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Victims and the Significance of Causing Harm

Guyora Binder*

As any mystery reader knows, a dead body is a problem. A death by violence announces the onset of a conflict between two worlds, the clandestine, illicit order of the street, and the public legal order of the state. The *consequence* of death makes the otherwise shadowed dramas of petty grifters suddenly *consequential* enough to attract the state's notice. In detective fiction, the interpreting eye of the state is what turns these small-time hustles into a tragic narrative, the beginning and middle needed to account for the victim's bitter end.

The history of Anglo-American criminal law also began with this problem of the unexplained corpse. While ancient Germanic law treated violent disputes as quasi-private matters to be resolved by the parties and their kin, whether in blood or money, Danish and Norman occupiers treated certain acts of violence as matters of public concern. Thus, they charged Anglo-Saxon villages an "ammercement" for each unattributed killing of one of their compatriots there.[1] Eventually, royal courts took jurisdiction over all homicides.[2]

As breaches of the king's peace, violent deaths were offenses against the crown. The sovereign could tolerate the controlled use of force within the household. This was not disorder, but the proper exercise of governing authority. On the other hand, armed conflict among men in public places raised the

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1. 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 26 (London, MacMillan 1883); CARLETON K. ALLEN, THE QUEEN'S PEACE 23-24 (1953).

2. JULIUS GOEBEL, FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF ENGLISH CRIMINAL PROCEDURE 423-40 (University of Pennsylvania Press 1976) (1937); NAOMI D. HURNARD, THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307, at 7-9 (1969); Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 417-19 (1976).

question of who governed.[3] In a state without a regular armed police force, the outbreak of such violence was an ever-present threat. A killing was particularly problematic because it could not be hidden and might well provoke retaliation. Killing therefore became a pivotal event, transforming what might otherwise remain a private dispute into a public wrong that challenged sovereignty and triggered the jurisdiction of the royal courts. We can think of homicide victims as spectral sentries guarding the frontiers of the ancient criminal law and mutely bearing witness to trespasses against the royal domain.

To this day, criminal law frequently conditions punishment on causing harmful results like death.[4] Intentional killing is generally punished more severely than failed attempts to kill;[5] reckless homicide is punished far more severely than dangerous but non-fatal acts like assault or reckless driving.[6] Much dangerous conduct remains unexamined and unpunished until it leads to harm. Many of us have caught ourselves acting irresponsibly behind the wheel and felt grateful relief that our stupidity or inattention escaped a collision with fate. But who among us has felt remorseful enough to stop a cop and turn ourselves in for our unconsummated calamities? Even in the deepest recesses of conscience we reassure ourselves, "no harm, no foul." If we are thus willing to accept "moral luck"[7] when it favors us, should we not also take the bad with the good?

Yet many criminal law theorists find the punishment of harm puzzling and even, in Sanford Kadish's phrase, "ration-

3. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 40-41 (London, Cambridge University Press 1968) (1898).

4. WAYNE R. LAFAVE, CRIMINAL LAW 331-32 (4th ed. 2003) (describing range of crimes requiring causation of a harmful result).

5. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 375 (3rd ed. 2001); JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW 635 (5th ed. 2004) (most jurisdictions punish attempts less than completed offenses); LAFAVE, *supra* note 4, at 580 (common law doctrine that attempted felony was misdemeanor).

6. N.Y. PENAL LAW § 120.25 (McKinney 2004) (defining reckless endangerment in the first degree as a class D felony for recklessly creating a grave risk of death with depraved indifference to human life); N.Y. PENAL LAW § 125.25(2) (McKinney 2006) (defining murder in the second degree as a class A-I felony for causing death as a result of recklessly creating a grave risk of death with depraved indifference to human life).

7. See THOMAS NAGEL, MORTAL QUESTIONS 24-38 (1979) and BERNARD WILLIAMS, MORAL LUCK 20-39 (1981), for explanations of the problem of moral luck.

ally indefensible."[8] They argue that acts should be evaluated only on the basis of the risks they create and the actors' awareness of those risks. One who knowingly imposes an unjustified risk on others acts wrongly, whether or not the risk eventuates in harm.[9] There are two main arguments for this position, one retributivist in its premises and the other utilitarian.

Retributivism is generally seen as an application of deontological ethics to criminal justice.[10] It pays homage to Kant's account of morality as fairness or non-hypocrisy. According to Kant's classic formulation of a retributivist account of punishment, the enjoyment of legal rights is a cooperative achievement that depends upon mutual forbearance from violating the rights of others and mutual agreement that those who willfully violate these rights shall suffer punishment. Accordingly, to enjoy and assert legal rights entails a moral duty to respect the rights of others or submit to punishment.[11]

On first reflection, retributivism would seem to support punishment for those who violate rights by inflicting actual harm. Yet some retributivists have been very influenced by Kant's idea that morality is a matter of acting on the basis of a good (that is, a fair or impartial) will. Based on this subjective conception of morality, they argue that the results of conduct

8. Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 697 (1994).

9. Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 936, 946-47 (2000); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1174-78 (1997); Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2184-91 (1994); Stephen J. Morse, *Reason, Results and Criminal Responsibility,* 2004 U. ILL. L. REV. 363, 379-81; Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498 (1974).

10. *See* HERBERT MORRIS, ON GUILT AND INNOCENCE 31-58 (1976); Jeffrie G. Murphy, *Three Mistakes about Retributivism*, *in* RETRIBUTION, JUSTICE, AND THERAPY 77 (Wilfrid Sellars & Keith Lehrer eds., 1979).

11. *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 80 (John Ladd trans., Hackett Pub'g Co. 2d ed. 1999) (1797) [hereinafter KANT, METAPHYSICAL ELEMENTS]; IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 9-21 (Alan W. Wood ed. & trans., Yale Univ. Press 2002) (1785) [hereinafter KANT, GROUNDWORK]; MORRIS, *supra* note 10, at 31-58; Guyora Binder, *Punishment Theory: Moral or Political?* 5 BUFF. CRIM. L. REV. 321, 350-66 (2002); Michael Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726 (1983).

are irrelevant in judging whether an act deserves punishment.[12] According to this view, an actor who claims and benefits from legal rights violates a moral duty by knowingly imposing an unjustified risk of harm to a right (or other legally protected interest). It is the inner decision to violate a moral duty by defecting from the cooperative scheme that constitutes the wrong. Once the actor has culpably imposed a risk, the wrongful and culpable act is complete. The results of his act are often out of his hands. Whether his shot hits its target or misses, whether the victim is driving a sturdy or a flimsy vehicle, whether medical treatment saves the victim, these are all irrelevant in assessing the actor's moral fault. These outcomes are a matter of mere fortuity or moral luck.[13]

Utilitarian penology derives originally from the writings of legal reformers Beccaria and Bentham, who emphasized the power of mild but regular penal sanctions to deter crime.[14] Today it is often understood as an application of act-utilitarian ethics to problems of criminal justice. Act-utilitarianism holds that moral decisionmakers should act so as to produce those consequences that will maximize the aggregate welfare of all persons.[15] According to this view, when the state punishes, it is a moral decisionmaker. The punitive infliction of suffering can only be justified morally, if it will prevent more suffering, presumably by deterring harmful acts or incapacitating those who would otherwise commit them in the future.

Again it seems that a concern with preventing harm—in the sense of aggregate disutility—should militate in favor of punishing those who actually cause it. But surprisingly, there are reasons to doubt the deterrent benefits of punishing harm.

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12. MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 195-96 (1997); A.W. Moore, *A Kantian View of Moral Luck*, 65 PHIL. 297, 304 (1990).

13. JOEL FEINBERG, DOING AND DESERVING 33 (1974); Alexander, *supra* note 9, at 935; Kadish, *supra* note 8, at 682; Kessler, *supra* note 9, 378-86; Morse, *supra* note 9, at 379-81; Schulhofer, *supra* note 9, at 1565-69; Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374, 382-85 (1982).

14. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 46-81 (David Young trans., 1986) (1764); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170, 183, 288 (J.H. Burns & H.L.A. Hart eds., Univ. of London 1970) (1789).

15. *See generally* J.J.C. SMART, OUTLINE OF A UTILITARIAN SYSTEM OF ETHICS (1961) (exposition of act-utilitarian ethics).

These derive from Bentham and Beccaria's original claim that moderate but certain punishment deters more effectively than severe but uncertain punishment.[16] By this reasoning, we would deter a particular act more effectively by sending all who commit it to jail for a year than by randomly selecting half and sending them to jail for two years.

The assumption that certainty deters more effectively than severity rests on several intuitions about the diminishing marginal disutility of incarceration. First, most people discount future welfare, so the utility loss from the second year of prison influences choice less than the utility loss from the first year because it is farther in the future.[17] Second, because people adapt their preferences to their circumstances, the utility loss from the second year should be less.[18] Third, if the disutility associated with incarceration depends upon either a temporary feeling of status degradation or a permanent stigma, the term of incarceration may not affect welfare that much.

There may be additional reasons why severe but uncertain punishment does not deter very effectively. Criminologist Jack Katz has argued that certain types of offenders, notably armed robbers, are risk-preferring. They relish the dramatic uncertainty of armed confrontation as an opportunity to demonstrate courage and assert an indomitable will.[19] A small chance of a large penalty may offer the challenge of a high stakes gamble, an opportunity to beat the odds and win.

Empirical analysis of law enforcement campaigns appears to bear out the assumption that certainty deters more effec-

16. Schulhofer, *supra* note 9, at 1533-37, 1546.

17. *Id.* at 1540; Michael K. Bock & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975); Alon Harel & Uzi Segal, *Criminal Law & Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV. 276, 280, 296-97 (1999); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 12 (1999).

18. John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 432 (1980); John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 201-02 (2005).

19. JACK KATZ, THE SEDUCTIONS OF CRIME 164-236 (1988).

tively than severity.[20] If this assumption is true, it follows that all equally dangerous and equally culpable acts should be punished equally. To attempt to deter harm by punishing only those acts of risk taking that actually cause harm is to create a "punishment lottery," reducing the certainty of punishment for the class of risky acts that produce harm. This should be less effective than punishing risk-imposition uniformly, but mildly.[21]

These arguments suggest that punishing harm advances neither of the two purportedly paramount goals of the criminal justice system, desert and deterrence.[22] Why then is it such a stubborn feature of our criminal law? On the other hand, if our chief theories of criminal law, utilitarianism and retributivism, cannot explain a persistent feature of our criminal law, maybe they are missing something important. A dead body turns out to be a problem for our prevailing theories of punishment as well.

It seems to me that the root of this problem lies in a common misconception as to what the purpose is of a theory of punishment. We know that goods like desert and deterrence are important aims of the criminal justice system, and it seems sensible that they should play a role in justifying punishment. But we have too readily assumed that the kind of justification they provide for punishment must be moral. Even though we are lawyers, trained in generating normative arguments from eclectic sources, we assume that a normative theory of punishment must be the task of a moral philosopher. Thus we assume a theory of punishment must begin with a general theory of

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20. 3 LEON RADZINOWICZ, A HISTORY OF THE ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 452-56 (1957); Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 176 (1952); Anthony Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, *in* 30 CRIME AND JUSTICE 143 (Michael Tonry ed., 2003).

21. OLIVER WENDELL HOLMES, THE COMMON LAW 48 (Neill H. Alford, Jr. et al. eds., Gryphon Eds., Ltd. 1982) (1881); THOMAS BABINGTON MACAULAY ET AL., A PENAL CODE 63-65 (The Lawbook Exch., Ltd. 2002) (1838); Schulhofer, *supra* note 9, at 1539-41.

22. COLO. REV. STAT. ANN. § 18-1-102 (West 2004) (retribution and deterrence among aims of penal code); DRESSLER, *supra* note 5, at 13-18 (explaining retribution and deterrence theories of punishment in terms of deontological and consequentialist morality).

value. This must generate some general standard against which all human acts can be measured, such as the utility principle or the categorical imperative. An institution like punishment is then reducible to acts of individuals, and it is justifiable when the acts composing it are justifiable morally.[23] From this perspective, the value of desert is derived from deontological ethics, and the value of deterring crimes depends upon act-utilitarian ethics. For these two ethical theories, acts that culpably impose harm are indistinguishable from acts that culpably impose risk and so should be treated alike.

But perhaps we should not expect to derive rules of criminal law from morality alone. The problem of justifying punishment is a political problem, arising as part of the larger problem of justifying the coercive force and prescriptive power of the state. A purely moral assessment of punishment leaves out the concern with the law's authority and the state's legitimacy that seemed so important in the development of the English criminal law. Rather than asking what rules of criminal law would be ideally fair or maximally efficacious in some hypothetical world, perhaps we should ask what role criminal punishment can best play in legitimating a particular state for its population.

I have elsewhere argued that if we interpret retributivism and utilitarianism as moral theories, both have counterintuitive implications for criminal justice.[24] Utilitarianism seems to counsel officials to frame and punish the innocent if that will most effectively deter crime; while retributivism seems to counsel private persons to exact vigilante justice if that will impose deserved suffering.[25] What connects these two counterintuitive implications is that both ignore the special responsibilities that public officials have by virtue of their roles. Public officials are agents of the public authorized to do things other individuals may not, but also obliged to justify their actions in a way that is transparent to that public. Criminal law is the law of state punishment, and so a normative theory of criminal law should

23. Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 121 (2000); Binder, *supra* note 11, at 321.

24. Binder, *supra* note 11, at 322-28.

25. *Id.* at 322-23, 325-28.

have something to say about the political competence of the state.

If utilitarianism is understood as a political theory, the obligation of public officials is not just to maximize public utility but to justify their actions to the public as utility-maximizing.[26] Utility is much better served by a publicly controlled policy process than by freeing public officials to act under cover of deception. Utilitarian psychology tells us that individuals are ordinarily motivated by self-interest, not the public interest. Identifying and pursuing the public interest is a cooperative achievement requiring careful institutional design. Thus, utilitarian penology is based on utility as a public value governing institutions, not utility as a personal moral imperative governing individual choice. This means that utilitarian penology will prioritize the institutional conditions required to insure the proper definition and pursuit of utility over particular improvements in welfare.[27]

We can give a similarly political account of retributivism. On this view, retributive punishment is not just about the allocation of moral responsibility among individuals, but about the construction of legal authority. For Kant, retribution is a kind of *justice* that presupposes a rule of *law*.[28] The moral duty to suffer punishment flows not from the viciousness of the criminal act as such, but from the hypocrisy of violating legal rights of a kind one claims and enjoys.[29] The rule of law is a necessarily cooperative achievement that alone can justify self-gratification as the exercise of a right. Similarly, the rule of law alone can justify retaliation as deserved retribution for violating a right. Thus, retributive justice is an exclusively public responsibility. Only a public official can express public disapprobation by punishing, and only a public official can warrant such a punishment as earned.[30] This means that public retribution provides an authoritative vindication of victims and an

26. Binder & Smith, *supra* note 23, at 167-68, 176-78, 189-209.

27. *Id.* at 210-13.

28. KANT, METAPHYSICAL ELEMENTS, *supra* note 11, at 128, 138-41; KANT, GROUNDWORK, *supra* note 11, at 56; Binder, *supra* note 11, at 352-53, 355-60.

29. KANT, METAPHYSICAL ELEMENTS, *supra* note 11, at 172; Binder, *supra* note 11, at 350-53.

30. JEFFRIE G. MURPHY, KANT: PHILOSOPHY OF RIGHT 117 (1970); KANT, METAPHYSICAL ELEMENTS, *supra* note 11, at 119-20.

authoritative condemnation of offenders that private vigilante violence cannot.

When we reinterpret our traditional theories of punishment in this way, as political rather than moral theories, we are emphasizing the character of punishment as an institution. Institutions are social practices organizing collective action by classifying situations as subject to norms.[31] Institutional practices often allocate classificatory judgments to particular individuals and require that they follow particular procedures. These individuals act with institutional authority. Authoritative judgments give others content-independent reasons for action.[32] Thus, in a legal system, the fact that a prescription is duly enacted as law becomes a reason to follow it, whether or not an individual thinks the prescription is otherwise morally obligatory or just.[33]

Individuals tend to accept institutional authority for at least three reasons. First, they may trust that institutionally authorized decision makers are especially competent to make substantive value judgments.[34] Second, they may want to achieve benefits that can only be realized through cooperation and so may be willing to support what they regard as a second-best norm because others are supporting it. Third, they may succumb to social influence[35]—a good thing if it allows them to overcome self-interest to cooperate. Institutions are necessarily collaborative practices. In evaluating an institution, we can only compare it to hypothetical alternatives that could actually command authority and motivate widespread compliance. If,

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31. *See* NEIL MACCORMICK & OTA WEINBERGER, AN INSTITUTIONAL THEORY OF LAW (1986); JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); GUY PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE (1999); DICK RUITER, INSTITUTIONAL LEGAL FACTS (1993); RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (1995); JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995) (defining and applying concept of institutions).

32. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 219 (1994).

33. PIERRE BOURDIEU, THE LOGIC OF PRACTICE 40-42, 98-111, 188, 238-39 (Richard Nice trans., 1990); H.L.A. HART, THE CONCEPT OF LAW 85-88 (1994); JOSEPH RAZ, THE AUTHORITY OF LAW 233-49 (1979).

34. JOSEPH RAZ, THE MORALITY OF FREEDOM 53 (1986).

35. Dan Kahan, *Social Influence, Social Meaning and Deterrence*, 83 VA. L. REV. 349, 349-56 (1997).

for example, punishing harm legitimates criminal justice in the culture we actually have, it does no good to say punishing risk would better deter offending in a society of perfectly rational self-interest maximizers. A society of perfectly rational self-interest maximizers would obey laws only in so far as they were coerced to do so. Compliance might be very low in such an uncooperative society.[36]

Given a conception of an institution as a practice of using norms to organize collective action, we can define *law* as including any institution that is relatively coercive, formal, and self-conscious.[37] Law's coercive quality is a function of its use of sanctions to encourage compliance with norms. Law's formality consists in the prominence of authority or content-independent reasons for obeying legal norms. Law's self-consciousness as an institution consists in the prominence of justificatory argument in its decision procedures. So, legal institutions involve norms of conduct understood, in principle, to be binding on persons recognized as occupying certain statuses, whether or not those individuals accept those obligations. These conduct norms are chosen or identified by persons recognized as occupying authoritative statuses, according to norms of procedure and discursive justification. They are backed by coercive sanctions, which are imposed by persons occupying authoritative statuses, according to norms of procedure, decision, and discursive justification.[38]

To characterize law as an institution is to say that legal processes condition participation on the acceptance of norms and the performance of roles (statuses subject to particular norms). Institutional roles channel action by supplying actors with a set of motives, concerns, and assumptions and a limited repertoire of behaviors. Roles render action intelligible and predictable to others. The desires to communicate to others or to be associated with certain roles can therefore motivate compli-

36. *See generally* Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1989) (assumption or self-interested rationality used to justify institution of property cannot explain how it arises).

37. Guyora Binder, *Aesthetic Judgment and Legal Justification*, 43 STUD. L. POL. & SOC'Y 79, 89 (2008).

38. *Id.*

ance with norms. In other words, people can comply with norms out of expressive rather than instrumental motives.[39]

As an institutional practice, then, law commands not only or ultimately by threatening.[40] Law orders society through the combined effects of coercive force and normative authority. Norms without force are not laws, but commands are not laws unless they are obeyed also out of a sense of obligation. Moreover, law's force and its authority are integrally connected. On the one hand, law can muster manpower and marshal weapons only because many people agree that its commands should be obeyed. On the other hand, the availability of coercive force enhances law's authority. Because many will prefer any effective legal system, however unjust, to anarchy or violent civil conflict, force tends to generate its own legitimacy. To view law as an institution, however, is to emphasize the role of law's normative authority in inducing compliance and legitimizing state force. That authority is a cultural construct, real in so far as people believe it to be so.

Punishment is an institution in the sense that it is also more than mere coercive force. Punishment is always the enforcement of a preexisting authoritative conduct norm carried out by one duly authorized to enforce that norm.[41] To punish is therefore to claim such authority. Even within the family, the power to punish implies the authority to enforce a preexisting norm, binding on the person punished. Whether or not punishment implies a claim to moral rectitude, then, it always implies a claim to political legitimacy. Much violent conflict involves much more than simple hostility or a dispute over access to resources. It involves contests over the political authority to make and enforce norms represented by the power to punish.

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39. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 6-7, 11-15 (1993); GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 474-75 (2000); RAZ, *supra* note 34, at 288-308.

40. HERBERT PACKER, LIMITS OF THE CRIMINAL SANCTION 62-66 (1968); ALF ROSS, ON GUILT, RESPONSIBILITY AND PUNISHMENT 37-38 (1975); Johannes Andenaes, *The General Prevention Effects of Punishment*, 114 U. PA. L. REV. 949, 950 (1966); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 406, 409-13 (1958); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-70 (1997); Louis M. Seidman, *Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 333-36 (1984).

41. Binder, *supra* note 11, at 321.

All violence connotes a claim to this kind of punitive authority and so implies a challenge to the political equality of the victim. That is why violence is so provocative—it always adds insult to injury.

Because punishment combines coercion with a claim to political authority, the punitive sanction has two aspects, each needing justification. Punishment imposes both suffering and blame. Punishment is a material disincentive: it must have a sting. But it also expresses a message. The punishing power repudiates the offender's act without any bargaining or compromise. Society can express this revulsion unequivocally by willingly sacrificing the social welfare. Thus, punishment does not simply internalize cost by shifting resources from an offender to a victim (or a victim's social insurance fund). Compensation of this kind tolerates, even justifies, costly conduct by pricing it. By contrast, punishment inflicts suffering without immediate benefit to anyone, thereby expressing condemnation.

The afflictive aspect of punishment explains the appeal of utilitarianism, which justifies the imposition of suffering to prevent greater suffering in the future. The expressive aspect of punishment explains the appeal of retributivism, which offers criteria for justifying blame and condemnation as deserved. However, neither theory seems adequate to explain both dimensions of punishment. Doing so requires an understanding of punishment as a political institution. Yet such a political account of punishment can also explain the persistence of punishment for actual harm.

Desert and utility may be—perhaps should be—important criteria for a democratic public to use in evaluating the legitimacy of criminal justice. But without legitimacy a criminal justice system is unlikely to achieve either value. First, consider the criminal law's efficacy in deterring crime. The deterrent threat of punishment will only be effective in so far as crimes are reported and offenders are identified, charged, convicted, and punished. A criminal justice system without popular support may not win cooperation from witnesses, law enforcement, jurors, or judges.[42] A haphazardly enforced criminal law is likely to be unfair as well as ineffective. Moreover, the deter-

42. Seidman, *supra* note 40, at 334-35.

rent efficacy of the criminal law does not depend only on the credibility of its threats. Most people obey criminal law most of the time because they have internalized the law's conduct standards as their own.[43] An illegitimate criminal law cannot mobilize conscience in this way and must rely on coercion. It is not enough that citizens see the rules of the criminal law as morally appropriate. It is important that they see those rules as having a personal claim on their loyalty and obedience, even when they disagree with them.

Criminal law, then, is a political institution that stakes a claim on the loyalty of those subject to it. Thus, its first imperative is not to be fair, not to be efficacious, but to conserve its own authority. An authoritative criminal law plays an important role in legitimating a modern liberal state by helping to establish the public good of a rule of law. According to this conception, the rule of law is a cooperative institution that secures mutual recognition of the civic status of all members of society. In a liberal state, the rule of law is supposed to secure mutual recognition of equal status.

Criminal law's particular importance in establishing civic equality rests on the pervasive significance of violence in human culture as a symbol of unequal status. To use force against others is to assert superiority over them in one of two slightly different forms. One possible meaning of violence is to assert political authority over a victim, a right to enforce obedience. Criminal punishment denies offenders this authority by reasserting the criminal law's monopoly on coercive force and by subordinating offenders to that law and so to the legal rights of their victims.[44]

Alternatively, in abusing a victim, the violent actor challenges the victim's honor. The victim must defend him or herself or avenge the wrong, or else be deemed to have acquiesced in it, thereby showing cowardice or lack of self-respect. Conversely, by accepting the risks of violent conflict, the abuser perversely gains in honor. In a society that tolerates violence, each member is under constant pressure to secure her status by us-

43. *See* sources cited *supra* note 40.

44. Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 124-30 (Jean Hampton & Jeffrie F. Murphy eds., 1998).

ing force defensively or even preemptively.[45] The result can be the escalating vengeance of the blood feud[46] or the gratuitous predation of the prison yard.[47] Criminal law makes the state the custodian of status by regulating violence. In return for citizens accepting the rule of law by forswearing private vengeance, the state undertakes to vindicate the dignity of each citizen by avenging wrongs on his or her behalf.[48]

Because the state is able to marshal the disapproval of all citizens who accept its rule of law, its retribution can reduce the status of the offender and vindicate the rights of the victim more effectively than can private vengeance. Of course a familial, religious, or ethnic group can warrant the status of a victim within the group by avenging the wrong done him or her. But if the offender is affiliated with a rival group capable of further retaliation, the justice of the victim's claim can remain controversial, and so the external status of the victim can remain contested. To make matters worse, in a society divided into contending clans, the degradation of one victim threatens the status of every member of the group. By contrast, a unitary state can avenge a victim in a way that is stable and final. The state is an institutional representation of the entire political community and is taken to speak for everyone, even the offender and his kin. This is perhaps what is meant by contemporary talk of punishment providing "closure" for victims and their families.[49] It restores their status in a way that does not provoke further challenge. Of course, in the post-heroic society established by the state's rule of law, the victim is deprived of

45. WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW AND SOCIETY IN SAGA ICELAND 29-34, 181, 185 (1990).

46. *Id.* at 181-87.

47. JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 75-76 (1981) (examining social pressures on prison inmates to avenge insults and injuries).

48. Of course, we should not exaggerate the comprehensiveness of a rule of law, nor should we conflate the rule of law with equality. The state's monopoly on violence is never complete, even in theory. Persons will sometimes be privileged to use force in defense of their own or others' entitlements, albeit as agents of the state. Moreover, if these entitlements are unequal, this authorized violence can reinforce hierarchy. A rule of law tends to stabilize status, to protect it from contestation, but not necessarily to equalize it.

49. However, there is evidence that psychological recovery from violence does not depend on such responses as vengeance, punishment, compensation, or apology. *See* JUDITH HERMAN, TRAUMA AND RECOVERY 188-95 (1997).

the opportunity to personally win honor at the offender's expense.[50] But the victim is compensated for this "loss" by escaping the constant pressure to risk life and limb to secure his or her own honor.

The rule of law state is thus an enormously important cooperative achievement. It precludes cycles of organized retaliatory violence, secures the dignity of each individual, and thereby also frees individuals to organize their lives around the pursuit of non-martial virtues. Yet, in asserting a monopoly on retaliatory force, the state deprives individuals and groups of the option of securing their own dignity. In so doing, the state undertakes an obligation to each individual to act on his or her behalf. This obligation is not a guarantee that the individual will not be victimized. The rule of law state promises the public generally that it will achieve social order by reducing violence to tolerable levels, not by eliminating it altogether. But the state's promise to each individual is to restore his or her status and vindicate his or her rights if he or she is victimized by violence. If the state leaves a wrong unredressed, it permits the offender's assertion of authority over the victim and leaves the degraded victim no recourse. This promise to retaliate on the victim's behalf is crucial in persuading the individual to transfer her loyalty from the rivalrous group, clan, gang, or sect to the unitary state.

This account of public retribution as a substitute for private or group vengeance incorporates aspects of both retributivism and utilitarianism. It incorporates the retributivist conception of criminal law as a social contract, a cooperative institution that conditions rights on the duties to respect and enforce the rights of others. Yet it also incorporates a utilitarian concern with consequences. On this account, a rule of law is desirable not because it is fair, but because its popular acceptance as fair allows it to prevent violence efficiently. In other words, in our particular social and cultural conditions, a regime of retributive punishment can enhance the authority of law. It can thereby motivate voluntary compliance and reduce costly reliance on co-

50. For this reason, Friedrich Nietzsche critiqued punishment as cowardly. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 72-74 (Walter Kaufmann, trans., Vintage 1967) (1887); *see also* MOORE, *supra* note 12, at 120-21 (explicating Nietzsche's views).

ercive force. It can take advantage of what Paul Robinson and John Darley have called "the utility of desert."[51]

Although this kind of mixed theory of punishment is popular among lawmakers and legal theorists,[52] moral philosophers object to it as unprincipled. Retributivists object that this kind of reasoning is not true retributivism but "revenge utilitarianism," because it ultimately values punishment for its consequences rather than its fairness.[53] Indeed, they argue that punishing to preempt vengeance rather than to do justice merely indulges and encourages base motives. But endorsing the institution of punishment because of its beneficial consequences in preventing violence does not entail endorsing particular acts of punishment regardless of their fairness. To prevent violence effectively, punishment must win the loyalty of the widest possible constituency, and the most reliable way to do so is to treat people fairly. But the people on whose loyalty the rule of law depends include not only potential offenders, but also potential victims. So punishing in order to preempt private vengeance is not a matter of yielding to unjustified hostility. Victims are justifiably resentful against those who violate their rights. We punish in order to maintain the fairness and integrity of an institution that has undertaken to stand up for the equal status of victims while precluding them from doing this for themselves. We adopt such an institution because it secures equal status more reliably and at less social cost than the alternative institution of the blood feud.

This account of criminal punishment as a political institution, rather than a moral act, helps explain our practice of punishing actual harm. To see this, let us review some of the leading arguments philosophers have offered for punishing harm. A review of these arguments reveals that we cannot easily make sense of our practice of punishing harm on the basis of the offender's moral desert alone. Instead we must factor in political obligations to victims.

Philosophers have offered at least five reasons why those who culpably cause harm deserve more punishment than those

51. Robinson & Darley, *supra* note 40, at 453.

52. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8-13 (1968); PACKER, *supra* note 40; Hart, *supra* note 40; Robinson & Darley, *supra* note 40.

53. MOORE, *supra* note 12, at 207-08; Kessler, *supra* note 9, at 2216.

who culpably impose risk. We may call these the determinist slippery slope, the lottery ticket argument, the remorse analogy, the undeserved gratification argument, and the undeserved status argument.

The determinist slippery slope is retributivist legal philosopher Michael Moore's answer to the moral luck argument. Moore argues that reducing actual harm to a matter of luck places the theorist on a slippery slope towards a deterministic view of choice and character as matters of luck as well. If an actor cannot be blamed for a consequence that would not have occurred under other circumstances, why should he or she be blamed for creating a risk that would have been less under other circumstances? Why should he or she be blamed for a choice he or she would not have made under less tempting circumstances, or with better parenting and education, or different genetic endowments?[54] If we accept the premise of the moral luck argument, that actors deserve punishment only for their choices, we need some way to separate the actor's choices from his or her circumstances. Otherwise, we render the retributivist project of deserved punishment incoherent and unachievable.

For Moore, the concept of action is the ledge that stops the slide down the determinist slope. Moore rejects the claim that action inherently involves risk but only contingently involves harm. Instead, he offers a picture of action as embodied willing. On this view, willing must produce some intended consequence—moving a body part in a desired direction—to count as action at all.[55] So if we require action as a requisite of criminal liability, we are already basing punishment on consequences. Those who object to punishing harm are simply disagreeing about which consequences should matter.

This argument is fine as far as it goes, but it may not take us far enough up the slippery slope to justify punishing harm. Yes, perhaps we can justify conditioning punishment on consequences as unavoidable—at least if we are going to have a liberal state that does not excessively police thought and association. But why must the consequences we punish be

54. MOORE, *supra* note 12, at 232-46.

55. *Id.*

harms? That we cannot act without causing consequences does not necessarily mean we choose all the consequences of our actions. While most modern criminal justice systems punish harm more than risk (holding other considerations equal), they still also punish crimes of harmless risk imposition. And by Moore's admission, a wrongful act can fall short of causing harm in any material sense. So his argument that deserved punishment for wrongful choice logically requires conditioning punishment on consequences does not imply any requirement of harmful consequences. Thus, Moore's argument does not identify any reason why ignoring actual harm would violate desert. We must look for some other justification for conditioning punishment on harm.

A second argument for punishing harm is philosopher David Lewis's lottery ticket argument. Lewis answers the moral luck objection by asserting the fairness of conditioning punishment on harmful consequences. He reasons that there is nothing unfair in determining the punishment for a particular offense on the basis of chance, as long as the odds are set and announced in advance.[56] As long as the offender is not ambushed by a retroactive penalty he could not have foreseen in choosing to offend, he assumes the risk of a variable penalty. Committing a crime is then like purchasing a lottery ticket, offering a determinate chance of a payoff, albeit a negative one. Indeed, given the inherent uncertainty of apprehension and conviction facing any offender, the penalty attached to crime is always a gamble. Since we don't consider it unfair to punish those offenders who are convicted simply because they had a chance of escaping punishment, we should not consider it unfair to punish those who cause harm because they had a chance of not doing so.

This argument may provoke the rejoinder that escaping punishment because of uncertain apprehension, although inevitable, is undeserved, and that conditioning punishment on chance results in similarly undeserved but avoidable deficiencies or excesses of punishment. But even if we accept the argument that subjecting offenders to a punishment lottery does not

56. David Lewis, *The Punishment that Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 63-67 (1989).

violate desert, that argument does not justify us in doing so. It means punishing harm satisfies desert as a negative constraint on punishment, but it does not mean we have affirmatively justified this choice among permitted approaches to punishment. To explain why we feel obliged to punish an equally culpable offender more if he caused actual harm, we have to talk about the victim.

Thus, when we determine that an offender has imposed a risk culpably on others, by hypothesis she is aware of the odds she will harm a victim. It may seem fitting to expect the offender to bear a similar risk, by conditioning her punishment on the harm she culpably causes.[57] This argument for conditioning punishment on harm depends on the fairness *to victims* of making the offender's suffering commensurate to that of the victim, rather than allowing the offender to endure less suffering than he happens to inflict. Thus, the obligation to punish harm seems to derive from the political duty to vindicate victims rather than the moral duty to give offenders what they deserve.

A third argument that punishment for harm is deserved is the remorse analogy, which likens the standards by which we impose punishment to the standards by which we judge our own actions. If most people feel that harm merits greater punishment,[58] it may be because it is normal to feel a greater sense of remorse when we cause harm and a sense of relief when our careless actions cause no harm.[59] Legal philosopher Antony Duff argues that one whose remorse for a careless action is unaffected by its results fails to show the empathy expected of a morally developed person.[60] Just as we regret our own harmless wrongdoing less than our harmful wrongdoing and therefore judge ourselves less harshly, we are more inclined to forgive others when their wrongdoing proves harmless. Duff argues that when we punish harm we communicate to the of-

57. *Id.*

58. Paul H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME 13-28, 74-79 (1995).

59. R.A. DUFF, INTENTION, AGENCY, AND CRIMINAL LIABILITY 189-90 (1990).

60. *Id.* at 189. *See also* MOORE, *supra* note 12, at 231.

fender that an extra measure of regret is morally obligatory as an expression of the empathy owed the victim.[61]

But is this an argument that the harmful wrongdoer deserves more punishment, or that the injured victim is owed more punishment? Our own feelings of remorse upon causing harm probably transcend disappointment in ourselves. Indeed, to the extent we are more disappointed in ourselves when we cause harm rather than imposing unjustifiable risk, it is largely because of our decreased ability to delude ourselves into minimizing the risk we carelessly imposed.[62] But insofar as our relative complacency about our own harmless wrongdoing results from self-serving self-deception, it has no moral weight and provides no justification for punishing harmless wrongdoers less than harmful ones. So what legitimate reasons do we have for feeling worse when we cause harm? We may feel empathy for our victims, shame because the lasting effects of our wrongful choices can make them enduring features of our social identities, and concern that we have given offense and provoked hostility. Thus, a good deal of the added remorse we feel when our careless wrongdoing causes harm is directed at our relations with others.

How should we translate these relational concerns in analogizing our impulses to punish harmful wrongdoers to our feelings of remorse upon causing harm? Do we punish to coerce the offender to empathize with the victim, to reprove the offender for failing to do so, or to express our own empathy? Do we punish only to force the offender to recognize the victim's rights, or also to express our own recognition of the victim's rights? Do we punish to force the offender to redress his offense against the victim and appease her hostility? Or do we punish also in order to avoid complicity in that offense and deflect the victim's hostility from ourselves? Kant described the duty to punish as a duty to avoid complicity in the offense and Joel Feinberg identi-

61. R.A. DUFF, CRIMINAL ATTEMPTS 345 (1996); R.A. Duff, *Subjectivism, Objectivism, and Attempts*, *in* HARM AND CULPABILITY 19, 37-39 (A. P. Simester & A. T. H. Smith eds., 1996); DUFF, *supra* note 59, at 191-92.

62. Herbert Wechsler, *The Challenge of the Model Penal Code*, 65 HARV. L. REV. 1097, 1106 (1952) ("From the preventive point of view, the harmfulness of conduct rests upon its tendency to cause the injuries to be prevented far more than on its actual result; results, indeed, have meaning only insofar as they may indicate or dramatize the tendencies involved.").

fied various forms of societal disavowal of the offense as expressive functions of punishment.[63] What I am suggesting is that we punish harm not only in order to express something to the offender and about the offender, but also to express something to the victim and about the victim to others. We punish not only in order to admonish the offender that he or she should respect the victim, but also in order to show the victim *our own* respect. If so, we are punishing harm for a purpose that transcends doing justice to the offender.

The remorse analogy is closely related to a fourth argument for punishing harm: the undeserved gratification argument. This argument is rooted in Kant's moral philosophy, which defines a moral act as one determined by a "good will," properly motivated by duties of fair cooperation. An immoral act is determined by a bad will, one that yields to a desire incapable of realization if universalized.[64] Punishment serves to enforce duties of fair cooperation by frustrating such anti-cooperative desires.[65] Kant therefore argued that no penalty should be imposed on a drowning swimmer who wrested a plank from another, because no later penalty could possibly negate his immediate desire to survive. Such a sanction could not constitute punishment because it could not frustrate the desire motivating the crime.[66] Kantian punishment makes the offender's illicit desire self-defeating, thereby illustrating the futility of such a desire if universalized.

On these premises, punishment for intentionally causing harm fairly corrects an offender's undeserved gratification for causing it. If we punished attempts and completed crimes equally, successful offenders would be left more satisfied than unsuccessful attempters. Their regret at having been caught and punished would be mitigated by their pleasure in having achieved their criminal aims. From this viewpoint, we are obliged to punish the successful wrongdoer more than the attempter lest we become complicit in his self-indulgence by per-

63. FEINBERG, *supra* note 13, at 98-105; KANT, METAPHYSICAL ELEMENTS, *supra* note 11, at 138.

64. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 61 (H. J. Paton trans., 1964) (1785).

65. Binder, *supra* note 11, at 352-55.

66. KANT, METAPHYSICAL ELEMENTS, *supra* note 11, at 35-36, 139.

mitting his undeserved gratification.[67] H.L.A Hart approved this argument as "the nearest to a rational defense" he knew for the principle that harmful wrongdoing deserves extra punishment.[68]

Yet the undeserved gratification argument appears to justify punishing *only* purposeful harm, not knowing or reckless harm. If the actor is indifferent to harm rather than seeking it, there is no extra satisfaction to frustrate through additional suffering. It seems that the undeserved gratification argument cannot justify enhanced punishment for causing harm in all cases. A possible response to this objection is that the desiderative attitudes we wish to negate include indifference to the welfare of victims, and we negate this by forcing the indifferent offender to share the victim's suffering. But if we thus punish in order to coerce empathy and remorse, the undeserved gratification argument collapses back into the remorse analogy, which we saw was more about giving victims their due than about properly repaying offenders.

This implication should prompt us to reexamine the Kantian aim of frustrating the offender's gratification in taking advantage of a victim. Does this aim derive primarily from a duty of justice to the offender or a duty of justice to the victim? Presumably, despite paradoxical claims of Kant and Hegel that offenders had a "right to be punished,"[69] the offender is hoping for neither punishment nor frustration. If we are obliged to spoil the offender's fun in order to dissociate ourselves from his act, we are apparently concerned about our obligations to victims. The offender humiliates a victim by harming him or her, and the public compounds that humiliation by tolerating it. Kantian morality is a cooperative scheme generating duties on the part of beneficiaries to cooperators who make the benefits possible. If we cannot prevent defectors from exploiting trusting cooperators, we can at least prevent them from enjoying the benefits and laughing at their victims as chumps. So, one reason we have to prevent the offender's undeserved gratification

67. Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes*, 5 LAW & PHIL. 1, 28-29 (1986).

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

69. Markus D. Dubber, *The Right to be Punished: Autonomy and its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 115 (1998).

is to prevent the consequent degradation of the victim. And we do this not only to enforce the offender's duty to respect the victim, but also to fulfill our own.

This reinterpretation of the undeserved gratification argument as a display of respect for victims brings us to our final argument for punishing harm: the undeserved status argument. This argument justifies punishment for actual harm as necessary to correct the effects of successful crime on the social status of offenders. It draws on Jean Hampton's expressive account of punishment as "defeat."[70] Hampton presumes that when one person wrongfully harms another, this offender asserts authority over the victim or claims superior honor. The offender thereby marks the victim as a person of lesser status[71] whose interests do not count. A person who suffers such an insult without resistance or retaliation invites more abuse from others.[72] On the other hand, the wrongdoer may gain in status and become an increasing threat to others if his wrong is left unredressed.[73] According to Hampton, punishment is necessary to reverse this undeserved increase in status by humbling the offender.[74] Yet, if the offender's increase in status is undeserved, so is the victim's decrease in status. It seems at least as important to correct that injustice. And insofar as the offender's claim to superiority rests on his subordination of a victim, it seems impossible to decrease the status of the offender without raising the status of the victim. By punishing, we restore the victim's status in much the same way as the victim might do by means of revenge. As our earlier discussion of punishment as a substitute for revenge revealed, however, there are some important differences. On the one hand, the victim cannot show martial honor and courage by personally avenging the wrong. On the other hand, the punitive state can back the

70. JEAN HAMPTON, THE INTRINSIC WORTH OF PERSONS 116-42 (Daniel Farnham ed., 2007); Hampton, *supra* note 44, at 111-61; Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 217, 227 (1984).

71. Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 31-48 (1992) (reviewing social scientific evidence of status-seeking behavior).

72. ABBOTT, *supra* note 47, at 75-76.

73. *See generally* BERTRAM WYATT-BROWN, SOUTHERN HONOR (1983) (studies of vengeance in honor-based societies); MILLER, *supra* note 45, at 179-220.

74. Hampton, *supra* note 44, at 124-30.

humiliation of the offender and the vindication of the victim with its unique authority.

This interpretation of criminal punishment as the state's exercise of a monopoly on vengeance gives the state a special obligation to punish those wrongdoers who actually cause harm. This is because offenders only gain undeserved status by subordinating particular victims. It is humiliating to be injured with impunity, but people tend to take risk much less personally. They are not personally compelled to retaliate against risk or endure loss of face.[75] The conception of state punishment as a substitute for private vengeance implies an undertaking to vindicate particular victims by avenging actual harms, rather than merely deterring the imposition of risk against the public at large.[76] Such deterrence may reduce injury, but does nothing to restore the status of those who have been wrongly injured. Thus, it does not preempt retaliatory violence, nor does it earn the loyalty of victims. The state may only justly claim the loyalty and demand the forbearance of victims if it fulfills its undertaking to vindicate them.

The state's promise to avenge wrongs against each citizen explains its obligation to punish particular harms, rather than maximizing the welfare of all by discouraging the imposition of risk.[77] The citizen's status is not challenged by merely being subjected to risk as part of a population. Only when he or she is subjected to unredressed harm is he or she forced into the dilemma of retaliating or accepting status degradation. Only then is the state obliged to exact retribution on his or her behalf in order to vindicate his or her honor. A failure to do so would represent the betrayal of a fundamental commitment. In wartime we often see citizens maintaining their loyalty to a state even in the face of death.[78] But as the Iraqi civil war illustrates, a state that does not guarantee its citizens' basic civic dignity cannot expect even compliance, let alone heroic self-sacrifice.

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75. Indeed, we tend to regard persons who treat careless behavior as a personal insult as pathologically sensitive, suffering from "road rage."

76. Hampton, *supra* note 44, at 124-30.

77. *Id.*

78. Seidman, *supra* note 40, at 333 (remarking on the fact that draftees will go to war rather than to jail, even though the latter is safer).

Rather than asking whether it is fair or utility-maximizing to punish actual harm, we should ask how doing so supports the criminal law's legitimacy. Once the question is posed in this way, the answer seems almost obvious: punishing harm contributes to the legitimacy of the criminal justice system by vindicating victims. The ability to thus account for the criminal law's otherwise puzzling punishment of actual harm is a strong argument in favor of a political conception of criminal law.