

“ABATEMENT MEANS WHAT IT SAYS”: THE QUIET RECASTING OF ABATEMENT

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INTRODUCTION

On May 25, 2006, Kenneth Lay, the former CEO of Enron, was convicted on ten counts of securities fraud and related offenses for misleading investors about the company’s tottering finances.¹ The four-month trial was notable for its complexity and expense: fifty-six witnesses had been called, and twenty-seven boxes of documents were submitted into evidence.² The evidence was “like a puzzle with 25,000 pieces dumped on the table,” one juror told the *Los Angeles Times*. “As you g[o]t closer to the end, the pieces started to come together.”³

The guilty verdict was widely applauded.⁴ For individual investors who lost money in Enron’s crash, Lay’s conviction was a step toward financial restitution and a judgment in civil court. But the verdict was also satisfying to many who lacked a financial stake in the case. For these people, the guilty verdict provided a sense that society had registered its disapproval of Lay’s actions. “To me, God has spoken to [Lay] with this verdict,” one Houstonian told the *Times*. Another remarked that “Lay and [codefendant Jeffrey] Skill-

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1. See *United States v. Lay*, 456 F. Supp. 2d 869, 870 (S.D. Tex. 2006) (stating, in abating order, that Lay was found guilty of all counts charged).

2. Vikas Bajaj & Kyle Whitmire, “*I Didn’t Know*” *Did Not Sway Houston Jury*, N.Y. TIMES, May 26, 2006, at A1.

3. Lianne Hart, *The Enron Verdicts: “How Could They Not See It?”*, L.A. TIMES, (May 26, 2006), <http://articles.latimes.com/2006/may/26/business/fi-jury26>.

4. See, e.g., Simon Romero, *A Lingering Resentment and a Desire to Move Beyond Rueful Memories*, N.Y. TIMES, May 26, 2006, <http://www.nytimes.com/2006/05/26/business/businessspecial3/26houston.html> (reporting that “as news of the guilty verdict against Enron’s former chief executives raced through the city on Thursday, many Houstonians expressed relief, satisfaction and even joy”); Letters to the Editor, *Justice is served in Enron case*, L.A. TIMES, May 27, 2006, <http://articles.latimes.com/2006/may/27/opinion/le-saturday27.2>; Adam Shell, *Enron Verdicts Good for Investors*, USA TODAY, May 29, 2006, http://www.usatoday.com/money/markets/us/2006-05-29-enron-mart-usat_x.htm?loc=interstitialskip (quoting financial experts who expressed belief that the guilty verdict strengthened investor confidence in the integrity of the markets).

ing lived their fancy lives in the public and now they're living their humiliation in public, and that's what they deserve."⁵

This satisfaction was to be short-lived. Lay died in his vacation home six weeks after the verdict, and just under four months before he was to be sentenced.⁶ In short order, District Judge Simeon Lake of the Southern District of Texas vacated Lay's conviction, dismissed the indictment, and denied a motion for restitution filed by former Enron employees.⁷ In so doing, Judge Lake acted in accordance with a well-established doctrine known as abatement ab initio, which requires that a defendant's conviction be formally extinguished when he dies before the conviction can be reviewed.⁸

The abatement of Lay's conviction touched off a debate between those who felt that he had slipped through a convenient loophole, and those who defended abatement as a vital procedural protection. The *Sacramento Bee* grouched that "[t]he dead man's estate should not simply be handed the fruits of Lay's wrongdoing"⁹ Similarly, one commentator called abatement "the sort of legal principle that may look good on paper, but seems ridiculous in real life."¹⁰ But others responded that the abatement doctrine safeguarded an important legal principle. Abatement "speaks to the foundation of integrity that we demand from our legal system," explained Loren Steffy, a columnist for the *Houston Chronicle*.¹¹ "The appeals process is a key safeguard to that system, a review to which every citizen is entitled. It's so important . . . that convictions can't be allowed to stand without it."¹²

In claiming that abatement compensates for the defendant's forfeited right of appeal, Steffy was offering the standard justifica-

5. Lianne Hart & Abigail Goldman, *The Enron Verdicts: No Hometown Heroes*, L.A. TIMES, May 26, 2006, <http://articles.latimes.com/2006/may/26/business/fin-houston26>.

6. See *Kenneth L. Lay, Ex-Chairman of Enron, Dies*, N.Y. TIMES, July 5, 2006, <http://www.nytimes.com/2006/07/05/business/05cnd-lay.html>; Jeremy Peters & Simon Romero, *Enron Founder Dies Before Sentencing*, L.A. TIMES, July 5, 2006, <http://www.nytimes.com/2006/07/05/business/05cnd-lay.html>.

7. *United States v. Lay*, 456 F. Supp. 2d 870, 870 (S.D. Tex. 2006).

8. *Id.* at 872.

9. Editorial, *Dead Man's Justice: Appeal Ruling that Erased Lay Verdict*, SACRAMENTO BEE, Nov. 30, 2006, at B8.

10. Ann Woolner, *How Kenneth Lay Died an Innocent Man*, OTTAWA CITIZEN, July 8, 2006, at D1.

11. Loren Steffy, *Even Though Lay Is Dead, Prosecutors Can't Let Go*, HOUSTON CHRON., Sept. 8, 2006, <http://www.chron.com/disp/story.mpl/business/steffy/4171624.html>.

12. *Id.*

tion for the doctrine.¹³ Yet for many, that argument is no longer convincing. A growing number of legal commentators have called for the abolition or modification of the abatement rule.¹⁴ Some opponents of the practice echo the language—and adopt the positions—of the “victims’ rights” movement, a highly successful three-decade-old effort to change the way the judicial system responds to victims of crime.¹⁵

Both sides in this debate assume that the abatement doctrine is deeply embedded in our common law. To opponents of abatement, the practice stems from an outmoded penal philosophy with little regard for the well-being of crime victims. In the eyes of abatement’s defenders, it reflects ancient truths about the rights of criminal defendants.¹⁶ *USA Today* captured this assumption of antiquity when, following Lay’s death, it reported that the doctrine “reflects centuries of legal principles going back to the Middle Ages in Europe.”¹⁷

In this Note, I show that the practice we know as abatement is in fact very new, having only arisen in the federal courts in the 1970s. Until that period, abatement was seen as a way to recognize that the courts’ penal role ended with death, rather than as a measure to protect the defendant’s rights. The transformation of abate-

13. See, e.g., *United States v. Estate of Parsons*, 367 F.3d 409, 413 (5th Cir. 2004) (en banc) (“[T]he state should not label one as guilty until he has exhausted his opportunity to appeal.”).

14. See Douglas A. Beloof, *Weighing Crime Victims’ Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1158–63 (2007) (criticizing abatement ab initio from a victims’ rights perspective and describing opposition to abatement in some courts); Timothy A. Razel, Note, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2224–26 (2007) (proposing a multi-factor test for when abatement should be applied); Tim E. Staggs, Note, *Legacy of a Scandal: How John Geoghan’s Death May Serve as an Impetus to Bring Abatement Ab Initio In Line with the Victims’ Rights Movement*, 38 IND. L. REV. 507, 528–32 (2005) (proposing that courts abolish abatement and instead let the defendant’s estate appeal his conviction posthumously).

15. See Beloof, *supra* note 14, at 1158–63 (taking a victims’-rights approach to abatement); Staggs, *supra* note 14, at 526–28 (describing the “friction” between abatement and victims’ rights).

16. See Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 954 (2002) (detecting, underlying abatement, a “larger premise: a conviction that cannot be tested by appellate review is both unreliable and illegitimate”).

17. Edward Iwata, *Legal Doctrine Stacks Up to Erase Lay’s Conviction*, USA TODAY, July 7, 2006, http://www.usatoday.com/money/industries/energy/2006-07-06-parsons-lay-usat_x.htm. The quote comes from the attorney who represented Parsons in *Parsons*, 367 F.3d 409. *Id.*

ment into a rights-protective measure has generated the features that today make the doctrine unique, such as its ability to exonerate the defendant, and to block quasi-civil remedies such as restitution.

My aim in narrating the rise of abatement is to dispel the air of historical immutability that surrounds the current version of the doctrine, and to display the connection between abatement's shifting justifications and its resultant shifting forms. My hope is that this knowledge will make courts and scholars more comfortable with discussing changes to abatement. By dispensing with the myth of abatement's antiquity, I hope to encourage courts and commentators to "enter the sanctum" of abatement—to tinker unabashedly with the shape of the doctrine, free from the illusion that abatement represents an ancient and unchanging practice.

Ultimately, I concur with the scholarly consensus that the modern features of abatement are largely undesirable, and I recommend a return to the earlier conception of abatement.

In Part I, I describe the modern contours of the abatement doctrine, and sketch the objections of its critics. In Part II, I discuss the traditional practice of abatement: Parts IIA and IIB describe the "punishment rationale" that underlies traditional abatement, and Part IIC discusses the contours of traditional abatement in practice. In Part III, I recount the emergence of the modern "appellate" rationale for abatement in the state and federal systems. Finally, in Part IV, I recommend that the appellate rationale be rejected, and that courts return to the punishment rationale instead.

I.

ABATEMENT TODAY: ITS FEATURES AND CRITICS

Abatement's defenders in the academy today cite a single principle to justify the doctrine, as do courts in nine federal circuits.¹⁸ Abatement, they say, is the guardian of the appellate right.¹⁹ It reflects the fact that a conviction untested—and untestable—by appeal is not truly final, so that an injustice is visited on the defendant if such a conviction is allowed to stand. In the words of Rosanna Cavallaro—the most prominent scholar to have defended abatement—the doctrine springs from "a larger premise [that] a convic-

18. See *infra* notes 125–36 and accompanying text.

19. See, e.g., *United States v. DeMichael*, 461 F.3d 414, 416 (3d Cir. 2006) ("The abatement rule is grounded in procedural due process concerns."); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997) (calling the appellate rationale "a fundamental principle of our jurisprudence from which the abatement principle is derived"); *infra* note 140 (collecting cases and law review articles likewise positing this theory).

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tion that cannot be tested by appellate review is both unreliable and illegitimate.”²⁰ This argument for abatement will be referred to hereinafter as the “appellate” rationale.²¹

Modern-day abatement has two defining characteristics, both products of the rights-protective appellate rationale. The first of these characteristics is abatement’s ability to elicit judicial proclamations of the defendant’s legal innocence. In other words, modern-day abatement does not merely reverse a conviction or suspend a judgment, but it is taken by courts as entitling a defendant to the statement that he is innocent in the eyes of the law. This property will be referred to below as the “exonerative” effect of abatement.

In a classic exonerative opinion, *United States v. Estate of Parsons*, the Fifth Circuit, sitting en banc, abated the deceased defendant’s convictions for arson, fraud, and money laundering, canceling a \$75,000 fine and an order to pay about \$1.3 million in restitution.²² Parsons’ death, the court said, meant that “in the eyes of the criminal court, the defendant is no longer a wrongdoer and has not defrauded or damaged anyone.”²³

The court of appeals’ reasoning was firmly grounded in the appellate rationale. In an early portion of the opinion, the court contrasted that rationale, which it described as the principle that “the state should not label one as guilty until he has exhausted his opportunity to appeal,”²⁴ with the more prosaic rule (dubbed the “punishment principle”) that a dead person simply should not be punished.²⁵

The government’s argument that the victims should be made whole, the court said,

[H]as little force if the concern is finality [of conviction] and the right of the defendant to contest his appeal at least once.

20. Cavallaro, *supra* note 16, at 954. See also *Parsons*, 367 F.3d at 413 (endorsing this rationale); Rosanna Cavallaro, *Why, Legally, Geoghan Is Now “Innocent,”* BOSTON GLOBE, Aug. 29, 2003, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/08/29/why_legally_geoghan_is_now_innocent/ (commenting in op-ed article, after the death and abated conviction of child-molesting priest John Geoghan, that “the rule of abatement is built upon the premise that the judgment of a trial court is not valid unless reviewed by an appellate court”).

21. The court in *Parsons*, following Cavallaro, calls this the “finality rationale,” since it turns on the non-finality of unreviewed convictions. *Parsons*, 367 F.3d at 413.

22. *Id.* at 411, 415.

23. *Id.* at 416.

24. *Id.* at 414.

25. *Id.* at 413.

Any references to the wrongful nature of the defendant and his actions are conditioned on an appellate court's upholding the conviction, assuming the defendant pursues an appeal. The defendant's death during the pendency of appeal pushes a court to nullify all prior proceedings. Despite what may have been proven at trial, the trial is deemed not to have taken place.²⁶

In other words, according to the court of appeals, the only way to rectify the injustice of a defendant's unappealable conviction is to speak and act as if the defendant were innocent—as if he had never been charged or convicted.²⁷

But the exonerative effect is not the only defining property of modern-day abatement. The other such characteristic will be referred to in this Note as the “restitution-blocking” effect: abatement blocks or complicates the various routes by which victims of crime can seek compensatory payments from defendants. In many federal circuits, orders of restitution are abated along with the conviction.²⁸ And a victim suing the defendant's estate—who would normally be able to use the conviction to estop the defendant from relitigating the facts at issue—will find the conviction unavailable for this purpose.²⁹

26. *Id.* at 415–16.

27. For another classic statement of the exonerative effect, see *United States v. Pauline*, 625 F.2d 684, 684–85 (5th Cir. 1980) (stating that, with abatement, “the family is comforted by restoration of the decedent's ‘good name’”); see also *United States v. Logal*, 106 F.3d 1547, 1551–52 (“[I]t is as if the defendant had never been indicted and convicted.”); *United States v. Schumann*, 861 F.2d 1234, 1237 (11th Cir. 1988) (holding that the defendant “stands as if he never had been indicted or convicted”); *Bagley v. State*, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960) (“The obliterative effect of abatement ab initio necessarily leaves undetermined the question of the appellant's guilt. For whatever comfort or benefit derivable therefrom, the legal presumption of innocence of the crime with which she was charged abides now in no less degree than before the criminal proceedings were instituted. Jurisdiction to determine the issue of guilt or innocence is now assumed by the ultimate arbiter of human affairs. The decision we undertook to render is a nullity.”).

28. See *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010); *Parsons*, 367 F.3d at 415; *United States v. Wright*, 160 F.3d 905, 909 (2d Cir. 1998); *Logal*, 106 F.3d at 1552.

29. Beginning with a string of decisions in the 1980s, seven courts of appeals have held that plaintiffs cannot use an abated conviction to estop relitigation of the facts underlying the conviction, because, in the eyes of the law, the defendant has never been convicted. See *Rich*, 603 F.3d at 724; *Parsons*, 367 F.3d at 417; *United States v. Asset*, 990 F.2d 208, 211 (5th Cir. 1993); *Schumann*, 861 F.2d at 1236–37; *United States v. Dudley*, 739 F.2d 175, 176 (4th Cir. 1984); *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983); *Pauline*, 625 F.2d at 684.

The restitution-blocking effect of modern-day abatement typically follows logically from its exonerative effect. If abatement leaves the defendant innocent—so the reasoning goes—then surely he cannot be required to “compensate” his “victims.”

The Ninth Circuit displayed this line of reasoning in *United States v. Rich*, an appeal by the estate of the Ponzi schemer Michael Rich, who had been convicted of fraud-related offenses.³⁰ The court affirmed the connection between abatement and the right to an appeal, intoning that a “fundamental principle of our jurisprudence from which the abatement principle is derived is that a criminal conviction is not final until resolution of the defendant’s appeal as a matter of right.”³¹ Accordingly, it argued, the unappealable conviction was fundamentally illegitimate, and could not be the basis for an order of restitution:

The Restitution Order must be abated because “the defendant is no longer a wrongdoer” once his conviction has abated. Just as it is inappropriate to impose restitution on a living individual who was never indicted or convicted, so it is inappropriate to impose restitution on the estate of a deceased individual who, in the eyes of the law, was never indicted or convicted. Abatement *ab initio* means what it says.³²

The argument that abatement restores innocence, and innocence forecloses compensatory judgments, has been a powerful one. Not only has it been used to cancel orders of restitution, but courts have also deployed it to nullify the issue-preclusive effect of criminal convictions in subsequent lawsuits by crime victims or the government. Such courts’ reasoning is typically the same as that of the court in *Rich*: the crime never happened in the eyes of the law, so it cannot form a basis for collateral estoppel.³³

30. 603 F.3d at 722, 724.

31. *Id.* at 729 (internal citations omitted).

32. *Id.* (internal citations omitted). *See also Parsons*, 367 F.3d at 415 & n.15 (declaring that the appellate rationale “mandates that all vestiges of the criminal proceeding should disappear,” and concluding that “[b]ecause [the defendant] now is deemed never to have been convicted or even charged, the order of restitution abates *ab initio*”); *United States v. Sheehan*, 874 F. Supp. 31, 34 (D. Mass. 1994) (“By choosing to make vacatur of the underlying judgment a concomitant of abatement of a prosecution, the courts have effectively treated the relevant judicial directives in the judgment to be without force and effect.”).

33. *See Pauline*, 625 F.2d at 684 (“[T]he abated conviction cannot be used in any related civil litigation against the estate.”); *Schumann*, 861 F.2d at 1237 (denying preclusive effect to conviction of deceased defendant in civil forfeiture suit because “[t]he defendant’s death pending his appeal serves to abate the conviction *ab initio* as pointed out earlier. In essence, [the defendant] stands as if he never had been indicted or convicted.”); *State Farm Fire & Cas. Co. v. Estate of*

To abatement's many critics, the benefits claimed for the practice are wholly disproportionate to the harm that it wreaks. Douglas E. Beloof, a leading voice in the victims' rights movement, has succinctly summarized the harms that opponents of abatement see in the exonerative and restitution-blocking effects:

For crime victims, validation that they were wronged comes from the conviction and sentencing of the criminal defendant. Furthermore, some financial redress for the wrong may come in the form of restitution. Abatement *ab initio* eliminates both the conviction and the opportunity for restitution. In the language of victims' interests, with abatement *ab initio* victims are denied justice and a secondary harm is inflicted upon them.³⁴

In the courts, much criticism of abatement has centered on the doctrine's air of exoneration—its purported ability to retract the accusation leveled by the government at trial and confirmed by the jury's verdict. For example, in 1998, the Illinois Appellate Court refused to abate the convictions of three defendants who had been convicted of horrifying crimes: a man who had shot and killed his wife, a woman who had hung her toddler son, and a man who had sexually abused his six-year-old niece.³⁵ The court's analysis focused on the exonerative effect of abatement:

Abating the proceedings *ab initio* . . . creates an unacceptable and ultimately painful legal fiction for the surviving victims which implies that the defendants have somehow been exonerated. We will not exacerbate the loss suffered by the victims of these crimes and add to their tragedy by entering a judgment that appears to absolve the defendants of their violent criminal acts.

Speaking directly, to wipe out the convictions of defendants . . . on the legal technicality suggested by defense counsel would serve only to increase the misery of victims who have endured enough suffering. In our view, the law should serve as

Caton, 540 F.Supp. 673, 683 (N.D. Ind. 1982) (denying issue-preclusive effect of abated conviction in subsequent civil suit because "no underlying previous decision now exists on which to apply the *Parklane* criteria. Abatement *ab initio* in a criminal setting wipes the slate clean."), *overruled on other grounds by* Ashlan Oil, Inc. v. Arnett, 656 F. Supp. 950 (N.D. Ind. 1987).

34. Beloof, *supra* note 14, at 1159. *See also* Razel, *supra* note 14, at 2217 ("[A] conviction for a heinous crime is in itself justice, and the loss of that conviction is a massive injustice . . .").

35. *People v. Robinson*, 699 N.E.2d 1086 (Ill. App. Ct. 1998), *vacated*, 719 N.E.2d 662 (Ill. 1999). Note that the refusal to abate was vacated by the Illinois Supreme Court.

a salve to help heal those whose rights and dignity have been violated, not as a source of additional emotional turmoil.³⁶

For all their vehemence, opponents of abatement seldom question the historical foundation of the practice. Abatement's critics tend to assume that the doctrine's rationale and form are deeply rooted in history. Thus, one student Note argues abatement has the potential to "thwart justice," nonetheless identifies it as a product of the Enlightenment, shaped by the American "commitment to the rights of the accused."³⁷ Another Note opposing abatement sees the finality principle as the most "sophisticated" and "accurate" explanation for the practice.³⁸ Professor Cavallaro, a defender of abatement, has similarly fostered the impression that abatement is a timeless, unchanging practice. She notes the "vigorous rhetoric that has sustained [abatement] for so long"³⁹ and declares that:

Since the creation of a statutory regime for appellate review of federal criminal convictions, there has been an unreflecting and—until quite recently—unanimous approach by the United States Supreme Court and federal circuits to determining the status of a defendant-appellant who dies.⁴⁰

Yet this version of abatement—and this understanding of its foundations—does not truly constitute, as claimed, a time-honored legacy dating back to the dawn of criminal appellate review. To the contrary, abatement as we know it today is a novelty. The principal features of modern abatement are of recent vintage, and so is the

36. *Robinson*, 699 N.E.2d at 1092. See also *State v. Devins*, 142 P.3d 559, 605 (Wash. 2006) (stating that the victim "was shocked and distressed when Devin's record was wiped clean These impacts alone, as described in her declaration, make the abatement rule 'harmful' as applied here."); *State v. Korse*, 111 P.3d 130, 135 (Idaho 2005) (rejecting abatement because "abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide"); *Bevel v. Commonwealth*, No. 2373-09-4, 2010 WL 3540067, at *4 (Va. App. Sept. 14, 2010) (refusing to abate because of "the adverse impact that abatement of the proceedings *ab initio* would have on the victim, A.M., who had reached closure and validation of her story only after a 'long . . . painful and emotional process,' to bring her father's wrongful conduct to light").

37. Razel, *supra* note 14, at 2201.

38. Staggs, *supra* note 14, at 526.

39. Cavallaro, *supra* note 16, at 947.

40. *Id.* at 949–50. See also *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997) (calling the appellate rationale "a fundamental principle of our jurisprudence from which the abatement principle is derived"); *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010) (quoting *Logal*, 106 F.3d at 1552).

supposedly ancient “appellate rationale” that underlies it for modern proponents and critics of the doctrine alike.⁴¹

II. THE TRADITIONAL PRACTICE OF ABATEMENT

In the previous Part, I showed that abating courts today display two characteristic tendencies: a tendency to describe themselves as exonerating the defendant, and a consequent tendency to cancel restitutive measures premised on the now-vanished conviction. Both features derive from the underlying belief that a conviction which cannot be appealed is not truly final and cannot with justice be relied upon.

In this Part, I will show that this was not always the case and sketch the contours of the more traditional form of abatement that prevailed for most of the twentieth century. This Part will begin by describing the rationale which underpinned traditional abatement, and then will demonstrate that, for traditional abating courts, this rationale required neither the defendant’s exoneration nor the cancellation of quasi-civil remedies.

Below, I use the phrase “traditional abatement” to describe a rationale and a set of practices that remained roughly typical of abatement from the late nineteenth century until the onset of the appellate rationale, which the federal circuits have adopted over the last three decades.⁴² This traditional understanding of abatement persists to the present day in many state courts.

Moreover, although my aim in this Note is to describe the practice of federal courts, I illustrate my argument with some state decisions, because state courts were virtually the sole locus of criminal jurisprudence until the Progressive Era, and thereafter continued to hear the vast majority of criminal cases until the passage of RICO and the Controlled Substances Act in 1970.⁴³ In using state cases, I

41. See *infra* Part III.A.

42. See *infra* Part III.A.

43. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2006); Controlled Substances Act, 21 U.S.C. §§ 801–971 (2006). See, e.g., Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 1993–99 (2008) (noting that, in the nineteenth century, criminal law was “not a significant concern of the federal government,” and describing the two great expansions of federal criminal law in the Progressive Era and in the 1970s); Roger A. Hanson & David B. Rottman, *United States: So Many States, So Many Reforms*, 20 JUST. SYS. J. 121, 122 (1999) (noting that, on average, general-jurisdiction state trial judges “resolve 416 criminal cases each year (more than five times the number of criminal cases handled by their federal counterparts)”).

echo the practice of the federal courts themselves, which often drew heavily on state precedents in their earliest abating decisions.⁴⁴ Where state and federal practice diverge, the split is noted.⁴⁵

A. *The Punishment Rationale for Abatement*

Whereas modern abatement decisions treat abatement as a remedy for the defendant's forfeited right of appeal, traditional abatement reflected the principle that death ended any possibility of punishing the accused, rendering further action on the court's part superfluous. This line of reasoning has been called the "punishment rationale."⁴⁶

Thus, the Circuit Court of Oregon, affirming in 1908 the abatement of a fine against disgraced U.S. Senator John H. Mitchell, explained that "no further proceedings can be had against a dead person. He cannot appear, either in person or by counsel; nor can he be required to obey the orders and judgments of the court touching his person . . . for his day of temporal punishment has passed."⁴⁷

For the *Mitchell* court, abatement of the Senator's fine was not a way to recognize his innocence, or to send a metaphysical message about the importance of the right of appeal. It was, rather, a matter of housekeeping, a procedural recognition of the brute fact that the defendant no longer existed. Mitchell, the court said, "could not be pecuniarily mulcted or punished in person after he had ceased to exist."⁴⁸

44. See, e.g., *United States v. Pomeroy*, 152 F. 279, 281 (C.C.S.D.N.Y. 1907) (citing seven state cases); *United States v. Mitchell*, 163 F. 1014, 1015 (C.C. Or. 1908) (citing four state cases).

45. See *infra* Part II.B.1 (discussing the practice, common in state courts but rare in the federal system, of abating the appeal and leaving the prosecution below intact).

46. *United States v. Estate of Parsons*, 367 F.3d 409, 413–14 (5th Cir. 2004) (en banc); see also Cavallaro, *supra* note 16, at 956 n.40 (collecting state cases).

47. *Mitchell*, 163 F. at 1015–17. See also *United States v. Dunne*, 173 F. 254, 257 (9th Cir. 1909) ("The judgment is against the person of John H. Mitchell; but no further proceeding can be had against him. The power of the court to enforce its judgment against him is at an end."); 17 C.J. *Criminal Law* § 3361 n.41 (1914) (giving as "reason for rule" that "a judgment can not [sic] be enforced when the only subject matter upon which it can operate has ceased to exist," and making no mention of the appellate rationale for abatement).

48. *Mitchell*, 163 F. at 1016. Of course, it has not always been the case historically that a criminal's death forecloses the punishment of his body. Foucault vividly describes, in the opening pages of *Discipline and Punish*, the 1757 burning of the

Early state decisions follow similar lines of reasoning. In a typical state case from 1907 invoking the punishment rationale, the Colorado Supreme Court remarked that “a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist.”⁴⁹ A Montana Supreme Court opinion from 1874 cited the statutory requirement that a defendant pending appeal “shall appear in the court in which the judgment was rendered, at such time and place as the Supreme Court shall direct, and that he will render himself in execution, and obey every order and judgment which shall be made in the premises.” These rules were absurd in the present case, the court said: “When the party is dead it is impossible for him to comply with the stipulations of the bond, or obey the mandate of the court.”⁵⁰ As a result, the punishment had to be abated.

The punishment rationale persisted in courts throughout much of the Twentieth Century. As late as 1984, the Fourth Circuit would justify its abatement of a fine, not by pointing to the rights of the defendant, but by noting the court’s inability to impose any sort of punishment on a dead person: “[a] decedent can hardly serve a prison sentence.”⁵¹ And in 1993, the Fifth Circuit would state that “the purposes of criminal proceedings are primarily penal—the indictment, conviction and sentence are charges against and punishment of the defendant—such that the death of the defendant eliminates that purpose.”⁵²

In summary, traditional abating courts were driven, not by the need to make up for a vanished right of appeal, but by an intuition that punishment after death was fruitless—indeed, impossible. In the next Section, I will show that this conception of abatement’s purposes drove a quite different practice—one that spoke of the

quartered body of the would-be regicide Robert Damiens. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 5 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1977).

49. *Overland Cotton Mill Co. v. People*, 75 P. 924, 925 (Colo.1904).

50. *State v. Perrine*, 56 Mo. 602, 602 (1874); *see also O’Sullivan v. People*, 32 N.E. 192, 194 (Ill. 1892) (calling it “vain and useless” to inflict punishment on a dead defendant); *Holmes v. State*, 163 P. 1112, 1112 (Okla. Crim. App. 1917) (abating because “[i]n a criminal action the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death”); *State v. Furth*, 144 P. 907, 908 (Wash. 1914) (abating because “[t]he underlying principle is that the object of all criminal punishment is to punish the one who committed the crime or offense”).

51. *United States v. Dudley*, 739 F.2d 175, 176 n.2 (4th Cir. 1984).

52. *United States v. Asset*, 990 F.2d 208, 211 (5th Cir.1993) (citing *United States v. Morton*, 635 F.2d 723, 725 (8th Cir. 1980)).

defendant differently, and treated money judgments against him very differently.

This observation occasionally even took on a religious tinge, as courts reflected on the judgment that the accused would face in the afterlife. For example, in *Mitchell*, the Circuit Court of Oregon said of the accused in 1908 that “his day of temporal punishment has passed.”⁵³ Fifty-eight years later, in 1966, the Tennessee Supreme Court would declare that:

One of the cardinal principles and reasons for the existence of criminal law is to punish the guilty for acts contrary to the laws adopted by society. The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs.⁵⁴

B. *Traditional Abatement in Practice*

Having described in Section A the punishment rationale behind traditional abatement, I proceed in this Section to show the kind of legal practice which that rationale drove. I will draw on this picture of traditional abatement practice in Part IV, where I argue for a return to the traditional underpinnings of abatement.

Abatement as traditionally practiced looked very different from the modern sort. Underlying these differences of practice, of course, was a basic difference in approach: because traditional abating courts did not believe in the nonfinality of unreviewed convictions, they did not treat the defendant’s death without appeal as throwing his guilt into question.

Traditional courts abated in several different ways, none of which connoted the erasure of the defendant’s guilt. Some courts abated the appeal alone, leaving intact the conviction below. Other courts abated the punishment below, much as a modern court would—but did so in a way that made clear that the underlying conviction had not been wiped from the record. These approaches are described, respectively, in Sub-Sections 1 and 2 below.

53. *Mitchell*, 163 F. at 1017.

54. *Carver v. State*, 398 S.W.2d 719, 720 (Tenn. 1966); *see also* *Blackwell v. State*, 113 N.E. 723, 723 (Ind. 1916) (“A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment.”); *State v. McDonald*, 424 N.W.2d 411, 420 (Wis. 1988) (Day, J., dissenting) (“There is nothing we can do for the deceased. A wise man long ago said of the dead: ‘Their love and their hate and their envy have already perished, and they have no more for ever any share in all that is done under the sun.’ *Ecclesiastes*, 9:6 (RSV).”).

Finally, whichever approach they took, traditional courts did not, as would a modern court, automatically cancel restitutionary measures upon abatement of the defendant's conviction. Rather, they analyzed such measures to see whether they were essentially penal (in which case they abated with the conviction) or essentially compensatory (in which case they were allowed to stand). This analysis is described in Sub-Section 3 below.

1. Abating the Appeal, but Leaving the Punishment and the Conviction Intact

As noted above, one of the prominent features of modern abatement is its exonerative quality—the tendency of courts to reverse the defendant's conviction both symbolically and legally, so that, “in the eyes of the criminal court, the defendant is no longer a wrongdoer and has not defrauded or damaged anyone.”⁵⁵ But for traditional abating courts, abatement did not speak to the question of the defendant's guilt; it served instead to recognize the court's limitations. As a consequence, traditional abatement had no exonerative, guilt-removing consequences.

The most striking evidence of this quality is the fact that, for many state courts, abatement has always meant dismissing the appeal but leaving the punishment intact—precisely the opposite of abatement's modern-day effect in the federal courts.⁵⁶ As many courts acknowledged, the result of this disposition was that the judgment below stayed in place.⁵⁷

The practice of leaving judgments intact is, of course, incompatible with the modern form of abatement, whose hallmark is the

55. *United States v. Estate of Parsons*, 367 F.3d 409, 416 (5th Cir. 2004) (en banc).

56. For modern state courts that still engage in the practice of abating the appeal alone, see *infra* note 62. For traditional statements of this practice, see 17 C.J. *Criminal Law* § 3361 (1914) (“Inasmuch as it is provided by the organic law that no conviction shall work corruption of blood or forfeiture of estate, where an accused dies pending his appeal, the appeal is abated.”); *Whitley v. Murphy*, 5 Or. 328, 331 (1874) (“[W]henver that appeal abated, it left the judgment in the Court below in full force.”); *O’Sullivan v. People*, 32 N.E. 192, 194 (Ill. 1892) (“The writ of error is abated.”); *State v. Ellvin*, 33 P. 547, 548 (Kan. 1893) (“The judgment was stayed, and, in a certain sense, suspended by the appeal, but a dismissal of the same ordinarily leaves the judgment unimpaired and in full force.”); *State v. Martin*, 47 P. 196 (Or. 1896) (abating “the appeal,” on motion of the prosecution, and denying motion of the defense to block abatement).

57. *See, e.g.*, *United States v. Mitchell*, 163 F. 1014, 1015–16 (C.C. Or. 1908) (“Ordinarily . . . the abatement or dismissal of the appeal or writ of error for any cause will leave the judgment below as it was prior to the removal of the cause to the higher court; that is, in full force and effect.”)

suspension of punishment.⁵⁸ The prevalence of this practice suggests a different attitude to abatement on the part of traditional courts. If, as I have suggested, traditional courts viewed abatement not as an acknowledgment of the defendant's restored innocence, but as a response to his having moved beyond the scope of criminal law, then they would have seen nothing strange in dismissing the action before the court and leaving in place the judgment below.

In the legal parlance of the writ system, traditional appellate courts carrying out this procedural move described themselves as abating the "writ of error"—the order requiring remittance of the trial record to the appellate court—rather than abating the "cause" or "suit" below.⁵⁹

The structure of review under the writ system may have encouraged the practice of abating the writ. As David Rossman has written, a writ of error "was, unlike an appeal, an original action, not a continuation of the case that had been litigated in the trial court."⁶⁰ In a formal sense, the reviewing court did not have before it the parties to the action below; it was quite literally trying the record, rather than trying the defendant.⁶¹ Thus, courts ruling on a writ of error had only an indirect power to change the outcome of proceedings below. They could do so only by finding legal error in the record. In conceptual terms, with abatement of the writ, the reviewing court's grip on that record vanished, and the "parties" before it disappeared. In such an institutional structure, a post-abatement reviewing court might logically have responded to the evaporation of its authority by dismissing the action before it and leaving untouched the prosecution below. For such a court, abating the judgment below would constitute an extraordinary act of judicial authority, at precisely the moment when the court's authority was formally weakest.

58. See *supra* notes 23–27 and accompanying text.

59. See *Mitchell*, 163 F. at 1015–16; see also *O'Sullivan*, 32 N.E. at 194 ("The writ of error is abated."); *Durham v. United States*, 401 U.S. 481, 482 (1971) (describing variance in the Court's earlier outcomes, and implicitly distinguishing abatement of the appeal from abatement of the cause, with the remark that "in an earlier case the Court announced the appeal had abated, while in another the Court stated the cause had abated") (internal citations omitted).

60. David Rossman, "Were There No Appeal": *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 525 (1990); see also BLACK'S LAW DICTIONARY 1610 (6th ed. 1990) ("[A writ of error] is commencement of new suit to set aside judgment, and is not continuation of suit to which it relates.").

61. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410 (1821) ("[T]he effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties, it acts only on the record.").

A substantial minority of state courts still abate the appeal while leaving the conviction intact.⁶² By contrast, in the federal courts, the practice of abating appeals alone has always been far rarer, leading some to mistakenly conclude that abatement of the appeal alone has never taken place in the federal courts.⁶³ In fact, federal courts *have* practiced appeal-alone abatement.⁶⁴ Unfortunately, their pronouncements on the subject have been so murky as to cause considerable confusion to later courts trying to glean the meaning of their own precedents. Federal judges have struggled since the turn of the Twentieth Century to determine whether pre-

62. See Tim A. Thomas, *Annotation, Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4TH 189 § 5[b] (collecting modern state cases for the proposition that “where an accused dies during the pendency of his appeal, the proceedings against him are not abated from the beginning and the appeal may not proceed”); *Surland v. State*, 895 A.2d 1034, 1036 (Md. 2006) (“About twelve State courts have adopted the . . . option, of either expressly leaving the judgment of conviction intact or dismissing the appeal and saying nothing about that judgment.”); *People v. Ekinici*, 743 N.Y.S.2d 651, 657 (Sup. Ct. 2002) (“Approximately half of the states either dismiss the appeal without vacating the conviction or permit it to continue by the appointment of a representative.”) (citation omitted); *People v. Robinson*, 699 N.E.2d 1086, 1091 nn.2–4 (Ill. App. Ct. 1998) (listing twenty-two states that abate the conviction, fourteen that dismiss the appeal alone, and eight that allow the appeal to continue by substitution), *vacated*, 719 N.E. 2d 662 (Ill. 1999).

63. For the claim that abatement of the appeal alone has never taken place in the federal courts, see *Crooker v. United States*, 325 F.2d 318, 320 (8th Cir. 1963) (finding a “unanimous[]” rule among the federal circuit courts that “the death of a defendant produces an abatement of the ‘cause’, the ‘action’, the ‘judgment’, and the ‘penalty’, and not simply of the status or stage which has been reached in the case at the time of the death”); *Durham*, 401 U.S. at 482–83 (relying on *Crooker* for the proposition that “the lower federal courts [are] unanimous on the rule to be applied: death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception”).

64. See John H. Derrick, *Annotation, Abatement Effects of Accused's Death before Appellate Review of Federal Criminal Conviction*, 80 A.L.R. FED. 446 § 7 (2009) (collecting federal cases which abate the appeal alone); *United States v. Mook*, 125 F.2d 706, 706 (2d Cir. 1942) (“The authorities give us no alternative but to dismiss the appeal. Nevertheless, we think it may not be amiss to say that it seems to us that the next-of-kin of a convicted person who dies pending an appeal have an interest in clearing his good name, which Congress might well believe would justify a change in the law.”); *Baldwin v. United States*, 72 F.2d 810, 812 (9th Cir. 1934) (dismissing the appeal, where defendant dies after perfecting appeal). Some Supreme Court opinions have abated the appeal and left the disposition of the fine to the courts of appeals, a practice that suggests a doctrine varying by circuit. See *Singer v. United States*, 323 U.S. 338, 346 (1945) (“The writ is accordingly dismissed as to [defendant] and the cause is remanded to the District Court for such disposition as law and justice require.”); *United States v. Johnson*, 319 U.S. 503, 520 n.1 (1943) (“[W]e dismiss the writ as to [the defendant] and leave the disposition of the fine that was imposed on him to the Circuit Court of Appeals.”).

cedent opinions abated the penalty or the appeal. In 1907, the court in *Pomeroy* fretted that:

The counsel for the executrix cites several western [state] cases in which courts have held that an appeal from a judgment for a fine is abated by the death of the defendant . . . [but] [t]he district attorney argues that these cases are simply authorities for the proposition that, after the defendant's death, the proceedings on appeal abate, leaving the judgment appealed from in full force.⁶⁵

Sixty-four years later, in *Durham v. United States*, the United States Supreme Court would evince similar confusion, observing dryly that it was nearly impossible to glean from its prior decisions whether abatement operated on the punishment or the appeal:

Our cases where a petitioner dies while a review is pending are not free of ambiguity. In a recent mandamus action the petitioner died and we granted certiorari, vacated the judgment below, and ordered the complaint dismissed. In a state habeas corpus case we granted certiorari and vacated the judgment so that the state court could take whatever action it deemed proper. Our practice in cases on direct review from state convictions has been to dismiss the proceedings. In an earlier case the Court announced the appeal had abated, while in another the Court stated the cause had abated.⁶⁶

The opacity of the precedential opinions examined by these courts suggests that traditional abating courts were curiously silent on what, to modern ears, are the crucial questions: What happens to the defendant? Fine or no fine? Conviction or absolution? Abating opinions that rely on the punishment rationale have typically said little or nothing about the defendant's fate, because that fate is simply *not the point*. Traditional abatement, as I have argued, was an administrative procedure, not a guarantee of rights.

In summary, the practice of abating the appeal while leaving the conviction intact was widespread in the state courts,⁶⁷ and there is reason to believe it was prevalent in the federal courts as well.⁶⁸ That history is at odds with any account of abatement which associ-

65. *United States v. Pomeroy*, 152 F. 279, 281 (C.C.S.D.N.Y. 1907) (internal citations omitted).

66. 401 U.S. 481, 482 (1971) (internal citations omitted). *See also* *Bagley v. State*, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960) ("In a large majority of the cases reviewed the decisions do not indicate whether the criminal prosecution was abated ab initio, or only the appeal.").

67. *See supra* note 56.

68. *See supra* note 64.

ates the practice historically with the exoneration of defendants who have forfeited their right of appeal. In the next Sub-Section, I discuss a practice by traditional abating courts which seems superficially to support the exonerative, modern-day account of abatement, but which in fact diverges sharply from it.

2. Abating the Punishment but Leaving the Conviction Intact

In contrast to courts that abated the appeal alone, many traditional courts abated the punishment below⁶⁹—a practice which, on its surface, closely resembled modern abatement. Yet the different rationale underlying traditional abatement still made itself felt in the non-exonerative quality of this act. Because abatement had no connection to the supposed guilt or innocence of the defendant—but served instead to recognize the court’s limitations—traditional abating courts distinguished between the defendant’s *penalty* and his *conviction*. Only the former was lifted; the latter remained intact. As the Illinois Supreme Court remarked in 1892, “[w]hen the defendant ordered to be punished is dead, *the execution of that order is absolutely arrested . . .*”⁷⁰

We can see evidence of this approach, with its focus on penalties rather than underlying guilt, in the way that turn-of-the-century judges handled the novel legal question of whether a defendant’s estate should have to pay his fines. A modern court might begin by noting the disappearance of the conviction underlying the fine and then reason that, when the conviction had been extinguished, the fine became formally improper or even unjust.⁷¹ By contrast, earlier abating courts were likely to emphasize the absence of the offender, ignoring entirely the question whether the underlying conviction was sound. Many fine-abating opinions thus begin with the observation that the defendant’s body is unavailable for punishment.⁷²

69. See Thomas, *supra* note 68, at § 2 (“[T]he most frequently stated rule is that under such circumstances, the prosecution abates from the inception of the case.”); *id.* at § 3 (collecting cases).

70. O’Sullivan v. People, 32 N.E. 192, 193 (Ill. 1892) (emphasis added).

71. See, e.g., United States v. Oberlin, 718 F.2d 894, 895–96 (9th Cir. 1983) (holding that abatement prevents the recovery of a fine because the defendant has been “denied the resolution of the merits of the case on appeal”).

72. See United States v. Mitchell, 163 F. 1014, 1016 (C.C. Or. 1908); Blackwell v. State, 113 N.E. 723, 723 (Ind. 1916) (“A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment.”); Boyd v. State, 108 P. 431, 431 (Okla. Crim. App. 1910) (abating fine because “a judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist In a criminal action, the purpose of the proceeding [is] to punish the defendant in person.”)

Having established that corporal punishment is impossible, the court then works laterally by analogy to the case of fines. Thus, the Ninth Circuit in *Mitchell* remarked that:

Imprisonment, in its general sense, is the restraint of one's liberty . . . and is personal to the accused. It is a thing self-evident, therefore, that the death of a person upon whom such a judgment is imposed would put an end to an infliction or enforcement of the punishment. A fine being a pecuniary punishment imposed upon the person, it would seem that a like result would follow.⁷³

Similarly, a commentator in 1921, explaining the principle of abatement, pointed out that “[u]pon the death of a defendant convicted of a crime in the Federal Court, the penalty is abated with death. In the case of sentence to corporal punishment *this is self-evident*. It also holds in cases of fines.”⁷⁴ The operative metaphor for abatement, then, was not that of someone being symbolically cleansed; it was that of an inmate dying in his cell and being buried in the prison cemetery.

A last testament to the absence of the exonerative effect in traditional abatement is the existence of cases in which families of decedents have *resisted* abatement because they wanted the chance to clear their relatives' names through appeal; abatement evidently would not have this effect. In 1967, for example, counsel for one Robert Hartwell—who was convicted of incest and then died pending appeal—asked the court not to abate his conviction, because “his reputation while alive is important to his three remaining children.”⁷⁵ We can contrast such language with the statement of a fi-

73. *Mitchell*, 163 F. at 1016.

74. 1 ELIJAH N. ZOLINE, FEDERAL CRIMINAL LAW AND PROCEDURE 183 (1921) (emphasis added).

75. *Hartwell v. State*, 423 P.2d 282, 283 n.2 (Alaska 1967); *see also* *United States v. Mook*, 125 F.2d 706, 706 (2d Cir. 1942) (abating conviction, but commenting that “we think it may not be amiss to say that it seems to us that the next-of-kin of a convicted person who dies pending an appeal have an interest in clearing his good name, which Congress might well believe would justify a change in the law”); *State v. Carter*, 299 A.2d 891, 892 (Me. 1973) (abating because “interests of the surviving family to preserve, unstained, the memory of the deceased defendant or his reputation while alive are held of insufficient legal consequence to require decision of the issues raised by the appeal”). The courts in *Hartwell* and *Carter* acknowledged the impracticality of such a scheme. *See Hartwell*, 423 P.2d at 284 (“There is no party to prosecute in this criminal proceeding. Death has removed the appellant from the jurisdiction of this court. The court cannot enforce the judgment and sentence pertaining to the appellant in the administration of its criminal laws.”); *Carter*, 299 A.2d at 894 (“Often, the appeal results only in a new trial, or other disposition, for which the defendant as a live human being is a pre-

nality-rationale court, which declared thirteen years later that, with abatement, “the family is comforted by restoration of the decedent’s ‘good name.’”⁷⁶

In summary, even when traditional abating courts followed procedures identical to those of their modern counterparts, they omitted one of modern abatement’s hallmarks: its exoneration of the defendant.

In the following section, I will note a further respect in which traditional abatement differed from the modern practice: its treatment of compensatory measures, such as orders of restitution and civil suits relying on the criminal judgment.

3. Leaving Compensatory Measures Intact

Part I noted the distinctive power of modern abatement to cancel compensatory remedies such as restitution.⁷⁷ For modern abating courts, this practice reflects the fact that the restitution order stems from a legally vanished conviction. As the Ninth Circuit has reasoned, “[a] [r]estitution [o]rder must be abated because ‘the defendant is no longer a wrongdoer’ once his conviction has abated.”⁷⁸

In this respect, traditional abatement once again diverges from its modern descendant. Because traditional abatement operated on the defendant’s punishment—rather than his conviction—it left the estate liable for non-punitive obligations stemming from that conviction. Courts thus approached cost and restitution orders by asking whether they constituted punishment or compensation. If they were punitive, they abated; if compensatory, they could stand.⁷⁹

The notion that compensatory measures could survive, even where penal measures abated, had actually taken hold decades before the first abatement decisions, in the mid-nineteenth century. In that period, state legislatures, with the support of legal scholars, tore down the longstanding common law rule that tort judgments,

requisite, a condition compliance with which the death of the defendant makes impossible.”).

76. *United States v. Pauline*, 625 F.2d 684, 684–85 (5th Cir. 1980).

77. *See supra* notes 28–33 and accompanying text.

78. *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010) (internal citations omitted) (citing *United States v. Estate of Parsons*, 367 F.3d 409, 416 (5th Cir. 2004)).

79. *See infra* notes 85–98 and accompanying text.

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like criminal penalties, abated with death.⁸⁰ Legislators and commentators distinguished tort judgments from criminal sanctions with the observation that a tortfeasor's death leaves behind an injured party with an interest beyond the physical punishment of the tortfeasor—an interest that can legitimately be satisfied by the estate, as inheritor of the defendant's obligations.⁸¹ The Supreme Court of Illinois articulated this distinction in 1892:

80. At the beginning of the nineteenth century, the common law rule on the survival of civil judgments was embodied in the Latin maxim *actio personalis moritur cum persona*, or “a person's act dies with him.” See, e.g., FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS IN OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 71 (F.H. Thomas Law Book Co. 1984) (1887) (“The common law maxim is *actio personalis moritur cum persona*, or the right of action for tort is put an end to by the death of either party”); *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884) (“At common law, actions on penal statutes do not survive”); *Henshaw v. Miller*, 58 U.S. 212, 219–24 (1854) (tracing the evolution and contours of the doctrine). In practice, the *actio personalis* rule dictated that tort judgments and fines were extinguished when the defendant died, in contrast to debts and contract liability, which survived against the debtor's estate. See *Henshaw*, 58 U.S. at 219 (“It has been expounded to exclude all torts when the action is in the form *ex delicto*”); T.A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 607 (1960). The reason for extinguishing civil judgments with death, as commentators made clear, was that to do otherwise would punish the inheritors for the testator's offense. As Blackstone put it, actions *ex delicto* (that is, actions “for wrongs actually done or committed by the defendant, as trespass, battery, and slander”) died with the offender, and could not be revived, because “neither the executors of the plaintiff have received, nor those of the defendant committed, in their own personal capacity, any manner of wrong or injury.” 2 WILLIAM BLACKSTONE, COMMENTARIES *302. Nineteenth-century commentaries typically attributed the non-survival of civil actions at common law to a confusion between the aims of compensation and punishment, perhaps owing to the relatively late emergence of tort law. Thus, in a Texas court in 1870, looking back after the *actio personalis* doctrine had been abrogated by state statute, the appellant counsel noted that “[a]t common law, [tort] actions . . . were in the nature of criminal prosecutions, in which the courts held that the representative could not be punished for the crimes of the dead.” *Wright's Administratrix v. Donnell*, 34 Tex. 291 (1871). Similarly, in 1886, after *actio personalis* had fallen into discredit, a commentator summed up thus the rationale of the common law approach: “If . . . the ancient idea of liability was punishment, then why should the executor and the estate of [the defendant] be punished for a wrong they never committed,” Sydney G. Fisher, *Survival of Actions*, 20 AM. L. REV. 48, 54 (1886). See also *Moyer v. Phillips*, 341 A.2d 441, 442–43 (Pa. 1975) (observing that “in the early nineteenth century survival statutes were enacted, along with wrongful death acts, to modify what was considered the harsh and unjust rule of the common law”).

81. See *United States v. Pomeroy*, 152 F. 279, 280 (C.C.S.D.N.Y. 1907) (“[T]his rule of law in actions of tort, permitting judgments recovered before the defendant's death to be enforced against his estate after his death, is based on the idea of compensation to a particular plaintiff injured, while the imposition of a fine as a punishment for a crime is based on the idea of punishment for a public offense.”);

Judgments in civil cases, whether in actions upon contracts or upon torts, are for the recovery or the denial of something But in criminal cases . . . the sole purpose of the action is not to give the people anything, but to punish the defendant in his person It is therefore apparent that, in judgments in civil cases, property rights are more or less directly affected; and such rights, under statute, are made to descend to and be obligatory upon the representatives, after death, of either or all of the parties to the judgment. But in criminal cases . . . the people acquire no property rights.⁸²

When it came time to decide whether quasi-civil measures accompanying the conviction should stand, state courts analyzed this question through the lens of the doctrine they had already developed to distinguish surviving from non-surviving civil judgments.⁸³ They needed only to ask whether the measure in question was essentially compensatory or essentially penal. In essence, having split off tort judgments from criminal sanctions in obedience to the principle that only penal judgments should abate, these courts now further decomposed criminal sanctions into compensatory (surviving) components and penal (non-surviving) components. The first quasi-civil measure to undergo this analysis was the judgment for costs.⁸⁴ For example, in refusing to abate such a judgment, the Su-

Wasserman v. United States, 161 F. 722, 724 (8th Cir. 1908) (holding that contempt order survives against the estate because it is civil, not criminal); O'Sullivan v. People, 32 N.E. 192, 192 (Ill. 1892).

82. *O'Sullivan*, 32 N.E. at 192.

83. *See* *Town of Carrollton v. Rhomberg*, 78 Mo. 547, 549 (1883) (saying of a fine that “[i]t has been held by this court that a prosecution of this character is a civil action in form, although *quasi* criminal in its nature,” and observing that “[i]f it is a civil suit it is neither an action *ex contractu* nor an action for [property crimes] within the meaning of our laws so as to survive against the representative of the wrongdoer”); *People v. St. Maurice*, 135 P. 952, 952 (Cal. 1913) (in analysis of criminal fine, noting that “a judgment that a defendant pay a fine with or without the alternative of imprisonment, constitutes a lien in like manner as a judgment for money rendered in a civil action,” and therefore must abate); *Blackwell v. State*, 113 N.E. 723, 723 (Ind. 1916) (abating fine because “[a] judgment for a fine differs from a judgment based on a tort or contract In case [sic] where a fine is imposed as a punishment, no principle of compensation is involved. A fine is imposed for the purpose of punishing the offender, and when an offender dies, he passes beyond the power of human punishment.”).

84. *See* *State v. Ellvin*, 51 Kan. 78433 P. 547, 548 (Kan. 1893). *See also* *People of Detroit v. Smith*, 597 N.W.2d 247, 250 (Mich. Ct. App. 1999) (“[D]efendant Smith died during the pendency of these appeals. Accordingly, the assessment of costs against her should stand, but the purely penal aspect of her sentence should be abated ab initio because it no longer serves a purpose.”); *State v. Keifer*, 24 Ohio Dec. 321, 326–27 (Com. Pl. 1913) (following *Ellvin* in refusing to abate judg-

preme Court of Kansas remarked in 1893 that “the costs adjudged against one convicted of crime do not constitute a part of the punishment inflicted upon him . . . [but] a separate civil liability in favor of the parties to whom they are due”⁸⁵ With the passage of restitution statutes in the late twentieth century, state courts began to apply the same punitive-compensatory analysis to restitution that they had used in analyzing judgments for costs.⁸⁶

As the state courts went, so went—at first—the federal courts. After Congress gave the federal courts power to order restitution in 1982,⁸⁷ it seemed at first as if the punitive-compensatory analysis of money judgments, with its underlying conception of abatement as operating on the punishment alone, would become settled doctrine. In 1983 William Dudley was convicted of misusing food stamps, sentenced to a fine and a prison term, and ordered to pay \$4,807.50 to the United States Department of Agriculture.⁸⁸ He died while his appeal was pending, and the fine and prison term were duly abated.⁸⁹ That left the order of restitution, which the Fourth Circuit refused to abate, on the grounds that the order was compensatory rather than penal:

The argument that impositions of penalties in criminal cases have heretofore always been abated on death of the accused . . . grows out of the consideration that punishment, incarceration, or rehabilitation have heretofore largely been the exclusive purposes of sentences and so ordinarily should be abated upon death for shuffling off the mortal coil completely forecloses punishment, incarceration, or rehabilitation, this side of the grave at any rate [But] an order of restitution, even if in some respects penal, also, has the predominantly

ment for costs); *Whitley v. Murphy*, 5 Or. 328, 331–32 (1874) (denying that costs are “the mere incidents of the judgment of conviction,” and asserting that “[the defendant’s] dying as [sic] completely satisfied the sentence of the law as if he had lived and served out his time in the penitentiary; but it did not satisfy the judgment for costs and disbursements, any more than his serving out his time in the penitentiary would have done”).

85. *Ellvin*, 33 P. at 548.

86. *See* *People v. Ekinici*, 743 N.Y.S.2d 651, 660 (Sup. Ct. 2002) (holding that restitution is compensatory and therefore does not abate); *State v. Christensen*, 843 P.2d 1043, 1043 (Utah Ct. App. 1992) (holding that “restitution is partly punitive” since it allows double damages, and therefore abates); *State v. Christensen*, 866 P.2d 533, 536–37 (Utah 1993) (overruling the Court of Appeals and holding that restitution does not abate, because order did not involve punitive fines and hence was merely compensatory).

87. Victim Witness Protection Act, 18 U.S.C. § 3663 (2006).

88. *United States v. Dudley*, 739 F.2d 175, 176 (4th Cir. 1984).

89. *Id.*

compensatory purpose of reducing the adverse impact on the victim.⁹⁰

The punitive-compensatory approach to abatement of restitution orders made headway in the courts during the early 1990s. By 1993, three more courts of appeals had adopted *Dudley*'s analysis, to be followed later by another in 2001.⁹¹

At the same time, however, the courts were absorbing the appellate rationale for abatement, which first appeared in the federal courts in the remarkable 1977 Seventh Circuit opinion, *United States v. Moehlenkamp*.⁹² With the spread of that rationale,⁹³ a different treatment of restitution would come to the fore.⁹⁴ In the 1990s, two previously undecided courts of appeal would adopt an approach to restitution orders dictated by the appellate rationale.⁹⁵ And between 2004 and 2010, two of the courts that had applied the punitive-compensatory analysis would repudiate their earlier positions, implicitly or explicitly, in favor of that approach.⁹⁶

In summary, the federal courts have displayed a similar trajectory with respect to each of abatement's two modern hallmarks. At first, under the influence of the punishment rationale for abatement, courts adopted a practice that neither exonerated the defendant nor required the automatic cancellation of restitutionary payments. Then, as they came under the sway of the appellate rationale, the courts took up a form of abatement in line with the mod-

90. *Id.* at 177.

91. See *United States v. Christopher*, 273 F.3d 294, 298 (3d Cir. 2001) ("The question whether an order of restitution should abate depends essentially on its categorization as penal or compensatory."); *United States v. Asset*, 990 F.2d 208, 213–14 (5th Cir. 1993) (distinguishing between penal and compensatory orders of restitution); *United States v. Johnson*, Nos. 91-3287, 91-3382, 1991 WL 131892, at *1 (6th Cir. July 18, 1991) ("To the extent that the deceased appellant has been ordered to make restitution as a consequence of his conviction, such restitution is not affected hereby."); *United States v. Cloud*, 921 F.2d 225, 226–27 (9th Cir. 1990) (refusing to abate restitution, on grounds that this would violate the compensatory purposes of the Victim Witness Protection Act); see also *In re One 1985 Nissan*, 889 F.2d 1317, 1319 (4th Cir. 1989) (holding that forfeiture proceeding is primarily remedial and therefore does not abate with death of the property owner).

92. *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977).

93. See *infra* notes 125–37 and accompanying text.

94. See *infra* Part III.

95. *United States v. Wright*, 160 F.3d 905 (2d Cir. 1998); *United States v. Logal*, 106 F.3d 1547 (11th Cir. 1997).

96. *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010); *United States v. Estate of Parsons*, 367 F.3d 409, 414–15 (5th Cir. 2004) (en banc).

ern conception—one that exonerated the defendant and canceled restitutionary measures as unjust.

In the next Part, I narrate the process by which courts moved from the older to the newer conception of abatement. I trace the spread of the appellate rationale in the states, where it gained momentum over forty years through a trio of influential cases. Then, I pinpoint the seminal moment in federal jurisprudence where a single case, *Moehlenkamp*, enabled the adoption of that rationale among the federal circuits.

III.

THE SPREAD OF THE APPELLATE RATIONALE

In Part I, I described the principal characteristics of modern-day abatement, summarized the scholarly and popular attacks on the practice, and suggested that abatement has managed to resist those attacks until now because of the widespread notion that it has deep historical roots and protects a firmly-embedded right.

In Part II, I described what I loosely called the “traditional” version of abatement—a set of practices, prevailing in the federal courts until the 1980s and in some state courts until today—that shared none of modern abatement’s most objectionable and vilified characteristics.

Now, in Part III, I will show how the newer conception of abatement took hold of the federal system. Because the appellate rationale originated in the states and percolated there for a century before its adoption in the federal circuits, I will first trace its gradual beginnings. The centerpiece of my discussion, however, will be an account of modern abatement’s sudden and unacknowledged rise in the federal system.

As stated in the Introduction, my aim in narrating this rise is to dispel the air of immutability that surrounds the current conception of abatement applied by courts, and to make clearer the connection between abatement’s shifting justifications and its concomitantly shifting forms.

A. The Appellate Rationale in the State System

The appellate rationale got an early start in the state courts. In 1879, the Texas Court of Appeals articulated a novel justification for abatement:

[I]n a purely criminal prosecution, the case is pending so long as the question of the guilt or innocence of the accused remains undetermined . . . [T]he proceedings are not definitely

settled when the law gives the right of appeal, and the party has availed himself of that right . . . until the appeal shall have been decided.⁹⁷

In suggesting that abatement reflects the non-final character of an unreviewed conviction, the *March* court was at least fifty years ahead of its time. This idea would not reappear in state criminal jurisprudence until 1934, when the Iowa Supreme Court, in *State v. Kriechbaum*, gave it lasting voice, declaring that “[t]he judgment below could not become a verity until the appellate court made it so by an affirmance The question of the defendant’s guilt was therefore necessarily undetermined at the time of his death.”⁹⁸

The language in *Kriechbaum*, in turn, became the classic statement of the appellate rationale for abatement and would often be cited as that rationale spread slowly throughout the states. In 1960, *Kriechbaum* was the sole precedent for the decision of Florida’s District Court of Appeal in *Bagley v. State*, where the court firmly adopted the exonerative view of abatement, declaring that “[t]he obliterative effect of abatement *ab initio* necessarily leaves undetermined the question of the appellant’s guilt.”⁹⁹ And thirteen years later, in 1973, *Kriechbaum* and *Bagley* were together cited by the Supreme Court of Maine for the proposition that “a judgment of conviction, in fact left under a cloud as to its validity or correctness when the defendant’s death causes a pending appeal to be dismissed, should not be permitted to become a final and definitive judgment of record”¹⁰⁰ Three years later, those three decisions would in turn together justify the Supreme Court of Louisiana in issuing *State v. Morris*,¹⁰¹ a ringing endorsement of the exonerative view of abatement. Conceding that the defendant might have lost on appeal had he lived to pursue review, that court said that nevertheless:

The surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation. This interest is of sufficient legal significance to require that a judgment of conviction not be permitted to become a final and definitive judgment of record when its validity or correctness has not been finally determined because the defendant’s death has caused a pending appeal to be dismissed.¹⁰²

97. *March v. State*, 5 Tex. App. 450, 453–54 (Ct. App. 1879).

98. 258 N.W. 110, 113 (Iowa 1934).

99. *Bagley v. State*, 122 So. 2d 789, 791 (Fla. Dist. Ct. App. 1960).

100. *State v. Carter*, 299 A.2d 891, 894 (Me. 1973).

101. *State v. Morris*, 328 So. 2d 65, 67 (La. 1976).

102. *Id.* at 67.

Morris, Bagley, and Kriechbaum are today among the most cited precedents for the rule of abatement in state courts.¹⁰³ They have been taken to justify abatement in a wide variety of factual circumstances, so long as the defendant dies after perfecting his appeal.

The appellate rationale's spread seems to have accelerated in the 1980s, as state courts drew on new federal decisions endorsing the rationale. Yet state courts continue to cite the punishment rationale, both alone and in tandem with the appellate rationale.¹⁰⁴

B. *The Appellate Rationale in the Federal System*

In the federal courts, the onset of the appellate rationale was at once later and more sweeping than it had been in the state courts. The first federal appellate opinion to cite this rationale for abatement was the 1977 decision of the Seventh Circuit Court of Appeals in *United States v. Moehlenkamp*;¹⁰⁵ by 2001, seven courts of appeals would embrace the rationale, and district courts in two other circuits would do so as well.¹⁰⁶ Most of these courts would cite *Moehlenkamp*.¹⁰⁷

The *Moehlenkamp* opinion was effective because of the way in which it recast existing Supreme Court precedents and used them to its tactical advantage. Where the Supreme Court had denied a constitutional right to appellate review in *Griffin v. Illinois*,¹⁰⁸ the *Moehlenkamp* court effectively cited the Court as affirming some form of right to such review.¹⁰⁹ Then, the *Moehlenkamp* court used

103. Information deduced from performing a Westlaw Custom Digest for headnote "110K303.50 Abatement" across all states. *Custom Digest*, WESTLAW, <http://www.westlaw.com> (Click on "Key Numbers"; then follow "West Key Number Digest Online" hyperlink; then select "110 CRIMINAL LAW"; then select "XVI. NOLLE PROSEQUI OR DISCONTINUANCE, k.303.5-k303.50"; then select "k303.50 Abatement"; then click "Search Selected"; then select database "State: All"; then select "Most Recent Cases"; then follow "Search" hyperlink.) (last visited June 8, 2011).

104. See *State v. Hossie*, 570 N.W.2d 379, 380 (S.D. 1997) (collecting rationales for abatement offered in state court opinions); *State v. Fanalous*, 106 P.2d 163, 163 (Utah 1940) (citing both rationales).

105. 557 F.2d 126 (7th Cir. 1977).

106. See *infra* notes 134–35 and accompanying text.

107. *United States v. Christopher*, 273 F.3d 294, 296–97 (3d Cir. 2001); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997); *United States v. Pogue*, 19 F.3d 663, 665 (D.C. Cir. 1994); *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir. 1983); *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980).

108. 351 U.S. 12, 18 (1956).

109. See *Moehlenkamp*, 557 F.2d at 128 (reading *Griffin* to mean that "when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice

its newly theorized right to explain a cryptic year-old Supreme Court precedent, *Dove v. United States*,¹¹⁰ in a way that cemented the authority of the courts of appeal to abate cases after the defendant died.¹¹¹

The first case which *Moehlenkamp* took up was a 21-year-old Supreme Court decision, *Griffin v. Illinois*,¹¹² in which the Court had held that an indigent criminal appellant had the right to a free transcript of his trial. The *Griffin* Court had pointed out that all fifty states granted some form of criminal appellate review, and that appeals had “now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant.”¹¹³ Where appellate review of convictions existed, the Court held, it was sufficiently bound up with the business of trial that it had to be equitably administered—which meant providing indigent defendants with the minimum means necessary to mount an appeal.¹¹⁴

In reaching this holding, the *Griffin* Court did not announce a constitutional right to appellate review; quite to the contrary, it explicitly conceded that no such right existed, saying that “a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.”¹¹⁵ Rather than turning on the vital importance of appeal, *Griffin* turned on the necessity of providing appeal equitably where it existed at all—a logical extension of the principle that everyone, rich or poor, should have access to the basic machinery of the courts.

Yet the *Moehlenkamp* court did not read *Griffin* as a decision about the importance of equity in access to courts. Rather, it read *Griffin* for the quite different proposition that justice was denied wherever appeal was unavailable.¹¹⁶ Partially quoting *Griffin*, the *Moehlenkamp* court declared that when a defendant dies pending appeal, “the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an

ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an ‘integral part of (our) system for finally adjudicating (his) guilt or innocence’”) (citations omitted).

110. 423 U.S. 325 (1976).

111. *Moehlenkamp*, 557 F.2d at 128.

112. *Griffin*, 351 U.S. at 12.

113. *Id.* at 18.

114. *See id.* at 19 (stating that denial of transcripts to indigent criminal appellants is “a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law”).

115. *Id.* at 18.

116. *Moehlenkamp*, 557 F.2d at 128.

‘integral part of (our) system for finally adjudicating (his) guilt or innocence.’¹¹⁷

In other words, the *Moehlenkamp* court subtly recast *Griffin*. The Supreme Court wrote *Griffin* as a decision about the distributive unfairness of allowing some defendants—and not others—access to the full panoply of procedural rights afforded by any given state’s criminal justice system. But the *Moehlenkamp* court read *Griffin* as a statement about the minimum level of process making up a constitutional baseline—the very statement that the *Griffin* court had denied it was making.

The measure of *Moehlenkamp*’s success can be seen in the way it has distorted subsequent understandings of *Griffin v. Illinois*. Courts have cited *Griffin* for the proposition that there exists a right (whether constitutional or otherwise) to appellate review.¹¹⁸ In 1997 and 2010, two circuit courts cited *Griffin* for the principle that “a fundamental principle of our jurisprudence from which the abatement principle is derived is that a criminal conviction is not final until resolution of the defendant’s appeal as a matter of right.”¹¹⁹ Neither court attributed this understanding of *Griffin* to the mediating influence of *Moehlenkamp*.

Having made appeals a quasi-due process right and abatement the guarantor of that right, the court in *Moehlenkamp* next had to justify the restriction of abatement’s remedy to the first appeal. Such a restriction did not seem to follow directly from *Griffin*, which made no distinction between the first appeal and later appeals. Yet the Supreme Court, in *Dove v. United States*, a cryptic one-paragraph *per curiam* opinion, had recently foreclosed abatement for defendants who died while awaiting a writ of certiorari.¹²⁰ While it did not explicitly say as much, *Dove* appeared to leave open the

117. *Id.*

118. *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997); *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010) (citing *Logal* as citing *Griffin* for the proposition). Nothing was especially striking about the facts in these cases: both were fraud actions, involving a Ponzi schemer in *Rich*, and management who gave out inflated revenue figures in *Logal*. 106 F.3d at 1552. The origin of the mis-citation seems to have been carelessness in *Logal*. In *Rich*, the court cited *Griffin* (via *Logal*) among a blizzard of other citations, offered with little context. 603 F.3d at 729.

119. *See infra* note 126.

120. 423 U.S. 325, 325 (1976) (“The Court is advised that the petitioner died at New Bern, N. C., on November 14, 1975. The petition for certiorari is therefore dismissed.”).

possibility of abatement on appeal to the circuit courts.¹²¹ If abatement was a compensation for the forfeited appeal, why was it triggered only on the first appeal?

It was part of *Moehlenkamp*'s genius that the opinion offered a satisfactory explanation for the *Dove* Court's unexplained distinction between first appeals (where abatement was still apparently permitted) and appeals to the Supreme Court (where death would no longer trigger abatement).¹²² Moreover, this explanation conveniently bolstered the new, rights-protective rationale for abatement. *Moehlenkamp* explained the *Dove* distinction by attributing near-constitutional importance to the fact that first appeals are statutorily guaranteed, while appeals to the Supreme Court are discretionary.¹²³ From *Dove*'s bare 61 words, *Moehlenkamp* inferred a soaring paean to the rights guaranteed by abatement:

The Supreme Court may dismiss the petition without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right. In contrast, when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an "integral part of (our) system for finally adjudicating (his) guilt or innocence."¹²⁴

The *Moehlenkamp* court did not offer to explain why "the interests of justice" dictated a single appeal, but not a second appeal. Yet its reasoning was nonetheless widely followed in other circuits.¹²⁵

121. *See id.* (overruling, "to the extent that [it] . . . may be inconsistent with this ruling," *Durham v. United States*, 401 U.S. 481 (1971), which had established abatement for all appeals in the federal courts).

122. *See supra* notes 120–121.

123. *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977).

124. *Id.*

125. *See United States v. Christopher*, 273 F.3d 294, 296–97 (3d Cir. 2001) (explaining the *Durham-Dove* sequence with the observation that "[i]n most criminal cases, proceedings in the Supreme Court differ from those in the Courts of Appeals in one fundamental respect: appeals to the Courts of Appeals are of right, but writs of certiorari are granted at the discretion of the Supreme Court," and then quoting *Moehlenkamp*'s language on the "interests of justice" and the right to an appeal); *Clarke v. United States*, 915 F. 2d 699, 714 (D.C. Cir. 1990) (citing *Moehlenkamp*, and stating that "the reason for the different dispositions [in *Durham* and *Dove*] is that a criminal defendant's interest in not standing convicted without appellate review is deemed to be exhausted once he has availed himself of his appeal as of right to the court of appeals"); *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980) (quoting *Moehlenkamp*, 557 F.2d at 128).

By uniting these two disparate strands of doctrine, the *Moehlenkamp* court crafted a persuasive new rationale for the federal practice of abatement. Through creative reading of Supreme Court precedents, it backed this argument with apparently incontrovertible authority. The *Moehlenkamp* court's appellate rationale for abatement was swiftly adopted by other courts of appeals.¹²⁶

No single factor explains the outcome in *Moehlenkamp*. The facts of the case were unremarkable; Charles E. Moehlenkamp had been convicted below on several counts of distributing controlled substances.¹²⁷ The appellate opinion hints at no irregularity in his trial that would have inspired the circuit court to effect a doctrinal breakthrough. The only slightly unusual factor was the presence of Tom C. Clark, a retired associate justice of the United States Supreme Court, on the Seventh Circuit panel that decided *Moehlenkamp*.¹²⁸ Justice Clark sat by designation on the Seventh Cir-

126. By the end of the 1980s, two more courts of appeals had embraced the appellate rationale, each citing *Moehlenkamp*. *United States v. Oberlin*, 718 F.2d 894, 895–96 (9th Cir. 1983); *Pauline*, 625 F.2d at 685 (5th Cir.). Three did so in the 1990s. *United States v. Wright*, 160 F.3d 905, 909 (2d Cir. 1998); *United States v. Logal*, 106 F.3d 1547 (11th Cir. 1997); *United States v. Pogue*, 19 F.3d 663 (D.C. Cir. 1994). And in 2001, the Third Circuit became the seventh federal court of appeals to apply the rationale in *United States v. Christopher*, 273 F.3d 294 (3d Cir. 2001). While the First and Fourth Circuits have not yet explicitly endorsed the appellate rationale, district courts in both circuits have rendered decisions premised on that rationale. *See United States v. Sheehan*, 874 F. Supp. 31 (D. Mass. 1994); *United States v. Chin (Chin I)*, 633 F. Supp. 624, 625–26 (E.D. Va. 1986), *rev'd sub nom. United States v. Chin (Chin II)*, 848 F.2d 55 (4th Cir. 1988). In *Sheehan*, the District Court ordered the return of a fine that had been partially paid before the defendant's death, reasoning that, for abatement purposes, "[t]he legally relevant distinction is not between punishing individuals and punishing their families or estates; it is between judgments which have become final following appeal and those which have not." 874 F. Supp. at 34. In *Chin I*, the District Court endorsed the appellate rationale for abatement as expressed in *Moehlenkamp*, but declined to abate the conviction of a defendant who had committed suicide in jail after expressing, in a letter to his wife, his intention not to appeal his conviction. 633 F. Supp. at 626. The court reasoned that the facts of Chin's case were unrelated to the purposes of the appellate rationale: "It seems contrary to our system of justice to allow, as defense counsel has asked, Chin to be absolved of all criminal liability because he intentionally took his own life at a time when he had not been afforded a right to appeal." *Id.* at 627. The Court of Appeals reversed and remanded in *Chin II* because the motion to abate had not been made by the defendant's wife, the only party with standing. 848 F.2d at 57–58. The Court of Appeals' order also stressed the need for "findings of facts by the district court on the contested issues of whether Chin committed suicide and whether he intended to abandon his right of appeal." *Id.* at 58.

127. *Moehlenkamp*, 557 F.2d at 127.

128. *Id.* (noting Justice Clark's presence on the panel).

cuit over one hundred times¹²⁹ over two years, and this sitting would be among his last; he died after participating in conference on the case, but before the opinion was submitted to him for approval.¹³⁰ Clark, the author of *Mapp v. Ohio*,¹³¹ had been a notable liberal on matters of criminal justice and civil rights,¹³² and it is conceivable that his presence on the *Moehlenkamp* panel influenced the opinion (even though he was not the author).

In the federal system, the ascendancy of the appellate rationale has been helped along by the refusal of courts to examine abatement's history. Extensive research has unearthed only two modern opinions in federal courts, one a dissent, that demonstrate a recognition of the way in which abatement has evolved, or the novelty of its exonerative and restitution-blocking qualities.¹³³ A Ninth Circuit panel exemplified the more typical bland incuriosity in 2010, when, justifying its abatement of a restitution order, it proclaimed: "Abatement *ab initio* means what it says."¹³⁴ As I have shown, of course, the content of abatement—what it "says"—has shifted throughout history, rather than having a fixed quantum of meaning.

For modern courts, the appellate rationale has come to seem like the obvious justification for abatement, as it alone can justify what these courts see as the immutable characteristics of abatement: its exonerative and restitution-blocking effects. Modern descriptions of the punishment rationale seldom treat it as an older rationale justifying a bygone form of abatement; rather, they treat it as a puzzling non sequitur, curiously unable to explain the practice which they believe it purports to justify.¹³⁵ Thus, the *Parsons* court

129. Information deduced from Westlaw search results for Seventh Circuit appellate cases with Justice Clark. WESTLAWNEXT, <https://a.next.westlaw.com> (Click on "Cases"; then follow "7th Circuit" hyperlink; then follow "Seventh Circuit Court of Appeals" hyperlink; then type "advanced: (JU,PA(clark)) AND "sitting by designation" /8 "supreme court")" in the search bar) (last visited Jun. 8, 2011).

130. *Moehlenkamp*, 557 F.2d at 127 n.* (noting Clark's death).

131. 367 U.S. 643 (1961).

132. See Tom C. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COLUM. L. REV. 175, 178–79 (1947) (lamenting the whittling-away of federal authority to protect civil rights); Tom C. Clark, *Criminal Justice in America*, 46 TEX. L. REV. 742, 743–45 (1968) (defending the Court's decisions to expand the rights of the accused in *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

133. See *infra* note 135.

134. *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010).

135. Only one majority opinion in a federal court has ever recognized the recency of the appellate rationale, or the age of the punishment rationale, and that in a ten-word aside. See *United States v. Oberlin*, 718 F.2d 894, 896 (9th Cir.

asserts that the appellate rationale “provides a better explanation” for the exonerative effects of abatement, and concludes that “[t]he primary justification for the abatement doctrine arguably is that it prevents a wrongly-accused defendant from standing convicted.”¹³⁶ Similarly, Professor Cavallaro tells us that the punishment rationale “fails to explain the extent of the relief afforded”¹³⁷ when courts exonerate a defendant, and that abatement must therefore “rel[y] significantly on a larger premise”—the finality principle. One student Note declines to even consider the punishment rationale, declaring that it “does not hold up well to a legal analysis”¹³⁸ and concluding that the appellate rationale is “[a] more sophisticated, indeed, probably [a] more accurate argument[] for abatement.”¹³⁹ For many other courts, the punishment rationale does not even seem to exist.¹⁴⁰

In sum, a single judicial sleight-of-hand ushered out the punishment rationale—which had long underpinned abatement¹⁴¹—and ushered the appellate rationale into the federal courts. As shown, that move has gone largely unrecognized because of the skill with which it was accomplished. Still, the courts’ new rationale for abatement—however convincing it appears—has had controver-

1983) (identifying punishment rationale as the “early rule,” and then introducing appellate rationale with the explanation that “[m]ore recently, the rationale has been expressed as follows”). But in a remarkable dissent from the en banc opinion in *United States v. Estate of Parsons*, 367 F.3d 409, 419 n.1 (5th Cir. 2004), six judges decried the appellate rationale as “a completely novel judicial creation which has not been embraced or even suggested by the other courts,” and declared that “the majority was apparently inspired to create the ‘appellate rationale’ by a single law review article”—Professor Cavallaro’s *Better off Dead*. See generally Cavallaro, *supra* note 16.

136. *Parsons*, 367 F.3d at 415.

137. Cavallaro, *supra* note 16, at 954.

138. Staggs, *supra* note 14, at 515.

139. *Id.* at 526.

140. See *United States v. DeMichael*, 461 F.3d 414, 416 (3d Cir. 2006) (“The abatement rule is grounded in procedural due process concerns.”); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997) (calling the appellate rationale “a fundamental principle of our jurisprudence from which the abatement principle is derived”); see also Barry A. Bostrom, Chad Bungard & Richard J. Seron, *John Salvi III’s Revenge from the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y. CITY L. REV. 141, 161 (2002) (“The basic public policy behind [abatement] is to protect the rights of persons who have been convicted, but whose right to appeal has not been fully exercised.”); James M. Rose, *Death of a Lay Man: Is There Guilt After Death?*, 34 WESTCHESTER B.J. 81, 81 (2007) (“The doctrine is based upon the fact that the (dead) defendant has no ability to pursue an appeal, and has not had the opportunity to do so . . .”).

141. See *supra* Part II.

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sial ramifications. The new rationale dictated a new form for the practice, and that form has attracted much criticism, as discussed in Part I. Moreover, since the novelty of abatement's rationale and form are unrecognized, some scholars have assumed that the only "fix" for abatement is to ban the practice entirely.¹⁴²

But this is not necessarily so. One little-considered option is a return to the traditional rationale for abatement, and to the practice that it entailed. In essence, the federal courts could revert to the world before *Moehlenkamp*. That world is described in the following Part.

IV. THE FUTURE OF ABATEMENT

In the following Part, I consider the effectiveness of the modern doctrine of abatement, and then describe the practical results of a return to the traditional form of the practice.

The standard defense of modern abatement asserts that the practice exists to protect a right to appellate review.¹⁴³ Implicit in this argument is the normative premise that rights demand uncompromising defense, regardless of whether their enforcement has a desirable or attractive result. Thus, say abatement's defenders, we should not cavil at the seeming ugliness of abatement's results: such is the cost of justice.¹⁴⁴ After all, as with the exclusionary rule¹⁴⁵ or

142. See Beloof, *supra* note 14, at 1159–61 (describing with approval the decisions of state courts declining to use the abatement doctrine).

143. See *supra* notes 19–21 and accompanying text.

144. See, e.g., Cavallaro, *Why, Legally, Geoghan Is Now "Innocent," supra* note 20 (commenting in op-ed article, after the death and abated conviction of child-molesting priest John Geoghan, that "[t]he many victims of Geoghan's abuse are understandably angered and perhaps even traumatized by the symbolism of a legal declaration that he is innocent. There will undoubtedly be an outcry . . . and an effort to change a rule that compels such a declaration. But the right of appeal that is the basis for the remedy is a right that we should all insist upon in a legal system that has the power to jail and execute its citizens.")

145. The exclusionary rule, of course, suppresses evidence that was unconstitutionally acquired, regardless of its centrality to the prosecution's case, or its bearing on the defendant's guilt. The justification for the rule lies not in any purported efficacy at ensuring that the truth is discovered, but in the rule's deterrence of police misconduct. See *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free.

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the speech protections of the First Amendment,¹⁴⁶ an unhappy result in the short term is often the price of defending an important principle in the long term.

This argument must founder, however, on the attempt to demonstrate that there exists a fundamental entitlement to appellate review—one strong enough to overcome the powerful arguments against abatement. As discussed in Part III, the Supreme Court has often denied that there exists a due process right to appellate review.¹⁴⁷ Moreover, the broader landscape of criminal procedure confirms that appellate review is an entitlement of relatively low dignity. The presumption of innocence falls after conviction.¹⁴⁸ Living defendants have no constitutional or absolute right to bail pending appeal,¹⁴⁹ and prosecutors may impeach their credibility with a prior conviction that is still pending appeal.¹⁵⁰

Against this background, abatement seems a triply incongruous doctrine. It represents a pocket of the law in which appellate review takes on a uniquely dignified, quasi-constitutional status. Moreover, in the name of guaranteeing such review, abatement offers not review itself, but something far more radical: actual exoneration, regardless of factual guilt. And this extraordinary remedy is

Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”).

146. It is a truism of First Amendment doctrine that, in the service of protecting the Amendment’s freedoms, we must look beyond the demands of the moment and “be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

147. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (“[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.”); *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987) (“[I]t is clear that the State need not provide any appeal at all.”); *McKane v. Durston*, 153 U.S. 684, 687 (1894) (holding that review of criminal convictions “was not at common law and is not now a necessary element of due process of law”). However, the right to an appeal is guaranteed by statute in the federal courts and in almost every state. *See Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously*, 95 *YALE L.J.* 62, 62 n.2 (1985) (noting that Virginia and West Virginia are the sole exceptions to this rule, but that Virginia offers a procedure which is “difficult to distinguish from the full scale review available in other states”); *see also* 18 U.S.C. § 3742 (2006) (providing for review of criminal convictions).

148. *See Cavallaro, supra* note 16, at 959 n.48 (collecting cases).

149. *See* 18 U.S.C. § 3143(b)(1)(B)(i), (ii) (requiring detention of a convicted and sentenced defendant unless there is clear and convincing evidence that the person is unlikely to flee or pose a danger to public safety and the appeal “is not for the purpose of delay and raises a substantial question of law or fact likely to result in (a) reversal [or] (b) an order for a new trial”).

150. *See* FED. R. EVID. 609(e) (“The pendency of an appeal therefrom does not render evidence of a conviction inadmissible.”).

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available only to a tiny population—the deceased—that is unable to enjoy the benefit that it confers. Abatement is a gold-plated remedy for a nonexistent right, offered to a perversely small proportion of the supposed right's holders.

If modern-day abatement makes only a crabwise and halting progress toward its supposed goals, it is terrifically effective at inflicting collateral damage. More specifically, as abatement's opponents have often said, modern-day abatement strips crime victims of compensation for the losses they have suffered at defendants' hands.¹⁵¹ Moreover, it triggers a powerful symbolic process, by which the appellate court cleanses the defendant of the guilt conferred at trial. That cleansing flies in the face of adjudged facts and callously re-injures victims of crime.

For this state of affairs, we have the appellate rationale to blame—a judicial innovation that turned abatement into a right, rather than a mere judicial practice. It is time for this experiment to end. Courts could achieve a form of abatement less offensive to crime victims, and more in keeping with the rest of our criminal procedure, if they returned to the punishment rationale for the practice. In considering whether to abate a sanction or an order of restitution, courts should not ask whether the defendant has had his conviction reviewed, but whether the measure constitutes punishment. Penal measures should abate; compensatory or restitutive measures should not.

Such a change in the basis for abatement would have several practical implications. First, a change in abatement's rationale would exchange the current patterns of practice for posthumous fines and posthumous quasi-civil judgments. Non-punitive compensatory measures, such as most orders of restitution and orders to pay costs, would always be enforced against the estate.¹⁵² By contrast, fines would not be imposed on defendants' estates, since only

151. See *supra* notes 34–36 and accompanying text.

152. There will be exceptions. Some courts have found restitution orders to be penal. *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993) (holding that, “though restitution resembles a judgment ‘for the benefit of’ a victim, it is penal rather than compensatory”); see also Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM L. REV.* 2711, 2745–49 (2005) (collecting cases); Razel, *supra* note 14, at 2215 (referring to the principle that restitution orders are compensatory as “controversial”). Courts operating under a traditional abatement approach will be free to make this judgment. What matters is that they will ask whether the orders are punitive or compensatory, not whether the defendant's conviction has been finalized by appeal.

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the accused, and not his inheritors, should be punished for his wrongdoing.¹⁵³

I acknowledge two bases on which some would argue for fining the defendant's estate. First, one might argue that, through fining, the deceased defendant loses the ability to transmit some of his wealth to his inheritors, an act which would have been satisfying to him in life. But since the deceased defendant is oblivious to the sanction at the time of imposition, I cannot see how it operates as a punishment. It can neither incapacitate him, nor reform him, nor impose retribution. It amounts to the punishment of an insensate being.

As another argument for fining the defendant's estate, some might deny that such a fine truly punishes the defendant's inheritors. On this argument, the fine does not deprive the inheritors of something that is "theirs," because their rights of inheritance are defined by legal rules of property, and because those rules may be altered to deny a defendant's inheritors the amount of his adjudged fine. But this argument conflates formal legality with justice; it reduces to the contention that, as government has the power to create rules of property, no procedurally legitimate change in those rules can be unjust.

A change in abatement's underlying rationale would affect not only the way in which courts exact money from defendants, but also the language and symbolism of abatement orders. Abating courts would refrain from speaking and acting as if abatement exonerated the defendant. At the level of phrasing, courts would not suggest that a defendant, following abatement, ceases to be "a wrongdoer in the eyes of the court." At the level of legal formality, abatement would no longer result in the vacatur of the defendant's conviction, or the dismissal of his indictment. While abatement would still suspend the defendant's punishment, this would be accomplished without erasing the formal indicia of conviction.¹⁵⁴

153. *See supra* Part II.B.1.

154. Some courts have recognized the symbolic importance of a court's formally recognizing the conviction below, even as it grants abatement. Thus, the Alabama Supreme Court has held that, when a defendant dies pending appeal, "the Court of Criminal Appeals shall instruct the trial court to place in the record a notation stating that the fact of the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed." *Wheat v. State*, 907 So. 2d 461, 464 (Ala. 2005).

There are four major alternatives to abatement which have been proposed by scholars or implemented by courts, but none possesses all three of the advantages described above.¹⁵⁵

First, some states have abandoned abatement entirely.¹⁵⁶ Such a course would entail the payment of fines—punitive, noncompensatory judgments—by defendants’ estates, which violates the principle that only the accused himself should be punished for his crimes.

Second, some state courts¹⁵⁷ have allowed a “substitute defendant” to pursue the appeal in place of the deceased.¹⁵⁸ This approach seeks to satisfy the victim’s interest in seeing the conviction affirmed, while giving the deceased defendant the error-correcting benefit of review. But the substitute-appellant approach is rife with problems. As the student author Timothy Razel has pointed out, “the defendant is not available to make the decision about whether, and how far, to pursue the appeal.”¹⁵⁹ Razel notes that a constitutional issue arising from a state criminal trial can be pursued through three levels of appeal.¹⁶⁰ Moreover, the substitute-appellant approach can produce absurd consequences, as when a reviewing court orders a new trial for the deceased defendant, or affirms his prison sentence. Finally, under the substitute-appellant approach, as under the approach of abolishing abatement entirely, a court could impose a fine on the deceased defendant’s innocent estate.

Third, the Fourth Circuit Court of Appeals—alone of the appellate courts—has retained an approach to orders of restitution which employs the distinction between punitive and compensatory measures, as outlined in *United States v. Dudley*.¹⁶¹ While this ap-

155. These approaches are described in Razel, *supra* note 14, at 2211–21. A little-used approach taken by the Alabama courts, but not described in detail here, involves the dismissal of the appeal and retention of the conviction, with a note placed in the record “stating that the fact of the defendant’s conviction removed the presumption of the defendant’s innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed.” *Wheat*, 907 So. 2d at 464; *see also* Razel, *supra* note 14, at 2220–21.

156. *See* Staggs, *supra* note 14, at 517 n.60 (collecting cases).

157. *See id.* at 518–20 (describing this approach and collecting cases); Surland v. State, 895 A.2d 1034, 1036 (Md. 2006) (“Approximately seven States have chosen to proceed with the appeal if a substituted party elects to do so . . .”).

158. *See, e.g.*, Staggs, *supra* note 14, at 529–30 (recommending this approach).

159. Razel, *supra* note 14, at 2218–19.

160. *Id.*

161. 739 F.2d 175 (4th Cir. 1984); *see supra* notes 87–90. However, at least one district court case within that circuit has signaled a movement toward the appellate

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proach is consistent with the punishment rationale for abatement, the Fourth Circuit's doctrine does not mitigate abatement's exonerative effects, a point that Razel makes.¹⁶²

Fourth, in his student Note, Razel—recognizing that abatement involves warring and incompatible interests—has proposed an “abatement hearing,” through which the trial court could balance these interests, and decide whether to abate the conviction or let it stand. The court would apply a four-factor test, considering: the amount of restitution at stake; the “heinousness of the offense”; whether the victims, if any, were involved and “interested” in the trial; and “any negative effect of the conviction on the decedent’s family, heirs, and next of kin”—for example, the possibility that indigent relatives of the defendant would be forced onto the welfare rolls.¹⁶³

While Razel's is an original and well-considered approach, it cannot help but violate one or the other of the two principal rationales for abatement. If it is wrong to punish the defendant's family (as traditional abating courts believed), then how does this become less wrong when the family has enough money to pay the fine? On the other hand, if abatement recognizes the defendant's right to an appeal (as modern abating courts believe), then how do the heinousness of the offense, and the grief of the victims, justify denying that right?

In the end, a change in abatement's rationale would have salutary effects far beyond any specific improvements that might be recommended here. By abandoning the notion that abatement guarantees a right, courts would free themselves to amend and improve the doctrine, or to pare it back. A judicial doctrine develops a protective carapace when it is thought to protect a right: the doctrine resists arguments of policy, coming to seem like an inherent good, worthwhile in itself. By stripping off this carapace, we permit ourselves to see abatement afresh—to decide for ourselves what abatement “means” and what it “says.”

rationale for abatement. *United States v. Chin (Chin I)*, 633 F. Supp. 624 (E.D. Va. 1986), *rev'd sub nom.* *United States v. Chin (Chin II)*, 848 F.2d 55 (4th Cir. 1988); *see supra* note 126.

162. Razel, *supra* note 14, at 2217.

163. *Id.* at 2223–26.

