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Re-Tribute: Reconsidering the Moral Psychology of Culpability and Desert

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RE-TRIBUTE: RECONSIDERING THE MORAL PSYCHOLOGY OF CULPABILITY AND DESERT

Guyora Binder∗ & Mathew Biondolillo∗∗

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It is an honor to write in tribute to the career and work of Professor Sam Pillsbury, who has been one of our most profound theorists of criminal law[1] and punishment[2] in an era when crime and punishment became central preoccupations of our political culture.[3]

Criminal law theory in the English-speaking world is dominantly utilitarian in approach, and has therefore conceived criminal culpability primarily in cognitive terms as expected harm.[4] But in the later twentieth century, deontology made a comeback in moral philosophy[5] and retributive punishment made a comeback in legal theory and penal policy.[6] Eventually, the prevailing cognitive model of culpability came under scrutiny as well. Sam Pillsbury was among the very first to highlight emotion's role in blame—how our passions affect both our culpability for wrong, and our judgments of blame. Addressing these questions from a Kantian retributive perspective,[7] Sam Pillsbury

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1. SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER (1998) [hereinafter PILLSBURY, JUDGING EVIL]; SAMUEL H. PILLSBURY, HOW CRIMINAL LAW WORKS: A CONCEPTUAL AND PRACTICAL GUIDE (2009).

2. Samuel H. Pillsbury, *Understanding Penal Reform: The Dynamic of Change*, 80 J. CRIM. L. & CRIMINOLOGY 726 (1989); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) [hereinafter Pillsbury, *Emotional Justice*]; Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483 (2002); Samuel H. Pillsbury, *Questioning Retribution, Valuing Humility*, 11 OHIO ST. J. CRIM. L. 263 (2013); SAMUEL H. PILLSBURY, IMAGINING A GREATER JUSTICE: CRIMINAL VIOLENCE, PUNISHMENT AND RELATIONAL JUSTICE (2019) [hereinafter PILLSBURY, IMAGINING].

3. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); LOÏC WAQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960'S (2021); Guyora Binder & Robert Weisberg, *What Is Criminal Law About?*, 114 MICH. L. REV. 1173 (2016).

4. *See* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2–4 (1990); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 27–34 (2002) [hereinafter Binder, *Rhetoric of Motive and Intent*]; Guyora Binder, *The Culpability of Felony Murde*r, 83 NOTRE DAME L. REV. 965, 1000–03 (2008); JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 29–30 (9th ed. 2021).

5. J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 77–150 (1973); J.J. Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

6. *See* BRAITHWAITE & PETTIT, *supra* note 4, at 3–5; PILLSBURY, JUDGING EVIL, *supra* note 1, at 5–10; K.G. Armstrong, *The Retributivist Hits Back*, 70 MIND 471 (1961); Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968); MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); ANDREW VON HIRSCH, DOING JUSTICE (1976); MICHAEL MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW (1997).

7. *See generally* IMMANUEL KANT, THE METAPHYSICS OF MORALS (Lara Denis ed., Mary Gregor trans., 1991) (1797) [hereinafter KANT, METAPHYSICS OF MORALS]; IMMANUEL KANT,

argued that empathy is central to the equal respect we owe one another. Thus, judgment properly conditions blame on deficient empathy, but can itself be faulted if insufficiently informed by empathy toward the wrongdoer.

The concept of tribute is integral to the problem of retributive justice. If tribute exacts due contribution and acquiescence to authority, retribution reestablishes authority after it has been flouted. They share a common root, along with such legal and moral terms as attribution, contribution, and distribution. All imply more than allotment: they also assess and divide. All derive from the Latin word for tribe,[8] a reminder that public retribution descends from an older tradition of private vengeance among antagonistic kin-groups competing for superior status.[9] In singling out offenders, retribution threatens to reinscribe a similar social division and status hierarchy. The constant challenge of retributive desert in a liberal state is to reintegrate the offender into our tribe, as an equal.

Sam Pillsbury's claims about the role of emotion in blame have been normative rather than empirical, but nevertheless informed by psychological intuitions. Here too, he was ahead of the curve. Later research in psychology has confirmed the complexity of our judgments of blame, our attention to offenders' motives, and the role of our own emotions in making these judgments.[10]

After reviewing some of Sam Pillsbury's claims, and locating them within debates on culpability and punishment, we will describe this empirical research on three questions: (1) the relative importance of intuitive judgment and reasoned justification in moral judgment; (2) the influence of information about agents' aims and desires in moral assessment of their conduct; and (3) the role of evaluator affect in moral evaluation of conduct. In light of these findings, we will see that the reflective assessments of culpability favored by Sam Pillsbury and other theorists may have demanding procedural requirements that our

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GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed. & trans., 1998) (1797) [hereinafter KANT, GROUNDWORK OF METAPHYSICS]; IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS (John Ladd trans., 2d ed. 1999) (1796) [hereinafter KANT, METAPHYSICAL ELEMENTS]; Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STANFORD ENCYC. OF PHIL. (Jan. 21, 2022), https://plato.stanford.edu/entries/kant-moral/ [https://perma.cc/F43Z-CZ5K].

8. Etymology of Tribute, ONLINE ETYMOLOGY DICTIONARY (Feb. 17, 2014), https://www.etymonline.com/word/tribute [https://perma.cc/8XC2-2HG6].

9. *See* WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW AND SOCIETY IN SAGA ICELAND (1990).

10. *See infra* Parts II, III.

current criminal process will rarely achieve. Our Essay is not the place to fully reimagine our criminal process. But readers interested in so doing are well advised to read Sam Pillsbury's latest book, *Imagining a Greater Justice*.[11]

I. THE COGNITION/EMOTION DEBATE IN CULPABILITY THEORY

Cognitive culpability theory has a long pedigree in Anglophone legal systems, reflecting the lasting influence of utilitarian penology. Systematic reflection on the purposes of criminalization and punishment began with the 1764 publication of Cesare Beccaria's *On Crimes and Punishments*.[12] This work conceptualized criminal justice in utilitarian terms, as a policy instrument for preventing crime.[13] It advocated clear prescriptive norms, enforced by mild but certain penalties.[14] Beccaria's ideas resonated in England, where the common law of crimes had come to be seen as unduly harsh, corrupt, and arbitrary in its administration, and ineffectual.[15]

Inspired by Beccaria, Jeremy Bentham drew a connection between the purposes of criminal justice and the design of the criteria of criminal liability. Bentham's ambitions ranged beyond criminal law, as he set out to develop a systematic science of legislation organized around the aim of maximizing social welfare. Nevertheless, criminal justice reform was the exemplary policy problem of the day. Bentham assimilated crime prevention into this more general goal of minimizing net expected harm. Crimes were conceptualized as conduct predictably and culpably endangering legally protected interests, with insufficient benefit.[16] Because only chosen wrongdoing was deterrable by means of threatened sanctions, all criminal liability had to be conditioned on culpability.[17]

Bentham's scientific project involved developing a technical vocabulary for drafting codes to enable transparent prescription,

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11. PILLSBURY, IMAGINING, *supra* note 2.

12. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., Hackett Publ'g Co. 1986) (1764).

13. *Id.* at 8.

14. Guyora Binder & Nick J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 162–64 (2000).

15. Douglas Hay, *Property, Authority and the Criminal Law*, *in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17–63 (1975) (describing arbitrariness of 18th century English criminal law).

16. *See* Binder & Smith, *supra* note 14, at 174–76.

17. *See id.* at 166–210.

consistent application, and empirical evaluation.[18] As part of this effort, Bentham and his followers sought a vocabulary for culpable mental states. Bentham insisted that criminal culpability should be conceptualized in cognitive rather than conative terms, as intention rather than motive.[19] As far as Bentham was concerned, there could be no bad desires. Since utility was defined by the satisfaction of desire as such, it could have no vantage point from which to evaluate desires. What made *conduct* antisocial, however, was only its expected effects on aggregate preference satisfaction.[20] Accordingly, Bentham identified culpability with perceptions of risk.[21] An acolyte, John Austin, developed a hierarchy of mental states, distinguishing what we would now see as purpose, knowledge (substantial certainty of harm), recklessness (subjective foresight of probable harm), and negligence (objective foreseeability of probable harm).[22]

Bentham's ideas about criminal codification proved influential. Benthamite reformers achieved political prominence in the 1830s and established the English Criminal Law Commission (on which Austin served) with the aim of drafting a Benthamite code.[23] While efforts to enact such a code failed, Thomas Macaulay's similar code was imposed on India, and although James F. Stephen led a similarly failed codification effort in the 1870s, his Benthamite code was adopted for Canada.[24] Finally, Hebert Wechsler drew substantially on these efforts in drafting the American Law Institute's 1962 Model Penal Code.[25] Wechsler first worked out these ideas in his influential article *A Rationale of the Law of Homicide*, in which he reimagined American homicide law as a single ladder, with grades of liability determined by the actor's expectation of causing death.[26] Wechsler drew on both the Commission and Stephen's scholarship,[27] and used Austin's hierarchy of mental states.[28] Eventually, his code would apply this approach to

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18. Guyora Binder, *Foundations of the Legislative Panopticon: Bentham's Principles of Morals and Legislation*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 79–99 (Markus D. Dubber ed., 2014).

19. *Id.* at 94.

20. *Id.* at 95.

21. Binder, *The Rhetoric of Motive and Intent*, *supra* note 4, at 27–32.

22. *Id.* at 32–34.

23. Binder, *supra* note 18, at 80.

24. *Id*. at 80–81.

25. *Id*. at 81.

26. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide I*, 37 COLUM. L. REV. 701 (1937).

27. *Id*. at 702–18, 721, 725–26. There is even a reference to Macaulay's code. *Id*. at 718.

28. Binder, *The Rhetoric of Motive and Intent*, *supra* note 4, at 32–34.

all crimes, which would be graded on the basis of the gravity of the interest endangered, and the risk consciously imposed.[29] That largely cognitive scheme would influence code revisions in about thirty-five states, many of which adopted aspects of its scheme of culpability.[30]

Yet, by the time these codes were adopted in the last third of the twentieth century, utilitarianism had lost some of its luster. Atrocious totalitarian regimes had perhaps diminished the appeal of an ethos open to sacrificing individuals for majority welfare. In moral philosophy, John Rawls drew on Kant's ethos of fairness in defending a redistributive model of social justice that would presuppose the distinct moral worth of each person and prioritize the welfare of the worst off.[31] In criminal law, public outrage about rising crime rates converged with skepticism about expert judgment to bring indeterminate sentencing into ill repute.[32] If the criminal justice system had little power to control crime, perhaps denouncing it accurately was a more achievable ambition. Such influential criminal law theorists as Herbert Morris and Michael Moore revived interest in retributive desert.[33]

Retributive desert may be conceptualized along two dimensions: deserved suffering and deserved denunciation. Justifying suffering as morally necessary is challenging: philosophers have done no better than to mobilize our moral intuitions that it is fitting, or that it increases the prospect that the offender will regret her choice.[34] By contrast, deserved denunciation has much more appeal. Kantian retributivists[35] often explain the connection between wrongdoing and deserved punishment as an expressive transaction. Kantian moral rationality requires that all of our actions meet a motivational test in manifesting a "good will."[36] Thus, our aims in acting must always be

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29. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

30. *Id.* (listing thirty-four state codes); WAYNE R. LAFAVE, CRIMINAL LAW 5–6 (5th ed. 2010) (listing thirty-eight state codes); Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 289 (2012) (listing twenty-four jurisdictions adopting Model Penal Code's culpability default rules).

31. JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (1971).

32. BRAITHWAITE & PETTIT, *supra* note 4, at 2–5.

33. Morris, *supra* note 6; MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 104–52 (2010).

34. E. F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 233–43 (1984); MOORE, *supra* note 33, at 104–52.

35. *See generally* KANT, METAPHYSICS OF MORALS, *supra* note 7; KANT, GROUNDWORK OF METAPHYSICS, *supra* note 7, at 31.

36. Johnson & Cureton, *supra* note 7.

bounded by respect for the moral equality of all other persons: we can take no advantage incompatible with a like advantage for everyone else.[37] Any offense against morality therefore implies and demonstrates disrespect for the equal moral standing of all others. The offender is therefore obligated to deprive herself of the advantage taken in order to negate this offense against the dignity of all moral agents and reassert the moral equality of all. Moreover, all other moral agents are obligated to require her to do so, lest they become complicit in the offender's denial of the victim's equality. Jean Hampton is the moral philosopher who most clearly articulated this expressive rationale for retributive punishment.[38] Such other retributive philosophers as Herbert Morris and Antony Duff argued that in thus enabling the offender to reassert the moral equality of the victim, retributive punishment actually benefited the offender.[39] The moral equality restored to all by punishment included that of the offender.

For our purposes, the significant feature of this expressive model of retributive desert is that it portrays wrongdoing as a motivational phenomenon. Regardless of any tangible harm inflicted by an offender to a particular victim, the most important injury wrought by any criminal offense is to the equal dignity of all moral agents. The offender's disregard of that moral dignity is the essential wrong requiring redress. This conception of wrongdoing as the expression of an offensive value made the offender's aims and desires—as opposed to her expectations—essential to her culpability. Wrongdoing was an error not of cognition, but of volition.

While utilitarian reformers had long argued that motive was irrelevant to criminal liability, a number of theorists began to argue during the 1990s that retributive punishment required identifying and denouncing the offender's aims and desires. Sam Pillsbury was among the very first of these. In a 1989 paper, *Emotional Justice: Moralizing the Passions of Punishment*, Pillsbury argued that the respect for others required by moral rationality required empathy and concern.[40] He further argued that an offender's failure to show such concern

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37.   *Id.*; KANT, METAPHYSICAL ELEMENTS, *supra* note 7, at 139.

38.   Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992).

39.   Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981); R.A. DUFF, TRIALS AND PUNISHMENTS (1986); R.A. Duff, *Responsibility, Restoration and Retribution*, *in* RETRIBUTION HAS A PAST: HAS IT A FUTURE? (Michael Tonry ed., 2012).

40.   Pillsbury, *Emotional Justice*, *supra* note 2.

justifiably provoked moral outrage, which he regarded as an important component of blame that denunciation should express.[41] Yet, he argued that moral rationality also required that such outrage be checked by empathy and concern toward the offender.[42] Thus, he concluded that both culpability and blame were properly conceived as moral sentiments.[43] Because moral rationality required both empathy and a capacity for righteous anger, neither judgments of guilt nor sentencing decisions needed to be purified of emotion.

A 1990 paper, *Evil and the Law of Murder*, drew on this emotional conception of moral rationality to identify the role of motivation in judgments of culpability.[44] Pillsbury identified the culpability required for murder, and especially aggravated murder, as "evil."[45] By this, he meant an attitude of extreme disrespect for the moral value of other persons. Again, this attitude was not simply cognitive—not simply a failure to recognize the moral agency of others—but emotional, a failure to value and care about others. Indeed, it also involved valuing and caring about the wrong things—power, greed, sexual dominion, or sadistic pleasure—in place of moral agency. Although highly critical of felony murder as concerned exclusively with a wrongful motive for endangering life to the exclusion of disrespect for life, Pillsbury also recognized it as properly concerned with the killer's evil motives. Nor was evil simply a disposition or character trait.[46] It was a value, adopted as a motivating reason for action. Retributive justice did not require liberal neutrality—it presupposed a commitment to specifically egalitarian values.

Eventually, Sam Pillsbury would extend his model of culpability as improper motivation to homicide conditioned on indifference to risk and to capital murder. These papers would become part of Pillsbury's pathbreaking book, *Judging Evil: Rethinking the Law of Murder and Manslaughte*r, a comprehensive interpretation and critique of American homicide law.[47] In rethinking homicide culpability, Pillsbury challenged Herbert Wechsler's defense of a primarily cognitive

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41. *Id.* at 693–98.

42. *Id.* at 697–98.

43. *Id.* at 698.

44. Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 447 (1990).

45. *Id.* at 476.

46. *Id.*

47. PILLSBURY, JUDGING EVIL, *supra* note 1; *see* Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 BUFF. CRIM. L. REV. 755 (2000).

culpability scheme in his *Rationale of Homicide*.[48] Pillsbury argued that a dual model of culpability, as embracing both expectations and motives, better accounted for our intuitions about deserved punishment and better accounted for features of existing law.[49] That body of law, he argued, assigned blame not merely for expected harm, but also on the basis of bad motives for imposing such risks.[50] Thus, voluntary manslaughter depended on heat of passion—a justifiable emotion, motivating an unjustifiable intentional killing.[51] Similarly, depraved indifference murder required not only conscious disregard of great risk, but an affective attitude of indifference to those endangered, and a willingness to impose danger for an unworthy purpose.[52] First degree murder was better understood as killing for a reprehensible purpose, or with great cruelty, than as contemplation or cool affect.[53] Aggravated or capital murder might turn on greater cruelty to vulnerable victims rather than only on a higher certainty of death.[54]

Sam Pillsbury was not alone in proposing a more complex model of culpability. In a 1992 paper, *Rethinking Mental States*, Ken Simons proposed that criminal actors were properly faulted not only for expecting that harm might result from their conduct, but also for willfully choosing to proceed toward a goal in the face of that expectation.[55] Thus, culpability involved not only cognition, but also volition. Moreover, volition states, like cognition states, could be ordered hierarchically. An actor might be indifferent to harm, or accept it, or desire it, and might choose to proceed for a better or worse purpose. Consistent with this approach, a 1998 paper by Alan Michaels would reinterpret even liability for knowing killing in volitional terms, as punishing the offender for the volitional wrong of choosing to "accept" death as a consequence of an action perhaps motivated by some other aim.[56] Finally, a 2002 paper by one of the present authors, Guyora Binder, argued that the oft-repeated maxim that "motive" is always irrelevant to criminal liability has long been descriptively false, at least if motive is

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48. Herbert Wechsler & Jerome Michael, *supra* note 26.
49. *See* PILLSBURY, JUDGING EVIL, *supra* note 1, at 42–44.
50. *See id.*
51. PILLSBURY, JUDGING EVIL, *supra* note 1, at 125–60.
52. Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105 (1996).
53. PILLSBURY, JUDGING EVIL, *supra* note 1, at 98–124.
54. *Id.* at 109–10.
55. Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).
56. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 553 (1998).

taken to mean volitional or affective attitudes.[57] Required culpable mental states have often specified aims and desires, not simply expectations, and that remains true in modern codes.[58]

Some scholars drew on virtue ethics to advocate evaluating emotion and character. In a 1995 paper, Kyron Huigens argued that offenders could be faulted not just for attending insufficiently to risk, but for cultivating passions and embracing ends that inclined them to ignore risk.[59] This was a virtue-based character theory, in the Aristotelean tradition. A 1996 paper by Martha Nussbaum and Dan Kahan argued that emotional responses to circumstances could supply morally appropriate or inappropriate reasons for action,[60] and added that this approach offered satisfying solutions to controversies in the law of provocation, premeditation, self-defense, duress, and insanity.[61] Like Huigens, Kahan and Nussbaum argued in the idiom of virtue ethics that offenders could be held responsible for the emotional dispositions they had cultivated.[62]

Of course, not everyone has agreed that culpability should depend on volitional or affective states. Such retributive theorists as Larry Alexander and Kim Ferzan have reasserted an account of culpability as a single mental state of recklessness, or subjective foresight of the risk of harm to a protected interest. From this perspective, culpability has only a single, cognitive dimension. For these thinkers, any evaluation of a defendant's aims and values apart from the effects of their conduct on the interest of others would violate liberal neutrality, which permits government to evaluate and sanction only conduct, but not opinion.[63]

In the next part, we turn from criminal law theories of culpability, to consider what moral psychologists have to tell us about assessments of culpability.

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57.   Binder, *The Rhetoric of Motive and Intent*, *supra* note 4, at 96.

58.   *Id.* at 95.

59.   Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995).

60.   Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

61.   *Id.* at 305–38, 341–46.

62.   *Id.* at 298–301, 342–44.

63.   LARRY ALEXANDER & KIMBERLY K. FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009).

II. INTUITION AND JUSTIFICATION IN PSYCHOLOGICAL THEORIES OF MORAL JUDGMENT

Humans are keen moral judges of their fellows, making moral judgments that are relatively systematic and consistent across cultures.[64] Psychologists have long been interested in how and when humans develop a capacity for abstract moral reasoning. The pathbreaking work of developmental psychologists Jean Piaget and Lawrence Kohlberg sketched a developmental ladder from a juvenile concern with pleasing parental authority, through an adolescent focus on conformity to convention, and culminating in a mature concern with abstract principle.[65] On these models, moral reasoning progressed from a concern with outcomes to a concern with reasons and expectations, and from a focus on authority to a focus on conscience.[66] However, little evidence emerged that reasoning about principle is widespread or plays an important role in moral decision-making outside of experimental settings.[67]

Today, many psychological models seeking to explain culpability judgments accord a prominent position to *intuitive* moral judgment, rather than articulable reasoning processes.[68] Research supporting such models finds that morally salient conduct provokes strong emotions and primes reasoning about moral issues, including about the

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64. *See* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law & Justice Policy*, 81 S. CAL. L. REV. 1, 10 (2007); John Mikhail, *Moral Intuitions and Moral Nativism*, *in* THE OXFORD HANDBOOK OF MORAL PSYCHOLOGY 364–87 (Manuel Vargas & John Doris trans., 2022).

65. JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932); 2 LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES (1984).

66. PIAGET, *supra* note 65; KOHLBERG, *supra* note 65.

67. *See generally* HELEN L. BEE, LIFESPAN DEVELOPMENT (1994); Hing K. Ma, *The Moral Development of the Child: An Integrated Model*, 1 FRONTIERS PUB. HEALTH 1 (2013) (critiquing the Piagetian and Kohlbergian stage-based models of moral development because reviews have found that moral reasoning using "formal operations" (abstract reasoning) and based upon an internalized sense of justice is rare despite the universality Piaget and Kohlberg claimed).

68. *See* BEE, *supra* note 67; Ma, *supra* note 67; Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCH. BULL. 556, 564–66 (2000); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012); Philip E. Tetlock et al., *People as Intuitive Prosecutors: The Impact of Social-Control Goals on Attributions of Responsibility*, 43 J. EXPERIMENTAL SOC. PSYCH. 195 (2007); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814 (2001) [hereinafter Haidt, *Emotional Dog*]; Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCIENCE 998 (2007); Bertram F. Malle et al., *A Theory of Blame*, 25 PSYCH. INQUIRY 147, 151, 177 (2014) (explaining how authors' path model of blame allows judgments to be automatic or deliberative without specifying which process is primary).

culpability of perceived offenders and the punishment they deserve.[69] An actor whose behavior provokes a strongly negative emotional re-action will be judged more blameworthy than an actor provoking milder emotions.[70]

The intuitive system is not the conclusive arbiter of moral judg-ments, however; it operates in parallel with a deliberative, rational judgment process that consciously weighs information about the actor and the conduct.[71] Yet, this rational system may only override intuitive judgments under certain circumstances[72] (for example, when one has an initially weak intuition and when cognitive processing is otherwise untaxed).[73] Usually, the rational system only kicks into gear after an intuitive judgment, often constructing an explanation for the intuitive judgment already arrived at.[74] In sum, moral judgments are more often intuitive, are arrived at outside of one's awareness,[75] and lead to cul-pability assessments that are justified by *post hoc* confirmatory ration-alization.[76]

In studying moral judgment, psychologists have distinguished among judgments of different kinds, in order to test relations among

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69. *See* Joshua D. Greene et al., *The Neural Bases of Cognitive Conflict & Control in Moral Judgment*, 44 NEURON 389, 397–98 (2004) (describing neurological distinction between affective and information-processing systems of moral judgment); *see, e.g.*, Haidt, *Emotional Dog*, *supra* note 68, at 814–15.

70. *See* Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 L. & CONTEMP. PROBS. 1, 28 (2012) (describing how the moral character of the actor in conjunction with assessments of their motive(s) influence moral emotions experienced, which impact the degree to which one perceives an actor as being intentional, foreseeing the result, and causing the result).

71. *See* Jonathan St. B.T. Evans, *In Two Minds: Dual-Process Accounts of Reasoning*, 7 TRENDS COGNITIVE SCI. 454 (2003) (reviewing evidence of competing automatic and controlled reasoning systems); Robinson & Darley, *supra* note 64, at 10.

72. *See* Robinson & Darley, *supra* note 64, at 53 ("We do not deny, though, that intuitions sometimes can be overridden by the reasoning system. One of the functions of the reasoning system is to monitor the quality of the mental products of the intuitive system. But apparently, this moni-toring is quite intermittent . . . .").

73. *See* Haidt, *Emotional Dog*, *supra* note 68, at 819 (describing reasoned judgment and pri-vate reflection links in social intuitionist model that allow for rational processes to override intuitive processes).

74. *See* Mark D. Alicke et al., *Causation, Norm Violation, and Culpable Control*, 108 J. PHIL. 670, 675 (2011) ("[N]egative evaluations or spontaneous reactions lead to the hypothesis that the source of the evaluations is blameworthy and to an active desire to blame that source.").

75. *See* Haidt, *Emotional Dog*, *supra* note 68; Mark D. Alicke & David Rose, *Culpable Con-trol and Causal Deviance*, 6 SOC. & PERSONALITY PSYCH. COMPASS 723, 725 (2012) ("Spontane-ous, negative evaluations induce observers to process information about an event in a 'blame-vali-dation' mode.").

76. *See, e.g.*, Haidt, *Emotional Dog*, *supra* note 68, at 818 ("[M]oral reasoning is an effortful process, engaged in after a moral judgment is made . . . .").

them. Thus, one may disapprove of a person, an act, or result.[77] Attribution of a negative (or positive) act or result to a person may or may not translate into blame (or praise).[78] But we will see that one additional factor in moral judgment that psychologists have studied is information about the motives of actors, and the other persons their actions affect.[79]

In recent decades, criminal law theorists have paid increasing regard to psychological research on moral judgment.[80] Examining research on the role of information about motive in attributions of culpability, as we do next, may shed light on the contentions of some criminal law theorists, including Sam Pillsbury, that criminal law *should* condition culpability on actors' aims and desires.[81] To what extent do those proposals track the practice of moral judgment in everyday life? In particular, we will focus on how experimental subjects react to badly motivated but harmless acts, and to well-motivated, but harmful acts.

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77. *See, e.g.*, Fiery Cushman, *Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment*, 108 COGNITION 353 (2008) (dissociating judgments of moral wrongness from those of blame and deserved punishment); *see also* Nadler & McDonnell, *supra* note 68.

78. Thomas Nadelhoffer, *Bad Acts, Blameworthy Agents, and Intentional Actions: Some Problems for Juror Impartiality*, 9 PHIL. EXPLS. 203 (2006); Joshua Knobe, *Intention, Intentional Action, and Moral Considerations*, 64 ANALYSIS 181 (2004).

79. *See* Alicke, *supra* note 68, at 564–71; Mark D. Alicke et al., *Culpable Control and Counterfactual Reasoning in the Psychology of Blame*, 24 PERSONALITY & SOC. PSYCH. BULL. 1371, 1379 (2008) (finding that fictitious actor judged more blameworthy and more causally influential for outcome when motive is negative than when it is positive); Ross Rogers et al., *Causal Deviance and the Ascription of Intent and Blame*, 32 PHIL. PSYCH. 404, 421–25 (2019) (describing results of three studies demonstrating influence of information on actor's character and motives on judgments of culpability); Tetlock et al., *supra* note 68; Nadler, *supra* note 70; Binder, *Rhetoric of Motive and Intent*, *supra* note 21, at 96 (explaining that although the idea that motives are irrelevant to criminal liability remains popular, the "irrelevance of motive" maxim no longer has a consistent meaning).

80. *See* Antony Duff, *Intention, Responsibility and Double Effect*, 32 PHIL. Q. 1 (1982); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995); Robinson & Darley, *supra* note 64; Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003); John Mikhail, *Universal Moral Grammar: Theory, Evidence & the Future*, 11 TRENDS COGNITIVE SCI. 143 (2007); Nadelhoffer, *supra* note 78.

81. *See* Pillsbury, *Emotional Justice*, *supra* note 2, at 662 (motive in criminal culpability); Kahan & Nussbaum, *supra* note 60, at 372–74 (contending that criminal law ought to consider emotional motivation behind criminal conduct); Huigens, *supra* note 59, at 1440 (stating inculpation requires "an assessment of the actor's practical judgment"); Simons, *supra* note 55 (culpability analysis should consistently factor in conative states).

III. AGENT MOTIVES IN CULPABILITY JUDGMENTS

Several prominent models of culpability hold that an offender's motives impact an observer's culpability judgments.[82] For example, research informed by Mark Alicke's "Culpable Control Model" has demonstrated that motives—an actor's goals and desires in acting—influence culpability judgments in several experimental studies.[83] Generally, the model posits that laypeople making culpability judgments attend to factors signaling an individual's degree of personal control over their actions and the results.[84] Personal control is composed in turn of what Alicke called "structural linkages," roughly translating to an actor's volition in acting, causal influence over harmful results, and ability to foresee harmful consequences.[85] On Alicke's model, these structural linkage assessments occur unconsciously and automatically, influencing culpability evaluations.[86]

When making an assessment of volition, one considers, among other factors, evidence of capacity for perception, cognition, and self-control, and situational constraints that might impact how voluntary an act is perceived to be, such as whether they are provoked or compelled to act, or preoccupied by some other stimulus.[87] In addition to these constraints, the actor's desires or aims can be important in assessing an individual's degree of personal control over their actions.[88] According to the Culpable Control Model, when an actor's motives are negatively evaluated, that can trigger a "blame-validation" mindset where the observer is primed to search for inculpating information or perceive ambiguous information as inculpatory.[89] In short, a negatively evaluated motive can implicitly lead observers to attribute culpability and, *post hoc,* to find evidence supporting that judgment.

In their experiments, Alicke and colleagues tested the assumptions of the Culpable Control Model and largely validated many of its

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82. *See, e.g.*, Alicke, *supra* note 68.

83. *See* Alicke et al., *supra* note 79, at 1379 (finding that fictitious actor judged more blameworthy and more causally influential for outcome when motive is negative than when it is positive); Rogers et al., *supra* note 79; Alicke et al., *supra* note 74, at 670 (finding information leading to negative evaluation of an actor influences blame and judgments of causal influence).

84. *See* Alicke, *supra* note 68, at 557–58, 560.

85. *Id.* at 557 (calling these variables "volitional behavioral control," "causal control," and "volitional outcome control" respectively).

86. *Id.* at 557–58.

87. *Id.* at 557–62.

88. *Id.* at 563–64.

89. *Id.* at 564–71.

central premises.[90] For example, when investigating the effect of an actor's motives on the actor's culpability for unintended harms, Alicke created a scenario in which a speeding driver collided with another car at an intersection, injuring the driver of the other car.[91] Additional factors were inserted into the scenario that could have contributed to cause the accident; however, the critical variable was the driver's motive, which was either to get home before his parents did, to hide their anniversary gift (a morally positive motive for haste) or to hide a vial of cocaine (a morally negative motive for haste).[92] Respondents read versions of the scenario where the actor had either the positive or negative motive and were asked (1) to identify the primary reason for the unintentional, unforeseen harm; (2) to rate the actor's degree of (a) causal responsibility for the harm and (b) blame for the harm; and (3) to choose the amount of civil damages to award to the injured driver.[93]

The authors found that when the actor's motive was morally negative, his speeding was judged to be the primary cause of harm significantly more frequently than when his motive was morally positive.[94] In addition, the actor's perceived degree of causal responsibility, blame, and damages owed paralleled the trend in assigning causal primacy. Thus, a morally negative motive was associated with greater causal responsibility, blame, and compensation to the victim.[95] The authors concluded that a negative motive could "instill[] an active desire to place a 'stain' on the source of [the observer's] emotional response [to a moral transgression] . . . [and] to exaggerate [the actor's] causal influence."[96] This further supported the Culpable Control Model's conclusions that information about morally negative motives

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90. The typical method of investigation is through the creation of hypothetical scenarios with a central actor who either (1) causes or fails to cause a result that is (2) intended or not intended; (3) foreseen or unforeseen; and with background information suggestive of motives that are (4) positive, negative, or neutral. Scenarios can be systematically manipulated to target a specific variable in the model (the actor's motive being our concern, here). Holding other variables constant, one can examine how information about an actor's motive affects the spontaneous evaluation of culpability and perceptions of the actor's intentions, causal influence, and degree to which they foresaw the result that support the intuitive culpability judgment. *See* Rogers et al., *supra* note 79; Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCH. 368 (1992).

91. Alicke, *supra* note 90, at 369–70.

92. *See id.* at 369 (finding other causal factors—oil slick, downed limb, other driver running stop sign—influenced absolute degree of culpability, but regardless of other causal explanations where actor had negative motive he was judged more culpable than when he had positive motive).

93. *Id.*

94. *Id.* at 369–70.

95. *Id.* at 372. All rated significantly higher for an actor with a morally negative motive than for an actor with a morally positive motive at a statistical significance level of $p < .05$. *Id.*

96. *Id.* at 377.

can mobilize implicit bias that could inculpate an actor for harm the actor could not have foreseen. In other words, a negatively perceived motive can combine with the actor's expectation of harm, or even substitute for such an expectation entirely.

The studies above focused on actual harms suffered by a victim, but the effects of negative motives on culpability for unrealized harms has also been examined through the lens of the Culpable Control Model using scenarios of overdetermined results and results from acts performed under compulsion.[97]

Overdetermined results are those that would result from multiple sufficient causes.[98] In one experiment, participants read scenarios in which the motive of a person intruding in another's home was either morally positive (to feed the owner's cat at the request of the owner's wife) or morally negative (to perform a robbery), and then assessed the culpability of the homeowner who fatally shot the intruder.[99] In these scenarios, the intruder could have died from the gunshot alone, but other potentially fatal elements were introduced: either (1) the victim had a brain aneurysm at the same moment as the shot (overdetermined scenario), or (2) the victim had a brain tumor that would have killed him within a few weeks (not overdetermined).[100] When the intruder acted with a morally positive motive the homeowner was judged more culpable and the gunshot deemed more likely the cause of death than when the intruder acted with a morally negative motive.[101] Thus, even where an offender's act is sufficient, but not necessary, to bring about a negative result, the actor's motive can influence observers' assessments of culpability.[102]

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97. *See* Rogers et al., *supra* note 79 (examining effect of more proximate intervening cause of harm on judgments of culpability); Alicke, *Culpable Control*, *supra* note 74 (examining effect of compelled harmful results on culpability).

98. *See* Alicke, *Culpable Control, supra* note 74, at 685.

99. *Id.* at 684–86.

100. *Id.*

101. *Id*. at 686.

102. From the perspective of criminal law doctrine, the shooter is just as causally responsible in the gunshot plus aneurysm scenario as in the gunshot alone scenario, because the gunshot and aneurysm are simultaneous sufficient causes. *See* Jones v. Commonwealth, 281 S.W.2d 920 (Ky. 1955); MODEL PENAL CODE § 2.03 cmt. 2 (AM. L. INST., Official Draft 1985); GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 379–80 (2d ed. 1983). Yet, it has long been noted that causal responsibility is less intuitive in this situation, James A. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149 (1925), and none of the arguments supporting treating simultaneous sufficient conditions as factual causes is very persuasive. *See* GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 208–10 (2016).

Another study examined the effects of motive on culpability judgments when the offender is under compulsion—forced to cause a harmful result.[103] In the scenarios tested, the offender, a pilot hired to fly businesspeople to Florida, was coerced at gunpoint to divert to Cuba and complied.[104] When the pilot intended to divert even before being compelled (in order to see his mistress, a morally negative motive) he was judged to be more intentional, to desire the outcome more, to act more voluntarily, to be more causally responsible for the diversion, and to bear greater blame for it than if his desires were unknown, or if he had the same desire (to see his mistress) but without having formulated the intention (to achieve this goal by hijacking the plane).[105] Thus, even when there are alternative causal explanations for harm following an actor's conduct, a morally negative motive makes observers more likely to attribute the harmful consequence to the actor.

Going beyond the Culpable Control Model, Janice Nadler has offered a model of "Motivated Blame" that posits a similar process for arriving at a judgment about an offender. This model also leads us to expect that an intuitive moral judgment will be followed by a *post hoc* search for justification.[106] Although the specific mental processes influencing a culpability judgment are different in the Motivated Blame Model than in the Culpable Control Model, motives remain important. Nadler predicted that a morally negative motive was more likely than a morally positive motive to lead to attributions of culpability.[107] In one scenario, two pilots died in a midair collision while fighting a blaze resulting from a fire catching flammable materials stored in an individual's trailer.[108] Nadler offered two alternative explanations for the flammable materials in the trailer—use in gardening (morally positive) and use in meth production (morally negative).[109] As Nadler predicted, the meth producer was judged more causally responsible and more to blame for the deaths, to have acted with greater foresight,

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103. *See* Rogers et al., *supra* note 79.

104. *Id.*

105. Conditions were labeled "Prior intent," "Secretly delighted," and "Common information and control." Here we call the prior intent scenario "negative motive" for consistency of terminology and in recognition of its similarity to other negative motive scenarios used in Culpable Control Model research where criminal behavior is undertaken for a morally reprehensible reason, such as the actor speeding to hide cocaine in Alicke et al., *supra* note 79, at 369–90.

106. *See* Nadler, *supra* note 70.

107. *Id.* at 273.

108. *Id.* at 274–75.

109. *Id.*

more intentionally, and more carelessly, and was deemed less likable, and seen more negatively.[110] This suggests that regardless of the precise test of culpability defined by law, information about a morally negative motive will be treated as evidence of culpability.

Additionally, Philip Tetlock's "Fair-but-Biased-yet-Correctible" model of culpability accords a place for motives in influencing judgments of offender culpability.[111] The main focus of this model is the effect of perceptions of broader social conditions with respect to crime in triggering a punitive "prosecutorial mindset."[112] This is "a cluster of causally interrelated indicators" resulting in "a heightened likelihood of causal attributions holding norm violators culpable . . . and of punishing both violators and those who fail to punish violators."[113] According to this model, judgments become strongly biased towards culpability and causal responsibility once one has been primed with a prosecutorial mindset.[114] The triggering information concerned high crime rates, ineffectual enforcement, and low social inhibitions against crime.[115] This suggested that information about a suspect's involvement in petty crime might make it more likely that a factfinder would impute causal responsibility or culpability with respect to more serious harm.

Finally, theories that do not explicitly emphasize automatic moral intuition in arriving at a moral judgment nonetheless recognize the importance of motive.[116] In his "Path Model of Blame," Bertram Malle theorizes that when a moral infraction is detected one first looks at whether it was caused by a particular individual and whether it was brought about intentionally, before evaluating an offender's reasons for intentional action.[117] When evaluating these reasons, however,

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110. Nadler & McDonnell, *supra* note 68, at 275–84 (emphasizing the effects of detecting moral transgression on moral emotions, which lead to moral judgment).

111. Tetlock et al., *supra* note 68.

112. *Id.* at 196.

113. The prosecutorial mindset can be triggered in the observer by information indicating that: "(a) norm violations are widespread; (b) norm violations are intentional; (c) violators are flaunting their contempt for shared values; (d) violators are routinely escaping punishment; (e) the social order is legitimate; and (f) norm violations offend shared moral values." *Id.*

114. We note that the model does not use the term "motive"; however, this clearly presents motives as dispositional triggers along an exculpation continuum that are considered and permit self-correction of the kneejerk judgment of an actor's actions. The model asserts that some motives are so universally condemned or excused as to be nearly deterministic in judgments of culpability. *Id.* at 196–99.

115. *Id.*

116. Malle et al., *supra* note 68, at 151–55; Cushman, *supra* note 77, at 356–61.

117. Malle et al., *supra* note 68, at 151–55.

immoral motives will aggravate, and moral motives justify an otherwise immoral action, resulting in a final blame judgment.[118] Thus, motives are evaluated and judged, affecting the degree to which an observer blames the actor for a harmful result.

In addition, Fiery Cushman's model assessed the impact of beliefs, desires,[119] and causality on judgments of the moral wrongness of conduct and blame for results.[120] Cushman presented scenarios varying an actor's (1) expectation of harm, (2) desire for harm, and (3) causation of harm, in a vignette where an actor burned the hand of a classmate in a sculpture class.[121] Cushman found that ratings of the actor's moral wrongness and responsibility for harm were independently influenced by both her expectations and her desires that her action would bring about a harmful result.[122] In another scenario, where an actor desired and believed her actions (adding poppy seeds to another's salad) would cause a harm (an allergic reaction) that was then brought about by an unrelated cause (hazelnuts already present in the salad), the actor was judged even less deserving of punishment than if no harm had occurred at all.[123] Cushman's results underscore that both expectation of harm and desire to cause harm influence moral assessments of conduct. However, his results show less influence of these factors on judgments of causal responsibility.[124]

Thus, psychological models explaining judgments of moral culpability accord a prominent place to the actor's motives. Yet to be explained is why information about the actor's motives informs answers to questions about expectations of and causal responsibility for harms that seem unrelated. We may hypothesize that such information affects observers' emotional responses to actors. Those emotions in turn generate intuitive judgments of disapproval that color *post hoc* reasoning about why the actor is at fault. The final part will therefore consider the role of observer's emotions in culpability judgments.

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118. *Id.* at 151–52.
119. Cushman defines "belief" in terms of foreseeability of harm resulting from agent's action and "desire" in terms of causing harm by the specific means an agent planned. Belief and desire are component elements of the author's definition of "intentionality." Cushman, *supra* note 77, at 357.
120. *Id.* at 360–61, 365.
121. *Id.* at 356–67.
122. *Id.* at 360–61.
123. *Id.* at 371–75 (underscoring that morally negative desire influences).
124. *See id.* at 374–75 (describing the blame-blocking effect of an intervening cause).

IV. THE ROLE OF EMOTIONAL RESPONSE TO AGENTS
IN JUDGMENTS OF BLAME

While the criminal justice system may aspire to arrive at dispassionate judgments of suspects' culpability, psychological theories of moral culpability hold that such judgments will be substantially influenced by the emotions suspects evoke in those judging them.[125] The emotional responses of those making culpability judgments may be influenced by many factors, including the emotions displayed by an offender and the degree to which the act itself violates social norms.[126] These emotional responses, generated by the automatic, intuitive moral system, tacitly influence moral judgments and culpability assessments.[127] Thus, it is important to understand the consequences of emotional influences on the decisions of those making legal judgments of blame—in particular jurors, judges, and prosecutors.

Although lay jurors' verdict decisions tend to closely align with those of judges,[128] there are also consistent differences in their decisions.[129] For example, judges tend to be more willing to convict than jurors.[130] Why might this be? Some authors have suggested that an ethos of legalism and professional detachment makes judges less likely than jurors to empathize with defendants.[131] Likelier explanations are that both state and federal judges are frequently recruited from the ranks of prosecutors,[132] while most state judges face election

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125. *See, e.g.*, Haidt, *Emotional Dog*, *supra* note 68; Alicke, *supra* note 68.

126. MODEL PENAL CODE §§ 3.02(1)(a), 5.01-03 (AM. L. INST., Official Draft 1985); *see* Nadler, *supra* note 70; Kahan & Nussbaum, *supra* note 60.

127. *See* Haidt, *Emotional Dog*, *supra* note 68; Alicke, *supra* note 68; Tetlock et al., *supra* note 68; John M. Darley, *Morality in the Law: The Psychological Foundations of Citizens' Desires to Punish Transgressions*, 5 ANN. REV. L. & SOC. SCI. 1, 1–4 (2009) (discussing influence of moral outrage on intuitive moral judgment).

128. *See* Neil Vidmar, *The Psychology of Trial Judging*, 20 CURRENT DIRECTIONS PSYCH. SCI. 58, 61 (2011).

129. *See* Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171, 204–05 (2005).

130. *Id.*

131. *See* Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 856–57 (2015) ("Sympathy and empathy in the jury box can be defended . . . [j]udges, however, are supposed to make reasoned decisions based on the facts and the law rather than on the basis of enmity or empathy for litigants.").

132. Tracey E. George & Albert H. Yoon, *Article I Judges in an Article III World: The Career Path of Magistrate Judges*, 16 NEV. L.J. 823, 840 (2016) (50% of federal district judges and 38% of federal magistrate judges are former prosecutors); Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL L. REV. 1203, 1235 (2010) (33% of state supreme court justices have experience as government prosecutors).

and consequent political pressure to demonstrate toughness toward crime.[133]

A juror's emotions often reflect underlying attitudes and beliefs,[134] operate implicitly,[135] and can bias their judgments of culpability.[136] These are not necessarily harmful consequences, as one's attitudes and beliefs are formed through experience in the context of a particular culture.[137] They can reflect social and cultural norms that, when violated, trigger automatic moral emotions and lead to judgments in line with the normative moral code.[138]

The problem is that extralegal defendant characteristics often affect jurors' emotions, making jurors more or less likely to recommend a guilty verdict and harsher sentence for reasons untethered to legal rules or moral fault.[139] For example, culpability judgments may be influenced by the defendant's race,[140] age,[141] gender,[142]

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133.   Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. 3–11 (Dec. 2, 2015) https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases [https://perma.cc/MWC6-8AU9]. Elections are held for state supreme courts in thirty-three states (seven hold partisan elections; thirteen hold nonpartisan elections; eleven hold retention elections after a judge's first term; and two hold elections under the Michigan method where parties hold nominating conventions to select candidates for subsequent nonpartisan elections). Partisan or nonpartisan elections are held for at least one type of intermediate appellate or trial court in thirty-seven states, and an additional three states hold retention elections for intermediate appellate or trial courts. *See Judicial Election Methods by State*, BALLOTPEDIA, http://ballotpedia.org/Judicial_election_methods_by_state [https://perma.cc/V7TE-CCRQ].

134.   *See, e.g.*, Natasha Korva et al., *Dangerous Decisions: Influence of Juror Attitudes and Defendant Appearance on Legal Decision-Making*, 20 PSYCHIATRY, PSYCH. & L. 384, 394–95 (2012).

135.   *See* Robinson & Darley, *supra* note 64, at 4–5.

136.   *See* Justin J. Gunnell & Stephen J. Ceci, *When Emotionality Trumps Reason: A Study of Individual Processing Style and Juror Bias*, 28 BEHAV. SCI. & L. 850 (2010); Tetlock et al., *supra* note 68, at 196 (positing that moral outrage helps trigger a prosecutorial mindset that precedes intuitive punitiveness).

137.   *See, e.g.*, Laurie A. Rudman, *Sources of Implicit Attitudes,* 13 CURRENT DIRECTIONS PSYCH. SCI. 79, 79–81 (2004) (indicating that early life experiences and culturally held biases impact implicit biases).

138.   David Pizarro, *Nothing More than Feelings? The Role of Emotions in Moral Judgment*, 30 J. FOR THEORY SOC. BEHAV. 355, 362, 365–66 (2000) ("Various beliefs held by the individual influence the very presence of affective arousal . . . [and] the presence of moral emotions is affected by the individual's moral beliefs.").

139.   *See* Gunnell & Ceci, *supra* note 136, at 868–71.

140.   *See* Korva, *supra* note 134, at 395; Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCH. BULL. 1367, 1375 (2000) (demonstrating favoritism of defendant of same race as juror).

141.   Joanna D. Pozzulo et al., *The Effects of Victim Gender, Defendant Gender, and Defendant Age on Juror Decision Making*, 37 CRIM. JUST. & BEHAV. 47, 60–61 (2010) (younger defendant seen as desiring sexual crime more against female victim).

142.   *Id.* at 60 (male defendant viewed as more guilty than female defendant in sexual assault).

attractiveness,[143] weight,[144] facial trustworthiness,[145] or socioeconomic status.[146] Victim characteristics, including gender and age, are similarly influential.[147] Where the juror confronts such a characteristic in a defendant or victim, they are more likely to experience negative moral emotions, such as anger, and to focus on confirmatory evidence when judging the person.[148]

There is also ample evidence that juror attributes influence how offender and victim characteristics are perceived and what moral emotions are provoked. Interacting with jurors' attitudes and biases are other cognitive proclivities.[149] These can include: legal authoritarianism, which is marked by holding legal attitudes "characterized by submission to authorities . . . conformity to society's conventions and rules . . . and a view of the world in terms of 'black' or 'white'";[150] just world beliefs, marked by a desire to believe that people get what they deserve;[151] and internal locus of control, which is characterized by the "belief that the events in [one's] life are due to things that they control."[152] Jurors may approach tasks with a relatively more "rational" or methodical processing style or with more "experiential" or intuitive processing style.[153] In deciding legal liability, jurors may be more motivated by the goals of achieving justice or avenging wrongdoing.[154] These cognitive biases and styles can affect outcomes. Thus,

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143. *See, e.g.*, Gunnell & Ceci, *supra* note 136, at 851–52 (reviewing attractive leniency bias).

144. *See, e.g.*, Natasha A. Schvey et al., *The Influence of a Defendant's Body Weight on Perceptions of Guilt*, 37 INT'L J. OBESITY 1275, 1279 (2013) (obese female defendant viewed as more culpable than lean female defendant).

145. *See* Korva, *supra* note 134, at 394–95 (demonstrating that those with trustworthy faces are considered less likely to commit crimes).

146. *See, e.g.*, Naomi J. Freeman, *Socioeconomic Status and Belief in a Just World: Sentencing of Criminal Defendants*, 36 J. APPLIED SOC. PSYCH. 2379, 2386–87 (2006) (low socioeconomic status individuals viewed as more guilty of criminal conduct in scenario involving stabbing and robbing store clerk than high socioeconomic status individuals).

147. *See, e.g.*, Theodore R. Curry, *The Conditional Effects of Victim and Offender Ethnicity and Victim Gender on Sentences for Non-Capital Cases*, 12 PUNISHMENT & SOC'Y 438, 449–53 (2010) (finding sentences are longer for violent crimes involving white and female victims). *But see* Pozzulo et al., *supra* note 141, at 60 (finding victim gender did not influence respondent ratings of guilt in simulated child sex abuse case).

148. *See* Tetlock et al., *supra* note 68, at 196–97 (describing anger as emotional indicator of prosecutorial mindset).

149. *See* Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, & Locus of Control on Venirepersons' Evaluations of Aggravating & Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCI. & L. 57, 66–67 (2007).

150. *See id.* at 60.

151. *See id.*; Freeman, *supra* note 146.

152. *See* Butler & Moran, *supra* note 149, at 61.

153. *See* Gunnell & Ceci, *supra* note 136, at 852–53.

154. *See* Korva, *supra* note 134, at 387.

greater legal authoritarianism, greater just-world beliefs, and greater internal locus of control are related to greater acceptability to the death penalty and lower likelihood of endorsing mitigators in capital sentencing.[155] Greater endorsement of vengeance motives is also generally related to a greater likelihood of finding a defendant guilty.[156] Experiential processing style is related to greater likelihood of guilt when other factors, such as a defendant's attractiveness, provoke negative emotions in the observer.[157] Thus, the lay juror comes to the courtroom primed to process information about victims and defendants in ways that may distort culpability judgments.

This picture may seem bleak in portraying jurors at the mercy of cognitive predispositions and biases. But jurors' emotions are not all bad. Jurors are also capable of empathizing with suspects, and this might trigger more effortful, rational processing that leads to a just result.[158] Affective empathy, the "vicarious emotion response . . . that occurs when exposed to the emotions of another,"[159] can call attention to a moral issue and invest it with concern.[160] Although empathy can be trait-like, with some people typically exhibiting more than others,[161] empathy can also be state-like, temporarily provoked in response to a situation,[162] and this transient empathy more powerfully impacts legal decision-making than trait empathy.[163] New information about an accused that prompts an empathic response can initiate a reflective process of emotional self-regulation that rationally checks an initial intuitive response.[164] This suggests that skillfully presented information and argument can mobilize jurors to make rational use of their emotional responses. Thus, despite the automaticity of emotions and their impact on moral judgment, a criminal trial can encourage

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155. *See* Butler & Moran, *supra* note 149, at 65–66.

156. *See* Korva, *supra* note 134, at 387.

157. *See* Gunnell & Ceci, *supra* note 136, at 851–52.

158. *See* Pizarro, *supra* note 138, at 359–62.

159. *Id.* at 359.

160. *Id.* at 360–62.

161. *See, e.g.*, Jane L. Wood et al., *'I Know How They Must Feel': Empathy and Judging Defendants*, 6 EUR. J. PSYCH. APPLIED TO LEGAL CONTEXT 37, 38 (2014).

162. *Id.*

163. *Id.* at 40–43.

164. *See* Pizarro, *supra* note 138, at 369–71 (describing various intentional strategies that can suppress or otherwise influence what emotions an individual experiences, and concluding: "[W]e are [not] merely passive recipients of reflexive emotional responses . . . [T]he control we have over our emotional reactions allows us to utilize their influence to serve our higher-order moral beliefs").

effortful, rational decision-making that is informed, but not controlled by emotions.[165]

Of course, empathy can also inform judicial judgments. According to Federal Circuit Judge Denny Chin, "[t]he reality is that empathy and emotion play an essential role in the real-world, day-to-day administration of justice."[166] Unfortunately, despite the belief that judges are more impartial and professional than lay jurors,[167] they too fall victim to many cognitive traps, including exhibiting racial bias,[168] considering inadmissible information,[169] and inflating estimates of the foreseeability of outcomes based on hindsight.[170] They must often make rapid-fire decisions, for example in setting bail, with little time to regulate their initial implicit emotions as jurors are allowed to do in a trial.[171] Bail decisions do exhibit racial disparities.[172]

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165.   *See, e.g.*, Irwin A. Horowitz et al., *Chaos in the Courtroom Reconsidered: Emotional Bias and Juror Nullification*, 30 L. & HUM. BEHAV. 163, 176 (2006) (finding that standard jury instructions do not lead to emotionally biased verdicts and that mock jurors functioned "in a legally appropriate manner"); *see also* Haidt, *Emotional Dog*, *supra* note 68, at 819 (describing social persuasion and private moral reflection as mechanisms through which intuitive emotional judgments can be overcome by rational cognitive processes); Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1051 (2014) ("When individuals are accountable and anticipate justifying their views to others, they process information more thoroughly, an effect that can reduce the effects of bias on decisions, including the effects of stereotypes."). *But see* Lee J. Curley et al., *Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making*, 62 MED. SCI. & L. 206, 211 (2022) ("From a limited amount of access to deliberation rooms and a great deal of proxy research it can be suggested that the intended 'averaging' out of biases does not always occur [in juries' decisions].").

166.   *See* Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1564 (2012).

167.   *See* Vidmar, *supra* note 128, at 58 ("The judge's role formally requires an understanding that his or her personal beliefs about the most just outcome of a particular dispute must often be subjugated in deference to consistency with the relevant body of law.").

168.   *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV 1195, 1195–96 (2009).

169.   *See* Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 125 (1994) ("The data . . . suggest[s] that judges and jurors in civil cases react similarly when exposed to material that is subsequently ruled inadmissible—their perceptions of central trial issues are altered."); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1325 (2005).

170.   *See, e.g.*, Aileen Oeberst & Ingke Goeckenjan, *When Being Wise After the Event Results in Injustice: Evidence for Hindsight Bias in Judges' Negligence Assessments*, 22 PSYCH. PUB. POL'Y, & L. 271, 275–76 (2016) (demonstrating that professional judges give heightened assessments of an event's foreseeability when the outcome is known, biasing negligence judgments).

171.   *See* David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1889 (2018) ("[B]ail judges . . . make quick judgments on the basis of limited information, with virtually no training.").

172.   *Id.* at 1929.

Most troublingly, however, the actors thus far discussed decide few criminal cases. Prosecutors are the central actors in the modern criminal justice system,[173] which resolves the overwhelming majority of charges through plea bargains rather than trials.[174] Determinate and guideline sentencing systems, severe penalties, and power to bring multiple charges, give prosecutors almost unilateral power to decide the fate of defendants.[175] Like other actors in the system, prosecutors are subject to biases, including racial bias.[176] Confirmation bias—the selective search for and attention to evidence confirming rather than testing—is particularly prevalent in prosecution and law enforcement, and compounded by belief perseverance and cognitive dissonance reduction.[177] These factors are often identified as factors in wrongful convictions.[178] And unlike judges, jurors, or prosecutors in other countries, American prosecutors have no duty of impartiality, and are rewarded politically and professionally for high conviction rates and stiff penalties.[179] Survey data finds that almost 90% of prosecutors see low crime and low recidivism as at least "important" and 60% as "very

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173. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805 (2012).

174. *See* NAT'L ASSOC. OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/RZ6H-D9RX] (partially attributing trial rate decrease from 20% to 3% over past thirty years to mandatory minimum sentencing); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 493 (2004).

175. *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013); Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 369 (2010) (describing the discretion of prosecutors to decide who to charge and with what crimes, to recommend high or low punishments, and to reward cooperation with the government, which all influence plea bargaining frequency); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–23 (2010) (case of defendant sentenced to fifty-five years for possessing a weapon while selling eight ounces of marijuana illustrates the unchecked power overcriminalization and determinate sentencing gives prosecutors); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) (prosecutorial advantages mean that criminal law rules no longer meaningfully determine results of plea bargaining).

176. Smith & Levinson, *supra* note 173.

177. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–1602, 1604–05; GOVERNOR'S COMM'N ON CAP. PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 19–22 (2002).

178. Burke, *supra* note 177, at 1590–91; BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 12 (2012).

179. Luna & Wade, *supra* note 175, at 1464–70.

important" measures of their performance.[180] That so many prosecutors see reoffending by convicts as a measure of their performance is particularly ominous, implying strong prosecutorial motivation to systematically overcharge and over-punish, to avoid adverse publicity in even a single case. Surely the "prosecutorial mindset" that we see as a distortionary bias when triggered in jurors,[181] is a source of bias in prosecutors themselves.[182] And while a genuinely adversary process might correct such bias, the realities of plea bargaining leave prosecutorial bias effectively unchecked. Thus, a high volume of cases means plea bargaining decisions are often made quickly, while prosecutors' partisan role and bargaining leverage insulate them from any prompts to reflect, empathize, or keep an open mind.[183] These circumstances allow bias to go unrecognized and uncorrected.[184] Thus, prosecutors' implicit racial biases likely contribute to disparate conviction rates and sentences for minority defendants.[185]

Given that prosecutors work in circumstances conducive to bias, it is important to examine what strategies can be employed within the criminal justice system to arrive at a less biased result. The most fundamental solutions to prosecutor bias would require redefining the role of prosecutors to make them more like the impartial judicial officials prevailing in Europe, reducing prosecutorial leverage by reducing penalties and narrowing liability, and restoring judicial sentencing discretion.[186] Sam Pillsbury has offered further proposals to reconstruct sentencing and correction as more restorative processes, aimed at

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180. BESIKI LUKA KUTATELADZE ET AL., FLORIDA INTERNATIONAL UNIVERSITY, PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE 7 (2018), https://caj.fiu.edu/news/2018/prosecutorial-attitudes-perspectives-and-priorities-insights -from-the-inside/report-1.pdf [https://perma.cc/75N7-89CC] (surveying sixty-seven prosecutors from Jacksonville, Florida).

181. *See* Tetlock et al., *supra* note 68.

182. Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 196 (2007) ("[B]iased assimilation of evidence can prevent prosecutors from believing defendants' claims of innocence."); Burke, *supra* note 177, at 1603–13; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 316, 327–31; Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327; Stephanos Bibas, *Plea Bargaining Outisde the Shadow of Trial*, 117 HARV. L. REV. 2464, 2498–502 (2004).

183. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 160 (1968) (rapid processing of cases requires a "presumption of guilt"); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 877 (2017).

184. Richardson, *supra* note 183, at 881–82.

185. *See* Lisa Stolzenberg et al., *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275, 277 (2013); Smith & Levinson, *supra* note 173, at 822.

186. Luna & Wade, *supra* note 175, at 1501–26.

developing the empathic capacity of both the offender and the community.[187]

But some observers have also proposed more moderate reforms. Recognizing the disproportionate effect of prosecutors,[188] Christina Morris has recommended several strategies that could help level the playing field for minority defendants. She has proposed screening potential prosecutors for implicit bias.[189] Once recruited, prosecutors could actively engage in exercises requiring them to learn about and take the perspective of defendants dissimilar to themselves.[190] This may allow for better understanding of the defendant's circumstances and how they may be viewed by a jury, and may reduce bias in trial preparation.[191] Finally, she has proposed systematic, office-wide record-keeping and analysis to find patterns of racial disparity, triggering review of individual cases to identify deficiencies in both individual prosecutors and office practices.[192] Alafair Burke has argued for both office pleading policies to reduce prosecutorial discretion, and de-biasing training.[193] Burke also proposes police turning over all evidence to prosecutors (rather than selecting only inculpatory evidence),[194] and broadening prosecutorial responsibility to pass on exculpatory evidence to the defense;[195] requiring prosecutors to present "devil's advocate" arguments to colleagues;[196] and institutionalizing "fresh" review of cases by a committee of colleagues or—better still—a board of independent reviewers.[197]

V. CONCLUSION

Sam Pillsbury has long raised deep questions concerning the proper role of emotion in our moral and legal practices of blaming. He was among the first scholars to draw attention to the importance to us

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187. PILLSBURY, IMAGINING, *supra* note 2.

188. *See* Christina Morris, *The Corrective Value of Prosecutorial Discretion: Reducing Racial Bias Through Screening, Compassion, and Education*, 31 B.U. PUB. INT. L.J. 275, 291 (2022) ("Even if prosecutors are not directly responsible for the biased results of the system, they should recognize that they are in a position either to alleviate or to perpetuate some of the disparities.").

189. *Id.* at 291–94.

190. *Id.* at 295–97.

191. *Id.*

192. *Id.* at 300–01.

193. Burke, *supra* note 182, at 205–07.

194. Burke, *supra* note 177, at 1614–16.

195. *Id.* at 1626–31.

196. *Id.* at 1618–21.

197. *Id.* at 1621–24.

of agents' motivations in assessing the morality of their conduct. He argued that we rightly see the mutual respect required by deontological morality as requiring that we factor empathy into our practical reasoning. He early argued that deserved blame must also be tempered by empathy, and that the aim of punishment must be to restore relations of mutual empathy.

Since Sam Pillsbury first raised these problems, a burgeoning empirical literature has arisen, examining the moral psychology of blame. That literature indicates that (1) blame is primarily intuitive, rather than reflective; (2) these intuitive judgments are indeed influenced by information about agents' reasons and desires; (3) intuitive moral judgments are highly susceptible to bias; but (4) rational deliberation, particularly in dialogue with others of differing experience, can mobilize empathic emotion to improve the fairness and reliability of our moral judgments.

We cannot be for or against emotion in acting or judging action. Emotion inheres in both our practical and moral judgment. But we can design institutions that will better mobilize our emotions in the service of fairness. Such institutions would not afford any actor unchecked power to punish.