

The Death Penalty and Victims' Rights: Legal Advance Directives

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Imagine that Hugo Bedau, or any other anti-death penalty activist, were murdered. Would it not be ironic if the person found guilty of his murder were executed? In such a case, to sentence a criminal to the death penalty, the most severe punishment allowed for her crime, would be to add insult to her victim's injury. Would it not be more appropriate, in this case, to seek a lesser penalty? Such questions raise yet another. Should there not be a way for people who oppose the death penalty to indicate that they would not want their murderers executed, perhaps with a legal advance directive? In fact, a number of organizations already provide documents by means of which a person can do just this.

The possibility of such directives raises at least two issues, both of which fall under the much broader heading of victims' rights. First, should provision be made for the victim of a crime to formally present to the court his or her preference regarding the severity of the sentence a convicted defendant is required to serve? In particular, should the victim be permitted to request a lesser sentence? Second, should the criminal court be formally required to take into account sentencing preferences of deceased victims? Both of these questions will be considered in what follows.

1. Victims' Rights and Respect for Victims

As members of the victims' rights movement are quick to point out, serious crimes can cause more than physical wounds, or money or property lost. One of the most disturbing aspects of being the victim of a serious crime is the sense that our humanity has been denied – the sense that we have been denied the respect owed to persons merely because they are persons. Moreover, it is an unfortunate psychological fact that being denied the respect we deserve can make us doubt that we are deserving of that respect.

In light of this, one of the fundamental concerns of the victims' rights movement is to ensure that victims who have already been dehumanized by the commission of a crime are not dehumanized again by a legal process that can appear to be more concerned with the rights of the accused than with the rights of the victim. In order to address this worry, the groups have advocated what have been called victims' bills of rights, and many states have incorporated related amendments into their constitutions.¹ The amendments include requirements regarding such things as: informing victims when specific stages of the judicial process will occur; that the victim be permitted to attend the trial; and that victim impact statements be permitted at the sentencing stage of a criminal trial.²

No doubt the passage of such amendments, along with greater emphasis on counseling and financial assistance, has significantly improved the circumstances of many victims. David Weisstub warns, however, that the very benevolence with which crime victims are currently regarded may itself give rise to problems. He points out that many movements that have sought to help other groups in need have, in the end, fostered a perception of the members of those groups as ineffectual and less than fully human.

The benevolence movements of previous centuries, which treated the poor, prisoners, and mental patients as tarnished, malformed, imperfect humans in the name of religion and science, transported these individuals out of the arena where their moral autonomy might otherwise have flourished The victimization [by crime] thus is a double-edged sword which, on the one side, is the act of violating the moral autonomy of another, while on the other side, curiously, it makes out of the person, an ineffectual submissive object of our benevolence.³

Who is in a position to deny a person's "moral autonomy," depends, in part, on what that person cares about, and what he wants to do as a member of his community. In the case of victims, or at least in the case of victims of significant crimes, one very common desire is to have some say in determining the penalty paid by a victimizer. Summing up the findings of a number of studies, Joanna Shapland concludes: "The concern with attitudes, information, consultation shown by victims in all of these studies is an expression of the need to be valued, to be wanted, to be an important participant."⁴

Given this interest on the part of the victim, the officials of the court are in a unique position to either respect or ignore the victim's desire to be an active part of the process. Although friends and relatives, and even the accused, may express sincere respect for the victim's desire regarding sentencing, only the court can grant it official respect. Only the court can make the expression of the victim's desire an effective act. The fact that the court does not do this when it can is naturally interpreted by many people as a sign of disrespect.

Being a victim involves being forced into a situation that is beyond the victim's control. It seems natural to suppose that a person who has been the victim of a crime may see the judicial process as an extension of the situation in which he was denied the respect properly accorded to human beings. If he has no more control during the judicial process than he did during the commission of the crime, this may aggravate his sense of himself as a victim. If, instead, he feels himself to be respected during the judicial process, and feels that he has some measure of control over the process, that he is a participant, this can perhaps help mitigate his experience of having been a victim.

While there is a strong pull to concentrate our efforts on the victim's feelings, if we take Weisstub's warning seriously, our focus should be on according the victim proper respect. As potential victims this is what most of us would choose. Most of us would prefer to know that were we to become victims, the state would ensure that we truly regain some measure of control over the situation, and that we are treated with genuine respect. None of us want to become an object of pity.

It might be objected, however, that while it may be true that we have an obligation to respect the desires of the victims of most crimes, this is not true of victims of murder. The dead no longer have any interests, and so they do not have an interest in having their former desires respected. But this is much too quick. First, many people find it natural to suppose that a murder victim has an interest in having his murderer caught and convicted. Second, and perhaps more importantly, there are numerous other situations in which we hold that fully respecting a person's thoughts and desires involves taking into account those thoughts and desires even when the person will not be affected by our actions, or become aware of what we have done or failed to do.

One obvious case in which we take ourselves to be obligated by the previously expressed wishes of people who are now dead is the execution of wills. We do not say that because someone is dead that it does not matter what her wishes were concerning what be done with her property. Nor do we normally take a person to be irrational for taking into account the wishes of a dead friend or colleague when continuing to pursue a project in which both had previously been engaged.

No one would deny that when a person is alive, fully respecting his preferences and projects involves behaving in a way that takes them into account even when the person is unaware of our behavior. If you claim to respect a person's request, but then fail to do as she asks, she will take it as no justification at all that you reasonably expected that she would not find out. For much the same reason, fully respecting the preferences and projects of the living involves maintaining respect for the preferences and projects of the dead. To do otherwise is not to respect the person's projects and preferences, but merely to worry about her feelings.

Another area in which people feel strongly about respecting the preferences of people who are currently unable to make their preferences known, and who may never know whether or not their preferences were respected, is medicine. Nowadays most people think that the primary factor determining how a patient is to be treated should be that patient's preference, and most people seem to think that this holds even when the patient is currently unable to understand, or is even unaware of, what is happening to her. Medical advance directives have been developed to enable individuals responsible for a person's medical care to treat her in accordance with her wishes even when she is no longer able to express them. As we will see, there are important parallels between the practice of law and the practice of medicine.

Parallels between medicine and law arise in large part because they both are set up to deal with persons in danger of suffering, or currently suffering harms. Both practices are necessary only because of our inherent vulnerabilities. Both protect us from suffering harms to which we are vulnerable, and both are prompted into action when someone has been harmed. The victim of violence may well find himself dealing with attorneys as well as physicians. A fuller examination of the parallels between these disciplines builds a case for promoting the use of a legal advance directive that is in some important ways similar to a medical advance directive.

2. Legal Advance Directives

Historically, patients and victims, and persons in general, have found it easy to assume that the expertise of acknowledged experts extends to all aspects of the fields in which they are experts. For instance, it is easy to assume that a physician is not only an expert on what to do to keep a person alive, but also that her expertise includes knowing if a patient should be kept alive. Similarly, because an attorney is an expert in knowing what sorts of penalties the law allows for which crimes, and in how to go about seeing to it that penalties are assigned, it is easy to assume that he is an expert in knowing which penalties are morally appropriate. But, in fact, neither medical nor legal expertise makes someone an expert on such moral issues. Because of her special training, a physician should know approximately how much pain and discomfort a patient can expect from a given treatment, and how likely it is that the treatment will succeed. But once this information has been conveyed to a patient and his family, she is in no better position than they to decide whether or not the suffering caused by the treatment is worth the chance for extra time it buys. Similarly, a prosecuting attorney should know how strong a case he has against a defendant. He should be able to make an educated assessment of whether he is likely to lose the case altogether if he takes it to court and presses for the death penalty, and should therefore accept a plea bargain. But this legal expertise does not make him an expert in knowing whether or not seeking the death penalty is morally required or even morally permissible.

Recently there has been a movement in many professions to give practitioners of the professions explicit training in dealing with related moral issues that are bound to arise. We now have courses in medical ethics, business ethics, engineering ethics, and legal ethics. Such courses are often taught, not only at the undergraduate level, but in professional schools as well. Ironically perhaps, one of the things that is taught in such courses is that certain moral decisions may not be the professional's to make. For instance, patient autonomy is of central importance in most medical ethics courses. There is no doubt that one of the main outcomes of the recent emphasis on ethics in the professions has been a laudable increase in the autonomy and the decision-making powers of individuals whose lives are affected by the work of these professionals.

None of this should be taken to mean that the increase in awareness of professional ethics means that professionals were previously unconcerned about morality. No doubt it has always been true that most professionals, like most persons in general, have generally had the best of intentions. The purpose of ethics courses is to help persons succeed in behaving morally if that is what they want to do. They cannot make persons behave morally if they have no prior interest in doing so.

In the not too distant past, attempts by physicians to behave in a morally respectable manner generally led them to do as much as they could to keep their patients alive, regardless of the resulting quality of life or the cost, in money and discomfort. It is likely that there were two related factors behind this. First, it was assumed that a

longer life was better than a shorter life, more or less regardless of the conditions a person might have to endure. A physician might be culpable for not doing enough to save a person's life, but could not be culpable for doing too much. Nothing would count as too much. Second, it was generally assumed that patients who were in their right minds preferred their physicians to do as much as possible to keep them alive. Thus, it was assumed that in adhering to such a practice physicians were acting in accord with the wishes of their patients. Given these two assumptions, it seemed that acting to preserve life was always morally safer than allowing a person to die.

Nowadays we recognize that this is not so. There is greater public acknowledgment that sometimes the conditions under which we would have to live make it the case that continued life is not objectively better than death. Of course, it does not follow that death must be objectively better than continued life, either. To take a trivial example, it does not follow from the fact that vanilla ice cream is not objectively better than chocolate that chocolate must be objectively better than vanilla. Relatedly, it has also come to be recognized that some competent patients prefer not to be kept alive in such situations. Thus, it is not morally safer to keep a person alive no matter what. It is morally safer to find out what patients themselves prefer. Recognition of this has led physicians to make greater efforts to determine what their patients prefer, and to encourage patients to make out medical advance directives. Although many different types of directions can be given in a medical advance directive, in the popular mind the primary purpose is to specify the conditions under which a patient prefers to be allowed to die.

Somewhat similar assumptions have been at work in the realm of the law as well. It has been generally assumed that victims of crimes want the perpetrators prosecuted and that they would prefer sentences for the crimes to be as strict as the law allows. Moreover, it is also usually assumed that the more serious a crime, the more likely it is that a victim would want the perpetrator to be punished to the full extent of the law. It would follow that there is a very strong presumption that a person who has been murdered would prefer, if he were able to make his preference known, that his murderer be sentenced to death. Thus, it is assumed that a prosecuting attorney who presses for the death penalty is acting as the victim of the crime would want her to act.

Also, just as in the medical setting it was assumed that it was objectively morally safer to do as much as possible to save a patient's life, so in the legal setting an attorney may assume that, insofar as she has any obligation to the victim, it is morally safer to press for the most extreme penalty. Many people will no doubt think that except in exceptional cases, a prosecutor who does not know the victim's preference and who seeks a relatively light sentence wrongs the victim. Fewer people are likely to think that a prosecutor who is ignorant of the victim's preference, and who seeks a harsher penalty than the victim might have chosen, has somehow wronged the victim.

With the existence of a significant anti-death penalty movement, as well as other movements, it is becoming obvious that these assumptions are false. Just as some patients do not want the strongest measures taken to keep them alive, so some victims of crimes do not want the most severe legal measures taken against individuals who have committed crimes against them. Just as the best way to ensure that a patient's wishes concerning her treatment are respected even when she herself cannot express them is to have her put her wishes into writing ahead of time, so the best way to allow that the wishes of murder victims concerning the sentencing of their murderers be taken into account is to have them put their wishes into writing ahead of time. Such would be a legal advance directive.

None of this is to suggest that the parallels between medicine and law are complete. Except in exceedingly rare cases, the primary concern of a physician is the welfare of her patient, and there is overwhelming agreement that a competent patient should have the ultimate say on the treatment. One of the main reasons for this is that the effect of the treatment is primarily borne by the patient. Most other effects are, in a sense, incidental. In contrast, the person who most strongly suffers the effect of a sentence is the defendant, not the defendant's victim. While the victim's welfare may be of some concern, it is probably not the primary concern of those responsible for the imposition of the sentence; they are likely to be more concerned with the safety of society, or

perhaps with retributive justice. Moreover, in the case of murder victims, it is not clear that we can talk about the victim's welfare. For all of these reasons, few people would hold that a victim should in general have the ultimate word on sentencing. Even so, none of these factors provide good reason to reject legal advance directives concerning capital punishment. A perfect parallel is not necessary for there to be a lesson for jurists to learn from the medical community's adoption of advance directives. The parallel is great enough if the victim's preference is a legitimate concern of those responsible for assigning a penalty.

3. Who is Affected?

While few people would be opposed to an increase in victims' rights in itself, there is a serious worry about how such an increase would affect others. Thus, it will be helpful to say a little about all of the groups affected by the outcome of a criminal case.

Two sets of persons affected by the judicial process are persons close to the victim and persons close to the defendant. Sometimes these groups will overlap. Members of both sets will be indirectly affected by the outcome of a trial. But this is not to say that the effect is insignificant. The family of a murder victim may be strongly affected by the sentence given to the person responsible for the death of their family member. Individuals close to a person convicted of a significant crime are frequently strongly affected by that conviction. For instance, the removal of a parent from a young family has an immense effect. Such effects are indirect but serious results of a sentence.

In a somewhat different way, we must also take into account the effect on society at large. It is only in exceptional cases that society will be much affected by the outcome of a single trial. But how trials in general are handled, which sentences are given for which crimes, which actions are considered crimes, how likely a person is to be convicted for the crime he has committed, and how likely he is to serve the sentence awarded, no doubt have a tremendous effect on how safe a society is, for whom it is safe, and in which ways it is safe. We would certainly want to avoid advocating anything which would threaten the safety of society at large.

The main persons affected by a trial are the victim and the defendant. Although we often talk as if the interests of the criminal are balanced by the victim's interests, it should be noted that in the usual case it is only the criminal who is directly affected by the trial's outcome. In a criminal trial, the defendant who is found guilty will be ordered to do something, or it will be ordered that something is done to her. In contrast, the effect of such an order on the victim is through its effect on the defendant. Moreover, although the effect on the victim may well be significant, it is almost certain that the effect on the person sentenced will be stronger. The effect of spending years in prison will almost certainly be greater than the satisfaction or sense of security a person may receive from knowing that someone is being made to pay this price for the crime committed against him.

4. Helping Victims Versus Avoiding Harm to Defendants

On the one hand, the primary reason given for curbing victims' rights is concern about the rights of criminal defendants. On the other hand, one central complaint of victims' rights groups is that individuals in the judicial system appear to be more concerned with how they treat individuals accused and convicted of committing crimes than they are with how they treat the victims of the crimes. When put this way, it sounds as if this is a terrible thing: a bad person who intentionally caused significant harm is being treated well, while the harmed and innocent person is treated badly. But perhaps there is something not quite right about this perspective.

The fact that individuals involved in the judicial process are engaged in making a decision about harming the defendant, while they are being asked to help the victim, is morally relevant. Everyone will agree that in most situations there is an obligation to refrain from causing unjustified harm. Fewer people will hold that there is a parallel obligation to provide help. To put the point another way: we must always justify causing someone harm, but we are rarely called upon to justify a failure to benefit someone. Although we are sometimes justified in killing or causing serious injury, such actions are immoral unless they have strong moral justification. At the same time, a person is not normally morally required to go out of her way to help others. There may be some cases in which a person is morally required to help: for instance, when the harm to be prevented is serious and

the effort needed to prevent it is minimal. But neither the seriousness of the help needed, nor the minimal nature of the effort required is by itself sufficient to create an obligation. You are not required to risk your life by running into a burning building in order to save someone, unless you have a professional obligation to do so, even though the person is desperately in need of help. Nor are you required to give someone a quarter to call a friend, even though it would cost you next to no effort to do so. The fact that I ask for your help does not obligate you to assist me, but even if I do not say anything, you are obligated to refrain from harming me.

Nevertheless, there is some temptation to say that once a person has broken some rules, the rules can no longer be invoked to protect her. Although we are usually required to refrain from harming, so the theory goes, we are not required to refrain from harming people who have already intentionally caused harm. But this attitude will clearly and with good reason be rejected when it comes to lesser violations. While my pinching you may justify you in slapping my hand, it does not justify you in riddling me with machine-gun fire. Even if some crimes warrant the death penalty, most do not. Moreover, it is in the interest of honest folk to make clear that lesser crimes will receive lesser penalties, while greater crimes receive harsher penalties. This is true from their perspective as potential victims, as well as from the perspective that admits the possibility of being subject to the penalties. We would not want the person who runs a red light to go on a killing rampage because she is already subject to our most severe penalty for running the light. Moreover, as a rational person I recognize that the penalties my society sets up to protect me may someday be applied to me or those I care about. Thus, I should beware of advocating harsher punishments if by doing so I increase my risk of facing a harsher punishment without decreasing my risk of becoming a victim of crime.⁵

Having noted the familiar complaint that individuals in the judicial system are more concerned with the rights of criminals and those accused of crimes than with the rights of victims of crime, we are now in a position to see why this should not have been so surprising. The system rightly takes avoiding causing unjustified harm to be a greater priority than ensuring justified benefits. When we also take into account the harm that such punishments cause to those close to a person convicted, persons who do not deserve the harm they will suffer as a result of the sentence, we can again see how strong the moral obligation of members of the judicial system is to avoid inflicting an unwarranted, or an unwarrantedly harsh sentence. For parallel reasons, self-interested rational persons will be concerned to set up their judicial systems to avoid inflicting overly harsh punishments, punishments the increased harshness of which is not offset by an increase in general safety. While such persons would be willing to take the risk of undergoing punishments, their interest in minimizing the risk of undergoing harsh punishments will require that they carefully consider how harsh the punishments should be.

We can also see that the original complaint was misleadingly put. It was claimed that members of the criminal justice system treat individuals accused and convicted of crimes well, while they treat the victims of the crimes badly. But except in exceedingly rare cases, treating criminal defendants well means causing them less harm. It does not mean benefiting them. Unfortunately, the system may also cause harm to the victims of crime, by invading their privacy, but insofar as the complaint is a matter of lamenting that the system does not benefit victims in a positive way, we can see that concern with avoiding unjustified harm to the criminal is a reasonable priority.

None of this is to say that officials of the judicial system are unjustified in imposing any sentence, or even that officials of the system are unjustified in imposing very strong penalties. It is not even to say that officials of the system cannot be justified in imposing the death penalty. It is only to say that both the moral and the rational perspective require us to be wary of advocating a system that risks imposing unjustly severe penalties. In contrast, it is far from obvious that there is a similar moral prohibition against rules that may result in a system that sometimes harms a person less than he deserves. Mercy, by itself, is certainly not a moral failing. There may be external reasons that make it immoral to inflict a lesser punishment, as when someone knows that to do so will result in someone else suffering an unjustified harm because the punishment fails to deter. But it would take some argument to show that a moral prohibition arises straight from the fact that the punishment is too mild. Similarly, self-interested rationality does not require a person to be concerned to avoid advocating rules

that might result in someone receiving a lighter sentence than is deserved. Such rules need only concern a self-interested rational person if they increase her likelihood of becoming a victim.

5. Possible Harms Caused By Legal Advance Directives

Even if it is in itself morally permissible to honor the victim's request that the court impose a less severe penalty than might be deserved, it may be immoral to do so if others would be harmed by honoring it. Let us look at who might be harmed if we respect the victim's request. Perhaps society, or its representatives, in the form of the prosecutor, judge, and jury, should not reduce the criminal's penalty, even at the request of the victim, because to do so would be detrimental to other members of society. Perhaps to do so would increase their risk of harm by increasing their risk of becoming victims of future crimes. While it is likely that reducing some penalties would make life in society more dangerous, this is an empirical question. No studies I know of have addressed the effect of reducing criminal penalties in general. But a number of studies have shown that the use of execution as a penalty does not increase general safety. There is no doubt that execution is a deterrent, but the relevant question is whether or not it is a greater deterrent than other penalties. No one would deny that a penalty as great as life imprisonment will deter the vast majority of us from committing any crime we might actually consider. If the threat of execution produces a greater deterrent effect, it does so only by influencing a very small minority who, unlike the rest of us, are not already deterred by a life sentence. But it is far from obvious that this very unusual minority would be deterred by any threatened penalty.

Even if the evidence concerning the deterrent effect of execution were ambiguous, it would not follow that maintaining capital punishment would be erring on the side of caution. In "Deterrence and Uncertainty," Ernst van den Haag argues that because the effectiveness of capital punishment as a deterrent is a very difficult empirical question, and one to which we may not have an answer in the foreseeable future, we must maintain the higher penalty, the death penalty.⁶ The choice, van den Haag argues, is between risking the lives of innocent victims by failing to impose a penalty that might have deterred their murders, or risking needlessly taking the lives of convicted criminals by imposing a penalty that provides no added safety for society. Unfortunately the question is not this simple. It could be that a judicial system known to promote mercy fosters a less violent society, while a judicial system known not to promote mercy, but to accept killing as a form of punishment, fosters a more violent one.⁷ Thus it is possible that more innocent persons will become victims of capital crimes if we maintain the death penalty.

But, in fact, given that most experts believe that studies have not shown that the death penalty deters better than life imprisonment, and that some studies appear to have shown that it does not provide better deterrence, we have somewhat more reason to believe that allowing this form of punishment hurts society more than it helps it. Given the studies that have been done it appears that we have more reason to believe that there is no harm to society in honoring a murder victim's request that his murderer not be executed than we do to believe that there is no harm to society in honoring a victim's request for lesser penalties other cases. The judicial system is not only directed toward the welfare of the victim. The court has a responsibility to the safety of society as a whole. In the case of capital punishment, respecting a murder victim's request to forgo executing his murderer poses no threat to society. It is not clear that the same can be said about respecting the right of victims more generally to request lesser penalties.

Another line of argument might allow that someone convicted of a crime owes society the penalty specified by the sentence. On that model, it would seem that society has a right to demand the debt to be paid. But it does not follow from this alone that society is in any way shirking its duty if it does not make this demand. It does not follow from the fact that society may demand a given penalty that there is anything morally objectionable about letting the convicted criminal off with a lesser penalty, or even with no penalty at all. If you owe me money, I am not immoral for failing to demand that you pay me back. Thus, we cannot argue against allowing society's representatives to hand down a lesser penalty at the request of a victim on the basis of the fact that the accused owes society a harsher penalty. It may or may not be morally permissible to let criminals out of their sentences, but if it is immoral, it is immoral for some other reason. Again, the most common reason given for insisting that

the penalty must be paid is that it makes society safer, but this is an empirical claim, and in the case of the death penalty it appears to be false.

Regardless of the relationship between the criminal and society, we might argue that it is not merely to society that the debt is owed. A debt is owed to the victim. We often speak of seeking justice for the victim. Thus, it might be argued, it would be immoral for society to show mercy, because to do so would be to release the criminal from a debt owed to another. If someone borrows money from you and me, I cannot cancel the debt that is owed in part to you. The point would be even stronger for those who hold that the debt owed is really to the victim alone. Nevertheless, in the case we are envisioning, the victim's preference is for the lesser penalty. Thus, while an objection of this sort may be raised elsewhere, it is not relevant here.

In a similar vein, it might be argued that something is owed to the friends and family of the victim. While this may be true, that again has little bearing on the situation we are discussing. Either such preferences agree with the victim's or they do not. In the case we are discussing the victim is assumed to prefer the lesser penalty, so if they agree, there is no conflict between the victim's preferences and the proposal we are considering. If the preferences of persons close to the victim do not match the preferences of the victim, surely the victim's preference is overriding. Just as I cannot forgive a person for the wrong he did to my brother, neither am I in a position to demand a greater penalty for the harm done to my competent brother than my brother regards as appropriate.

Someone might try to argue against this by maintaining that people who care about the victim of a crime are harmed, and are therefore victims themselves, so that their preferences should be given the same respect as those of any other victim. But the sentence a person serves must be for the crime for which she was convicted, and the defendant in a criminal trial is not tried for the harms caused the victim's family and friends. Nor should she be, otherwise a crime committed against a popular person would involve more counts than the same crime committed against a loner. This would clearly result in greater protections for some than for others, and violate the principle of equal protection. Thus, while individuals close to the victim might have preferences regarding the punishment suffered for the crime, their preferences cannot compete with those of the victim himself.

It might be thought that things are different in the case of murder. When there has been a murder it may look as if there is no question of the preferences of the family conflicting with the preferences of the victim, because by hypothesis the victim has died. Even if his prior preferences are known, he cannot currently care about the penalty to be paid. As we have seen, however, fully respecting a person's choices and preferences involves respecting them even when that person will never know about it, and thus respecting the sentencing preference of a murder victim is not significantly different from respecting the sentencing preference of the victim of any other crime.

Finally, it might be said that the individuals harmed by granting the lesser penalty are the others convicted of similar crimes whose victims did not request lesser penalties. These persons might complain that the result of honoring a victim's request is that they themselves pay a higher price for committing the same crime. As a practical matter, the courts have decided against this type of objection to allowing victim input into the sentencing phase of a criminal trial. Victim impact statements are currently permitted and clearly intended to influence the severity of the sentence. To the extent that the court allows victim impact statements, there is a bias toward allowing that which has the potential to contribute to a harsher penalty. If worries that this practice might unfairly lead to some defendants paying a higher penalty than others for the same crime are not sufficient to rule out its use, surely they are not sufficient to rule out the use of legal advance directives.

There are difficulties, however, with arguing that legal advance directives should be allowed because, if they cause a harm, it is a harm the courts already allow. Bearing in mind that the question at issue is merely whether or not one person paying the penalty for a given crime is harmed by the fact that someone else is paying a lesser penalty for committing the same crime, there is a fundamental difference between the situation in which the first person's penalty is raised above the standard and the situation in which the second person's penalty is lowered.

For instance, unlike the policy of allowing a victim to request a harsher penalty, the policy under discussion here can hardly be used in a racist or otherwise discriminatory manner. It is easy to imagine racist victims motivated to request harsher penalties by the fact that their attackers are of the disfavored race. In a country in which the majority harbors any trace of racism against a minority, such a policy could have significant discriminatory implications. But it is difficult to believe that there is a parallel danger of racist victims being motivated to request lesser penalties by the fact that their attackers are of the favored race. Moreover, as with legal documents generally, discriminatory intent in a legal advance directive would certainly invalidate it.

There is no question that the rational attitudes of individuals who are defendants in murder trials would be very different toward a rule permitting victim impact statements and a rule permitting consideration of legal advance directives. Assuming that the defendant does not prefer execution, the only possible difference a rule allowing consideration of legal advance directives can make in the outcome of the trial is a benefit to that defendant. Thus, if we hold that a legitimate complaint about the harm caused by a system of sentencing is a complaint someone could rationally make before actually receiving his sentence, then it appears that individuals convicted of similar crimes would not be genuinely harmed by the use of legal advance directives. Thus, we have found no obvious reason to refuse to give official respect to a murder victim's request that his murderer not be executed.

6. Using Victims

We have noted that in a criminal court the crime for which the defendant is tried is a crime against an individual, and not the collateral harm experienced by the victim's family and friends. We said that because it is a crime against the person that is being punished, the preference of the victim regarding that punishment rightly has a bearing that the preferences of others do not. But there is another reason to give the victim's request that his murderer not be executed more weight than the same request made by anyone else. In order to see this, let us consider a fanciful case. Imagine yourself visiting a society in which liars are punished by having their tongues cut out no matter how trivial the lie. Suppose that you have discovered that someone has lied to you, and that you are angry enough to believe that the person should be punished. Perhaps it was a typical case of student plagiarism. Would you report this lie? I would not, and probably you would not either. We would not report the lie because we believe that cutting out a person's tongue is too harsh a punishment for lying.

Suppose further that the lie has been discovered, and that you are required to testify against the liar. Assuming that you were originally unwilling to report the lie, presumably you will also object to being forced to testify. Your attitude is unlikely to be: "I have done my part as a responsible person. I have testified against this liar, and he should be punished. It has nothing to do with me if, as a result of this conviction, others choose to inflict an immoral penalty." Kant's distinction between treating persons as means versus treating them as ends is useful here. In forcing you to participate in a judicial process to which you object, the court treats you as a means and fails to respect you as an end. You may have been actively opposed to the policy of cutting out the tongues of liars before, but now it is not merely a matter of being opposed to a policy. Whereas before you objected to the harm being done to others, now you are objecting to being forced to play a role in causing that harm; you are objecting to something being done to you.

The parallel with the death penalty should be obvious. If we take victims' rights seriously, we should not impinge on a victim's freedom by forcing him to participate in a process which will cause harms to which he is morally opposed. The victim ought to have a say here, even if others do not, not as compensation for the harm already suffered, but because failure to respect the fact that the victim has a moral objection to the death penalty forces him to be a party to something he finds morally objectionable. Ignoring the preferences of others does not harm them in this way.

Someone might object that the victim who believes in the death penalty is similarly forced to participate in a process which she considers immoral if she is forced to be party to a murder trial the outcome of which cannot be a sentence of death. If we should honor a murder victim's legal advance directive requesting that his murderer not be executed, we should also honor an advance directive requesting that execution. But there is an

important difference here. The person who would request that the death penalty be imposed objects to the idea that his murderer will receive a prison sentence instead of being executed. He does not object to the fact that the prison sentence is imposed. He objects to the fact that the death penalty is not imposed. To use Kant's distinction again, a court which imposes a lesser punishment than you believe is appropriate is one which does less than you believe that it should. The court fails to make use of you in a way that you wish it would. But it does not thereby use you in a way that you wish it would not, and there is no moral requirement to use persons as they want to be used. Thus, for a variety of reasons, it is not true that if we give official weight to a murder victim's request that his murderer not be executed we must also give official weight to his request that his murderer be executed.

7. Conclusion

Insofar as we support the victims' rights movement, we have reason to support the use of legal advance directives allowing individuals opposed to the death penalty an effective means of expressing their wish that their murderers not be executed. This is an extension of taking victims' rights seriously in other circumstances, and helps to demonstrate that we truly respect the rights and autonomy of persons who have become victims. We have considered a number of worries about granting victims this sort of power, but given that most of those who are professionally concerned with the issue of the death penalty agree that there is no good reason to believe that the failure to impose the death penalty increases the risk of capital crime, we have been unable to discover anyone who has a legitimate interest in prohibiting such legal advance directives. If a murder victim could speak, his request that his murderer not be sentenced to death ought to be given serious consideration. By means of legal advance directives murder victims can speak.⁸

Notes

1. Leslie Sebba, *Third Parties: Victims and the Criminal Justice System*, (Columbus, Ohio: Ohio State University Press, 1996), p. 22.
2. In *Booth v. Maryland* (1987) victim impact statements were ruled out in capital cases, but this was overturned in 1991 by *Payne v. Tennessee*.
3. David Weisstub, "Victims of Crime in the Criminal Justice System," in *From Crime Policy to Victim Policy*, ed., Ezzat A. Fattah (New York: St. Martin's Press, 1986), p. 196.
4. Joanna Shapland, "Victims and the Criminal Justice System," in *From Crime Policy to Victim Policy*, p. 215.
5. See Bernard Gert's discussions of rationality and punishment in *Morality: Its Nature and Justification* (New York: Oxford University Press, New York, 1998).
6. Ernest van den Haag, "Deterrence and Uncertainty," in *Journal of Criminal Law, Criminology and Police Science*, vol. 60, no. 2, 1969.
7. In California between 1907 and 1963 homicides tended to increase in the month following an execution. See Bowers and Pierce, "Deterrence or Brutalization?" in *Crime & Delinquency*, 26, (1980), p. 453. See also Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," in *Philosophy & Public Affairs*, vol. 14 (Spring 1985).
8. This paper benefited greatly from the comments I received while presenting an earlier version to the philosophy department at Texas Tech University. I am also grateful for the comments of Hugo Bedau, Joshua Gert, Paul McGreal, Stephen Nathanson, and Linda Radzik.