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Proximate Retribution

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ARTICLE

PROXIMATE RETRIBUTION

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ABSTRACT

An essential element of the theory of retribution has been missing from courts' and legal scholars' analyses. While they have outlined a number of varieties of the theory and fleshed out their nuances, courts and scholars have largely neglected to examine which harms flowing from a criminal offender's conduct should be considered in determining that offender's desert. The more remote harms caused by an offender's conduct, such as the effects of his offenses on the families and friends of his victims or the effects of criminal conduct on society in general, are pervasive in communities across the nation. This Article takes a first look at this neglected issue of the role that more remote harms should play in sentencing and asserts that accounting for these more remote harms under certain conditions would better reflect the basic tenets of harm-based retributivism—the theory at the heart of many sentencing schemes. The Article acknowledges some of the concerns that considering these harms raises and argues that a proximate causation analysis is essential to limit the harms considered in sentencing while

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recognizing the full array of harms caused by criminal conduct. This notion of "proximate retribution" is necessary to rein in criminal liability under the theory.

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I. INTRODUCTION

The bounds of retributivism have shifted throughout the ages. A theory that began as a substantiated breed of vengeance or retaliation has transformed into a concept used to define an offender's "just deserts."[1] It has in many cases evolved from a pure justification for punishment to what is now often a limitation on punishment.[2] Legal scholars have spent centuries

1. *See* Leonard Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 33 (1978); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1299–1300 (2006).

2. *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 15–19 (2003); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 699–703 (2005); Ristroph, *supra* note 1, at 1300. This Article uses the terms "justification" and "purpose" interchangeably when referring to retribution for the

debating the nuances of the theory of retribution. They have disagreed on why an offender deserves punishment—perhaps because he has acted as a free rider by failing to abide by the law or because he has sent a message to society that his victims are of lesser worth.[3] And scholars have disagreed about how to determine the precise value of an offender's desert.[4] Despite significant attention by scholars, though, one key component of the theory of retribution seems to have been largely overlooked.

Both courts and legal scholars have generally neglected the question of which harms are relevant in retribution-based sentencing. Ordinarily, courts consider only the most direct harms caused by criminal conduct, and scholars seem to take for granted that only these most direct harms, if any harms, are worth considering.[5] Neither courts nor scholars have explained, however, why this is the case, and neither have taken a closer look at the advantages and disadvantages of considering some of the more remote harms caused by criminal conduct.[6] Perhaps they should be asking questions such as whether an offender should be held responsible for the suffering he has caused to the family of a murder victim, or whether the hurt suffered by a child rape victim having to testify at the trial of her rapist, should be

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sake of convenience even though there is an important distinction between the two terms in some contexts. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 21 n.6 (2003); Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 439–40; Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 949 (2010).

3. *Compare* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 476–78 (1968) (advocating a system that punishes individuals who fail to observe societal rules at society's expense), *with* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1660, 1666 (1992) (labeling Morris's conception of punishment as focusing on "free riders" and denouncing his theory in favor of a moral-based system that accounts for the human worth of the victim).

4. *See* Alschuler, *supra* note 2, at 10–12; Jeffrey Standen, *The New Importance of Maximum Penalties*, 53 DRAKE L. REV. 575, 586 & n.63 (2005).

5. *See* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1846–48 (2007); Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 106–07 (2010) (noting that the Supreme Court's recent decision in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), "took somewhat of a harm-based retributivist turn" and extended its "retribution analysis to less direct effects of the offender's conduct, mark[ing] the outer bounds of the Court's examination of retribution thus far").

6. *Cf.* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1239–40 (2001) (noting that many retributivists fail to provide a basis from which to ascertain the correct magnitude of punishment); discussion *infra* Parts IV–V (evaluating the advantages and disadvantages of considering more remote harms in sentencing). *But see* Payne v. Tennessee, 501 U.S. 808, 823–25 (1991) (considering some of the consequences of allowing juries to hear victim impact evidence at sentencing).

considered in sentencing.[7] These are the very real harms that both courts and scholars have largely ignored in their work on sentencing and on defining the bounds of retributivism.

This Article identifies and explores this gap in sentencing analyses by examining the relevance of more remote harms in sentencing. Part II briefly traces the history of retributivism and taxonomizes various modern varieties of the theory. It then surveys legal scholars' attempts to wrestle with how to determine the exact value of a particular offender's desert and notes that, despite this struggle, scholars have largely neglected to ask which harms are relevant in determining an offender's desert. Part III examines retributivism's traditional role in criminal sentencing and highlights the limitations of sentencing in both guidelines and nonguidelines sentencing systems. It explains how courts have ignored the more remote harms of criminal conduct in sentencing and how these more remote harms are real and present in our communities. Part IV asserts that consideration of these more remote harms is central to the foundation of harm-based retributivism—the theory on which many sentencing schemes are based. Further, accounting for these harms provides additional benefits, such as furthering equality among offenders in sentencing, providing an incentive for offenders to mitigate the harms flowing from their criminal conduct, and sending a message to society, as well as the offender, that the harms of criminal conduct are pervasive. Part V acknowledges that considering some of these more remote harms may lead to difficulties, such as the appearance that the criminal justice system is ranking victims or that some offenders could be subject to limitless criminal liability for their actions. These concerns can be ameliorated, Part VI explains, by overlaying a legal limitation of proximate causation on the consideration of such harms. This narrowing of harm-based retribution by a theory of "proximate retribution," the Article concludes, is necessary to remain true to the basic tenets of harm-based retributivism while accounting for concerns such as avoiding exponentially increasing punishments and preserving the role of mens rea in criminal law.

II. THE THEORY OF RETRIBUTION

The theory of retribution has a rich and complex history. Throughout the ages, the theory has been modified and

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7. This second question was recently addressed in the Supreme Court case of *Kennedy v. Louisiana*, 554 U.S. at 442–43. *See infra* text accompanying notes 158–65.

reformulated and has waxed and waned in popularity.[8] Scholars have spent significant time trying to determine the proper principles underlying retributivism and what limitations should be placed on this theory justifying punishment;[9] yet scholars have generally failed to address whether causing harms in addition to those most directly related to an offender's criminal conduct justifies additional punishment.[10]

A. *A History of Retributivism*

The penological purpose of retribution was perhaps the first articulated justification for legal punishment.[11] It can be traced back to the Hammurabi Code of about 1760 BC,[12] when this early form of retribution, otherwise known as *lex talionis*, was cruder in nature and is said to have taken the shape of retaliation or vengeance.[13] In addition to Hammurabi's Code, the later-written

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8. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314–17 (2000) (noting retribution's decline and subsequent rise in American criminal law); Hampton, *supra* note 3, at 1685–89 (examining the influence of retribution in several court cases spanning over a hundred years); *infra* text accompanying notes 44–53 (describing retributivism's reconfiguration by contemporary theorists into a balancing of rights).

9. *See, e.g.*, Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 199–216 (2009) (asserting that retributive punishment ought to account for an offender's subjective experience of punishment).

10. *Cf.* Kevin Cole, *Deference, Tolerance, and Numbers: A Response to Professor Wright's View of the Sentencing Commission*, 31 SAN DIEGO L. REV. 651, 659–60 (1994) (suggesting that while a harm-based retributivist might care about indirect harms, courts should not defer to the Federal Sentencing Commission to adopt such a view based solely on empirical data); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 611–12 (2000) (observing that only a few scholars have recognized a distinction between direct harm and more general impacts on victims).

11. *See* MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 60 (1990) (noting that *lex talionis* is "[t]he first historical, sanctioned, and arguably moral version of like for like in Western culture"); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 13 (1989) ("The history of the retributive view of punishment begins with the biblical and talmudic ethical and legal ideas . . . .").

12. Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 58 (2008) ("The first written record of the *lex talionis* . . . has been traced to the Code of Hammurabi . . . in approximately 1760 B.C."); *see also* Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1113 n.186 (2007) (noting that the Hammurabi Code's "place in history was earned [in part] because it was the first set of laws, and one of only a handful of known ancient laws, to make this remedial transition from private revenge to state-imposed punishment"). The Hammurabi Code, written around 1760 BC, was the first set of laws, and it promulgated the theory of *lex talionis*. *See* BLACK'S LAW DICTIONARY 996 (9th ed. 2009) (defining *"lex talionis"* as "[t]he law of retaliation, under which punishment should be in kind—an eye for an eye, a tooth for a tooth, and so on—but no more").

13. *See* BLACK'S LAW DICTIONARY, *supra* note 12, at 996 (defining *"lex talionis"* as "[t]he law of retaliation, under which punishment should be in kind—an eye for an eye, a

books of the Bible[14] specifically sanction this form of retribution, suggesting that the proper punishment for a transgression is an equal punitive response: an eye for an eye, a tooth for a tooth.[15] While this early form of retribution seems harsh, some scholars have explained that, compared to the unlimited punishments that preceded the articulation of *lex talionis* in the Hammurabi Code, this was a humane innovation in that it actually served as the first legal limitation on punishment.[16]

In later centuries, scholars such as Kant and Hegel further developed the theory of retribution and added greater moral

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tooth for a tooth, and so on—but no more"); Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 973 (2008) ("Critics commonly equate retribution with revenge . . . ."); Henry F. Fradella, *From the Legal Literature*, 42 CRIM. L. BULL. 498, 504–05 (2006) (explaining that retribution "is closely tied to the notion of revenge" and that "[r]evenge as a basis for punishment has its roots in ancient times"); Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. COMP. & INT'L L. 361, 380 (2010) (explaining that *lex talionis* "demands equal and exact injury as a form of revenge against an adversary"); Alexander Tsesis, *Contextualizing Bias Crimes: A Social and Theoretical Perspective*, 28 LAW & SOC. INQUIRY 315, 329 (2003) (explaining that *lex talionis* is closely tied to revenge). *But see* Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 49, 58–59 (Mark D. White ed., 2011) (distinguishing retributivism from revenge).

14. These first five books of the Christian Bible are also known as the Pentateuch, or the Torah in the Jewish tradition. Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the* Beth Din *Precedent*, 25 J.L. & RELIGION 379, 382 n.12 (2009).

15. *Exodus* 21:24–25 (Tanakh) ("[E]ye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."); *Leviticus* 24:20 (Tanakh) ("[F]racture for fracture, eye for eye, tooth for tooth. The injury he inflicted on another shall be inflicted on him."); *Deuteronomy* 19:21 (Tanakh) ("Nor must you show pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."); *see also* ROBERT FRANCIS HARPER, THE CODE OF HAMMURABI, KING OF BABYLON: ABOUT 2250 B.C., at 73, 75 (Lawbook Exch., Ltd., 2d ed. 1999) (1904) ("If a man destroy the eye of another man, they shall destroy his eye. . . . If a man knock out a tooth of a man of his own rank, they shall knock out his tooth."). As Professor Igor Primoratz has explained, "the demand for equality of punishment and offense" could either be interpreted in terms of the offense's and punishment's specific features—requiring that the offender be subjected to the same wrong as the victim—or in terms of that "what is common to them, what makes them comparable: in respect of 'value', or their 'universal property of being injuries.'" PRIMORATZ, *supra* note 11, at 80–81. This "eye for an eye" concept, often referred to as *lex talionis*, is generally not considered part of modern-day retributive theory. *See* Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 846 (1972).

16. *See* PRIMORATZ, *supra* note 11, at 87 (explaining that the biblical demand for "'life for life [and] eye for eye' . . . did not encourage, but rather restrained the vengefulness of the wronged"); Lee, *supra* note 2, at 704 ("Even the cruel-sounding Biblical version of *lex talionis* was a limiting principle in its historical context. As Igor Primoratz explains, the principle served to 'restrain[ ] the vengefulness of the wronged' by commanding 'for one life, take one, not ten lives; for one eye, take one, not both.'" (quoting PRIMORATZ, *supra* note 11, at 87)); *see also infra* text accompanying note 26 (explaining that this early retaliative form of retribution is often now viewed as barbaric).

content to its original form of *lex talionis*. Kant asserted that punishment is justified only when an offender's actions are morally wrong and that the punishment must be equivalent to the offense committed.[17] While some scholars have equated Kant's approach to the ancient principle of *lex talionis*,[18] it differs from at least the vengeance-based interpretation of *lex talionis* in that desert, not the victim's or society's thirst for vengeance, is the only principle justifying punishment.[19] Hegel, too, distinguished his version of retributivism from simple vengeance.[20] He reasoned that punishment must be imposed on criminal offenders because otherwise the offender's wrong would be viewed as a "right" by society.[21] Hegel also argued that criminal offenders have a right to be punished and that only through punishment can they be redeemed.[22]

Philosophers and legal scholars have long touted the appropriateness of retributive punishment, but beginning in the late eighteenth and early nineteenth centuries, consequentialist theories of punishment—rehabilitation, deterrence, and incapacitation—challenged retribution's position as the primary

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17. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 99–103 (John Ladd trans., The Bobbs-Merrill Co. 1965) (1797) (asserting that judicial punishment should be imposed only when an individual has committed a crime and that the punishment should be similar in kind and degree); *see also* Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1262 (2005).

18. *See, e.g.*, Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 284 n.50 (2005) (referencing Kant's "famous account of the principle of the *lex talionis*").

19. *See* KANT, *supra* note 17, at 100 ("Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else . . . ."); *see also* Leo Zaibert, *The Ideal Victim*, 28 PACE L. REV. 885, 894–95 (2008) (explaining that some "retributivist[s] would insist on punishing the deserving even in those cases in which 'the criminal's victims are indifferent (or even opposed) to punishing the one who hurt them'" (quoting MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 89 (1997))).

20. *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 101 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821); Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 375 ("Hegel proclaims that without focusing on the offense and the 'injured universal,' punishment would be nothing more than personal revenge.").

21. *See* HEGEL, *supra* note 20, § 99; MARK TUNICK, HEGEL'S POLITICAL PHILOSOPHY: INTEGRATING THE PRACTICE OF LEGAL PUNISHMENT 34 (1992).

22. *See* HEGEL, *supra* note 20, § 100; TUNICK, *supra* note 21, at 35–36; *see also* Brian K. Payne et al., *Justifications for the Probation Sanction Among Residents of Virginia—Cool or Uncool?*, 67 FED. PROBATION 42, 43 (2003) (noting Hegel's belief in the link between punishment and redemption for criminals and discussing how retribution-based punishments focus on society's moral obligation to punish criminals).

justification for punishment in the legal and philosophical landscapes.[23] By the beginning of the twentieth century, consequentialist theories of punishment had firmly replaced retribution as the primary accepted justification for punishment.[24] Criminologists had determined that blame was useless and that criminal behavior was the product of uncontrollable genetic and environmental factors.[25] They labeled retribution's focus on retaliation or vengeance as unacceptably barbaric and considered the theory a remnant of harsher times.[26] Thus, by 1949, the Supreme Court had concluded that "[r]etribution [was] no longer the dominant objective of the criminal law."[27] And in 1972, Justice Thurgood Marshall

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23. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 12–13 (1981) (explaining that "[t]he rehabilitative ideal became an important element in practical penological thought only when imprisonment became a principal mode of punishment," which did not take place until the rise of the prison at the end of the eighteenth century); Cotton, *supra* note 8, at 1314–17.

24. *See* Cotton, *supra* note 8, at 1314–17.

25. *See* Alschuler, *supra* note 2, at 2 ("Many early twentieth-century reformers doubted their ability to blame."); *see also* Tonry, *supra* note 17, at 1239–40 (explaining that, in the 1930s, "practitioners, policymakers, and professors" embraced utilitarian justifications of punishment and had difficulty accepting retributive justifications because "[p]enal sensibilities [at the time] . . . included assumptions about the environmental and psychological causes of criminal behavior, the malleability of human beings, the ethical desirability of rehabilitating offenders, and the capacity of correctional and other programs to do so").

26. Blecker, *supra* note 13, at 973 ("Critics commonly equate retribution with revenge—disparaging 'an eye for an eye' as barbaric."); *see also* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1333 (2007) ("There have historically been a number of objections to retribution, including its harshness . . . ."); Ristroph, *supra* note 1, at 1299 (explaining that critics of retributivism characterize the theory "as glorified vengeance" but that supporters of the theory "emphasize[ ] ways in which retributive punishment serves egalitarian values and respect for human dignity"); *supra* text accompanying notes 11–16 (explaining that early forms of retributivism were vengeance-based or retaliative in nature).

27. Williams v. New York, 337 U.S. 241, 248 (1949). Further, the Model Penal Code of 1962 disclaimed retribution as a proper penological purpose, including retribution only as a limiting principle of punishment while including various other purposes as legitimate justifications for punishment. *See* MODEL PENAL CODE § 1.02 (Official Draft and Explanatory Notes 1962) (setting forth prevention and rehabilitation as the primary purposes of punishment); *see also id.* at Explanatory Note (noting that the relevant section of the Model Penal Code "states the general purposes of the provisions governing the sentencing and treatment of offenders, again within the general framework of a preventative scheme"); *cf.* Cotton, *supra* note 8, at 1318–19 (suggesting that the movement away from retributivism and toward consequentialism was prompted by the drafting and dissemination of the Model Penal Code). *But see* Cotton, *supra* note 8, at 1321–22 (noting that some legal scholars have suggested that the Model Penal Code does incorporate the purpose of retribution but explaining why this is an improper interpretation of the language of the Code). After the dissemination of the Model Penal Code, about half of the U.S. states adopted legislative statements on the purposes of punishment that similarly ignored the traditional primary purpose of retribution. *See id.* at 1318–19. Even today, state statutes setting forth the acceptable penological purposes of

proclaimed that "no one has ever seriously advanced retribution as a legitimate goal of our society."[28]

Sometime between the late 1960s and mid-1970s, however, retribution began reemerging as a legitimate, and even the primary, justification for punishment.[29] Although there is some disagreement as to when this revolution began, some scholars have suggested that it stemmed from theories and proposals discussed in either Herbert Morris's influential *Persons and Punishment*, which was published in 1968, or Andrew von Hirsch's *Doing Justice*, which was published in 1976.[30] Aside from

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punishment state that these purposes are "to protect the public safety and welfare by preventing the commission of crime through the deterring effect of the sentences authorized, the rehabilitation of those convicted, and their confinement when the public safety and interest requires." MINN. STAT. ANN. § 609.01(1) (West 2009). *But cf.* Cotton, *supra* note 8, at 1324 (noting that some states adopted somewhat different wording). Some scholars characterize legislators' inclusion of a variety of penological purposes in criminal offense and sentencing statutes as "retir[ing] from the debate [among the proper penological purposes] with the hope that in practice the proper mix of purposes will come about." George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1895 (1999). But some suggest that such retirement is appropriate, because "the basic moral principles of legislators do not lend themselves to floor debate." James M. Galliher & John F. Galliher, *A "Commonsense" Theory of Deterrence and the "Ideology" of Science: The New York State Death Penalty Debate*, 92 J. CRIM. L. & CRIMINOLOGY 307, 330 (2002).

28. Furman v. Georgia, 408 U.S. 238, 363 (1972) (Marshall, J., concurring).

29. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 845–46 & n.6 (2002) (asserting that "[w]hether it is a 'revival,' a 'resurgence,' or a 'renaissance,' retributivism's rapid 'rise' since the early 1970s has been remarkable" but noting that "[t]here is some disagreement as to when the revitalization of retributivism began" (footnotes omitted)); Cotton, *supra* note 8, at 1355–56 (explaining that retribution reemerged as the primary justification for punishment); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 (1992) ("It is widely acknowledged that retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment." (footnote omitted)); Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 783–84 ("With this disillusionment with the traditional utilitarian rationales for punishment, retribution is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground, after all, upon which to base a system of punishment.").

30. *See* Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1, 10 (2010) (stating that von Hirsch's *Doing Justice* "is considered by many to have rekindled retributivism as the basis for sentencing"); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 194 n.75 (2005) (noting that *Doing Justice* "spearhead[ed] the resurgence of retribution as the dominant penal philosophy"); Christopher, *supra* note 29, at 846 n.6 (naming *Persons and Punishment* as a possible starting point for the revitalization of retributivism). *See generally* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS xxxiv, xl (1976) (explaining the conclusions of the Committee for the Study of Incarceration, which amount to "a departure from tradition" and a "retreat[ ] from a concept of individualized justice [and] discretion in sentencing"); Morris, *supra* note 3, at 475–76 (arguing that a criminal offender has an inalienable right to be punished and that to deny this right "implies the denial of all moral rights and duties").

philosophical musings on the matter, however, courts once again began adopting retributivist rationales for punishment in the mid-1970s, even despite state laws limiting the purposes of punishment to deterrence, incapacitation, and rehabilitation.[31] Courts often accomplished this through either ignoring the governing state law or by employing a nonbinding judicial opinion as binding precedent.[32] For example, in 1978, despite the Minnesota statute providing that the relevant purposes of punishment include only deterrence, rehabilitation, and incapacitation,[33] the Minnesota Supreme Court quoted without disapproval a district court's statement that sentencing decisions incorporate many considerations, including retribution.[34] The Maine Supreme Judicial Court similarly disregarded statutory consequentialist language when, in 1978, it determined that a court should take into account "the interest of the public in retribution" when sentencing and that the sentence should be "tailored to the individual characteristics and deserts of the particular defendant."[35] Other courts instead cited nonbinding U.S. Supreme Court statements as justification for embracing retributivism despite the theory's complete absence from statutory sentencing policy statements. The Texas Court of Criminal Appeals, for example, explained that the 1976 U.S. Supreme Court case of *Gregg v. Georgia*[36] recognized retribution as a legitimate penological purpose and that this essentially trumped state law.[37] While the three-Justice plurality opinion in *Gregg* had certainly stated that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence," it did not command that states use the theory of retribution as a justification for any, and certainly not all, punishments imposed.[38] As one scholar has pointed out, "what is

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31. *See infra* text accompanying notes 32–41.

32. Cotton, *supra* note 8, at 1325. Professor Cotton suggests that injecting retributivist rationales into sentencing statutes was also accomplished through statutory construction. *Id.*

33. *See* MINN. STAT. ANN. § 609.01(1) (West 1963); *see also* Cotton, *supra* note 8, at 1324, 1326 (describing the statute as "clearly nonretributive").

34. *See* State *ex rel.* Taylor v. Schoen, 273 N.W.2d 612, 615–16 (Minn. 1978) ("Many considerations are embodied in a prison sentence, not the least of which [is] punishment . . . ." (internal quotation marks omitted)); *see also* Cotton, *supra* note 8, at 1326 & n.49.

35. State v. Samson, 388 A.2d 60, 67–68 (Me. 1978).

36. Gregg v. Georgia, 428 U.S. 153 (1976).

37. *See* Adams v. State, 577 S.W.2d 717, 729 (Tex. Crim. App. 1979), *rev'd on other grounds by* Adams v. Texas, 448 U.S. 38 (1980).

38. *Gregg*, 428 U.S. at 183 (plurality opinion). The *Gregg* case involved only the punishment of death, and the Court has stated numerous times that a punishment may be constitutional if it serves *either* the purpose of retribution or deterrence. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("Unless the imposition of the death penalty

constitutionally permissible is not the same thing as what is state law."[39] By 1984, the U.S. Supreme Court had explicitly recognized retribution as "an element of all punishments society imposes,"[40] and today, many scholars conclude that retributivism is the leading theory for justifying punishment.[41]

B. A Taxonomy of Retributivist Theories

One of the reasons that retribution reemerged as a justification for punishment is that retributivism was repackaged as an egalitarian concept of "just deserts" rather than as a tool of vengeance.[42] Although, historically, retribution had been viewed by many as a primal urge to harm others who have harmed us,[43] some contemporary theorists have reconfigured retributivism as a balance of rights—a formulation more palatable to post-Enlightenment liberal ideals.[44] This

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on a mentally retarded person measurably contributes to one or both of these goals [of retribution and deterrence], it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." (internal quotation marks omitted)); *see also* Ryan, *supra* note 5, at 136 & n.300 (explaining that, while the Supreme Court has not been entirely clear that the Punishments Clause does not require that a punishment serve both retributive and deterrent functions to be upheld as constitutional, most Punishment Clause cases seem to adopt the position that serving either a retributive or a deterrent function will suffice).

39. Cotton, *supra* note 8, at 1329. Professor Cotton describes the Texas court as "exaggerat[ing] the tenor, scope, and significance of the three-justice opinion," *id.* at 1327, and accuses other state courts citing *Gregg* for this proposition of mischaracterizing the *Gregg* opinion, *id.* at 1334.

40. Spaziano v. Florida, 468 U.S. 447, 462 (1984).

41. *See, e.g.*, Dolinko, *supra* note 29, at 1623 ("It is widely acknowledged that retributivism, once treated as an irrational vestige of benighted times, has enjoyed in recent years so vigorous a revival that it can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment." (footnote omitted)); R.A. Duff, *In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara*, 24 MELB. U. L. REV. 411, 411 (2000) ("A striking feature of penal philosophising during the last thirty years has been the revival of retributivism."); James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 180–82 (2010) (arguing that retributivism is the primary theory justifying punishment under the Federal Sentencing Guidelines); Hampton, *supra* note 3, at 1659 ("There has been a steady rise in the popularity of retributivism over the last decade, which is surprising given its near death in the 1950's and 1960's.").

42. This new formulation of retributivism was accompanied by scholars' abandonment of the traditional term "retributivism" and adoption of the more historically neutral terminology of "just deserts." Ristroph, *supra* note 1, at 1300. *But see* Markel, *supra* note 13, at 62 ("[D]esert should not be the key focus as we talk about retributive justice.").

43. *See* Ristroph, *supra* note 1, at 1299; *see also supra* text accompanying notes 11–16 (explaining that retributivism was originally viewed as a theory of vengeance or retaliation).

44. *See* Ristroph, *supra* note 1, at 1299; *see also* Robert F. Cochran, Jr., *"How Do You Plead, Guilty or Not Guilty?": Does the Plea Inquiry Violate the Defendant's Right to*

modern egalitarian conception of retributivism comes in a variety of forms.[45] One type of egalitarian retributivism, known as protective retributivism, suggests that punishing criminals for their wrongdoing is necessary to restore a balance in society.[46] Society is built on rules that, for the benefit of the community, forbid certain harmful conduct.[47] Each of these rules imposes burdens on members of the community, and by committing a crime, the offender enjoys the benefits of a stable society but frees himself of the burdens of following the law.[48] The free-rider offender, then, must pay the debt that he owes to society through criminal punishment.[49] Another formulation of egalitarian retributivism—victim vindication—uses punishment to right a wrong.[50] The offender has committed a wrong through his offense, which sent a message to the victim and all of society that the offender's rights are more valuable than the victim's rights.[51] Through punishing the offender, society corrects the offender's unfounded statement and reaffirms the victim's worth, thus

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Silence?, 26 CARDOZO L. REV. 1409, 1448 (2005) (describing Enlightenment liberalism as elevating an individual's freedom, autonomy, and privacy "at the expense of [the] community"). Scholars have also adopted other varieties of retributivism, but these are too numerous to outline in this Article.

45. In egalitarian retributivism, "[p]unishment must be imposed to respect the dignity of the victim as well as the dignity of the wrongdoer." Ristroph, *supra* note 1, at 1300.

46. *See, e.g.*, Morris, *supra* note 3, at 477–78 (explaining that punishment is justified because an offender "owes something to others, for he has something that does not rightfully belong to him" and that punishment "restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt"). This theory suggests that each individual must share equally the burdens of the law and that those who violate the law are still enjoying the benefits of the law but have exempted themselves from the burdens of it. *See* Ristroph, *supra* note 1, at 1299.

47. *See* Morris, *supra* note 3, at 477.

48. *See id.*

49. *See id.* at 477–78; Ristroph, *supra* note 1, at 1299.

50. *See* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 124–37 (1988); Hampton, *supra* note 3, at 1686. *But see* Christopher, *supra* note 29, at 944 (suggesting that victim vindication might be consequentialist in nature). In addition to protective retributivism and victim vindication, there is a third variety of retributivism known as assaultive retributivism. *See* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1169 (1980) (characterizing assaultive retributivists as more likely "to argue for more punishment in the world" and to "rely covertly on a form of utilitarianism, or on a social contract theory that assumes what they are trying to prove"). This version of retributivism posits that it is proper to punish criminals based on desert because it is morally justified to hate criminals, and this theory is more reminiscent of the primarily rejected concept of *lex talionis*. *See id.* at 1169, 1173 ("'[A]ssaultive' retributivists . . . are likely to stress the *absolute* aspect of proportionality[—]*e.g.*, a killer ought to be killed; a rapist ought to be raped . . . ."); *supra* notes 11–16 and accompanying text.

51. MURPHY & HAMPTON, *supra* note 50, at 124–25, 128; *see* Hampton, *supra* note 3, at 1686.

restoring the balance to the individuals' dignities.[52] In that sense, retribution serves both communicative and expressive functions in that it signals to the wrongdoer and to society that the offender's actions are unacceptable.[53]

Some scholars have explained that, in addition to repackaging retributivism as a theory of egalitarianism, criminal theorists have girded this modern version of retributivism by updating the philosophical foundation of the penological justification.[54] The traditional concept of retributivism eschewed consequentialist theories because they failed to respect the rights of individuals and, contrary to the teachings of Kant, used punishment as a means rather than an end in itself.[55] Further, pure consequentialism posed the risk of punishing innocent individuals for the good of society.[56] The new retributivism of the late twentieth century, however, attempted to reconcile retributivist goals with those of consequentialists.[57] This updating means that retributivism now often draws to some extent on consequentialist theories of punishment, such as deterrence, and uses this to appeal to a broader support base.[58] In

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52. MURPHY & HAMPTON, *supra* note 50, at 125–29, 133–35; Hampton, *supra* note 3, at 1686; *see* Ristroph, *supra* note 1, at 1299. Under this theory, punishment "symbolize[s] the subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is, 'What you did to her, she can do to you. So you're equal.'" Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1, 13 (Wesley Cragg ed., 1992).

53. Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 215–17, 227 (1984); *see* JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95–101 (1970); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 370–71, 374, 376–77 (1981); Hampton, *supra* note 3, at 1686–87 (1992); *see also* Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 MINN. L. REV. 261, 304–05 (2009) (summarizing the theories of expressivists); *cf.* Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 42 STAN. J. INT'L L. 39, 70 (2007) ("Expressivism is not or need not be, strictly speaking, a self-sufficient 'justification' for punishment; it is a function and essential characteristic of punishment as a social institution." (footnote omitted)). *But cf.* Harel & Porat, *supra*, at 304 (suggesting that retributivism and expressivism are two separate schools of thought); Mary Sigler, *Private Persons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 165 (2010) (asserting that expressive and communicative theories of punishment "do not fit neatly into either the utilitarian or retributive categories, for they typically reflect elements of both"). The "communicative" function of punishment refers to sending a message to an offender, whereas the "expressive" function of punishment refers to sending a message to the public. *See* Markel & Flanders, *supra* note 2, at 929 n.89.

54. *See* Fish, *supra* note 12, at 66 (summarizing Hart's position); Ristroph, *supra* note 1, at 1299.

55. *See* KANT, *supra* note 17, at 100; Christopher, *supra* note 29, at 864; Fish, *supra* note 12, at 63, 67.

56. *See* Dolinko, *supra* note 29, at 1632–33.

57. *See* Fish, *supra* note 12, at 66–67; Ristroph, *supra* note 1, at 1305–06.

58. *See* Fish, *supra* note 12, at 66–67; Ristroph, *supra* note 1, at 1299.

enveloping consequentialist theories into its formulation, this more modern version of retributivism has, in many instances, metamorphosed from employing retribution as a justification for punishment to using it only as a limitation on punishment.[59] For example, perhaps the permutation of this modern version of retributivism that has gained the most traction among courts and scholars is "limiting retributivism," which uses the tenets of ordinary retributivism to determine the appropriate endpoints on an acceptable range of punishment and uses consequentialist theories to determine the particular punishment within that range.[60] One scholar has even noted that most American jurisdictions have adopted such a hybrid theory of punishment.[61]

Beyond variations in terms of explaining why punishment is justified under a theory of retribution, or whether retribution should be employed as a justification for or limitation on punishment, there are differing theories on how to evaluate an offender's desert.[62] For example, intent-based retributivists believe that one deserves punishment for his culpable state of mind.[63] They believe that it is unfair to treat culpable defendants

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59. *See* Ristroph, *supra* note 1, at 1299 (discussing how retributivism uses the egalitarian model to limit punishment to the amount necessary to "restore a just distribution of the burdens of the law").

60. *See id.* at 1301–04.

61. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76, 78 (2005) ("[A]lmost every system has adopted some form of what Norval Morris called 'limiting retributivism' (also known as modified just deserts).").

62. *See generally* Adam J. MacLeod, *All For One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 33–35, 40–45 (2008) (examining the views of "Blackstonian retributivists" and "victim-centrists").

63. Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 735–36 (1988). Some scholars refer to intent-based retributivists as subjectivists or to intent-based retribution as either deontological or empirical desert. *See, e.g.*, Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 1994 J. CONTEMP. LEGAL ISSUES 31, 49 ("When I refer to 'subjectivism' in this paper, I am referring to intent-based retributivism."); Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 148–50 (2008) (categorizing conceptions of desert as either vengeful, which focuses on the harm done; deontological, which "focuses on the blameworthiness of the offender"; or empirical, which also "focuses on the blameworthiness of the offender"). Deontological retribution focuses "on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy." Robinson, *supra*, at 148. Empirical retribution "focuses on the blameworthiness of the offender . . . [b]ut in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community's intuitions of justice." *Id.* at 149. Deontological retribution has the advantage of having the "ability to produce true principles of justice independent of personal or community opinion," and empirical retribution has the advantage of being effective in deterring crime because it draws on the community's abstract notions of right and wrong. *See id.* at 153 ("The special value of the empirical conception of desert is its utilitarian effectiveness in crime-control; the special value of the deontological conception of desert is

differently based on the "moral luck" of whether their culpable actions actually caused harm.[64] In contrast, finding reason to be less troubled by holding offenders of similar culpabilities to different levels of responsibility, harm-based retributivists believe the harms an offender causes are relevant to the severity of his punishment.[65] To the extent that American sentencing systems are retribution-based, they are often harm-based systems in a number of respects.[66] This is exhibited, for example, in that they punish attempts less seriously than they punish completed crimes and that they punish felony murders as severely as ordinary intentional murders even though the defendant may not have intended to kill the victim.[67] Despite

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its ability to produce true principles of justice independent of personal or community opinion.").

64. *See* Ashworth, *supra* note 63, at 736–37; Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1105 (1997) (noting that the argument that retributivism is consistent with moral luck is controversial).

65. Ashworth, *supra* note 63, at 735–36; *see, e.g.*, Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 238–40 (1994) (asserting that the "standard educated view"—that whether a wrongful action causes harm has no moral significance independent from culpability—is "mistaken"). Some scholars refer to harm-based retributivists as objectivists or to harm-based retribution as "vengeful desert." *See, e.g.*, Cole, *supra* note 63, at 48, 50–51; Robinson, *supra* note 63, at 147. One harm-based retributivist, Professor Robert Nozick, has reduced the theory to a mathematical formula, equating justified retribution with the degree of culpability times the harm caused or risked ($R = r \times H$). Adil Ahmad Haque, Lawrence v. Texas *and the Limits of the Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 21–22 (2007) (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 60 (1974)).

66. *See* Adam L. Alter, Julia Kernochan & John M. Darley, *Transgression Wrongfulness Outweighs Its Harmfulness as a Determinant of Sentence Severity*, 31 LAW & HUM. BEHAV. 319, 320 (2007) (noting that most American jurisdictions require wrongfulness and harmfulness for criminal liability); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1402 (2003) (noting that the attempt or success distinction of harm-based retribution has "survived in positive law"); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 104–05 (1993) ("Harm-based retribution is the principle of the [Federal Sentencing G]uidelines . . . ."); Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 423 (2003) ("Empirical research on the psychology of justice supports an emerging consensus that people's punishment judgments are guided to a large degree by a harm-based retributive psychology."); Ryan, *supra* note 5, at 103 n.121 ("[M]ost courts take into account the harm caused by the defendant when determining the proper punishment to be imposed."). *But see* Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 415–16 (2002) (asserting that "simple-minded consequentialism"—"lengthy incapacitation and an 'economy of threats' deterrence" animate the Federal Sentencing Guidelines rather than rehabilitation or retribution).

67. *See* Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74–75 (1990) ("The felony-murder rule brands a killer as a murderer even if a jury would conclude that the killer did not intend to kill the victim, but merely intended to rob the victim, [whereas] [i]ntent-based retributivists . . . insist that the killer should be treated as just another robber unless

harm-based retribution's prevalence in American sentencing, many scholars are resistant to this version of retributivism and instead favor an intent-based approach.[68]

C. Assigning Desert

When adopting a conception of retribution, questions arise about how to determine the exact value of an offender's desert.[69] Indeed, one of the central criticisms of retributivism is that it fails to offer a means by which to assess the particular level of punishment that an offender deserves.[70] While numerous empirical studies demonstrate that individuals across cultures generally agree on the relative, or ordinal,[71] ranking of standard criminal offenses,[72] there seems to be little agreement as to the cardinal ranking—or the weighted sequencing—of these offenses.[73] Although these concerns of ordinal and cardinal

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some independent finding of the killer's criminal mens rea is made respecting the killing."); Moore, *supra* note 65, at 280 (explaining that felony murder is an example of an "impure strict liability" crime—one "that . . . require[s] some culpable mental state but . . . do[es] not attach such culpability requirements to all material elements of the offense"); Ryan, *supra* note 5, at 102–03 & n.118 (explaining that theories of harm-based retribution suggest punishing attempt offenses less severely than completed offenses). *But see* Ryan, *supra* note 5, at 104 n.123 (acknowledging that some scholars have asserted that intent-based retributivism also supports the felony murder rule). The Court has limited, to some extent, the constitutionality of the felony murder doctrine. *See* Tison v. Arizona, 481 U.S. 137, 149 (1987); Enmund v. Florida, 458 U.S. 782, 801 (1982); Ryan, *supra* note 5, at 103–04 & n.123.

68. *See* Moore, *supra* note 65, at 238–40 (explaining that the "standard educated view" denies "wrongdoing" as relevant to determining an offender's desert).

69. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 130 (1992) (asserting that a primary criticism of the theory "is that retributivists have no way of accurately measuring the level of moral guilt necessary to justify punishment").

70. *Id.*; *see* Kaplow & Shavell, *supra* note 6, at 1238–39 (identifying as some of the central criticisms of retributivism the difficulties of "assess[ing] the degree of wrongfulness" and "determin[ing] the proper punishment given a view of the magnitude of the wrong").

71. The problem of "ordinal ranking" relates to the concern that more serious crimes should be punished more severely than less serious crimes. *See* Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 10 (2003) (suggesting that desert demands ordinal ranking—"that a case of greater blameworthiness receive greater punishment than a case of comparatively less blameworthiness").

72. *See generally* Robinson & Kurzban, *supra* note 5 (reviewing empirical studies establishing an agreement on ordinal ranking and reiterating the findings of earlier studies that there is no agreement on cardinal ranking).

73. *See id.* at 1881–82. Outside the context of criminal law, Professor Daphna Lewinsohn-Zamir has explained:

> An "ordinal" ranking of preferences represents the order of an individual's preferences. Any numbers used in such ranking indicate only the sequence of preferences and do not convey information about the strength of preferences. In a "cardinal" ranking, by contrast, there is meaning to the differences

ranking have received significant scholarly attention, both protective retributivists and victim vindication retributivists have generally left the question of the particular punishment that an offender deserves up to judges, legislators, and sentencing commissions.[74] While scholars have at least recognized the difficulty of cardinal ranking, they have largely neglected to identify the issue of which particular harms caused by an offender's criminal conduct are relevant in determining ordinal and cardinal offense rankings.[75] But an assessment of which harms matter is important because it could impact the determination of which punishment the offender actually deserves. An exception to this general oversight by scholars, though, Andrew von Hirsch has opined that "[t]he consequences that should be considered in gauging the harmfulness of an act should be those that can fairly be attributed to the actor's choice[, which] militates . . . against including in harm the unforeseeable consequences of the act."[76] The details of von Hirsch's reasoning, however, remain somewhat unclear.[77] Michael Moore has also

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between the numbers attached to rankings. The distances between the ranked preferences designate the intensity with which one alternative is preferred to the other.

Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1393 n.7 (2009).

74. *See infra* Part III.

75. *But cf. supra* text accompanying notes 63–64 (explaining that intent-based retributivists base punishment on the offender's culpability).

76. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 64–65 (1985). Von Hirsch also stated that this premium on an actor's choice further militates against including within the notion of harm "the consequences wrought by other independent actors who happen to choose similar actions." *Id.* at 65. He explained that an offender should not be held responsible for actions that he does not commit personally even if his actions contribute to a larger harm. *Id.* at 64–65. As an example, he stated that "[s]hoplifting is not rendered serious by the large number of persons who commit this crime and by the aggregate economic injury done, for no shoplifter has control over the number of other persons who choose to engage in this conduct." *Id.* at 65.

77. The sources that von Hirsch cites for his proposition—*Doing Justice* and an article he published in the *Journal of Criminal Law and Criminology*—also provide little explanation for his assertion. Other scholars have similarly avoided addressing the issue of which harms are relevant in determining an offender's desert. *See, e.g.*, Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 4 (1991) (determining that "[p]articular criminal acts are too diverse to be rated on an individualized basis," explaining that issues of "aggravation and mitigation" are "complex enough to call for a separate article," and examining only the "*standard harm* involved in a given category or subcategory of crime"). A few commentators have delved into the closely related question of what constitutes a victim, but they have primarily limited their inquiries to the definition of victim under the Federal Sentencing Guidelines. *See generally* Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 117–20, 143–46, 164 (2006) (examining the issue of victimhood under the Federal Sentencing Guidelines and proposing a definition for the term "victim"); Andrew Nash,

discussed the relevance of unforeseeable harms in his attempt to "dissolve" the notion of "moral luck" as an objection to harm-based retribution.[78] Unlike von Hirsch's statement, however, Moore's account does not include an assertion about which harms should be considered in sentencing. Instead, Moore concludes that, because only harms that are caused "normally," rather than "freakishly," are considered in determining an offender's desert, the offender will be held responsible for only those consequences that he could have foreseen, and thus the problem of "moral luck" disappears.[79]

Protective retributivists, who premise punishment on the wrongs committed against society,[80] would presumably look to the harms society has suffered as a result of the offender's action if their protective retributivism is harm-based. When determining a murderer's desert, for example, one would expect harm-based protective retributivists to consider the harm the murder caused to society due to the fact that murder is considered blameworthy not just because it results in the death of the victim but because it also causes society to suffer.[81] After all, society has lost one of its members, and the murderer has disparaged the community's teaching that murder is immoral.[82] As William Blackstone has explained, the "private wrong" against the victim "is swallowed up in the public."[83] In fact, some scholars have asserted that this public conception of crime is central in American law,[84] which is reflected in the practices of allowing only government prosecutors, not victims, to prosecute

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Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419, 1420, 1435–36, 1456–57 (2008) (exploring the role of victims under the Federal Sentencing Guidelines and proposing a definition for the term "victim" under the Guidelines).

78. Moore, *supra* note 65, at 253. Despite Moore's attempt to "dissolve" the objection of "moral luck," his argument does not seem to have found much traction among legal scholars.

79. *Id.* at 254–56, 258. This account of Moore's explanation is over-simplified, thus for a fuller understanding of Moore's account of the disappearance of "moral luck," please see *id.* at 253–58.

80. *See* MacLeod, *supra* note 62, at 33–34 (characterizing this as the "Blackstonian view").

81. *See id.* ("In the Blackstonian conception, murder" is considered blameworthy because of "the loss that the community suffers—the loss of one of its members and the murderer's disparagement of the community's teaching that murder is immoral—[which] suffices to justify punishing the murderer.").

82. *Id.* at 34.

83. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *6.

84. *See* MacLeod, *supra* note 62, at 34 ("In American criminal law, the defining parameters of criminal prohibitions continue to lie along these principles [that criminal conduct constitutes an offense against society and that the societal harm caused justifies punishing the offender].").

defendants and of captioning criminal cases as the government entity against the offender.[85] Despite all of this, retributivists seem to neglect specifically examining the resulting harms in society in each case and instead either appeal to society's members to settle the moral depravity of an act[86] or else grope within the province of philosophy for an answer to how morally wrong an act is.[87] For example, researchers have surveyed individuals to assess their views on the punishments that offenders deserve for committing crimes such as robbery and murder.[88] Overwhelmingly, though, these surveys fail to mention the more remote harms caused by the listed offenses.[89] Other scholars have instead proposed a scheme by which to measure the wrongfulness of an act based upon the personal interests impaired by the crime, such as the immediate victim's physical integrity, financial position, freedom from humiliation, and privacy.[90] It is, of course, possible that societal harms are generally approximated and already entered into the punishment calculus in determining baseline punishments that are available

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85. *Id.* at 34–35.

86. *See, e.g.*, Robinson & Kurzban, *supra* note 5, at 1848–50 (describing questionnaire studies designed to determine people's intuitions of justice based on the punishment they believed that offenders should incur as the result of committing various offenses); *see also* Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1834–36 (2007) (describing this concept of "empirical desert").

87. *See* MacLeod, *supra* note 62, at 33–34 (explaining why certain wrongs are considered blameworthy under the Blackstonian conception).

88. *See* Robinson & Kurzban, *supra* note 5, at 1848–50.

89. *See id.*

90. *See* von Hirsch & Jareborg, *supra* note 77, at 19–20 (proposing a framework by which the seriousness of crimes can be more accurately measured). Von Hirsch has been characterized as a protective retributivist. *See* Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 247 (1989) ("[V]on Hirsch advocated a retributive theory of punishment . . . which in modern times has been labeled 'protective retributivism' . . . ."). Other scholars have suggested that the punishment imposed should be proportionate to the harm caused to the immediate victim but have said little about how to determine the actual punishment imposed. For example, Herbert Morris, who explained that premising punishment on the violation of rules that "establish a mutuality of benefit and burden and in which the benefits of noninterference are conditional upon the assumption of burdens . . . is both reasonable and just," did not delve into the nuances of how to determine the appropriate punishment to impose. Morris, *supra* note 3, at 477; *see also* George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 961 (1985) (stating that, in a number of retributive theories, there are two inquiries: (1) "whether there is a wrong to be punished," and (2) "if so, how grievous it is"); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 991 (1985) (noting that Kant's and Herbert Morris's approaches to moral blameworthiness "embody a proportionality principle—a correspondence between the wickedness of the act and the suffering to be inflicted upon the actor").

under sentencing guidelines or statutes,[91] but even if this were the case, it is suspect that these harms would be the same in every case and thus could be accounted for in such a generic fashion.

Those who subscribe to a theory of retribution more akin to victim vindication predictably assert that the justification to punish stems from the victims' interests rather than societal interests, which are sometimes more removed from the specific criminal conduct at issue.[92] Ordinarily, under a harm-based version of this theory, an offender would be punished based on the harm he causes to a particular victim.[93] As one scholar explains, under victim vindication, punishment serves to "'even[ ] the score' between the victim and the offender."[94] Professor George Fletcher, though, has focused on a representative victim group, rather than the particular victim, in pinpointing what harms punishment must balance.[95] Further, he seemingly extends liability under this argument by asserting that actions not resulting in victim harm should still be punished so as to ensure equal treatment among offenders and avoid "the phenomenon of *impunidad*—[allowing one to] remain[ ]

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91. This may, for example, be the case with hate crimes, which are often said "to inflict greater individual and societal harm." *See* Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993).

92. *See* Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 838 (2006). *But cf.* MacLeod, *supra* note 62, at 34 (asserting that the American criminal justice system subscribes to a retributive theory that looks to societal interests in assessing punishment). Professors Adil Ahmad Haque and Jean Hampton adopt similar forms of victim vindication. *See* Hampton, *supra* note 3, at 1686 ("[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action . . . ."); Haque, *supra* note 65, at 22–25 (discussing one interpretation of retribution as requiring "the existence of a victim whose rights the state seeks to vindicate through punishment").

93. *See* Collins, *supra* note 92, at 838 (noting how punishment serves as a form of compensation by placing the victim in the position she would have been in if the criminal offense had not occurred).

94. *Id.* at 837–38 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 18 (3d ed. 2001)); *see also* Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 736 (2008) ("The conception of state punishment as a substitute for private vengeance implies an undertaking to vindicate particular victims by avenging actual harms . . . ."); Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337, 359 (2007) ("Under the victim vindication variant, retribution is achieved when the criminal receives punishment proportional to the offense to the victim.").

95. *See* George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547, 556–57 (2005); George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51, 54–55 (1999); *see also* MacLeod, *supra* note 62, at 44 (noting that Fletcher's "communities are merely subsets of the community at large").

unpunished for one's crimes."[96] As with protective retributivism in practice, though, punishment under a harm-based theory of victim vindication focuses primarily on harms caused to immediate victims of the offender's conduct and on restoring this particular equality or moral balance that the offender's harmful actions upset.[97] It ordinarily neglects the more remote victims of the offender's criminal conduct and thus overlooks the more remote harms caused by that conduct.[98]

III. RETRIBUTION IN PRACTICE

While the principle of retribution is something often debated among philosophers and legal scholars, retributivism also has practical applications. Retributivism is central to criminal sentencing and has generally served as a principal factor in sentencing for the past few decades.[99] Yet courts' retribution analyses, like those of legal scholars, have neglected to examine the more remote harms of criminal activities that remain pervasive in our communities.

A. Retribution in the Courts

Much more than fodder for legal scholars, the principle of retribution has played a major role in criminal sentencing.[100] In

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96. *See* Fletcher, *The Place of Victims*, *supra* note 95, at 60–63; *see also* MacLeod, *supra* note 62, at 40 (explaining Fletcher's view that, "once a community assumes the responsibility to punish, it must punish all wrongdoers, including those who harm no victims, so that it does not violate the norm of equal treatment"). Professor MacLeod explains that "[t]his conception flips the Blackstonian model on its head. Whereas in Blackstone's view the victim's interest is subsumed within the interest of the community, in Fletcher's view the state's obligation to punish usurpers follows from its prior commitment to vindicate offenses against particular victims." MacLeod, *supra* note 62, at 40. Professor Michael Moore suggests that Fletcher's views are incompatible with retributivism and instead places Fletcher in the corrective justice camp. *See* Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 75–77 (1999); *see also* MacLeod, *supra* note 62, at 42 (relating this disagreement between Fletcher and Moore). According to Professor MacLeod, "Moore doubts that equality and proportionality will persist in retributive punishment if that punishment is left to the discretion of individual victims . . . [a]nd he finds unpersuasive the notion that a wrongdoer's culpability can be relative to the victim's desire to see the wrongdoer suffer." MacLeod, *supra* note 62, at 42 (footnote omitted).

97. *See id.*

98. *See id.* at 40 (describing victim-centric retributivism as a focus on vindicating the interests of direct victims, rather than broad communal interests).

99. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 978–81 (1999); Ristroph, *supra* note 1, at 1306 (describing how retribution has recently gained wide approval as a principal factor in modern sentencing).

100. *See* Ristroph, *supra* note 1, at 1306 ("Retribution . . . is central to modern sentencing."). *But cf.* Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 414 (1992) (asserting that the imposition of sentences is often "driven not by theoretical justifications but by political concerns").

determining the appropriate sentences for criminal offenders, judges[101] consult the purposes of punishment authorized by statutory law, and even when those statutes are only consequentialist in nature,[102] courts interpret them to include the purpose of retribution.[103] In the case of *United States v. Bergman*,[104] for example, U.S. District Court Judge Marvin Frankel[105] relied in part on retribution in sentencing a rabbi–philanthropist, convicted of Medicare and tax fraud, to four months' imprisonment.[106] He explained that, "as is known to anyone who talks to judges, lawyers, defendants, or people generally," just deserts is a factor in sentence determination.[107] Similarly, in the sentencing of Michael Milken—a well-known American financier and philanthropist who pleaded guilty to violations of federal securities and tax laws—U.S. District Court Judge Kimba Wood partially rooted her sentencing decision in retribution.[108] She

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101. Although judges are responsible for sentencing criminal offenders in most jurisdictions, some jurisdictions charge the jury with this responsibility. *See* Dhammika Dharmapala, Nuno Garoupa & Joanna Shepherd, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1066 (2010).

102. *See supra* text accompanying notes 23–28 (explaining how consequentialist theories of punishment replaced retributivist ones in the late nineteenth and early twentieth centuries).

103. *See* Cotton, *supra* note 8, at 1316–17 & n.8; *supra* text accompanying notes 31–39.

104. United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976).

105. Judge Frankel was a central figure in the fall of rehabilitation in the mid-1970s and the construction of the Federal Sentencing Guidelines. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 124 (1972).

106. *See Bergman*, 416 F. Supp. at 497–98, 500. New York law at that time provided that one of the general purposes of the Penal Law was "[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted and their confinement when required in the interests of public protection." N.Y. PENAL LAW § 1.05(5) (McKinney 1965) (current version at N.Y. Penal Law § 1.05(6) (McKinney 2009)).

107. *Bergman*, 416 F. Supp. at 500. In *Bergman*, Judge Frankel did seem to doubt the prevalence and acceptability of retribution among sentencing purposes, but this is likely a product of the time during which the case was decided—at the lowest ebb of retributivism. *See id.*; *supra* text accompanying notes 23–28 (describing a time during the late nineteenth century and earliest part of the twentieth century when consequentialist theories of punishment had replaced retributivist ones).

108. United States v. Milken, No. (S) 89Cr.41(KMW), 1990 WL 264699, at *3–7, *10 (S.D.N.Y. Nov. 21, 1990). By the time *Milken* was decided, the New York legislature had amended the New York law governing the purposes of punishment. *See* N.Y. PENAL LAW § 1.05 (McKinney 1982) (amended 2006). The law in effect when *Milken* was decided included a possible, but vague, reference to the purpose of retribution. *See* N.Y. PENAL LAW § 1.05(5) (McKinney 1982) (amended 2006). It provided that one of the general purposes of the Penal Law was "[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community." *Id.* Although both the Milken example and the Bergman example come out of the

stated that an imprisonment term of ten years would "further the goals of punishment and retribution."[109]

Not only do sentencers regularly rely on retribution in sentencing, but evidence suggests that sentencers' punishment decisions may very well be primarily based on notions of retribution.[110] Judges may subscribe to a variety of theories in sentencing,[111] but the chiefly retributive basis of guidelines sentencing schemes suggests that judges in many jurisdictions are steered toward extensive reliance on the theory of retribution in sentencing.[112] Further, studies suggest that "most people consider desert-based punishment to be the fundamental goal of criminal law and intuitively respond to actual cases in desert-based terms."[113] It is possible that judges, who may have a more

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Southern District of New York, judges across the country rely on retribution in sentencing.

109. *Milken*, 1990 WL 264699, at *6–7. Considering judges' regular resort to retribution in sentencing, it is not surprising that prosecutors often make retribution-based arguments to sentencers. *See, e.g.*, Harris v. State, 2 So. 3d 880, 924 (Ala. Crim. App. 2007) (stating that the court has consistently held that "[r]etribution is a proper subject of prosecutorial argument" to the jury (internal quotation marks omitted)). Additionally, jurors are often instructed on the proper purposes of punishment before being sent off to deliberate about a defendant's appropriate sentence. *See* Cotton, *supra* note 8, at 1317. Further, during voir dire, lawyers sometimes screen potential jurors based on the permissible purposes of punishment. *See id.*

110. *See* Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 295–97 (2002) (finding that laymen's impositions of punishment were motivated primarily by "just deserts"); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 676 (2000).

111. *See* Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1377 & n.24 (2009) (asserting that "[j]udges' sentencing philosophies vary" and that "[t]hese philosophies . . . correlate with widely divergent sentences").

112. *See* Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 459–60 (2006) (asserting that most, if not all, guidelines systems are based on a form of retributivism—more specifically, limiting retributivism); *cf.* Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code's Sentencing Proposals*, 61 FLA. L. REV. 665, 677–79, 681–82 (2009) (noting that a number of scholars agree that the American Law Institute's proposed revisions to the sentencing provisions of the Model Penal Code are based primarily on a theory of retribution). Although guidelines schemes may be advisory in nature, *see, e.g.*, United States v. Booker, 543 U.S. 220, 245 (2005) (severing the provision of the Federal Sentencing Guidelines that made them mandatory, thus "mak[ing] the Guidelines effectively advisory"), they are still often a starting point for judicial determinations of punishment, *see, e.g.*, Gall v. United States, 552 U.S. 38, 49 (2007).

113. Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 823–24 & n.25 (2007); *see also* John M. Darley, *Citizens' Assignments of Punishments for Moral Transgressions: A Case Study in the Psychology of Punishment*, 8 OHIO ST. J. CRIM. L. 101, 106, 116 (2010) (explaining that "people's intuitive responses to wrongdoing are primarily driven by retributive considerations" and concluding that "a 'natural response' to moral norm violation is punishment generated for retaliatory purposes");

reasoned approach to sentencing, can overcome this intuitive response and appeal to other justifications for punishment in sentencing.[114] However, for seasoned sentencers, like many judges, their experiences of routinely sentencing criminal offenders may have transformed their reasoned sentencing responses into intuitive responses, which are, again, most often retributive in nature.[115] Moreover, even sentencers who maintain reasoned, as opposed to intuitive, responses to sentencing scenarios may still be primarily drawn to retributive punishment goals because the current prevalence of retribution in the American sentencing milieu[116] may have conditioned them to retribution-based sentencing.[117] Accordingly, retribution is important to modern-day sentencing decisions.

B. Courts' Neglect of More Remote Harms in Sentencing

Since retribution reemerged as a primary justification for punishment around the mid-1970s,[118] courts, like legal scholars, have primarily limited their retribution analyses to the most direct harms caused by the relevant criminal violations rather than also including the broader societal impacts of criminal activity.[119] Gradually, however, in a handful of cases, some courts

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Hofer, *supra* note 112, at 460 ("Psychological research has consistently shown, for example, that people are sensitive to factors associated with just deserts when making sentencing decisions and relatively insensitive to factors associated with deterrence theory."). However, scholars have noted that "[t]he difference between elite and popular conceptions of desert is stark." Ristroph, *supra* note 1, at 1318; *see* Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 576 & n.17 (2009) (questioning whether the desert "theorists" or "the people" should revise their views when "a popular belief about a question of desert does not match up with conclusions arrived at through theorizing and reflecting about desert").

114. *See* Darley, *supra* note 113, at 113 (suggesting that one might expect judges "to have developed a carefully thought-through and consciously-reasoned approach to assigning punishments").

115. *See id.* at 114–15 (explaining that "many decisions, repetitively made, move toward being made more intuitively" and that this phenomenon may apply to judicial sentencers).

116. *See supra* text accompanying notes 40–41 and Part III.A.

117. *See* Darley, *supra* note 113, at 115–16 (suggesting that individuals may be conditioned to appeal to one purpose of punishment over another, resulting in "a reasoned override" of a punishment intuition). *But cf.* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 42–43, 45–46 (2010) (doubting that "inertia" has kept post-*Booker* sentencing disparities minimal but acknowledging that the cognitive bias of "anchoring" may be at least partially responsible).

118. *See supra* text accompanying notes 29–41.

119. Somewhat surprisingly, there is very little scholarly literature clearly examining what harms U.S. courts have considered throughout history in determining the appropriate sentences to impose on criminal offenders. This could stem either from scholars' relative disinterest in the topic of sentencing until around the 1960s; judges' historical neglect to explain their reasoning for imposing particular sentences; or the fact that, in jurisdictions relying on parole boards to ultimately determine the duration of

have expanded their analyses of harms to at least consider injuries other than the most direct physical ones.[120] In the 1984 case of *State v. Phillips*,[121] for example, a Missouri court determined that, in trying and sentencing a defendant, it was appropriate to consider the victim's nervous breakdown and continuing therapy following her brutal rape.[122] The court then considered the psychological injuries that the victim suffered as many as eight months after the criminal conduct occurred.[123] Not only was the court considering a more remote type of injury—psychological instead of physical—but it was also considering harms that took place much later in time than the original criminal offense.[124]

In guidelines systems, judges rarely account for the more remote harms caused by criminal conduct because they are ordinarily encouraged to abide by certain pre-set sentences, or narrow sentencing ranges, for particular offenses.[125] Oftentimes, these sentences or narrow ranges are based not only on the most direct harms caused by the offender's conduct, but also on certain statutorily specified aggravating and mitigating factors or on factors specified for use in guided departures from suggested sentences.[126] These factors, however, ordinarily do not take into account all of the more remote harms caused by an offender's conduct. Instead, these factors are based on

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imprisonment sentences, the particular sentences judges impose may have less significance than they otherwise would.

120. *Cf.* Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 42 (2010) (noting the victim's rights movement's achievement of instituting victim impact evidence at sentencing).

121. State v. Phillips, 670 S.W.2d 28 (Mo. Ct. App. 1984).

122. *See id.* at 31–32. *But see* State v. Houx, 19 S.W. 35, 37 (Mo. 1892) (finding that the victim's physical condition three months after the offense "was too remote to throw any light on the real issues in the case" but determining that the error in admitting this evidence was harmless).

123. *Phillips*, 670 S.W.2d at 31.

124. *See id.* at 31–32.

125. Although sentencing disparities have increased somewhat after *Booker* and its progeny, the effect has been "modest." *See* Scott, *supra* note 117, at 18, 41; *see also* William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 316, 329 (2011) ("With exceptions for child pornography and crack cocaine sentences, the average length of imprisonment for all other offenses has remained relatively constant over the past ten years, despite *Booker* and its progeny."). According to one study, "[w]ithin-range and government-sponsored sentences continue to account for more than 80% of sentences in the federal system." Scott, *supra* note 117, at 18.

126. *See* Frase, *supra* note 61, at 79 (noting that, in a determinate sentencing system, the legislature "specifie[s] a narrow sentencing range for each offense, with minor adjustments for aggravating and mitigating circumstances").

things such as the victim's role in the offense,[127] the offender's lack of capacity,[128] the victim's vulnerability,[129] and any particular cruelty involved in the offense.[130] For example, under the "adjustment" structure of the Federal Sentencing Guidelines, judges,[131] in shaping a defendant's sentence, may take into

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127. *See, e.g.*, KAN. STAT. ANN. § 21-4716(c)(1)(A) (2007) (providing that a downward departure may be permissible if "[t]he victim was an aggressor or participant in the criminal conduct associated with the crime of conviction"); MINN. STAT. ANN. § 244 app. § II.D(2)(a)(1) (West 2010) (providing that, if "[t]he victim was an aggressor in the incident," the judge may use this as a factor to justify departure from the presumptive sentence); WASH. REV. CODE § 9.94A.535(1)(a) (2010) ("The court may impose an exceptional sentence below the standard range if it finds that . . . [t]he victim was an initiator, willing participant, aggressor, or provoker of the incident.").

128. *See, e.g.*, KAN. STAT. ANN. § 21-4716(c)(1)(C) (2007) (providing that a downward departure may be permissible if "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed"); MINN. STAT. ANN. § 244 app. § II.D(2)(a)(3) (West 2010) (providing that a permissible mitigating factor for departure is the offender's lack of "substantial capacity for judgment when the offense was committed" due to "physical or mental impairment"); WASH. REV. CODE § 9.94A.535(1)(e) (2010) ("The court may impose an exceptional sentence below the standard range if it finds that . . . [t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.").

129. *See, e.g.*, KAN. STAT. ANN. § 21-4716(c)(2)(A) (2007) (providing that an upward departure may be permissible if "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity which was known or should have been known to the offender"); MINN. STAT. ANN. § 244 app. § II.D(2)(b)(1) (West 2010) (providing that an upward departure may be justified if "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender"); WASH. REV. CODE § 9.94A.535(3)(b) (2010) (providing that a jury determination that "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance" may justify "a sentence above the standard range").

130. *See, e.g.*, KAN. STAT. ANN. § 21-4716(c)(2)(B) (2007) (providing that an upward departure may be justified if "[t]he defendant's conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense"); MINN. STAT. ANN. § 244 app. § II.D(2)(b)(2) (West 2010) (providing that an upward departure may be justified if "[t]he victim was treated with particular cruelty for which the individual offender should be held responsible"); WASH. REV. CODE § 9.94A.535(3)(a) (2010) (providing that a jury determination that "[t]he defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim" may justify "a sentence above the standard range").

131. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that due process and the Sixth Amendment require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court built on this precedent, holding that a mandatory sentencing range of a state guidelines sentencing scheme constitutes a "prescribed statutory maximum," thus a judge increasing a sentence beyond the guidelines range based on aggravating factors that the judge found based on a preponderance of the evidence standard violated the Sixth Amendment. *Id.* at 301–04. In *United States v. Booker*, 543 U.S. 220 (2005), the Court took the *Blakely* holding to its logical conclusion by determining that the Federal Sentencing Guidelines, as they then stood, were unconstitutional. *See id.* at 243–44. To remedy the problem, though, the Court

account[132] whether "the defendant knew or should have known that a victim of the offense was a vulnerable victim"[133] or whether the offense constituted a hate crime[134]—two circumstances that warrant an upward adjustment.[135] Further, the Guidelines also provide for departures from the suggested sentencing ranges when, for example, "the defendant committed the offense while suffering from a significantly reduced mental capacity . . . [that] contributed substantially to the commission of the offense";[136] "the victim's wrongful conduct contributed significantly to provoking the offense behavior";[137] or "the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim."[138] In a number of guidelines sentencing schemes, sentencers may also depart from the prescribed sentence or range based on aggravating or mitigating factors not specifically identified in the guidelines.[139] Under most guidelines sentencing schemes, though, judges are required to record their reasons for departing from the suggested sentences when they do so.[140]

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severed a provision of the Guidelines, rendering them advisory rather than mandatory in nature. *See id.* at 245. After all, the Court concluded, it "ha[d] never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Id.* at 233.

132. Although the Federal Sentencing Guidelines were originally promulgated as mandatory for district court judges, in *United States v. Booker*, the Court excised this portion of the Guidelines to render them only advisory in nature. *Booker*, 543 U.S. at 245. The Court did this to avoid striking down the Guidelines under the Fifth Amendment Due Process Clause and the Sixth Amendment's notice and jury trial guarantees, which require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476, 490.

133. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2010).

134. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (2010).

135. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a)–(b)(1) (2010).

136. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2010).

137. U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2010).

138. U.S. SENTENCING GUIDELINES MANUAL § 5K2.8 (2010).

139. *See, e.g.*, KAN. STAT. ANN. § 21-4716(c)(1) & (2) (2007) (providing "nonexclusive" lists of aggravating and mitigating factors); MINN. STAT. ANN. § 244 app. § II.D(2) (West 2010) (providing a "nonexclusive list of factors which may be used as reasons for departure"); WASH. REV. CODE § 9.94A.535(1) & (3) (2010) (noting that the enumerated mitigating circumstances "are not intended to be exclusive reasons for exceptional sentences" but providing that the enumerated list of aggravating circumstances to be considered by a jury is exclusive); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(a)(2)(B) (2010) ("A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.").

140. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(e) (2010) ("If the court departs from the applicable guidelines range, it shall state . . . its specific reasons for departure . . . ."). *See generally* Judy Ann Clausen, *"Your Honor, May I Have That in Writing?" A Proposed Response to Violations of the Federal Sentencing Written Reasons Requirement*, 42 U. TOL. L. REV. 705 (2011) (exploring circuit splits

Rarely, it seems, have these recorded reasons for departure been based on the more remote harms that the offender's conduct causes, such as how the offender's trial has affected testifying witnesses.

While courts ordinarily neglect addressing many of the remote harms flowing from criminal conduct,[141] a handful of courts have distinguished between some immediate and more remote harms in the context of determining what constitutes a "victim" under the language of the Federal Sentencing Guidelines.[142] For example, in *United States v. Zats*,[143] the Third Circuit was faced with the question of whether the vulnerable victim adjustment of the Guidelines should apply to harmed individuals who were not the direct victims of the charged offenses.[144] In that case, the defendant was a debt collector who employed coercive and illegal methods in attempting to collect debts.[145] The defendant also routinely failed to turn over the collected funds to his clients, the creditors.[146] The defendant pleaded guilty to conspiracy to commit mail and wire fraud,

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regarding how stringently appellate courts must judge the written reasoning requirement).

141. *See supra* note 119 and accompanying text.

142. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2010) (providing that the base offense level should be increased by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim"). Moreover, in discussing the statutory guidance to provide to the Sentencing Commission, the Senate Committee on the Judiciary stated that the Commission might examine "whether the offense was committed in a manner plainly designed to limit the danger to the victims." S. REP. NO. 98-225, at 170 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3353. The statute ultimately vesting authority in the Sentencing Commission did direct the Commission to consider whether "the nature and degree of the harm caused by the offense," as well as "the community view of the gravity of the offense," and "the public concern generated by the offense" were relevant to an offender's punishment. 28 U.S.C. § 994(c)(3)–(5) (2006). However, the Commission appears to have addressed these concerns related to the harms caused by criminal conduct, if at all, in a somewhat indirect manner. Aside from providing for sentence modifications focused on matters other than the more remote harms caused by criminal conduct, *see supra* text accompanying notes 131–39, the Commission seemed to address these concerns of harms by adopting a real-offense, rather than a charge-based offense, approach to determining an offender's baseline punishment range, *see* Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 726 (2010), and researching, but failing to implement, community views on particular crimes, *see* Carissa Byrne Hessick, *Prioritizing Policy Before Practice After* Booker, 18 FED. SENT'G REP. 167, 167 (2006). Ultimately, though, it seems that the Guidelines still focus on only the most direct harms caused by an offender's criminal conduct.

143. United States v. Zats, 298 F.3d 182 (3d Cir. 2002).

144. *Id.* at 184–87. Although the Federal Guidelines base sentences on "real" offenses, as opposed to "charge" offenses, these individuals who were allegedly vulnerable were not the most direct victims under either definition. *See id.* at 187.

145. *Id.* at 184.

146. *Id.*

thus his clients—the individuals he defrauded of the collected debts—were the direct victims of the offenses at issue.[147] The clients were not considered vulnerable, but the debtors that the defendant coerced were.[148] Examining the language of the Guidelines, the court determined that the identity of the victim should be read broadly and that courts may take into account all of the conduct underlying the offense of conviction in determining whether a sentencing enhancement applies.[149] Accordingly, the court determined that the vulnerable victim enhancement was appropriate in the case.[150] In *United States v. Hoyungowa*,[151] however, the Ninth Circuit found that the "extreme psychological injury" suffered by a murder victim's family was not a ground on which to base an upward departure under the Guidelines.[152] The court explained that the departure guideline for extreme psychological injury "applies . . . only to the direct victim of the crime and not to others affected by the crime."[153] It was concerned that providing an upward departure on this ground "would punish the murderer of the head of a household more harshly than the murderer of a transient."[154]

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147. *Id.* The defendant also pleaded guilty to a tax offense in violation of 18 U.S.C. § 371 and to attempted tax evasion in violation of 26 U.S.C. § 7201. *Id.*

148. *See id.* at 186–90.

149. *See id.* at 186–87. The court stated that "victim status is not limited to those hurt by the offense of conviction, but also includes those hurt by relevant conduct outside that offense." *Id.* at 187. Thus, this broader conception of a victim under the Guidelines is linked to the Guidelines' determination that sentences should be based not only on the crime of conviction but also the defendant's "relevant conduct." *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A), (a)(3) (2010) (stating that sentences shall be based upon "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "all harm that resulted from the[se] acts and omissions").

150. *Zats*, 298 F.3d at 187; *see also, e.g.*, United States v. Kennedy, 554 F.3d 415, 424 (3d Cir. 2009) (quoting *Zats* for the same proposition); United States v. Moon, 513 F.3d 527, 541 (6th Cir. 2008) (noting that the vulnerable victim adjustment may be based on the victims of the defendant's "relevant conduct"); United States v. Bolden, 325 F.3d 471, 500 (4th Cir. 2003) ("In order to apply the vulnerable victim adjustment, a sentencing court must identify the victims of the . . . [defendant's] relevant conduct."); United States v. Johnson, 297 F.3d 845, 873 (9th Cir. 2002) (explaining that the vulnerable victim enhancement "applies whenever the offense of conviction involved 'relevant conduct' that victimized a person that the defendant knew or should have known was vulnerable" (citation omitted)).

151. United States v. Hoyungowa, 930 F.2d 744 (9th Cir. 1991).

152. *Id.* at 747 (internal quotation marks omitted).

153. *Id.* In *United States v. Alber*, 56 F.3d 1106, 1112 (9th Cir. 1995), though, the Ninth Circuit concluded that while an upward departure based on "extreme psychological injury" applies only when that harm is suffered by the direct victim, a court may depart upward based on extreme psychological injuries to remote victims because this is a "circumstance of a kind or to a degree the Sentencing Commission did not adequately take into account when formulating the Guidelines."

154. *Hoyungowa*, 930 F.2d at 747. For a discussion of this concern about ranking victims, see *infra* text accompanying notes 260–66.

In contrast to the direction judges receive under guidelines sentencing schemes, under nonguidelines sentencing schemes, judges usually have little guidance in terms of what sentence an offender deserves to receive.[155] Further, in these sentencing jurisdictions, it is rare that judges explain why they impose the sentences that they do.[156] Accordingly, it is difficult to determine what specific factors judges take into account in setting sentences in these jurisdictions, but it seems unlikely that they take into account all of the harms that offenders' criminal conduct cause because there appears to be little discussion of such remote harms in sentencing decisions.

The Supreme Court has recently implied that some of the more remote harms of criminal conduct should indeed be considered in sentencing.[157] In its Eighth Amendment case of *Kennedy v. Louisiana*,[158] the Court evaluated whether the punishment of death is constitutional for the crime of child rape and concluded that the relevant harms to be considered extend beyond the most direct harms of the child rape victim's suffering

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155. *See* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 381–86 (2005). Note, however, that nonguidelines and indeterminate sentencing are ordinarily associated with consequentialist, rather than retributivist, theories of punishment. *See* Cotton, *supra* note 8, at 1360; Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 818 (2002); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 252.

156. *See* Robert Batey & Stephen M. Everhart, *The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional*, 11 U. FLA. J.L. & PUB. POL'Y 5, 13 n.48 (1999) (explaining that, in Florida's indeterminate sentencing system of times past, "there was no requirement for the judge to give any reason for handing down a harsh sentence, as long as the sentence was below the maximum provided by law"); D. Michael Fisher, *Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders*, 5 WIDENER J. PUB. L. 269, 274 (1996) ("Under indeterminate systems, judges had discretion in determining the length of the sentence imposed and did not have to explain their sentencing decisions."); Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 439 (1999) (noting that a common criticism of indeterminate sentencing is that judges fail to explain their reasons for the sentences imposed); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 213 (2005) ("Previously, under indeterminate sentencing, federal trial judges rarely spelled out factual findings or gave reasons for their sentences."); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 572 (1993) (noting that, in indeterminate sentencing systems, "courts seldom explain their decisions and are rarely reviewed").

157. This is not to suggest that *Kennedy* should be interpreted as providing a necessary formula for punishment justifications that state legislatures and courts must follow in all circumstances. *Cf. supra* text accompanying notes 36–39 (explaining how some courts have mistakenly cited the Supreme Court case of *Gregg v. Georgia* as requiring states to adopt retributive punishment rationales).

158. Kennedy v. Louisiana, 554 U.S. 407, 418 (2008).

as a result of the rape.[159] After stating that retribution "reflects society's and the victim's interests"[160] and determining that the retribution inquiry "must include the question whether the [punishment] balances the wrong to the victim,"[161] the Court described some of the more remote harms caused by a child rapist's conduct:

> Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, [the child rape victim] was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount once more all the details of the crime to a jury as the State pursued the death of her stepfather[, the offender].[162]

The Court then concluded that these harms were relevant to a determination of the appropriate sentence to impose on the offender.[163] Surprisingly, the Court did not conclude that this additional suffering justified imposing a harsher punishment on the offender, however. Instead, the Court stated that "[i]t is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator."[164] It then concluded that a more lenient punishment was appropriate because it would help alleviate the child victim's suffering by requiring a lesser testifying commitment by the child victim and thus "balance[ ] the wrong to the victim."[165]

Despite the Court's suggestion that these more remote harms are relevant to sentencing, lower courts and scholars have not seemed to recognize the significance of the *Kennedy* Court's novel retributive analysis.[166] Although numerous courts, scholars,

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159. *See id.* at 441–46.

160. *Id.* at 442; *cf. supra* text accompanying notes 45–53 (describing the theories of protective retributivism and victim vindication).

161. *Kennedy*, 554 U.S. at 442.

162. *Id.* at 442–43.

163. *See id.* at 442–43, 446.

164. *Id.* at 442.

165. *See id.* at 442–43, 446–47.

166. *See supra* text accompanying notes 158–63 (explaining the *Kennedy* Court's suggestion that more remote harms are relevant to sentencing); *supra* note 157; *infra* text accompanying notes 167–70 (providing examples of lower courts and scholars that have failed to recognize the *Kennedy* Court's atypical analysis).

and practitioners have cited the case as binding precedent, they have cited it for propositions such as that the death penalty may be imposed only for crimes that result in the victim's death,[167] that children's testimony in death penalty cases is potentially unreliable,[168] and that the sexual abuse of children leads to significant harms.[169] They have seemed to overlook what is one of the most important facets of the Court's reasoning in the case: its expansion of the traditional harms considered under a theory of retribution.[170]

Aside from the Supreme Court's allusion to the more remote harms caused by an offender's criminal conduct, victim impact evidence is usually the only source of information that sentencers might actually expressly consider regarding the more remote harms that an offender's conduct causes.[171] However, most jurisdictions have provided little guidance as to the nature of the evidence that may be admitted in such sentencing proceedings.[172] In guidelines systems, especially, in which sentencers are explicitly directed to consider certain factors in setting sentences but not explicitly encouraged to consider the more remote harms caused by an offender's criminal conduct, it remains unclear whether sentencers do indeed consider these more remote

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167. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) ("[T]he Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals." (citing *Kennedy*, 554 U.S. 407)); United States v. Caro, 597 F.3d 608, 638 (4th Cir. 2010) (citing *Kennedy*, 554 U.S. at 447). While the *Kennedy* Court stated that this proposition is true with respect to crimes against the individual, it suggested that the punishment of death could be properly imposed for crimes such as treason and kingpin drug activity. *See Kennedy*, 554 U.S. at 437.

168. *See* Humphries v. Cnty. of L.A., 554 F.3d 1170, 1195 (9th Cir. 2009) (quoting *Kennedy*, 554 U.S. at 443); *see also* Miller v. Martel, No. CV 08-05075 CJC (RZ), 2009 WL 3122549, at *3 n.1 (C.D. Cal. Sept. 24, 2009) (citing *Kennedy* for the same proposition).

169. *See* United States v. Irey, 612 F.3d 1160, 1207 (11th Cir. 2010) ("Much has been said to describe and emphasize the grave harm that sexual abuse of children inflicts on its victims. Some of the best and most recent descriptions of that harm can be found in *Kennedy* . . . ." (citation omitted)); *see also* United States v. Comstock, 130 S. Ct. 1949, 1974 (2010) (citing *Kennedy* as an example of a case in which sexual abuse was demonstrated to be "a despicable act with untold consequences for the victim personally and society generally").

170. *See, e.g.*, Edward M. Fox II, Note, *A Whisper to State Legislatures? The Potential Irony of the Supreme Court's Decision in* Kennedy v. Louisiana, *128 S. Ct. 2641 (2008)*, 88 NEB. L. REV. 832, 845–47 (2010) (relating the Court's retribution analysis and asserting that it "broke no new ground").

171. *See* Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 150, 153–56, 160–68 (1999) (detailing various types of remote evidence admitted as victim impact evidence but explaining how other remote evidence, such as "opinion" evidence related to the crime and appropriate sentence, is generally limited); *supra* text accompanying notes 158–63 (explaining the *Kennedy* Court's suggestion that more remote harms are relevant to sentencing).

172. Logan, *supra* note 171, at 162.

harms.[173] In nonguidelines systems, too, because judges often do not provide any reasoning behind the sentences they impose, it remains uncertain that the sentencers are influenced by evidence of more remote harms.[174] Moreover, even when this controversial evidence is admitted, studies suggest that such evidence has little, if any, effect on sentencing decisions. For example, a 1994 study concluded that victim impact statements failed to increase sentencers' serious consideration of the harms caused by offenders' conduct and also did not result in harsher sentencing decisions for offenders causing greater harms to victims.[175] Additionally, a 1999 study concluded that victim impact statements have no significant effect on whether the death penalty is imposed in capital cases.[176] Further, studies have also shown that "sentence severity has not increased following the passage of [victim impact statement] legislation."[177] One scholar has suggested that it seems like it is not victim impact evidence that affects sentences but is instead the factor of what type of victim was violated by the offender's conduct.[178] Professor George Fletcher concludes that this makes sense; "[i]t would seem odd," he has mused, "that the determination of the death penalty," for

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173. *See supra* text accompanying notes 125–40 (describing how guidelines systems use specified factors for sentencing that ordinarily do not include remote harms and how judges' recorded reasons for departing from the guidelines are often not based on remote harms).

174. *See supra* text accompanying notes 155–56.

175. *See* Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 462–65 (1994) (concluding that victim impact statements made little difference in sentencing decisions).

176. *See* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 491–92, app. B at 540–44; *see also* Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 331–41 (2003) (finding no causal relation between the introduction of victim impact evidence and sentencing outcomes). *But see, e.g.*, Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL. CRIME & L. 331, 334 (1999) (discussing mock jury trials in which victim impact statements may have had some effect on capital decisions).

177. Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV., July 1999, at 545, 547–48; *see also* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 634, 636 (2009) ("Influencing the sentence, however, has never been an explicit or implicit purpose of the [victim impact statement] legislation." (quoting Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483, 490 (2004))).

178. *See* Fletcher, *The Place of Victims*, *supra* note 95, at 51, 55 ("But the sentiments of the particular victims seem to me less important than the class of victims violated by the particular offense.").

example, "should depend on the general affection or hostility of the [victim's] relatives."[179]

C. *The Existence of More Remote Harms*

Retributivist courts' and theorists' neglect in examining in any depth which particular harms an offender should be held accountable for does not stem from an absence of these more remote harms created by a criminal offender's conduct. In addition to direct harms to victims, such as the victim's death in a murder case or a victim's injury—whether financial, physical, or mental—in an assault and battery case, offenders' conduct may cause harms to other members of society.[180] Friends and family of the most direct victim may suffer emotionally, or even financially, as a result of the victim's injury.[181] A business may suffer from losing the knowledge and productivity of one of its employees and may be further harmed by its responsibility for paying part of the employee's medical costs.[182] Even strangers who identify with the most direct victim may suffer emotionally, and criminal offenses also stir up general fear among other members of society.[183] Further, crime in a community may upset local norms about moral behavior.[184]

Individuals are also sometimes harmed by participating at an offender's trial. While some direct victims find testifying against an offender empowering, other direct victims suffer immensely as a result of testifying.[185] Studies show that child victim witnesses, especially, often suffer psychological harms when they are forced to testify against their victimizers.[186] This has led a number of states to enact legislation designed to protect child victim testifiers by, for example, allowing child testimony to be presented by videotape,[187] allowing children to

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179. *Id.* at 51.

180. *See* Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1233–36 (2004).

181. *Id.* at 1235.

182. *See id.* at 1234–35.

183. *Id.* at 1235.

184. *Id.* at 1236.

185. *See* Jessica Liebergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 LAW & PSYCHOL. REV. 139, 157–58 (1997).

186. *Id.* at 170–71.

187. *See* Maryland v. Craig, 497 U.S. 836, 853 & n.2 (1990) (listing the thirty-seven states that permit videotaped testimony of sexually abused children).

testify via closed-circuit television,[188] or providing the judge with discretion to close the courtroom when a child is testifying.[189] Testifiers who were not direct victims may also be harmed when they are compelled to testify at trial.[190] These more remote victims of the offender's criminal conduct may suffer from spending time away from their homes or work to testify and from being exposed to what are often the gruesome details of a crime.[191]

Criminal activity also takes a toll on communities. According to the "broken windows" theory, an offender's criminal conduct could encourage further criminal activity in the community.[192] This increase in crime could cause some community members to flee the area, cause other residents to become less neighborly, and cause most residents to stay off the streets after dark.[193] It could even cause residents to become suspicious of one another, which may lead to behaviors that seem racist or otherwise discriminatory in nature.[194] In essence, an offender's criminal activity can change the character of a neighborhood. Further, increased crime often leads to decreased property values and impels communities to increase taxes to fund better police forces, additional prosecutions, and an increasing number of criminal

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188. *Id.* at 853–54 & n.3.

189. Ellen Forman, Note, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 HASTINGS L.J. 437, 443 & n.5 (1989).

190. *See* Richardson v. Marsh, 481 U.S. 200, 210 (1987) (emphasizing the importance of joint criminal trials because, if prosecutors were forced to bring separate proceedings against each criminal defendant, there would be numerous inefficiencies and fairness concerns, including that witnesses would have "to repeat the inconvenience (and sometimes trauma) of testifying" in each of these proceedings); Paul Marcus, *Re-evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL RTS. J. 67, 90 n.121 (2002) (noting that greater convenience for witnesses is one of the "presumed efficienc[ies] of joint trials" and that compelling lay witnesses to testify "certainly forces real burdens upon them," such as requiring them to be absent from home or work).

191. *See Richardson*, 481 U.S. at 210; Marcus, *supra* note 190, at 90 n.121.

192. Bilz & Darley, *supra* note 180, at 1236; *see also* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31 (describing the "broken windows" theory). Some empiricists have questioned the reliability of the "broken windows" theory, *see, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 464–67 (2000) (summarizing the origin of the theory and some empirical doubts that some scholars have raised about the theory), and some have explained how the theory has been distorted by police departments policing in the name of the theory, *see, e.g.*, *id.* at 469–72.

193. Bilz & Darley, *supra* note 180, at 1236.

194. *See id.* at 1237 ("[N]eighborhood watch groups can also take on vigilante, and sometimes even racist, overtones—the creation of which must also be considered a harm of crime.").

punishments.[195] A 1999 study found that the annual public and private prevention costs of crime in the United States—such as city police forces and private security guards, as well as lost productivity and other indirect economic costs of crime—amounted to over $1 trillion.[196]

Crime can also cause institutions, such as the criminal justice system, to lose credibility.[197] An increase in crime can cause the public to lose faith in the police, and ineffective prosecutions can cause people to lose faith in local prosecutors and the system in general.[198] This loss of respect for the criminal justice system can not only lead to crime victims and their associates feeling like they have been victimized a second time, but it can also lead to individuals' failures to comply with the law.[199] This, in turn, can contribute to rising crime rates in a community and feed into the "broken windows" theory.[200]

Not only do the immediate and more remote victims suffer harms as a result of an offender's criminal activity, but the offender, himself, also suffers. When apprehended, tried, and convicted, an offender will most clearly suffer as a result of his legally sanctioned punishment, whether that involves probation, imprisonment, or even death.[201] Prison is known to harden criminals, which could also lead to higher crime rates and perhaps more violent crime in the community.[202] Aside from offenders' punishments, though, some offenders suffer guilt or distress as a result of committing their crimes.[203] Moreover, they are often stigmatized, especially when convicted.[204]

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195. *See id.* at 1235–37, 1240.

196. *See* David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 620–29 (1999) (estimating the annual cost of crime in the United States to exceed $1 trillion).

197. Bilz & Darley, *supra* note 180, at 1237–38.

198. Mary Holland Baker et al., *The Impact of a Crime Wave: Perceptions, Fear, and Confidence in the Police*, 17 LAW & SOC'Y REV. 319, 319–21, 324–25, 330 (1983); Bilz & Darley, *supra* note 180, at 1237–38.

199. Bilz & Darley, *supra* note 180, at 1237–38.

200. *See id.* at 1236–38; *supra* text accompanying notes 192–96. *But see supra* note 192 (explaining that some scholars do not buy into the "broken windows" theory).

201. *See* Bilz & Darley, *supra* note 180, at 1238.

202. *See id.*

203. *See, e.g.*, *id.* at 1238 & n.83, 1239; Steven Stack, *Homicide Followed by Suicide: An Analysis of Chicago Data*, 35 CRIMINOLOGY 435, 440–41, 449 (1997) (explaining how many murderers are racked with guilt to the point of suicide after killing a "loved one"). One might even consider the offender's pleasure gained as a result of his offense as a harm caused to the offender himself. *See* Bilz & Darley, *supra* note 180, at 1239.

204. *See* Bilz & Darley, *supra* note 180, at 1238–39.

Offenders' families, friends, and acquaintances are also harmed as a result of the offenders' criminal activities.[205] This is especially so if they depend on the offender either financially or emotionally, and their harms will likely be magnified when the punishment amounts to confinement or death.[206] Research suggests that families of offenders sentenced to death suffer from "repeated nightmares, sleepless nights, difficulty concentrating, impaired short-term memory, hypervigilance, a constant aching grief, and episodes of uncontrollable crying."[207] Offenders' families, friends, and acquaintances will also suffer the stigma that accompanies their association with the offender.[208] Further, they often expend significant resources to help the offender avoid punishment.[209] These harms, too, have been largely neglected in analyses of retribution-based punishment.

IV. CONSIDERING THESE MORE REMOTE HARMS IS CONSISTENT WITH HARM-BASED RETRIBUTION AND IS OTHERWISE BENEFICIAL

Accounting for these more remote harms that have generally been overlooked by both courts and scholars would result in sentences that better reflect an offender's desert, at least when determining desert based upon a harm-based theory of retribution—the variety of retribution upon which many sentencing schemes are based.[210] Whether one adopts a theory of protective retributivism or victim vindication from within a harm-based framework, all of the harms an offender's conduct causes, either to society or to the victim, respectively, are theoretically relevant in determining such desert. Because protective retributivists endeavor to restore balance to society that the offender has disrupted by benefiting from the law but failing to abide by it,[211] effecting this equilibrium in society may require that harms in addition to those most directly caused be accounted for in sentencing the offender. Similarly, because retributivists subscribing to the victim vindication variety of the theory seek to balance the offender's and victims' dignities by correcting the offender's misguided statement that his rights are

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205. *See id.* at 1239.

206. *See id.*

207. Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 209 (2007).

208. *See* Bilz & Darley, *supra* note 180, at 1239.

209. *Id.*

210. *See supra* text accompanying note 66.

211. *See supra* text accompanying notes 46–49.

more important than his victims' rights,[212] addressing the harms caused to all of the offender's victims should arguably be contemplated in sentencing under a harm-based theory.[213] Accordingly, accounting for these more remote effects of the offender's conduct often better reflects harm-based desert and is truer to a harm-based retributive rationale for punishment.

Because accounting for this greater array of harms would better reflect an individual offender's desert, doing so would allow more equitable treatment of offenders in that an offender who created greater harms would be punished more severely than an offender who created lesser harms, even if both offenders committed similar crimes.[214] If a judge were to consider these harms in determining the appropriate sentence to impose, this could perhaps serve as a fair compromise between proponents of guidelines systems and advocates of nonguidelines systems. While guidelines systems are generally touted as minimizing sentencing disparities among similarly situated offenders, nonguidelines systems provide judges with greater flexibility to individualize offenders' sentences to more closely match their crimes and personal circumstances.[215] Providing for further consideration of harms within a guidelines system would provide judges with greater flexibility to match an offender's sentence to his harm-based desert. And considering additional harms within a nonguidelines system might nudge judges to examine more closely an offender's sentence in relation to the sentences of other offenders convicted of similar crimes and in light of the harms caused by each such offense.

Considering more remote harms in sentencing could provide other benefits as well. In addition to serving retributive goals that are most embraced by today's sentencing schemes, recognizing

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212. *See supra* text accompanying notes 50–53.

213. Certainly, it may seem unfair to consider all of the harms flowing from a criminal offender's conduct. Accordingly, there should perhaps be a proximate causation limitation imposed on the harms resulting from an offender's conduct. *See infra* Parts V–VI (hypothesizing why accounting for remote harms is not the norm, but arguing for such an accounting limited by a proximate causation construct).

214. In most jurisdictions, a defendant's sentence also depends somewhat on his criminal history. *See* Ahmed A. White, *The Juridicial Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705 (2006) (recognizing that enhancing criminal punishment because of the offender's criminal past has "long been an important component of American sentencing policy"). In that case, accounting for the more remote harms of sentencing could be more equitable to a defendant who has committed the same category of offense as another offender, and has a similar criminal history, but has caused fewer harms.

215. *See generally* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 939–45 (1991) (explaining the trade-offs between individualization in nonguidelines schemes and the reduction of sentencing disparities in guidelines schemes).

these other harms in sentencing might also serve deterrent purposes, which are still important in today's sentencing systems. Certainly, if a would-be offender is aware that his punishment for a crime may be enhanced, that will increase the deterrence value of the punishment. Further, if the offender considers that this enhancement would be based on circumstances that could be, in part, beyond his control, perhaps this will cause him even greater pause before engaging in the criminal conduct. While increasing the base value of an offense would likely also increase the deterrent value of a punishment, such an action would fail the goal of marginal deterrence.[216] As Cesare Beccaria argued: "If an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so."[217] This hazard can be avoided by instead increasing an offender's punishment only when he causes greater harms.

Another benefit of accounting for more harms that an offender causes in committing his offense is that this could incentivize offenders to attempt to mitigate the harms flowing from their criminal conduct. Similar incentives to mitigate are important in other areas of law. In the torts context, for example, a defendant may limit the extent of his liability by mitigating the harms caused by his tortious conduct.[218] The defendant may thereby escape the extensive liability that would otherwise result from the traditional tort rule that a defendant is responsible for all of the harms resulting from his intentional tortious conduct and for all of the harms

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216. *See* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2389 (1997) (explaining that the problem of marginal deterrence "is essentially the problem of cliffs—exacting equal penalties for crimes of lesser and greater magnitude leads to crimes of greater magnitude"). *But cf.* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, *in* 38 CRIME AND JUSTICE: A REVIEW OF RESEARCH 65, 68–69 (Michael Tonry ed., 2009) (stating that "the marginal deterrence hypothesis[—]that increases to previously applicable penalties will prevent crimes by raising their prospective punitive cost"—has been supported by some, but refuted by most, studies).

217. CESARE BECCARIA, *On Crimes and Punishments*, *in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 1, 21 (Richard Bellamy ed., Richard Davies, Virginia Cox & Richard Bellamy trans., Cambridge Univ. Press 1995) (1764).

218. *See* Osborne M. Reynolds, Jr., *Transferred Intent: Should Its "Curious Survival" Continue?*, 50 OKLA. L. REV. 529, 531 (1997) ("No limit of *proximate* causation is imposed in the intentional tort situations, as it is in negligence . . . ."); John J. Walsh, Steven J. Selby & Jodie L. Schaffer, *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1135 (1996) ("[I]n determining the issue of direct or proximate causation for intentional torts, the courts implicitly or explicitly have adopted the general doctrine that there is 'extended liability' for intentional torts, and thus the rules of proximate causation are more liberally applied in [these] cases . . . than in cases of mere negligence.").

proximately caused by his negligent conduct.[219] This same incentive to mitigate would exist in the criminal context if a sentencing court were to consider a broader array of harms resulting from the offender's criminal conduct in determining the appropriate sentence to impose.

Further, consistent with a victim vindication theory of punishment, considering these more remote harms would communicate with the offender and express to society in general that the harmful effects of criminal conduct extend beyond just the primary victims and are felt throughout society.[220] This could enforce moral norms within the community, and highlighting these particular effects of crime would likely resonate more deeply with the offender and other members of society than, for example, generalizing that crime is harmful to society.[221]

V. SOME CONTEMPLATED DIFFICULTIES IN CONSIDERING MORE REMOTE HARMS

Considering that accounting for these more remote harms would better reflect an offender's harm-based desert and provide other sentencing benefits, and considering that the Supreme Court seems to have embraced the consideration of some of the most remote harms in sentencing,[222] the question arises as to why courts and scholars ordinarily fail to take into account these more remote harms in determining punishments. While few, if any, courts or scholars have articulated why such remote harms are regularly neglected in sentencing, there are several possibilities as to why accounting for them is not the norm.

First, there is the concern that enhancing an offender's sentence based upon consequences he may not have intended is unjust and inconsistent with the basic requirement of mens rea

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219. *Supra* note 218. *But see infra* note 227. A torts plaintiff also has a duty to mitigate his injuries, and if he fails to do so, the defendant responsible for the plaintiff's initial injury will not be held responsible for the exacerbation of that injury resulting from the plaintiff's failure to mitigate. 2 DAN B. DOBBS, THE LAW OF TORTS 510 (2d ed. 2000).

220. *See supra* text accompanying notes 46–53 (explaining the expressive and communicative values of retribution that are encompassed within the victim vindication variety of retributivism).

221. *See* Dena Cox & Anthony D. Cox, *Communicating the Consequences of Early Detection: The Role of Evidence and Framing*, J. MARKETING, July 2001, at 91, 91–92 (explaining that "research suggests that audiences tend to be more interested in and influenced by anecdotal than statistical evidence" and that "many subjects seem to 'tune out' abstract generalizations").

222. *See supra* text accompanying notes 158–65 (discussing the Court's accounting for more remote harms in *Kennedy*).

in criminal law.[223] Certainly, mens rea is of utmost concern in determining whether a defendant may be held criminally liable.[224] Yet mens rea is sometimes irrelevant in determining criminal liability, such as when an offender may be held criminally liable for the quite serious crime of statutory rape even though he is unaware that the individual with whom he had sexual intercourse was underage.[225] Further, mens rea has also been considered unnecessary in applying some sentencing enhancements. For example, under the Federal Sentencing Guidelines, an offender may receive a sentence enhancement for discharging a gun even though this was an unintentional action.[226] Moreover, in the torts context, intentional tortfeasors are held liable for all[227] of the consequences flowing from their tortious conduct, regardless of whether they intended those results.[228] The breadth of this potential liability stems from the greater culpability attributed to intentional, rather than unintentional, tortfeasors.[229] One might argue that, because criminal conduct is even more egregious than an intentional tort, a criminal offender should be held criminally liable to an even greater extent. However, more is at stake for the criminal

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223. *See* DRESSLER, *supra* note 94, at 117–19 ("[T]he *mens rea* requirement . . . is founded on the belief that it is morally unjust to punish those who accidentally, rather than by choice, cause social injury.").

224. *See id.* at 117 (stating that criminal liability requires proof of mens rea).

225. *See* Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 438 (2007) ("Statutory rape is perhaps the most controversial example of a strict-liability crime.").

226. *See* Dean v. United States, 129 S. Ct. 1849, 1855 (2009) (stating that, while "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct . . . [i]t is not unusual to punish individuals for the unintended consequences of their *unlawful* acts").

227. Some courts limit the harms for which the intentional tortfeasor is liable by a proximate causation limitation that is often more flexible than the proximate causation limitation seen in the context of negligence. *See* James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 233–34 (2000).

228. *See* 2 DOBBS, *supra* note 219, at 54 (stating that, for example, "[o]nce a battery is established, the defendant becomes liable for the harms resulting, including unintended ones"); *see also* Tate v. Canonica, 5 Cal. Rptr. 28, 33 (Cal. Ct. App. 1960) ("The law has for a long time recognized a distinction between intentional and negligent torts, and has generally . . . been more inclined to find that defendant's conduct was the legal cause of the harm complained of, where the tort is intentional."); R.D. v. W.H., 875 P.2d 26, 30–31 (Wyo. 1994) (noting that "courts have recognized that a higher degree of responsibility should be imposed upon tort-feasors whose conduct was intentional than upon those whose conduct was merely negligent" and adopting this approach).

229. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 (2010).

offender because criminal punishment can possibly result in incarceration or even death, whereas tort law remedies usually reside in the realm of monetary damages. Ultimately, this mens rea concern is congruent with the problem of moral luck that has led many scholars to reject harm-based retribution as a legitimate basis on which to punish offenders.[230] Once one accepts that many current sentencing schemes base offenders' punishments on at least some of the harms they cause, though, holding offenders liable for the more remote harms that their conduct causes makes more sense.[231] Still, because mens rea is considered foundational to criminal justice, perhaps there is reason not to punish offenders more severely for the most remote effects of their criminal conduct but to instead limit the application of harm-based retribution to some extent.[232]

One might also be troubled by taking into account the more remote harms caused by an offender's criminal conduct because those harms are not specifically proscribed by statute. Surely, one of the essential elements of criminal law is that the prohibited conduct must be detailed in advance by statute.[233] This serves the function of providing notice to would-be criminal offenders that they likely will be punished for their wrongful actions.[234] However, there is no clear requirement that harms for which punishment is doled out, instead of the conduct leading to criminal liability, must be specified in advance by statute. In fact, a number of criminal statutes do not specify any particular harm to be caused before even criminal liability attaches, let alone any form of punishment.[235]

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230. *See supra* text accompanying notes 63–68.

231. *Cf.* David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731, 763–69 (1993) (suggesting that, under retributive theories of punishment, harms that a criminal offender caused but did not foresee might be relevant and that consequentialist theories of punishment buttress the conclusion that they should be deemed relevant).

232. For a proposed limitation on accounting for these more harms, see *infra* Part VI.

233. *See* WAYNE R. LAFAVE, CRIMINAL LAW 11 (4th ed. 2003) (explaining the principle of legality—that a "basic premise of the criminal law is that conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal"); *see also* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 9 (2006) ("The 'principle of legality' (in Latin, *nulla poena sine lege*) requires that criminal laws be specified in advance by statute." (footnote omitted)).

234. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205 (1985).

235. Criminal statutes are of two types: those that specify a prohibited harm and those that do not. *See* LAFAVE, *supra* note 233, at 331 (explaining that "some crimes are defined in such a way that the occurrence of a certain specific result of conduct is required for its commission," but other "crimes are so defined that conduct accompanied by an intention to cause a harmful result may constitute the crime without regard to whether that result actually occurs"). Professor LaFave cites murder as an example of a crime in which causation of a harm is required for criminal liability, and he cites perjury as an

For example, under New York law, driving while intoxicated is a misdemeanor punishable by up to a year in jail, even if the offender driving in such a state does not cause any obvious harm.[236] Criminal liability is presumably imposed for the risk of harm that the offender's actions have created,[237] and punishment is likely also premised upon this risk of harm. Yet, New York law does not articulate that it is this risk of harm that punishment is based upon,[238] thus neither the harms nor risk of harms that the offender's conduct cause are specified by statute.[239] Accordingly, the fact that the more remote harms of an offender's conduct are similarly unspecified by statute should act as no more of an impediment to courts accounting for such harms in sentencing. Again, though, there should perhaps be a limit on the extent of the more remote harms to be considered.

Another hypothesis for why courts and scholars have overlooked these more remote harms in sentencing is that holding an offender responsible for such harms could lead to limitless criminal liability. As Andrew von Hirsch explained in the related context of determining an offender's guilt, extending criminalization to conduct that causes only remote harms limits one's liberty[240] because "all sorts of seemingly innocent things [one does] may ultimately have deleterious consequences,"[241] and "virtually anything a person might do could be criminalized on grounds of its potential for harmful imitations."[242] While von Hirsch's concern applies only to

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example of a crime for which no harmful result is required before criminal liability is imposed. *Id.*

236. N.Y. VEH. & TRAF. LAW §§ 1192–1193 (McKinney 2010).

237. *See* People v. Cintron, 13 Misc. 3d 833, 852 (N.Y. Sup. Ct. 2006); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1, 6 (2007) (explaining that negligent or reckless behavior, if it fails to bring about harm, may amount to only "a relatively minor endangerment offense, like driving while intoxicated"); John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. SOC. JUST. 439, 454 (2005) ("The fact that someone is driving without a valid license neither causes actual harm nor necessarily increases any risk of harm, unlike other driving offenses such as reckless driving, driving while intoxicated, or vehicular homicide.").

238. *See* N.Y. VEH. & TRAF. LAW §§ 1192–1193 (McKinney 2010).

239. Further, in nonguidelines, and even guidelines, sentencing systems, judges are ordinarily afforded a fair amount of discretion in setting offenders' sentences. *See* United States v. Booker, 543 U.S. 220, 223 (2005). In *United States v. Booker*, for example, the Court stated that it "ha[s] never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Id.*

240. Andrew von Hirsch, *Extending the Harm Principle: 'Remote' Harms and Fair Imputation*, *in* HARM AND CULPABILITY 262, 270, 275 (A.P. Simester & A.T.H. Smith eds., 1996).

241. *Id.* at 260.

242. *Id.* at 270.

criminalizing conduct in the first place,[243] an analogous concern might arise if the retribution imposed on an offender were to reflect the more remote harms caused by the offender's criminal conduct. This specious threat of limitless criminal liability, though, should not serve as a deterrent to courts accounting for more remote harms in sentencing. Although there is little discourse relating to this concern of limitless liability in the context of criminal law, civil tort law is replete with discussion on this issue[244] and these tort law exchanges focus on the concerns of justice and prudential limitations.[245] While it may seem fundamentally unfair to hold an offender liable for harms that are only tangentially related to his conduct,[246] considering these more remote harms in sentencing may actually advance the concept of justice because subjecting an offender to the possibility of greater punishment for causing more extensive harms could better reflect the penological purpose of retribution, along with the supplemental benefit of additional deterrence.[247] Further, accounting for the more remote harms of an offender's conduct could be limited by the legal construct of proximate causation just as this concept is used as a tool of limitation in tort law and just as it limits criminal liability in the first instance.[248] Applying such a proximate causation analysis to the problem would likely resolve the prudential concerns raised by considering the more remote harms that an offender's conduct causes by saving courts from having to delve into the most remote harms caused by an offender's conduct if those harms are unforeseeable or too indirect. Moreover, the potentially foreseeable harms of offenders' criminal conduct, such as the costs of trial and punishment, increased taxes, and decreased property values,[249] while perhaps difficult to pinpoint in every case, could be approximated relatively easily by looking at the type of crime

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243. *Id.* at 260.

244. For example, in the famous case of *Palsgraf v. Long Island Railroad Co.*, Justice Andrews, in dissent, expressed this concept in his analysis of proximate causation. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 102–03 (N.Y. 1928) (Andrews, J., dissenting) (stating that courts "cannot trace the effect of an act to the end, if end there is").

245. *See* 2 DOBBS, *supra* note 219, at 446 ("Judgments about proximate cause . . . at least roughly speaking, . . . reflect the ideas of justice as well as practicality.").

246. *Cf. supra* text accompanying notes 223–32 (discussing the concern of holding an offender responsible for consequences he may not have intended).

247. *See supra* text accompanying notes 210–17.

248. *See* LAFAVE, *supra* note 233, at 336–37 (comparing the tort and criminal requirements of proximate causation); *infra* Part VI.

249. *See supra* text accompanying notes 195–96.

involved, the location in which the crime was committed,[250] and the average amount spent on trial and offender punishments.[251]

Another reason why current sentencing practices and scholarship may neglect to consider more remote harms is the belief that such effects might be better redressed in the civil tort process.[252] Many scholars have argued that the American system

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250. One might argue that taking into account the location in which a crime was committed might exacerbate the problems of inner-city crime because it could create the incentive of committing crimes in localities that already have low property values. But this concern could perhaps be ameliorated by using the average, rather than the individual, locale-related costs of harm in the analysis. This has the disadvantage, however, of creating a variance between the offender's just deserts and the actual sentence imposed.

251. *Cf. supra* text accompanying note 91 (noting difficulties in making similar approximations). One might argue that taking into account the costs of trial and punishment might unconstitutionally encourage criminal defendants to forgo their rights to trial and instead plea-bargain because it is less costly. *See infra* text accompanying notes 267–68. This, too, is an interesting issue that requires further investigation.

252. Related to this issue of over-criminalization, one might be concerned that extending the concept of retribution to harms beyond those most directly caused by an offender might result in an offender effectively being punished twice for one instance of harmful conduct because he could also be found liable in tort for the same harmful consequences. This regard for double punishment for the same underlying conduct, however, constitutes something of a red herring because inherent in this argument is the notion that, like criminal punishment, civil liability and the accompanying payment obligations constitute punishment. As the Supreme Court has explained, however, civil liability does not ordinarily constitute punishment. *See* Hudson v. United States, 522 U.S. 93, 99 (1997) (emphasizing that the Double Jeopardy Clause "protects only against the imposition of multiple *criminal* punishments for the same offense" and explaining that, while some civil penalties may rise to the level of a criminal punishment, this is only the case when the civil "statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty" (citation omitted) (internal quotation marks omitted)); *see also* Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND. L. REV. 353, 378 n.177 (1998) ("[C]ivil tort actions for wrongful death . . . do not violate the Double Jeopardy Clause when they follow criminal acquittals on charges of murder . . . ."). Although an offender could potentially be liable for the results of his conduct in both criminal law and tort law, there is already significant overlap between criminal and civil law, and an offender can indeed be prosecuted and convicted for an offense and also be held civilly liable for the same underlying conduct. For example, an offender could be convicted of murder and also found civilly liable in a wrongful death or survival suit. *See infra* text accompanying notes 306–14. Even if there were a concern about punishing an offender twice for the same underlying conduct, however, which would essentially be punishing him more than he deserved, perhaps such a concern should be dealt with as a matter of policy rather than as a systematic exclusion of harms from sentence consideration. After all, if a defendant's sentence does not completely account for the harms he caused and if he were not sued in civil court for these harms, he would be receiving less punishment than he deserved. *See infra* text accompanying note 257. As a model, the U.S. Department of Justice deals with this concern of over-punishment on a regular basis, and its response, most commonly known as the Petite Policy, is documented in its Attorneys' Manual:

> Although there is no general statutory bar to a federal prosecution where the defendant's conduct already has formed the basis for a state prosecution, Congress expressly has provided that, as to certain offenses, a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts.

has become "over-criminalized," which will ultimately lead to "injustice, and . . . will weaken the efficacy of the criminal law as an instrument of social control."[253] Scholars making this argument focus on the criminal law's attempts to shoehorn increasing types of conduct into the public welfare offense category of crimes, resulting in criminal law's usurpation of wrongful conduct not requiring mens rea.[254] Accordingly, these scholars emphasize criminal law's unique role in teaching the public about morality and condemning offenders for their harmful actions,[255] and they argue that criminalizing conduct that is not morally repugnant ultimately weakens the moral message that criminal law conveys to society.[256] While including more remote harms in sentencing analysis could increase a number of offenders' punishments, it would not amount to holding criminally liable offenders who were not guilty of criminal conduct. Accordingly, it affects punishments in a different way than criminalizing conduct that should arguably constitute only a civil tort. In acknowledging a greater breadth of harms that offenders cause, including more remote harms in sentencing would simply improve the proportionality between the offender's conduct and his received punishment and more effectively express to society the seriousness of offenders' criminal conduct.[257]

Further, opponents of taking into account the more remote harms of criminal conduct might emphasize that American jurisdictions already punish most offenders too severely,[258] and

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UNITED STATES ATTORNEYS' MANUAL § 9-2.031 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/ (citing 18 U.S.C. §§ 659, 660, 1992, 2101, 2117, and 15 U.S.C. §§ 80a-36, 1282, and stating that one of the main purposes of the policy is "to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s)"). Similarly, if civil liability were considered punishment, courts could account for this by modifying an offender's sentence accordingly.

253. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991).

254. *See id.* at 215–19.

255. *See id.* at 223.

256. *See id.* at 235–36.

257. *See supra* text accompanying notes 214–15, 220–21.

258. *See* Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307 (2009) (explaining that the "state and federal governments [have] tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences," leading to the United States' status as an outlier in punishment practices, "not only among prevailing practices in the Western world, but also in comparison to the United States' own long-standing practices"); Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 59 (2009) ("[B]ecause the popular conception of

taking into account further harms in sentencing will only exacerbate the problem. To the extent that considering such harms will lead to harsher punishments in the United States is a valid concern, however, this is a complaint better levied against the high base levels of American sentencing ranges, rather than the determination of which harms should be considered in assessing an individual's desert. Omitting these more remote harms from sentencing consideration undermines equality among offenders' punishments because it essentially places offenders causing only the most direct harms on the same plane as offenders also causing more remote harms through their criminal actions.[259]

One concern raised in reaction to introducing victim impact evidence at the sentencing stage is that doing so could amount to ranking victims, and this same concern might be registered against accounting for the more remote harms that an offender's conduct causes in determining the appropriate sentence to impose. In response to the Supreme Court's 1991 decision in *Payne v. Tennessee*,[260] in which the Court determined that it was not unconstitutional for juries to consider victim impact evidence at sentencing in capital cases,[261] scholars argued that allowing jurors to consider these harms resulting from a defendant's criminal conduct would effectively "enhance certain victims by identifying them as worthier than other [victims or members of society]."[262] Moreover, there is fear that this comparison of

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criminal justice is retributive and degrading, the United States imposes and enforces some of the harshest punishments in the Western world.").

259. *See supra* text accompanying notes 214–15. Further, taking into account more remote harms in sentencing could actually decrease sentences in certain situations if accounting for such harms were viewed through the lens of "balanc[ing]" the offense with the harm to the victims as the *Kennedy* Court suggested. Kennedy v. Louisiana, 554 U.S. 407, 442 (2008); *see supra* text accompanying notes 158–65. While this sense of "balanc[ing]" seems not to be at the core of retributivism but instead a creation of the *Kennedy* Court, *see* Heidi M. Hurd, Paper, *Death to Rapists: A Comment on Kennedy* v. Louisiana, 6 OHIO ST. J. CRIM. L. 351, 356 (2008), suggesting that allowing such harms to ironically decrease the sentences of the worst offenders is perhaps an unwise decision.

260. Payne v. Tennessee, 501 U.S. 808 (1991).

261. *Id.* at 825–27, 830.

262. Vivian Berger, Payne *and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 44–47 (1992); *see also* José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 406 (1997) (expressing concern that consideration of victim impact evidence may cause sentencing hearings to devolve "into presentations of 'the worth of the victim'"); Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 131 (1993) (asserting that retributivism "prohibits distinctions between the lives of persons on the basis of their societal worth"); Logan, *supra* note 171, at 157–59 (noting some courts' concern that consideration of victim impact evidence encourages comparing a victim's

victims will be based on invidious and intolerable distinctions, such as race.[263] This matter of victim ranking, however, is based on the premise that some victims are indeed more valuable than others.[264] While one might argue that the hard-working father of four is more valuable in the eyes of society than a homeless man who has no family and only a few friends, that is not necessarily the case, and it is not an assumption requisite to measuring the harms caused by an offender's criminal conduct. Accounting for harms an offender's conduct causes in society—beyond the immediate and most direct harms of the offender's criminal conduct—does not incontrovertibly translate into assessing the worth of his victims.[265] The cause of greater harms in society could be a result of factors other than a particular victim's worth—such as the offender's choice of method for committing his crime or the sheer number of victims of his crime. Imposing a harsher sentence on an offender does not necessarily mean that his victims' lives were worth more; it just means that he has caused greater societal harm in addition to that of his most immediate victim's injury. While imposing a greater sentence will serve the expressive function of conveying to society the extent of the harms caused, it will not serve, and does not purport to serve, the function of conveying to society the relative worths of the offender's victims.[266]

Some theorists might also pinpoint particular remote harms that should not be considered in sentencing. For example, one might argue that the harms related to a criminal offender's

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worth to the worth of other members of society). *But see* Dubber, *supra*, at 133–34 (couching ranking based on a victim's societal worth as a consequentialist concern rather than a retributive one). Scholars' identification of this issue may have been triggered by Justice Stevens's dissent in *Payne*, in which he suggested that evidence relating to the differences among various victims "can only be intended to identify some victims as more worthy of protection than others" and that distinguishing between victims "risks decisions based on . . . invidious motives," such as race. *Payne*, 501 U.S. at 866 (Stevens, J., dissenting).

263. Berger, *supra* note 262, at 47–48. Indeed, this is the same concern that was addressed in *McCleskey v. Kemp*, in which the Supreme Court rejected the defendant's equal protection challenge that was based on a study suggesting that the death penalty was more often imposed on defendants who had killed black victims than on defendants who had killed white victims and the punishment was imposed more frequently on black murderers than white murderers. *See* McClesky v. Kemp, 481 U.S. 279, 291–99 (1986).

264. *See* Berger, *supra* note 262, at 44–45.

265. *Cf.* Friedman, *supra* note 231, at 750 ("If the objective of victim impact statements is not to give the jury special information about why one victim is more deserving than another, but rather to remind the jury of the value of the lives of victims, then no comparative judgment among victims is required." (emphasis omitted)).

266. *Cf. Payne*, 501 U.S. at 823 (explaining that "victim impact evidence is not offered to encourage comparative judgments . . . [but is instead] designed to show . . . *each* victim's 'uniqueness as an individual human being . . . .'").

trial—such as the cost of trial or the harms imposed upon a child rape victim in having to testify against her rapist—should not be considered harmful in the law's eyes because it undermines an offender's constitutional right to trial or because trial constitutes a public good.[267] Certainly, a defendant's right to trial and the concomitant benefits that trials provide—such as enforcing the rule of law, lending credibility and authority to the court system and to the government in general, satisfying the community's urge to punish, educating the public about the law, and reaffirming some basic principles of American democracy[268]—are important. While recognizing more remote harms, such as those caused to testifiers at criminal trials, may acknowledge the importance of trial and the suffering that the testifiers endure by requiring the offender to pay for these harms, offenders might be deterred from exercising their rights to trial if this could result in greater harms and thus more stringent punishments. This is similar to the difficulty experienced in our current criminal landscape of extensive plea bargaining practices. Such deterrence not only impinges on a defendant's right to trial and due process rights but it also detracts from the other goods provided by criminal trials. Even though the Court has not found a constitutional violation of one's right to trial or due process rights in the plea bargaining context, a criminal defendant would not be

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267. One might similarly argue that the more remote harmful effects related to an offender's trial should not be considered because those harms are, in effect, canceled out by the burdens that a trial also imposes on the offender. Aside from the fears of conviction and subsequent punishment, which are arguably deserved when a defendant is guilty of an offense, criminal defendants facing trial do indeed suffer further tribulations. As one scholar has explained, trial is "expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming." David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995); *see also* Susan J. Szmania & Daniel E. Mangis, *Finding the Right Time and Place: A Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts*, 89 MARQ. L. REV. 335, 342 (2005) ("For many criminal defendants, they may be humiliated by the presence of others in the courtroom such as family members or victims."). This cancellation argument, however, while creative, lacks the force to overcome the foundation of retributivism: imposing on the offender the punishment that he deserves. While the offender, himself, certainly suffers as a result of having to endure the hardships of trial, *see supra* text accompanying notes 201–204, the mathematical invention that these harms cancel out harms to others has no solid basis in law or theory. In fact, instead of cancelling out other harms, one could argue that the harms the offender causes to himself by having to undergo the hardships of trial should lead to a more stringent punishment being imposed on the offender. *See infra* text accompanying note 269.

268. *See* Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 630–31 (2004); Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421, 1426 (2007); Luban, *supra* note 267, at 2625; Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961).

afforded the same benefit of the bargain—a lesser charge or sentence in exchange for a guilty plea—in the context of considering more remote harms at sentencing. Thus, despite any benefits of remaining true to a harm-based theory of retribution, these right-to-trial and due process concerns suggest at least a policy reason to limit the number and type of more remote harms that should be considered in sentencing.

Finally, one might argue that accounting for the more remote harms resulting from the punishment the offender receives and the stigma attached to his accusal, conviction, and sentencing[269]—such as the harms inflicted on the offender, himself, or on his family, friends, and acquaintances—would lead to consideration of exponentially increasing harms and that this would be senseless and unjust. For example, imagine an offender who deserves a sentence of five years' imprisonment for the direct harms resulting from his criminal conduct. If the sentencing court were to also take into account the harms this offender caused to himself and to his family, friends, and acquaintances, then he would deserve a harsher sentence. One could argue that this harsher sentence, though, would cause greater harms to the offender, himself, and his family, friends, and acquaintances. Accordingly, the offender would deserve an even harsher sentence. This reasoning could continue indefinitely and, in the extreme, an offender could receive the harshest sentence available for a relatively minor offense. This concern, then, especially calls for a limitation on the remote harms to be considered in sentencing criminal offenders.

VI. AN ISSUE COTERMINOUS WITH PROXIMATE CAUSATION

All of these concerns related to accounting for the remote harms of an offender's criminal conduct when sentencing may explain why courts and scholars have largely neglected to consider such harms. But, again, it seems that the theory of harm-based retribution makes no distinction between these harms and those most directly caused by a criminal offender's conduct. Perhaps consideration of these harms is a reason to reject harm-based retributivism in its entirety—a position that many scholars have taken.[270] But, considering our current sentencing landscape,[271] it seems unlikely that actual sentencing practices will begin

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269. *See supra* text accompanying notes 201–09.

270. *See* Moore, *supra* note 65, at 238–39 (explaining that the "standard educated view" denies "wrongdoing" as relevant to determining an offender's desert).

271. *See supra* text accompanying notes 40–41 and Part III.A.

completely ignoring any harms of criminal conduct. Perhaps a more sensible solution is to provide some direction for which harms should be deemed relevant in sentencing.

Many of the concerns raised revolve around issues such as the offender's intentions, his knowledge, or his freedom of action.[272] For example, a deficit of mens rea relates to the concern that the offender would be punished for harms that he did not intend.[273] Similarly, the notice issue that the lack of statutory enumeration of harms raises relates to the concern that the offender's punishment could be based on something of which he had no prior knowledge.[274] This, and the related concern of limitless liability, could chill the would-be offender's freedom of action.[275] Even the concern that already-too-severely punished offenders could be punished even more severely,[276] in some sense, restricts an offender's freedom of action by potentially incapacitating him for a longer period of time. These concerns of intention, knowledge, and freedom of action are the same concerns that have led courts to impose proximate causation limitations in the criminal liability and torts contexts.[277] In criminal law, the issue of proximate causation ordinarily arises in the context of determining a defendant's guilt.[278] In this situation, experts contend that proximate causation becomes a relevant issue primarily when an actor intends one wrongful result, or culpably risks such a result, but a different wrongful result materializes.[279] For example, suppose that an actor "pours a large quantity of gasoline into the first floor of a building with a large number of people in it, and lights the fluid; but instead of death from fire, an individual falls because the floor is slippery, hits his head, and dies."[280] While factual causation almost certainly exists—because,

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272. *See supra* text accompanying notes 224–31 (analyzing the role of mens rea in the determination of criminal liability).

273. *See supra* text accompanying notes 223–32.

274. *See supra* text accompanying notes 233–39.

275. *See supra* text accompanying notes 233–51.

276. *See supra* text accompanying notes 258–59.

277. The term "proximate causation" is sometimes alternatively referred to as "legal causation." *See* BLACK'S LAW DICTIONARY, *supra* note 12, at 250 (equating the terms "proximate cause" and "legal cause").

278. *See* LAFAVE, *supra* note 233, at 336–37.

279. *Id.* at 336. Such a result could differ in terms of the individual or property that was harmed, the type or degree of harm that resulted, or the manner in which the harm occurred. *Id.*

280. David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend Upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1168 (2009) (setting forth this example). Most typically, the issue

but for the actor pouring the gasoline onto the floor, the victim would not have slipped, fallen, and died—there is a question of whether proximate causation is also present.[281] Thus, the question remains of whether legal policy dictates that society should hold this actor criminally liable.[282]

When courts evaluate whether a defendant's conduct has proximately caused a particular result, they often focus their examination on the issue of foreseeability. They ask, for example, whether the general manner in which the harm came about was foreseeable to a reasonable person in the defendant's position.[283] Consider the Minnesota Supreme Court case of *State v. Schaub*,[284] in which the court had to determine whether a defendant could be convicted of manslaughter when the defendant unscrewed a gas line in his apartment in an attempt to commit suicide, police officers subsequently removed the defendant from his apartment, and the accumulated gas later caused an explosion in the building that ultimately killed another resident.[285] The court concluded that criminal liability was feasible in this circumstance because proximate causation "rests largely on a determination of what ought to have been foreseeable to defendant as the probable result of the dangerous situation which he had created," and the other resident's death was foreseeable.[286] This question of foreseeability is sometimes expressed in other terms. For example, in one California case,[287] a court instead asked whether the harmful result was the "natural and probable consequence" of the defendant's actions,[288] and in another case, a California court examined whether the suffered harm was "within the risk of harm created by the defendant's

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of proximate causation seen in the criminal law context is in cases dealing with homicide. LAFAVE, *supra* note 233, at 336.

281. *See* LAFAVE, *supra* note 233, at 336–37.

282. *See id.* at 337.

283. *See* State v. Schaub, 44 N.W.2d 61, 64 (Minn. 1950) (holding that a criminal defendant can be found guilty "if the end result itself was foreseeable"); Robinson, *supra* note 63, at 148 (describing the deontological concept of "desert" that takes into account, not just the harm caused by the offender, but also "the broad array of forces operating upon the individual").

284. *Schaub*, 44 N.W.2d at 64.

285. *Id.* at 62–63.

286. *Id.* at 64–65.

287. People v. Concha, 218 P.3d 660 (Cal. 2009).

288. *Id.* at 664 (quoting People v. Roberts, 826 P.2d 274, 301 (Cal. 1992)); *see also* People v. Dawson, 91 Cal. Rptr. 3d 841, 856 (Cal. Ct. App. 2009) (explaining proximate causation as existing when the "direct, natural and probable consequence" of the actor's conduct caused the prohibited harm).

negligent conduct."[289] Ultimately, however, these approximate issues of foreseeability, as does the common proximate causation question of whether an intervening or superseding cause—essentially unforeseeable events—broke the chain of causation such that there is no proximate causation.[290]

While foreseeability is ordinarily the touchstone for courts' proximate causation analyses, some courts instead examine the notion of directness, which, in certain scenarios, may differ somewhat from foreseeability.[291] For example, in the Pennsylvania case of *Commonwealth v. Root*,[292] the majority adopted this rather different view of proximate causation.[293] In that case, the defendant accepted his acquaintance's challenge to engage in an automobile race on a rural highway.[294] Both participants were driving in excess of the speed limit, and the defendant's acquaintance was driving in the lane designated for oncoming traffic.[295] The acquaintance collided with an oncoming vehicle and was killed.[296] The defendant was charged and convicted of involuntary manslaughter, but the Supreme Court of Pennsylvania overturned the defendant's conviction because it determined that the defendant's conduct did not proximately cause the decedent's death.[297] According to the court, a "more direct causal connection [was] required for conviction" in this case.[298] While the *Root* majority focused on the concept of directness in evaluating proximate causation, Justice Eagen's dissent in *Root* instead focused more on the concept of foreseeabilty.[299] Justice Eagen argued that the decedent's actions

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289. *Dawson*, 91 Cal. Rptr. 3d at 857.

290. *See, e.g.*, *Schaub*, 44 N.W.2d at 64 ("To sustain a conviction for manslaughter"—the offense at issue in the case—"the act of defendant must have been the proximate cause of the death of [the victim] without the intervention of an efficient independent force in which defendant did not participate or which he could not reasonably have foreseen.").

291. *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 268 (1991); LAFAVE, *supra* note 233, at 343, 349.

292. Commonwealth v. Root, 170 A.2d 310 (Pa. 1961).

293. *See id.* at 311–14.

294. *Id.* at 310.

295. *Id.* at 310–11.

296. *Id.* at 311.

297. *See id.* at 311–14.

298. *Id.* at 314.

299. *Id.* at 315 (Eagen, J., dissenting). Justice Eagen also made the interesting point in his dissent that criminal law protects the people of the state, not just the victim of a crime, and he suggested that this should be kept in mind in determining the defendant's guilt. *See id.* at 318 ("While the victim's foolhardiness in this case contributed to his own death, he was not the only one responsible and it is not he alone with whom we are concerned. It is the people of the Commonwealth who are harmed by the kind of conduct the defendant pursued. Their interests must be kept in mind.").

under the pressure-laden circumstances to which the defendant contributed "should have been expected and [were] clearly foreseeable."[300]

Courts thus analyze proximate causation in their pursuit of determining whether a defendant is guilty of an offense, but in the criminal context, they have not ordinarily used the concept to determine the extent of an offender's desert.[301] Thus, while in *Schaub* the court engaged in a foreseeability analysis to determine whether the defendant was criminally liable,[302] it is rare that a court would extend its proximate causation analysis in such a case to determine whether the defendant's punishment should be more severe because his actions caused harms other than the most immediate victim's injury—such as emotional harms to the victim's friends and family resulting from this injury, emotional harms to the offender's friends and family resulting from his offensive actions and conviction, or costs resulting from the police officers' need to intervene.[303] Instead, when sentencing, courts limit their analyses to the most direct harms of the criminal offense.

Although this proximate causation analysis of the extent of criminal harms caused by offender conduct is lacking from most criminal proximate causation analyses, perhaps some guidance may be gleaned from courts' examinations of proximate causation in the context of civil torts. Indeed, a number of courts have concluded that their criminal proximate causation analyses closely resemble their proximate causation analyses in tort law.[304] While in the civil tort context, courts still primarily examine the issue of proximate causation for determining whether a defendant is liable, the tort causation analysis is also somewhat more flexible because it can more closely reflect the extent of harm caused by the defendant. This difference in accounting for more remote harms in the criminal and tort contexts stems from the fact that these harms resulting from criminal conduct are often not statutorily proscribed and thus producing them is not

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300. *Id.* at 315.

301. *Cf., e.g.*, 18 U.S.C. § 3553(a) (2006) (listing factors to be considered in imposing a sentence but failing to mention the concept of proximate causation).

302. *See supra* text accompanying notes 284–86.

303. *See supra* text accompanying notes 180–209 (discussing possible indirect or remote harms that may result from criminal conduct).

304. *See, e.g.*, People v. Dawson, 91 Cal. Rptr. 3d 841, 855 (Cal. Ct. App. 2009) ("It is well established that the principles of causation as they apply to tort law are equally applicable to criminal law."); State v. Schaub, 44 N.W.2d 61, 64–65 (Minn. 1950) (examining a number of civil tort cases to further explore the issue of proximate causation in a criminal case).

often a criminal offense in its own right.[305] In the tort context, however, a defendant may be liable for almost any harms at least negligently caused because, unlike in the criminal context, a statutory proscription is not a prerequisite for liability. For example, if Jane murders John, she may be found criminally liable for that murder. Her punishment, which will likely be severe, will probably not take into account harms caused by Jane's actions other than the direct result of her actions: John's death. Her punishment likely will not take into account the effect of John's death on his friends and family or the effect of Jane's conviction and sentencing on her own friends and family, for example. In contrast, in tort, Jane might be liable for John's death through either a survival action or a wrongful death suit brought by John's spouse. The survival action—which would focus on what the deceased individual would have been able to recover had he survived[306]—would be comparable to the murder charge in the criminal context because it would deal with the consequences of the most direct harms caused by Jane's action: John's suffering upon his death.[307] The wrongful death action, though—which would constitute an action to recover for the injuries suffered by those surviving John[308]—would take into account other harms that Jane had proximately caused with the requisite state of mind. Recovery under a wrongful death action could include reasonable expenses for John's funeral,[309] John's lost financial support of the survivors,[310] loss of consortium,[311] emotional distress,[312] or even punitive

305. *Cf.* Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 724–25 (2008) (explaining that tort law provides a more flexible framework than criminal law and so can accommodate more forms of wrongdoing).

306. 2 DOBBS, *supra* note 219, at 804.

307. *Id.* There is certainly a difference, though, between the injuries of death and suffering.

308. *Id.*

309. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(a) (McKinney 2010) (stating that a plaintiff's damages may include "reasonable funeral expenses of the decedent").

310. *See, e.g.*, Freeman v. Davidson, 768 P.2d 885, 887 (Nev. 1989) (explaining that Nevada law "allows heirs to prove damages for loss of probable support").

311. *See, e.g.*, Bullard v. Barnes, 468 N.E.2d 1228, 1232 (Ill. 1984) ("[T]his court quite recently unanimously held, based on a broad definition of pecuniary injury, that a widowed spouse had the right to recover damages for loss of consortium under the Wrongful Death Act."). Loss of consortium could include "loss of companionship, society, love, advice [or] guidance." 2 DOBBS, *supra* note 219, at 812.

312. *See, e.g.*, ARK. CODE ANN. § 16-62-102(f)(1) (2005) (providing that "[t]he jury or the court, in cases tried without a jury, may fix such damages as will be fair and just compensation for pecuniary injuries, including . . . any mental anguish resulting from the death to the surviving spouse and beneficiaries of the deceased"); DEL. CODE ANN. tit. 10, § 3724(d)(5) (1999) (providing that "[i]n determining the amount of the award[,] the court or

damages.[313] Liability under the wrongful death claim, then, would take into account a number of the harms Jane caused that would not be accounted for in the criminal context. Further, in the tort context, Jane would also be potentially liable for harms caused to bystanders witnessing John's death.[314] Again, these likely constitute harms not ordinarily contemplated in determining a criminal offender's desert. To be sure, harms resulting from tortious conduct are limited—not only by proximate causation, but also by other restraints such as the economic loss doctrine.[315] Yet, tort law still takes into account a greater spectrum of harms than those ordinarily considered in the criminal context.[316]

Despite its appeal, it seems that a proximate causation limitation does not explain why courts have largely neglected to address which harms are appropriate to consider in sentencing. If such a civil tort proximate causation analysis were applied to the remote harms not often considered in sentencing, it is likely that at least some of them would be deemed proximate on occasion. Certainly, it is plausibly foreseeable to a reasonable person that a victim's friends and family will suffer as a result of an offender's criminal conduct, especially when the crime at issue

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jury may consider . . . [m]ental anguish resulting from such death to the surviving spouse and next-of-kin of such deceased person"); OHIO REV. CODE ANN. § 2125.02(B)(5) (LexisNexis 2007) (providing that "[c]ompensatory damages . . . awarded in a civil action for wrongful death . . . may include damages for . . . [t]he mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent").

313. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(b) (McKinney 2010) (stating that "punitive damages may be awarded if such damages would have been recoverable had the decedent survived"); N.C. GEN. STAT. § 28A-18-2(b)(5) (2009) (providing that "[d]amages recoverable for death by wrongful act include . . . [s]uch punitive damages as the decedent could have recovered . . . had he survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct"); Portwood v. Copper Valley Elec. Ass'n, Inc., 785 P.2d 541, 543 (Alaska 1990) (holding "that the estate of a decedent who dies without statutory beneficiaries is entitled to seek punitive damages"); *see also* 2 DOBBS, *supra* note 219, at 813 (explaining that "some courts have allowed punitive damages in spite of the [governing] statute's pecuniary loss requirement").

314. Bystander liability in tort law, though, is often limited beyond the notion of proximate causation by ideas such as whether the plaintiff was closely related to the victim or whether the plaintiff suffered emotional distress beyond that which a disinterested witness would ordinarily suffer. *See* 2 DOBBS, *supra* note 219, at 839–41 (detailing the factors beyond proximate causation that limit bystander liability).

315. *See* Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss from Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1082 (2008) (describing the economic loss doctrine as requiring a buyer who suffers solely economic loss to recover damages through contract law rather than tort law).

316. *See* Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 239 (1996) (laying out the factors that account for the higher diversity of tort proceedings than criminal proceedings).

is exceptionally serious. This is particularly the case when the criminal offense results in the victim's death or serious bodily injury. Such harms might also be considered a direct result of the offender's conduct. While perhaps more removed from the criminal offense, some might also consider other harms as reasonably foreseeable or direct such that they should be contemplated by sentencers. These harms might include those caused to businesses; costs associated with the offender's apprehension, conviction, and punishment; and those inflicted on individuals who identify with the victim. They might also include the harms related to the offender's punishment, the stigma that accompanies conviction and punishment, and the harms that this can cause to the offender's family and friends. And while perhaps not contemplated by a criminal offender at the time of his offense, it is arguably reasonably foreseeable that a criminal offense will cause members of society greater fear and anxiety, and perhaps even cause members of the public to become desensitized to criminal activity. Further, to an educated person, the "broken windows" theory, harms to institutions, an increase in taxes, and a decrease in property values might be contemplated results of crime, but one could argue that this would not be foreseeable to a reasonable person, especially one situated as the typical would-be offender.[317] While these more remote harms of criminal conduct are most often not as foreseeable as the most direct harms of that conduct, and while many of them are quite tenuous in nature, they are at least worthy of contemplation at sentencing. They are similar to the harms caused to rescuers or to patients by virtue of medical malpractice in tort cases—both of which have been determined to be foreseeable and thus proximate in many a tort case.[318] Courts' and scholars' neglect to engage in any sort of discussion of these harms certainly suggests that they are not applying a proximate causation analysis to exclude these harms from sentencing contemplation—or at least not consciously applying such an analysis. Such a limitation is desirable, though, in light of the many concerns that accounting for those more remote harms raise.

Beyond this traditional proximate causation limitation, there may be need for other limitations to implement policy goals

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317. Ordinarily, the proximate causation analysis focuses on whether a consequence is foreseeable to a reasonable person rather than whether it is foreseeable to a would-be offender or tortfeasor, however. *See* 2 Dobbs, *supra* note 219, at 334.

318. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 457 (1965) (providing that the person initially liable in a tort claim is also liable for any harm resulting from third persons rendering aid, even if that aid is carried out in a negligent manner).

not implicit in traditional proximate causation analyses. For example, concerns about undermining a defendant's constitutional right to trial or exponential harms that an offender causes to himself may justify further curtailing the consideration of more remote harms in criminal sentencing. To ensure consistency in sentencing among offenders and to more fully implement harm-based retributive sentencing goals, though, it is important that these other policy considerations are discussed and clearly articulated.

VII. CONCLUSION

While courts and scholars have generally neglected to consider the more remote harms that an offender's criminal conduct has caused, accounting for such harms in sentencing could prove beneficial. It could increase the parity between an offender's desert and the sentence imposed on him and could provide for greater individualization among offenders. Further, sentences based upon these more remote harms could add to the deterrence value of the punishment and improve its expressive and communicative characters. Accounting for these more remote harms certainly raises concerns, however, such as punishing an offender for harms he did not intend or the creation of limitless liability. Limiting the remote harms considered at sentencing by applying a proximate causation analysis would mitigate these concerns. But harms such as those that the offender's conduct imposes on the victim's family, friends, and society are certainly worthy of consideration in sentencing.

Sentencers' entertainment of victim impact evidence fails to effectively hold offenders accountable for these more remote harms. Studies suggest that such evidence does not affect criminal sentences, and even if it does, this evidence is usually limited to harms caused to the victim herself, or to her closest friends or family members.[319] Instead, accounting for these more remote harms in sentencing guidelines, or at least educating sentencers that all harms proximately caused by the offender's criminal conduct should be considered, would aid in allowing sentencers to provide for punishments that better reflect offenders' harm-based deserts. Achieving greater proportionality in sentencing is desirable, thus courts and scholars should more carefully examine how to properly account for more remote harms in sentencing.

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319. *See* Davis & Smith, *supra* note 175, at 459, 467 (concluding from study that victim impact statements did not influence sentencing decisions).