, I naturally do not subscribe to the theory of specification. Under the specification theory, individuals do not “cease” to have rights—their rights are limited from the outset and, in this limited form, are absolute. For example, a person does not have a right not to be killed. He only has the right—yet the absolute right—not to be killed wrongly or unjustly (pursuant to the moral version of specification) or except in certain circumstances (pursuant to factual specification). My argument presumes that people’s rights are not absolute and that they may be lost or reduced, which means that the theory of rights I employ is anything but specification.²⁹

There are a couple of reasons why I reject the specification theory. One is that, following Feinberg, I am pessimistic about the plausibility of fully defining a right—it would take volumes and it has never been actually done.³⁰ Yet more importantly, specification is based on an “incorrect view of rights,”³¹ pursuant to which, if there are

Aff., 93, 97-99 (1978) (pointing out that a conflict between two absolute rights is “logically impossible in just the manner of a hypothetical conflict between an irresistible force and an immovable object”). Feinberg has defined absolute rights in the following way:

An absolute right (if there is such a thing) is a right that would remain in one’s possession, fully effective as a ground for other people’s duties to one, in all possible circumstances. If my right to X is absolute, then there are no circumstances in which it is “subject to legitimate limitation” or in which the correlated duties of others to me in respect to X are suspended. If the right is absolute, then I possess it, and others are bound to me in the appropriate ways in all circumstances *without exception*.

Id. at 97-98. See also Judith Jarvis Thomson, Self-Defense and Rights, in *Rights, Restitution, and Risk* 33, 40-42 (William Parent ed., 1986); Judith Jarvis Thomson, *Some Ruminations on Rights*, id. at 49; and Judith Jarvis Thomson, *Rights and Compensation*, id. at 66.

29. For a similar point, see Thomson, *Self-Defense and Rights*, supra note 28, at 40 (observing that “neither [factual nor moral specification] would be opted for by anyone who did not take the view that rights are, in a certain sense, *absolute*”).

30. See Feinberg, supra note 28, at 99-100.

31. Thomson, *Self-Defense and Rights*, supra note 28, at 39-40.

circumstances when someone's right has a priority over mine, it means that I never had the relevant right in the first place.

Take a well-known example with mountaineers who saved their lives by breaking into someone's cabin and staying there for a few days while waiting out a snow storm. Of course, under any theory of rights, the actions of the mountaineers were justified as the "lesser evil": by invading the cabin owner's property rights in his cabin and food, they avoided a greater harm of death or serious injuries to the members of the group. The specification theory, however, would justify the mountaineers not because their right to life was more important than the cabin owner's property rights, but because the cabin owner's property rights were limited from the outset and simply did not exist under the described circumstances. Thus the mountaineers did not infringe on any rights at all.

But is that correct? I think not. Because if that were the case, the cabin owner would not be entitled to any compensation for the consumed food or other loss caused by the mountaineers. And, as we know, the law does provide for compensation to a party whose rights were invaded in a case of private necessity. Therefore, it is inaccurate to say that the cabin owner's property rights were limited from the outset. One could say, as I sometimes do in "Victims and Perpetrators," that they are *conditionally* limited, but all that really means is that they are *not* limited until and unless a certain condition is satisfied.

Husak's erroneous assumption that the principle of conditionality of rights is based on the specification theory leads him to say that this principle "is not compatible with a theory that alleges that victims *forfeit* their rights by engaging in faulty behavior."³² In my view, this conclusion is incorrect: by acting in a certain way, a person may trigger a condition on which a certain right of his depends. As Thomson puts it, an aggressor "(conditionally) divests himself of claims he had formerly had: here there is not

32. Husak, *supra* note 13, at 528.

permissible infringement of claims, but the forfeiting of them.”³³ In fact, out of the three theories discussed by Thomson,³⁴ the principle of conditionality of rights is probably closest to the “forfeit” theory—with two caveats.

One, “forfeit” is a loaded term. For my purposes, it is more accurate to talk about the loss or reduction of rights, not their complete forfeiture. A right that has been lost may be regained; “forfeit” suggests that the right has been lost forever.³⁵

The other caveat is perhaps more important. It seems to me that we should use different theories when explaining situations involving a victim who chose to change his moral status vis-à-vis the perpetrator and situations in which the victim lacked either *actus reus* or the requisite *mens rea*. In the second instance (which would include cases of “innocent aggressors,”³⁶ “innocent threats”³⁷ and “innocent shields”³⁸),

33. Thomson, *supra* note 21, at 362.

34. The three theories are “forfeit,” “specification,” and “overriding.” See Thomson, *Self-Defense and Rights*, *supra* note 28, at 33-48.

35. Thomson acknowledges this difference: “[S]aying that Aggressor simply ceased to have the right is not the same as saying that Aggressor has forfeited the right.” *Id.* at 37.

36. See, e.g., Larry Alexander, *A Unified Excuse of Preemptive Self-Protection*, 74 *Notre Dame L. Rev.* 1475 (1999). Alexander defines “innocent aggressors” as

[t]hose who appear to be attacking me without legal justification, but who are legally and morally nonculpable in doing so. They may be acting on a reasonable but mistaken belief that I am threatening them or others. They may be insane. Or they may be small children who have picked up loaded pistols.

Id. at 1481-82.

37. See, e.g. Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 *U. Pa. L. Rev.* 1361 (1999). Finkelstein writes:

The innocent threat is a man who has been pushed off the edge of a cliff and is barreling toward you as you sit on a terrace below. The problem is that he is fat, very fat, and if he lands on you he will kill you. The only thing you have time to do is shift the position of an awning over your head. If you do shift the awning, he will be catapulted into a ravine and die, and you will survive. If you do not shift the awning, you will die and he will survive, because you will break his fall.

Id. at 1369.

38. See, e.g., Robert Nozick, *Anarchy, State, and Utopia* 35 (1974). Nozick defines innocent shields as

the “overriding” and not the loss/reduction of rights rationale may be more appropriate.

Compare, for example, cases of self-defense against a villainous aggressor and against an “innocent threat.” In both instances the perpetrator is justified in causing harm to the victim (to the extent that is necessary to protect the perpetrator against the harm the victim would otherwise cause him). But in the first case the victim did something to deserve that, whereas in the second case the unfortunate victim just happened to be in the wrong place at the wrong time. The rationale behind the “innocent threat” cases seems to be the same as behind the “necessity” cases. Unlike the villainous aggressor, an “innocent threat” victim does not lose or reduce his right to life; this right is overridden by considerations of “greater good.”

Husak asks how a person may “reduce” his right not to be harmed. As I explain in my article, by this general right not to be harmed I mean a cluster of distinguishable rights: for example, not to be attacked, not to be attacked with deadly weapons, not to be physically hurt, seriously injured, maimed, tortured, raped, or killed.³⁹ If I attack you using a stuffed animal as a weapon, I may lose my right not to be attacked but most likely I will not lose my right not to be killed. What happened then to my general right not to be harmed? I retained some of the rights that form it but not all. It became more limited, “reduced.”

I argue that a person very seldom, if ever, loses all of the specific rights forming this general right not to be harmed. Partly this is so because we view certain rights as inalienable. The right not to be severely tortured (at least tortured to death) is probably one of them. In current law and moral philosophy, a person may neither waive nor

those innocent persons who themselves are nonthreats but who are so situated that they will be damaged by the only means available for stopping the threat. Innocent persons strapped onto the front of the tanks of aggressors so that the tanks cannot be hit without also hitting them are innocent shields

Id.

39. See *Victims and Perpetrators*, supra note 1, at 465-66.

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forfeit that right. Another reason why a person may not lose all his rights is the teleological nature of the permission to cause non-consensual harm. For example, B's privilege to harm A is limited to the amount of harm necessary for the protection of B's rights that are about to be violated by A.

In this regard, it is interesting to turn to Husak's argument about rape. He sees "no reason to exempt rape from the class of offenses for which victim fault can mitigate the liability of perpetrators."⁴⁰ According to Husak, one situation in which the perpetrator's liability might be mitigated is post-penetration rape.⁴¹ I disagree with that for a number of reasons.

In my view, sex without consent is sex without consent, no matter when the consent was refused. Moreover, if the reason for withdrawing consent is, say, physical pain or emotional discomfort *caused* by the intercourse, there is a good chance the victim was not aware that she would experience this pain or discomfort when she gave her consent. I fail to see why the perpetrator who ignored the victim's pleas to stop is less guilty simply because at some point in the past the victim did not object.

To be sure, Husak is right that rape, like any other crime, can be graded.⁴² For example, under the Wisconsin Penal Code, a person who has a sexual intercourse with another without consent is guilty of third degree sexual assault. If, in addition, the perpetrator uses or threatens to

40. Husak, *supra* note 13, at 533.

41. *Id.* at 533. Husak suggests that the best way to accomplish this mitigation is by "enacting a new crime of post-penetration rape, less serious than a crime in which consent is not given at all." *Id.* at 534, n.31.

42. Practically all states do grade sexual offenses. See, e.g., Robert R. Lawrence, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 Va. L. Rev. 1657, 1664 (1984) (observing that most states have adopted graded "sexual offense" legislation). Moreover, it is probably unhelpful to use "rape" as a generic name for every sexual offense. Not every homicide is murder; the same way, not every sexual offense is rape. In fact, some states have abandoned this term altogether. Instead, the offense is called "criminal sexual conduct." See, e.g., Mich. Comp. Laws §§ 750.520a to .520e, .520i (1996).

use force or violence, his offense goes up one notch to second degree sexual assault. The use or threat of use of a dangerous weapon brings it up to first degree sexual assault.⁴³ This differentiating between more and less significant threat, however, has nothing to do with the victim's contribution.⁴⁴

Under the principle of conditionality of rights, a victim may lose her right not to be harmed either voluntarily or involuntarily. To lose this right voluntarily, the victim must consent to a certain act. Naturally, consent to any continuous personal contact is revocable. By consenting to undergo a root canal procedure or to attend a friend's poetry reading, one does not acquire an obligation to go through the painful experience until the very end. Moreover, one does not assume the risk that the dentist will continue drilling despite the patient's desperate objections. It seems obvious that the same should be true for sexual intimacy, no matter what was the reason for a request to stop it—pain, psychological discomfort, or anything else.

Now, can a person involuntarily lose her right not to be raped? One may forfeit a right to bodily inviolability only if that person has infringed upon an important right of another.⁴⁵ In other words, post-penetration rape may be fully or partially justified if the perpetrator had a right that his sexual partner would continue the intercourse as long

43. Wis. Stat. § 940.225 (1999).

44. The Model Penal Code ("MPC") reduces rape from a felony of the first degree to the felony of the second degree if the victim was a "voluntary social companion of the actor upon the occasion of the crime" or had "previously permitted him sexual liberties." Model Penal Code § 213.1(1) (Proposed Official Draft 1962). I will not add anything new by saying that the Sexual Offenses section of the MPC should have been revised a long time ago. See, e.g., Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 *Ohio St. J. Crim. L.* 207, 209-10 (2003) (criticizing the MPC rape rules). In addition to the cited provision, the gender-specific language (§§ 213.1-213.4); the marital rape exception (§§ 213.1-213.6); the offense of seduction by promise to marry (§ 213.3(1)(d)); and the defense, available in certain instances, of the victim's sexual promiscuity (§ 213.6(3)) are, to put it mildly, outdated, and embarrassing to see in the influential document like the MPC.

45. I am not discussing here whether one's right not to be raped may be overridden, e.g., under the balance of evils.

as the perpetrator desired. I do not believe such a right exists. Courts refuse to order specific performance even of commercial contracts for personal services because to do so “would . . . run contrary to the Thirteenth Amendment’s prohibition against involuntary servitude.”⁴⁶ To the extent values of liberty and personal autonomy are worth anything, frustrated sexual expectations may give rise to a grudge but not to a legal (or moral) right to proceed with the unwanted intimacy.

Even if the victim violated a legitimate right of the perpetrator, should her misconduct partially justify rape? Let’s say a woman slaps a man on the face, he loses control, and in the state of rage, he rapes her. I do not think that in this case the defendant should be granted mitigation either. Rape is no different from physical torture, which is not subject to the defense of provocation and, in my view, justly so.⁴⁷ Considerations of human dignity and autonomy dictate that certain rights, including the right not to be tortured or raped, may not be forfeitable.⁴⁸

Finally, to be justified under the theory of self-defense, the rape must be immediately necessary to prevent the victim from causing serious harm to the perpetrator. I guess a case of “raping in self-defense” would look like that: a woman attacks a man with a knife. The man is not armed. To prevent the woman from stabbing him, he has only one choice: to rape her. I may be lacking in imagination but I have trouble visualizing this scenario.

46. *Government Guarantee Fund v. Hyatt Corp.*, 95 F.3d 291, 303 (3d Cir. 1996).

47. See, e.g., *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); see also *Victims and Perpetrators*, supra note 1, at 473, n.342 (pointing out that rape and torture do not satisfy the excusatory requirement of provocation pursuant to which the perpetrator must act impulsively, in an immediate response to the offense).

48. For discussion of excusatory requirements that prevent rape from being covered by the defense of provocation, see *Victims and Perpetrators*, supra note 1, at 473-74, n.342.

III. RIGHTS: MORAL OR LEGAL?

In my article, I argue that one way for a victim to lose or reduce his right not to be harmed is by violating a legal right of the perpetrator. Husak disagrees that the right in question should be legal rather than moral. He claims that “[a]ttempts to use our *legal* rights to decide when victim fault alters the criminal liability of perpetrators are both too broad as well as too narrow.”⁴⁹

In an attempt to prove that my approach is too broad, Husak wonders: “In some Muslim countries, for example, women have no legal right to dress provocatively. Would Bergelson conclude that an Afghani woman who broke the law by wearing a miniskirt in public provides a partial defense for Afghani rapists?”⁵⁰ A couple of paragraphs later, Husak answers his own rhetorical question, admitting that perhaps his counterexamples “betray a misunderstanding”⁵¹ of the principle of conditionality of rights, which, as my article indicates, “require[s] the *offender* to have the right that the victim not behave as she does,”⁵² and does not simply mitigate the offender’s liability due to any illegal act by the victim.

But if the right that the victim not behave the way she did is personal, how can we explain the defense of others? Under the common law, the right applied only to the defense of family members and close associates.⁵³ The restriction was a result of the right’s origin: it evolved from the right to protect one’s property, particularly one’s household (including one’s wife, children, servants, etc.).⁵⁴ Today, the rationale is somewhat different—the right to defend others is viewed as a derivative right, an extension

49. Husak, *supra* note 13, at 535.

50. *Id.*

51. *Id.* at 536.

52. *Id.*

53. 40 Am. Jur. 2d Homicide § 170 (2004).

54. See Rollin Morris Perkins, *Criminal Law*, 1018-19 (2d ed. 1969); 4 William Blackstone, *Commentaries on the Laws of England* 3 (Univ. of Chicago Press 1979) (1769).

of the attacked person's self-defense,⁵⁵ a form of subrogation of rights: "One asserting the justification of defense of another steps into the position of the person defended. Defense of another takes its form and content from defense of self."⁵⁶ Clearly, this subrogation is possible only when the person whose rights are at risk is identifiable. Various victimless crimes, including the hypothetical offense of wearing a miniskirt, do not allow any private citizen to assert a personal right that has been violated and the protection of which might be delegated to or assumed by another.

Whereas Husak fails to demonstrate the overinclusiveness of the principle of conditionality of rights, his argument that the principle may be underinclusive has merit. We can think of a number of examples, particularly in the area of provocation, in which the victim acts immorally but legally with respect to the perpetrator (e.g., taunts or insults him), and we intuitively feel that, if, in these circumstances, the perpetrator overreacts and assaults the victim, his liability should be reduced.⁵⁷ I share this intuition, yet I would reduce the perpetrator's liability through partial excuse and retain full or partial justification only for the violation of legal rights.⁵⁸

My choice is mandated by practical as well as theoretical considerations. Let's say we chose the violation of the perpetrator's moral (instead of legal) rights as the ground for reducing his liability—how would we decide what moral rights people possess? Searching, as Husak invites me to do, for a "broad and deep"⁵⁹ societal consensus as to whether particular lawful behavior is nevertheless

55. See, e.g., *Ducket v. State*, 966 P.2d 941, 944-45 (Wyo. 1998).

56. *Leeper v. State*, 589 P.2d. 379, 383 (Wyo. 1979).

57. Simons and Harel make similar arguments. See Harel, *supra* note 8, at 501-02 (arguing that the provoking act need not be a violation of duty on the part of the victim); see also Simons, *supra* note 3, at 562 ("It would be plausible, on a partial justification rationale, to mitigate in the case of a victim who subjected the defendant to intense and protracted emotional abuse, even if that abuse is not otherwise criminal or tortious.")

58. See, *Victims and Perpetrators*, *supra* note 1, at 476.

59. Husak, *supra* note 13, at 537.

immoral does not strike me as a good practical solution. How shall we do the searching—by polls? Shall we make participation in these polls mandatory, under the penalty of law, in order to ensure that the consensus is in fact “broad and deep”? How often shall we conduct these polls? And would not the very questions asked reveal inevitable social and cultural biases? In other words, how can we legitimately define the scope of overwhelmingly recognized moral and immoral conduct?⁶⁰

An alternative solution suggested by Husak is to reject the conventional morality in favor of critical morality.⁶¹ This seems to be an appealing option, until we start thinking of its practical implementation. I wonder how we would go about incorporating these moral rights into a legal definition of the new defense? How would we (a) determine, and (b) notify the community of what this “true” morality entails, i.e., what behavior is justifiable? Husak, for instance, seems to believe that, by agreeing to sexual penetration, a woman diminishes her right not to be forced to have sexual intercourse against her will.⁶² I believe otherwise. Critical morality, by definition, has the “correct” answer but neither Husak nor I nor the rest of the community can claim the privilege of its superior knowledge.

60. Judge Hand has raised similar concerns in his famous immigration decisions when he pointed out the difficulty of determining what constitutes a “good moral character” or “the generally accepted moral conventions current at the time.” *Schmidt v. United States*, 177 F.2d 450, 451 (2d Cir. 1949). He found the task imposed on courts “impossible of assured execution; people differ as much about moral conduct as they do about beauty.” *Johnson v. United States*, 186 F.2d 588, 589 (2d Cir. 1951). He criticized the notion that the court could rely on the “judgment of some ethical elite, even if any criterion were available to select them.” *Id.* Judge Hand also considered and rejected the possibility of poll data. “Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters.” *Schmidt*, 177 F.2d at 451.

61. See H.L.A. Hart, *Law, Liberty and Morality* 20 (1963) (differentiating positive morality, “the morality actually accepted and shared by a given social group,” from critical morality, “the general moral principles used in the criticism of actual social institutions including positive morality”).

62. Husak, *supra* note 13, at 533-34 (suggesting that post-penetration revocation of consent is the kind of victim behavior that should reduce the perpetrator’s liability).

As a result, had we followed Husak's suggestion, judges and jurors would have no better guidance than their own understanding of critical morality—i.e., in the end the conventional (or even personal, idiosyncratic), and not critical, morality would determine the perpetrator's culpability. Considering the variety of opinions on many moral issues in any society, and particularly in a multicultural society like ours, that would lead to inconsistent, unpredictable, and unfair verdicts.

Due to these concerns, my proposal is *intentionally* curtailed. I advocate an affirmative defense that would completely or partially justify the perpetrator if, among other things, the victim has violated the perpetrator's legal rights. These rights should be legal and not merely moral because the scope of protected rights must be clearly and legitimately defined and communicated to the community.⁶³ This is required by the very principle of legality considered to be the first principle of American criminal law jurisprudence.⁶⁴

In addition, using moral instead of legal rights to determine *legal* liability is a dangerous step back to the overwhelmingly criticized and rejected doctrine of "moral wrong." Pursuant to that doctrine, a person would lose a right to invoke a defense (mistake of fact) if he acted immorally, although not illegally, and his act produced a criminal result.⁶⁵ Similarly to the "moral wrong" doctrine, Husak's proposal may cause the victim to lose a legal right

63. See, e.g., *People v. Phyfe*, 32 N.E. 978 (N.Y. 1893) (holding that a "citizen is entitled to an unequivocal warning before conduct on his part . . . can be made the occasion of a deprivation of his liberty or property"); *People v. Arroyo*, 777 N.Y.S. 2d 836, 844 (N.Y. Crim. Ct. 2004) (applying the same rule).

64. Joshua Dressler, *Understanding Criminal Law* 39 (3d ed. 2001).

65. *Id.* at 157. The classic case in which the doctrine was applied is *Regina v. Prince*, 2 L.R.-C.C.R. 154 (1875), in which the defendant was prosecuted for "unlawfully tak[ing] or caus[ing] to be taken, any unmarried girl, being under the age of sixteen years, out of the possession . . . of her father . . ." The defendant believed the girl to be eighteen, whereas in fact she was only fourteen. The court convicted the defendant, denying him the defense of a mistake of fact because, even if the circumstances had been as he believed them to be, his act would have been immoral.

(e.g., not to be assaulted) simply because she did something immoral (e.g., broke a promise).

Therefore, in my view, it is preferable to be somewhat underinclusive and limit the application of the principle of conditionality of rights to legal rights only. This seems to be a reasonable solution from both the theoretical and practical perspectives. It still allows a court to apply the defense of *excuse* to limit the perpetrator's liability if it finds that the victim's immoral but legal behavior would make a reasonable person lose his temper. And, as a policy matter, it promotes respect for the law by maintaining that a person whose behavior was absolutely legal, even if mean and malicious, may not be *justifiably* assaulted.

IV. ASSUMPTION OF RISK: UNREASONABLE BUT LEGAL AND MORAL BEHAVIOR OF THE VICTIM

In conclusion, Husak poses what he considers to be the hardest question about comparative liability: should it apply to situations in which the victim acted unreasonably, although perfectly legally and morally?⁶⁶ In Husak's example, some of his colleagues irresponsibly fail to install software that would protect their computers from viruses. He asks: "To what extent should perpetrators who deliberately create a computer virus be less culpable for all of the harms that occur—even those harms that would have been prevented if victims had taken reasonable precautions?"⁶⁷

In my mind, the perpetrator's liability should not be affected by merely stupid or irresponsible acts of the victim. A car thief's liability should not be reduced simply because the car owner has left his car unlocked; and a rapist's liability should not be reduced because a jogger has chosen a deserted section of the Central Park for her evening exercise.⁶⁸

66. Husak, *supra* note 13, at 538.

67. *Id.* at 539.

68. My views are shared by some and opposed by some of my commentators. Cf. Hurd, *supra* note 4, at 510 (arguing that "the law would be unwise to

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One does not owe criminals a duty to protect oneself or one's property from their intentional criminal acts.⁶⁹ That is not to say that the victim owes no duty to anyone. For example, in torts, as Simons correctly notes, a car owner who has left the car key in the ignition is not at fault with respect to the car thief but may be at fault with respect to a third party who was run over by the car thief.⁷⁰ Similarly, an irresponsible faculty member may be at fault with respect to his colleagues whose computers were infected because of his lack of due care. He may be reprimanded or even fined but that will have no effect on the hacker's liability because the careless faculty member owed no duty of care *to him*.

articulate an assumption of risk defense that reduced the criminal penalty for wrongdoing every time a victim knowingly and voluntarily encountered its prospect").

For we should then find that a woman who wore a low-cut red dress to a rough bar reduced her rights against rape if she knew that in dressing provocatively she might incite the unwanted attentions of a drunken aggressor. And we should find that the jogger who entered Central Park at dusk knowing of the risk of being mugged was complicit in his own mugging; his voluntary assumption of a known risk properly reduces the penalty imposed on the predictable assailant. And we should find that the woman who ran to the store for a jug of orange juice on New Year's Eve voluntarily reduced her rights against being struck by a drunk driver, for she knowingly and voluntarily invited those risks when she ventured onto the roads on that treacherous night. And we should find that a person who knowingly left her keys in her car invited its theft, thus reducing the penalty justifiably imposed on the car thief.

Id. 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 that criminal law should punish perpetrators who commit crimes against careless victims less severely). For my critique of Harel's position, see *Victims and Perpetrators*, supra note 1, at 424-25, 467.

69. See, e.g., George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. Rev. 347, 356 (1996).

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. See also, *Victims and Perpetrators*, supra note 1, at 473-74.

70. Simons, supra note 3, at 556.

V. CONSENT V. ASSUMPTION OF RISK

I must admit, I find completely fascinating the way Hurd builds her case for distinguishing between consent and assumption of risk. Moreover, I have nothing against “splitting the doctrinal baby”;⁷¹ however, I’d prefer the cut to be across a different joint.

Hurd starts with critically looking at my analysis of the defense of consent in torts.⁷² Following the Restatement, I maintain that, to be effective, consent must be given for the particular conduct, or to substantially the same conduct.⁷³ What Hurd does not like in this language is the word “conduct,” which presumably applies to both actual consent and assumption of risk. She draws a line between one’s consent to another’s (i) physical *contact* with his person or property, and (ii) wrongful *conduct*, assuming one appreciates its risks and wrongfulness. In the first case, consent is “morally magical: it eliminates wrongdoing altogether.” In the second case, consent makes the victim partially responsible for the resulting harm or loss.

I am not sure this distinction is helpful. It is not clear to me, for instance, why we should put consent to physical contact into a separate category. What if X consents to someone watching her take a shower, or taking nude pictures of her, or posting those pictures on the Internet? There is no physical contact involved in any of these situations. However, X’s consent seems to be equally “morally magical” in that it completely eliminates wrongdoing.

Moreover, if Hurd’s goal is to “accurately parse between those who drag race and those who leave their keys in vehicles stolen by drag racers,”⁷⁴ she does not need this distinction. Hurd correctly underscores that to lose a

71. Hurd, *supra* note 4, at 513.

72. *Id.* at 511-12.

73. Restatement (Second) of Torts § 892A(2)(b) (1979) (“To be effective, consent must be to the particular conduct, or to substantially the same conduct.”); *cmt.* to 892A(2) (same).

74. Hurd, *supra* note 4, at 512.

right voluntarily, the victim has to “consent to *the defendant’s wrongful conduct*, and not just to *the risk* that that conduct will occur.”⁷⁵ A person assumes the risk that this particular conduct may cause him harm; however, he does not assume the risk of *different* conduct. Accordingly, a woman who consents to a kiss runs a risk that she may contract her partner’s herpes; yet she does not assume the risk of being raped.

In my view, a more important distinction between consent and its constructive form, assumption of risk, is that a person may, expressly or tacitly, *consent* to the unlawful conduct of another; in that case he becomes a coauthor of his injury. These are, for instance, cases of drag racing and Russian roulette. However, a person may not be deemed to have *assumed the risk* of the unlawful conduct of another. That is so because people who violate the law have no right to force others to accommodate their criminal behavior by acting in a certain way or refraining from action. A different rule would reward unlawful behavior at the cost of lawful behavior, which would be both unfair and inefficient. The law may not force people to sacrifice their liberty so that wrongdoers do not get “greater opportunities for wrongdoing.”⁷⁶ Therefore, the woman who ran to the store for a jug of orange juice on New Year’s Eve did not assume the risk of being struck by a drunk driver, just as the hapless colleague of Husak did not assume the risk of having his computer attacked by a hacker.

VI. CONTRIBUTORY NEGLIGENCE

What if the victim herself acted unreasonably or unlawfully—can we say that the perpetrator’s liability should be reduced because of her contributory negligence, i.e., her failure “to accord *herself* due care?”⁷⁷ As I have already discussed in connection with Hurd’s and Husak’s assumption of risk arguments, for unreasonable but lawful

75. *Id.*

76. *Id.* at 521.

77. *Id.*, at 516-17.

behavior, the answer should be “no.”⁷⁸ What about the unlawful conduct of the victim, which contributed to his injury? Should the fault of “a victim who failed to strap her seatbelt, or who herself drove drunk, or who neglected to service the brakes of her vehicle”⁷⁹ reduce the criminal liability of the perpetrator? This issue is far too complicated for the shorthand of this article, but I think that the answer should be “yes,” to the extent the unlawful conduct of the victim contributed to the harm that befell her.

I see a principled difference between the victim’s careless but lawful behavior and her unlawful conduct in the scope of the legitimate expectations of the perpetrator. Numerous considerations, from liberty to legality, prohibit punishing people for thoughtless but lawful behavior that harmed no one but themselves. To the extent they do not harm others, people have the right to be stupid, clumsy, and irresponsible. So, when we make our plans and go through our lives, we cannot rely on other people being highly intelligent, alert, and prudent. Accordingly, if our culpable actions cause others harm, we have no basis to claim the reduction of liability based on their imperfect behavior.

On the other hand, we have the right to expect that other people obey the law (at least when their failure to do so would directly affect us). If traffic rules require drivers to stop at the red light, I should be able to rely on that rule. Thus, if the victim did not stop, and our accident was caused by both his failure to stop and my speeding, it seems fair to reduce my liability. Moreover, even if I was fully responsible for the accident, but due to the victim’s unlawful failure to wear a seat belt, his injury turned out to be more significant than it would be otherwise, it also seems fair to reduce my liability for the harm, which is attributable to the victim’s own fault.

78. See *supra*, notes 65-69 and the accompanying text.

79. Hurd, *supra* note 4, at 517.

VII. ATTEMPT, ENDANGERMENT, AND OTHER RISK
CREATION

How would the principle of conditionality of rights work in cases of attempts, endangerment, and other instances of risk creation in which the actor does not actually bring about the relevant social harm?⁸⁰ Simons asks: “If a speeding driver almost strikes the victim, but misses, should it really matter whether the victim was jaywalking?”⁸¹ Well, *if* we are willing to prosecute a driver who *almost* struck a pedestrian, I don’t quite see why we should deny the driver a defense. If the victim’s right to physical inviolability was recklessly endangered, and we view this endangerment as wrongdoing serious enough to justify criminal punishment,⁸² it certainly matters to what extent it was the defendant’s fault. Would Simons refuse to consider the victim’s conduct even if the victim intentionally threw himself in front of the car in an unsuccessful attempt to commit suicide?

There is nothing idiosyncratic in my answer. We know numerous examples of attempted crimes when the conduct of the victim made all the difference for the liability of the perpetrator. A defendant charged with an attempted murder for shooting at the victim may be fully exonerated if he acted in self-defense or may be found guilty of a lesser offense if the victim provoked him.⁸³

80. Simons, *supra* note 3, at 563-64.

81. *Id.* at 564.

82. See Model Penal Code § 211.2 (Proposed Official Draft 1962); see also Claire Finkelstein, *Is Risk a Harm?*, 151 U. Pa. L. Rev. 963, 987-90 (2003) (arguing that imposition of risk is a harm to the person on whom it is inflicted). But see Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. Rev. 249 (1996); Heidi M. Hurd, *Nonreciprocal Risk Imposition, Unjust Enrichment, and the Foundations of Tort Law: A Critical Celebration of George Fletcher’s Theory of Tort Law*, 78 Notre Dame L. Rev. 711 (2003); Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. Contemp. Legal Issues 157, 193-208 (1994). Hurd contests the claim that “risks to others are, by themselves, wrongs, and that individuals can have rights against risks (rather than simply rights against harms).” Hurd, *supra* note 4, at 519 n.21.

83. See, e.g., *Cox v. State*, 534 A.2d 1333, 1336 (Md. 1988) (an attempt to kill a provoker is punishable as an attempted voluntary manslaughter); *State v. Robinson*, 643 A.2d 591, 597 (N.J. 1994) (same).

It appears that the crucial question for the determination of the perpetrator's liability in inchoate crimes is whether there is an identifiable victim. If such a victim exists, his conduct has to be taken into account the same way as in completed crimes. If, on the other hand, the perpetrator is guilty of risk creation with respect to the general public (e.g., an attempted terrorist act), there is no particular victim(s) whose conduct may be relevant; accordingly, the principle of conditionality of rights would not warrant a defense. Now, what if the perpetrator strikes against an aggressor or provoker but at the same time recklessly endangers the lives of a group of innocent bystanders (e.g., by throwing a hand grenade that fortuitously failed to explode into a room full of people)? I think it would make sense to conclude that the victim's aggressive or provocative conduct should be taken into account to eliminate or reduce the perpetrator's liability as to that one person but not the rest of the group.

Generally speaking, the principle of conditionality of rights should be applied to inchoate offenses the same way it can be applied to completed offenses—if there is an identifiable victim, the conduct of that victim may affect the perpetrator's liability.

VIII. MULTIPLE DEFENDANTS

Another of Simons's concerns involves multiple defendants: "If a single defendant's liability is properly mitigated because of the victim's fault, should it not also be mitigated if a second defendant's faulty or wrongful conduct contributed to a victim's harm (apart from whether the victim's own conduct is properly considered a mitigation)?"⁸⁴

Simons correctly deduces that no mitigation would be available to two defendants engaged in criminal conduct together, as conspirators or accomplices.⁸⁵ He does not

84. Simons, *supra* note 3, at 564.

85. *Id.* (observing that, when two defendants act together, additional culpability and danger of group criminality might preempt any possible

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discuss a case in which the harm is divisible, e.g., in which two unrelated, independently acting defendants are responsible for different harms. Say, as a result of attending a restaurant, the victim suffers a theft and a severe food poisoning. I don't think Simons would have a problem with holding each, the thief and the reckless cook, responsible only for the harm he personally caused.⁸⁶

The scenario Simons seems to have in mind is known in the legal literature as concurrent overdetermination.⁸⁷ A typical example would be a case of two independent concurrent fires, each sufficient to burn down the building, which join and together destroy it.⁸⁸ Simons asks: “[i]f two independent speeding drivers collide and cause the victim's death, in circumstances where the speeding of either alone would have been sufficient to cause the harm, should the punishment for each be mitigated, because of the causal contribution and fault of the other?”⁸⁹

Simons apparently thinks that the principle of conditionality of rights would mandate such mitigation. This is an odd proposition and certainly one that does not follow from my argument. Concurrent overdetermination cases involve parties whose individual actions are independent from anyone else's actions (in terms of either causation or culpability) and do not change the ultimate amount of harm. Therefore, in those cases, consistently with the principle of conditionality of rights and current law, the conduct of any additional actor—a perpetrator or the victim—does not have any effect on the liability of a particular defendant.

For example, in Simons's hypothetical, neither driver would be entitled to any reduction of liability. Each driver's negligence is a “but for” and proximate cause of the

mitigation).

86. I assume the two crimes are truly unrelated, as opposed to, say, food poisoning giving the thief an opportunity to steal the victim's wallet.

87. See, e.g., Michael S. Moore, Causation and Responsibility, *Soc. Phil. & Pol'y*, Summer 1999, at 1, 9-13; Richard Wright, Causation in Tort Law, 73 *Cal. L. Rev.* 1735 (1985).

88. See Moore, *supra* note 87, at 10.

89. Simons, *supra* note 3, at 564.

fatal accident.⁹⁰ Each collision is causally sufficient and independent from the other—if the other driver did not exist, the victim would still be dead. Conversely, outside of the overdetermination context, when a collision results from negligent actions of a driver and the victim, the causal contribution of each party is a necessary condition of the resulting harm. If the victim acted differently, he would not be harmed.

More importantly, in Simons's hypothetical, the wrongful actions of one defendant toward the victim do not reduce the obligations of the other defendant not to act wrongfully toward the same victim. Accordingly, each of them is guilty of violating the victim's rights. In contrast, the principle of conditionality of rights allows mitigating the perpetrator's liability only when the victim has acted in such a way as to eliminate or reduce some of his rights, thus eliminating or reducing the perpetrator's responsibility for interfering with them.

Therefore, in accord with the principle of conditionality of rights, the number of independent, simultaneously acting defendants in cases of concurrent overdetermination is completely irrelevant to the issue of their respective criminal liability.

IX. PRACTICAL IMPLEMENTATION

The final question I want to address is how the defense of comparative criminal liability should be implemented. According to my proposal, the comparative liability should function as an affirmative defense.

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,

90. See, e.g., Moore, *supra* note 87, at 29-30. See also *Corey v. Havener*, 65 N.E. 69 (Mass. 1902) (holding both defendants liable in a case where each rode his motorcycle by the victim's horse, and the frightened horse injured the victim, although the noise of even one motorcycle would have been sufficient to produce the same result).

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.⁹¹

In this regard, two commentators, Husak and Simons, express concerns. Husak tries to envision how the mechanism of mitigation will work in the case of partial reduction of criminal liability. He correctly notes that the structure of homicide offenses provides an ideal solution. “When persons commit homicides, fault mitigators such as provocation function as ‘imperfect defenses,’ allowing defendants to be convicted of a lesser-included offense like manslaughter.”⁹² He then goes on to warn that “lesser-included offenses are rare outside the context of homicide; there usually is no hierarchy of offenses for which defendants whose fault is mitigated might be convicted.”⁹³

I agree with Husak that the structure of homicide offenses provides a convenient paradigm for applying any partial defense, not just the one related to the victim’s conduct. However, I disagree that, to incorporate a partial defense, there is no other “alternative but for legislatures to enact a number of lesser-included offenses for which defendants whose liability is mitigated can be convicted.”⁹⁴

One way to proceed, in the case of successful invocation of the defense of comparative liability, is to permit downgrading of an offense charged to a lower degree or to another lesser related offense, regardless of whether or not it is also lesser included.⁹⁵ This solution would not require too much legislative effort since the majority of non-victimless crimes (and we need to deal only with those) already have some less serious analogues, particularly in the jurisdictions whose penal codes are modeled on the

91. Victims and Perpetrators, *supra* note 1, at 487.

92. Husak, *supra* note 13, at 525.

93. *Id.* at 525-26.

94. *Id.* at 532.

95. An offense is considered lesser included only if “the elements of the lesser offense are a subset of the elements of the charged offense.” *Schmuck v. United States*, 489 U.S. 705, 716 (1989).

MPC. For example, article 211 of the MPC includes aggravated assault (a felony of the second or third degree), simple assault (a misdemeanor or petty misdemeanor), and reckless endangerment (a misdemeanor). When warranted by facts, say, homicide could be reduced to aggravated assault or even reckless endangerment.⁹⁶

True, recent decisions have purported to limit jury instruction on lesser offenses to those which meet the strict requirements for lesser-included offenses.⁹⁷ Yet, as one commentator has suggested, cases that limit lesser offense instructions to included offenses typically rely on statutes or rules.⁹⁸ These cases have not considered that sometimes a lesser offense can be a defense or defense theory. Thus, a restriction of instruction on a lesser offense may be a restriction of the defendant's constitutional right to present a defense. For that reason, one could argue that when an instruction on a lesser non-included offense is necessitated by a defense, including the defense of comparative liability, it should be allowed.

I do not insist that this is the best strategy to incorporating the defense of comparative liability. All I mean to say is that if we believe that victims' conduct is and ought to be relevant to the criminal liability of perpetrators (and Husak certainly seems to think so), we *have to* find a way to make it a part of criminal law.

While Husak is concerned about expanding the law, Simons worries about asking jurors to apply a multifactor test, a comparative fault-like inquiry on a case-by-case basis, thereby giving them too much discretion over the

96. See *Victims and Perpetrators*, *supra* note 1, notes 329-36, and the accompanying text.

97. Thomas Lundy, *Jury Instruction Corner: Obtaining Instruction on Non-Included Lesser Offenses*, 24 *Champion* 48, 48 (2000). See also, *Carter v. United States*, 530 U.S. 255 (2000); *Hopkins v. Reeves*, 524 U.S. 88 (1998) (holding that defendants' right to a lesser charge jury instruction is limited to lesser-included offenses only).

98. See Lundy, *supra* note 97, at 48. See also *Brown v. Commonwealth*, 555 S.W. 2d 252, 257 (Ky. 1977) ("Evidence suggesting that a defendant was guilty of a lesser offense is, in fact and in principle, a defense against the higher charge . . .").

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REPLY

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length of criminal punishments.⁹⁹ I do not think Simons's worries are warranted. In practically any criminal trial, jurors have to deal with a multifactor test. They have to decide who had rights to what, who was at fault, and who was causally responsible for the harm. They often have to use a "comparative fault-type inquiry" in order to determine whether the defendant acted reasonably.

Moreover, in many instances, that inquiry directly translates into the verdict and the length of criminal punishments. For example, in a case of involuntary homicide, the difference between negligence, recklessness, and recklessness manifesting extreme indifference to the value of human life determines the choice between negligent homicide (a felony of the third degree), manslaughter (a felony of the second degree), and murder (a felony of the first degree).¹⁰⁰

In "Victims and Perpetrators," I was primarily interested in making a case for the defense of comparative liability in criminal law and identifying general principles supporting this defense. If this defense is recognized, it certainly will be necessary to define its boundaries more rigorously, coordinate its use with that of other defenses, and overcome numerous practical obstacles. But, as I said, if we believe that considerations of fairness, consistency, and efficiency mandate the recognition of comparative criminal liability, we may not reject the advocated defense simply because it will take an effort to implement it.

99. See Simons, *supra* note 3, at 565 ("[Bergelson] articulates a multifactor test, a comparative fault-type inquiry that apparently is to be applied by a jury case by case, resulting, for example, in a reduction of one or more grades of the crime, or in a mitigation of the usual sentence within a grade.").

100. Model Penal Code §§ 210.2 & 210.3 (Proposed Official Draft 1962).