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Victimhood

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The figure of the victim looms large in criminal law and procedure.[1] The victim's prominence begins with the substantive law. Perhaps most obviously, some crimes are defined by the effect of the defendant's action on the victim or intended victim. The same attack may constitute murder if the victim dies, but only attempted murder if the victim survives, even though the defendant intended to cause the victim's death.[2] Wholly apart from its role in the definition of crime, however, judges traditionally have considered a crime's effect on its victim in deciding on a sentence. In many jurisdictions, including the federal court system, probation officers prepared presentencing reports setting forth, along with details about the defendant's background, the harm that the defendant inflicted upon the victim.[3]

More recently, victims' rights groups have campaigned for a federal constitutional amendment guaranteeing, *inter alia*, a victim's right to be heard at sentencing.[4] Although neither the House nor the Senate has approved such a bill yet,[5] the Senate voted in April 2004 to grant statutory rights to crime

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1. *See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 865 (1996) ("The existence of a victim, of course, is what prompts the criminal trial."). For a brief history of the role of the victim in criminal law, see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938-42 (1985). Victim participation also might enhance the justice of the sentencing process. *See* Howard C. Rubel, *Victim Participation in Sentencing Proceedings*, *in* TOWARDS A CRITICAL VICTIMOLOGY 238, 245 (Ezzat A. Fattah ed., 1992).

2. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 209 (2d ed. 1986).

3. *See* ROBERT DAWSON, SENTENCING 24-41 (1969); Stephen A. Fennell & William H. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1616-17 (1980).

4. *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982). The task force recommended that the United States Constitution be amended to guarantee that "the victim, in every criminal prosecution[,] shall have the right to be present and to be heard at all critical stages of judicial proceedings." *Id.*

5. Bills to propose a constitutional amendment, which would need to be approved by the states, are before both the House and the Senate. *See* H.R.J. Res. 10, 108th Cong. (2003); S.J. Res. 1, 108th Cong. (2003). As of August 13, 2004, the House Bill was referred to the House Committee on the Judiciary's Subcommittee on the Constitution, and a motion on the Senate floor to proceed to consideration of the bill was withdrawn. Bill Tracking, H.R.J. Res. 10, 108th Cong. (2003), *available at*

victims.[6] A majority of states, thirty-two at last count,[7] have already chosen to include such a provision in their constitutions,[8] and other states have enacted statutory protections.[9] The degree and form of victims' participation in the

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http://thomas.loc.gov; Bill Tracking, S.J. Res. 1, 108th Cong. (2003), *available at* http://thomas.loc.gov. The most recent text of the Senate version of the proposed amendment is as follows:

> Section 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.
> Section 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.
> Section 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.
> Section 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.
> Section 5. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

S.J. Res. 1, 108th Cong. (2003).

6. *See* Carl Hulse, *Senate Votes to Grant Rights to Victims of Federal Crimes*, N.Y. TIMES, Apr. 23, 2004, at A20.

7. *See* http://www.klaaskids.org/vrights.htm (last visited Mar. 1, 2006) (providing a map summarizing which states have victims' rights constitutional amendments).

8. *See, e.g.*, ARIZ. CONST. art. II, § 2.1; FLA. CONST. art. I, § 16(b); MICH. CONST. art. I, § 24; R.I. CONST. art. I, § 23; WASH. CONST. art. I, § 35; cf. TEX. CONST. art. I, § 30; (guaranteeing crime victims the right to be present at sentencing). For a comprehensive analysis of one state's victims' rights statute, see Mary Margaret Giannini, Note, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws*, 34 IND. L. REV. 1157 (2001).

9. *See, e.g.*, CONN. GEN. STAT. § 54-222a (2001); CONN. GEN. STAT. § 51-286e (1985) (setting forth the rights of victims at crime scenes and in judicial proceedings); N.C. GEN. STAT. § 15A-830 (2003) (setting forth a comprehensive Crime Victims' Rights Act). One concern with such statutes is that they might be in tension with other

criminal justice process in general and at the sentencing phase in particular has become the subject of heated debate.[10] The debate, however, has largely ignored a central question: Who should count as a victim of crime?

This question is important not only for determining the rights to which putative victims are entitled under current and proposed laws, but also because who counts as a victim may matter for purposes of sentencing. In recent years, the use of the U.S. Sentencing Guidelines in federal courts diminished this issue's significance, leading judges to elaborate the definition of "victim" only where the Guidelines specifically used that term. That may soon change, however, as a result of the Supreme Court's decision in *United States v. Booker*.[11] In *Booker*, the Court held that the mandatory nature of the Guidelines violated the Sixth Amendment rights of criminal defendants,[12] and concluded that the proper remedy was to make the Guidelines advisory.[13] The Court noted that sentencing courts are obliged to consider Guidelines ranges but may also adjust the sentence based on other concerns.[14]

Because appellate courts will continue to review sentences for reasonableness,[15] a common law of sentencing can be expected to emerge. Courts thus will have the opportunity to consider the definition of terms such as "victim" in contexts in which the Guidelines use the word, and potentially even in contexts in which the Guidelines do not specifically indicate that a sentence should depend on the crime's effects on, or the status of, the victim. This

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statutory and constitutional rights. *See, e.g.*, William Glaberson, *Jersey Court to Decide Limits of Victim's Rights to Address Jury*, N.Y. TIMES, June 11, 1996, at B1 (reporting on a controversy in New Jersey over victims' rights legislation). *But see* State v. Muhammed, 678 A.2d 164, 171 (N.J. 1996) (finding the statute at issue constitutional).

10. *See generally* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: USE AND ABUSE OF VICTIMS' RIGHTS (2002); Robert Elias, *The Law of Personhood: A Review of Markus Dirk Dubber's* Victims in the War on Crime: Uses and Abuses of Victims' Rights, 52 BUFF. L. REV. 225 (2004); Aya Gruber, *The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMP. L. REV. 645 (2003); Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215 (2001-2002). The topic has been under discussion for some time. *See, e.g.*, Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357 (1986); Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29 (1987); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982); Karen L. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417 (1989); Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199 (1988).

11. 125 S. Ct. 738 (2005).

12. *Id.* at 748-56.

13. *Id.* at 756-57.

14. *Id.* at 757-69.

15. *Id.* at 764-68.

Article's primary purpose is to develop a theoretically and functionally sound approach to defining the term "victim." A secondary purpose is to illustrate the kind of jurisprudential and practical considerations that sentencing and reviewing courts should take into account in setting criminal sentences. The Article will seek to develop a definition of "victim" that can be used both within the context of Guidelines analysis, and also in any other context in which a court concludes that a crime's effects on, or the status of, the victim should matter at sentencing. The Article will show how the courts can take the guidance of Congress and the Sentencing Commission seriously while developing broader sentencing principles.

The Federal Sentencing Guidelines make several explicit references to victims. The Guidelines generally seek to reduce judicial discretion in the sentencing process,[16] producing in each case a relatively narrow recommended sentencing range dependent on the defendant's offense level and criminal history. The Guidelines require the calculation of two figures: the defendant's total offense level, which quantifies the seriousness of the crime of conviction and relevant conduct, and his criminal history category, which quantifies the seriousness of the defendant's past criminal conduct. The Guidelines prescribe a base offense level for each federal offense, as well as adjustments that should be made to the base offense level depending on the defendant's conduct during the course of the crime, resulting in the total offense level. The Guidelines also provide detailed instructions on how to calculate a defendant's criminal history category. A table sets forth sentencing ranges for every possible combination of offense level and criminal history category.

Several of the Guidelines' prescribed adjustments to the base offense level involve the status or defendant's treatment of the "victim."[17] For example, the Guidelines authorize the sentencing court to increase the offense level if the defendant knew or should have known that the "victim" was unusually vulnerable;[18] if the "victim" was a government officer or employee, a former government officer or employee, or a member of the immediate family of any of the above, and the offense of conviction was motivated by such status;[19] and if the defendant physically restrained the "victim" in the course of the offense.[20] The Guidelines also permit departures from the prescribed Guideline range if, among other things, the "victim" suffered psychological injury much more serious than that normally resulting from commission of the offense,[21] or if the defendant's conduct was unusually heinous, cruel, brutal or

16. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A (policy statement) (2003).
17. *See id.* § 3A (victim-related adjustments).
18. *See id.* § 3A1.1.
19. *See id.* § 3A1.2.
20. *See id.* § 3A1.3.
21. *See id.* § 5K2.3.

degrading to the "victim."[22] Other Guidelines provide for departures when certain harms, for example, death,[23] physical injury,[24] or abduction,[25] occur as a result of the crime, but do not explicitly require that these harms be visited upon the "victim."[26]

But who, in the context of the Sentencing Guidelines, is a "victim"?[27] Surprisingly, the Guidelines do not define the term, leaving the federal courts to sketch out the contours of its meaning.[28] It is easy enough to say that the victim is whomever the substantive criminal law, in particular the statute that the defendant was convicted of violating, sought to protect.[29] But does the

22. *See id.* § 5K2.8.

23. *See id.* § 5K2.1.

24. *See id.* § 5K2.2.

25. *See id.* § 5K2.4.

26. *U.S. Sentencing Guidelines Manual* § 5K2.2, the policy statement dealing with departures for significant physical injury, does refer to the "victim," but not in the sentence authorizing the departure. Section 5K2.2 states:

> If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in § 5K2.1.

Id. § 5K2.2.

Read literally, section 5K2.2 appears to allow departures where any person, but not necessarily the "victim," suffers significant physical injury, while authorizing a substantial departure where the "victim" suffers a major, permanent disability. *Id.*

27. Markus Dirk Dubber, for example, argues that non-victim impact evidence should be excluded from capital sentencing hearings. Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready To Strike*, 41 BUFF. L. REV. 85, 126-27 (1993). While it is relatively easy to distinguish murder victims from non-victims, Dubber provides no guidance as to how the line should be drawn in other criminal cases: "If victim evidence is not restricted to evidence provided by the victim, it would be difficult to distinguish between non-victims who would, and those who would not, be entitled to testify at a capital sentencing hearing on behalf of the State." *Id.* at 126. Dubber also points out that "[v]ictims' rights laws generally do not provide for the participation of anyone other than the victim in non-capital sentencing." *Id.* For a comprehensive list of studies on victim impact statements in capital cases, see Jean M. Callihan, *Victim Impact Statements in Capital Cases: A Selected Bibliography*, 88 CORNELL L. REV. 569 (2003).

28. *See* Part III, *infra*.

29. *Cf.* Jackson Toby, *Is Punishment Necessary?*, *in* THEORIES OF PUNISHMENT 102, 103-04 (Stanley E. Grupp ed. 1971). Toby appears to use the term "victim" in a narrow sense, referring to other affected parties as "[t]hose who identify with the victim—not only his friends and family but those who can imagine the same injury

term "victim" also include others affected by the crime – for example, the family of a person who was murdered or kidnapped, the drug addicts who purchase the wares of kingpins, or the government officials and general community betrayed by public corruption?

A broad definition of "victim" in a murder case thus could encompass ever-wider circles of individuals. The innermost ring might consist of a murdered individual, while the next circle would include the immediate family and intimate friends of that person.[30] The next circle, more removed from the murdered individual but nevertheless significantly affected by the crime, might be made up of the community shocked by and forced to come to terms with the loss of one of its members. Yet a further outer ring might consist of all those far-away newspaper readers, television watchers and Internet browsers who learn of the crime and are disturbed, however momentarily, by its brutality. In addition, once the murderer is identified, his own family, friends, and community might suffer as a result of the crime. Under a very broad definition of the term, all of these individuals could be considered victims.

Whatever the sociological and criminological soundness of such a construction, the Federal Sentencing Guidelines' failure to articulate the meaning of the term threatens to undermine the proportionality and uniformity that the

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being done to them," *id.* at 103, and pointing out that some offenses "do not involve victims at all, e.g., gambling, or . . . involve victims of a quite different kind," *id.* at 104.

30. Supporters of the federal victims' rights amendment would argue for increased participation of a victim's family in the sentencing process. Stephen Schafer has suggested that primitive societies did not recognize individual culpability; instead, the family or clan of a crime victim revenged themselves on the family of the criminal. *See* STEPHEN SCHAFER, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE VICTIM AND HIS CRIMINAL: "VICTIMOLOGY" 4 (1967); *see also* Deirdre Golash, *Punishment: An Institution in Search of a Moral Grounding*, *in* PUNISHMENT: SOCIAL CONTROL AND COERCION 11, 13 (Christine T. Sistare ed., 1996) (characterizing punishment in ancient Greece as means of vindicating victim); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 21 (1999) ("The earliest criminal prosecutions were largely private proceedings through which a victim sought retribution against and restitution from the perpetrator of the crime."). Even today, some forms of Islamic law permit the victim's family to determine or even carry out the sentence meted out to the defendant. *See, e.g.*, *Iran's "desert vampire" executed*, *available at* http://news.bbc.co.uk/1/hi/world/middle_east/4353449.stm (Mar. 16, 2005); Thomas K. Grosse, *Nurse Is Spared a Beheading: Victim's Brother Accepts $1.24m as Saudi "Blood Money"*, BOSTON GLOBE, Oct. 16, 1997. The Iranian case was the subject of much debate on a widely-read legal blog, *see* Punishing Monsters: Update, *at* www.volokh.com/archives/archive_2005_03_13-2005_03_19.shtml#1111170132 (Mar. 18, 2005). Victim participation in punishment also existed under the now-defunct Taliban regime in Afghanistan. *See* Ahmed Rashid, *Harsh Justice on a Soccer Field: Under Taliban Supervision, a Killer Is Executed By His Victim's Family*, LONDON DAILY TELEGRAPH, Apr. 1, 1997; *Murder Victims' Families Slay Convicted Killers*, NEWARK MORNING STAR-LEDGER, Feb. 11, 1996.

Guidelines, even after *Booker*, can help promote.[31] Although the number of federal appellate cases specifically addressing the identification of a victim is relatively small, it is of paramount importance that Congress, the Sentencing Commission and the courts recognize that the term is fundamentally ambiguous not only for the sake of sentencing policy, but also for a wide range of statutory initiatives as well. Congress has passed several statutes guaranteeing assistance and fair treatment for crime victims,[32] but has defined the term "victim" in only one, stating that it refers to "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime."[33]

But that definition is still potentially ambiguous. Moreover, it does not answer the question of how the term "victim" should be defined for the purposes of the Sentencing Guidelines. The fact that Congress desired to extend government services and benefits to a wide range of individuals – indeed, to almost anyone affected in any way by a crime, if one understands the definition literally – suggests that Congress and the Commission may have wished to limit the definition in the sentencing context.[34] There is, after all, a significant difference between granting benefits to individuals on the basis of victim status and sentencing other individuals to significant deprivations of liberty because of harm they have caused to putative victims. Nevertheless, exploring the definition of the term "victim" in the sentencing framework highlights the need for thoughtful consideration of the possible meanings of the term.

Moreover, despite the relatively limited number of cases consciously confronting the question of who is a victim, many other cases contain the potential for this sort of discussion but fail to address it. This situation typically arises because the defendant failed to appeal his sentence on the grounds that the district court enhanced his sentence under the victim-related adjustments and departures due to the crime's effects on an individual who was not, in fact, a "victim." A number of cases, for example, involve enhancements for the harm bank tellers suffer during bank robberies.[35] Under one interpretation

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31. *Cf.* John Garry, Note, *"Why Me?": Application and Misapplication of § 3A1.1, the "Vulnerable Victim" Enhancement of the Federal Sentencing Guidelines*, 79 CORNELL L. REV. 143, 151 (1993) (arguing that haphazard application of section 3A1.1 undermines proportionality and uniformity).

32. *See* Federal Victim & Witness Protection Act of 1982, 18 U.S.C. § 1512 (2000); Victims of Crime Act of 1984, 42 U.S.C. § 10601 (2000); Victims' Rights & Restitution Act of 1990, 18 U.S.C. § 3771 (Supp. 2004).

33. 42 U.S.C. § 10607(e)(2) (2000).

34. *Cf.* United States v. Gordon, 393 F.3d 1044, 1052 (9th Cir. 2004) ("[The Mandatory Victims Restitution Act of 1996's] purpose is to make the victims whole; conversely, the Sentencing Guidelines serve a punitive purpose.").

35. *See* United States v. Phillips, 287 F.3d 1053, 1057-58 (11th Cir. 2002) (holding that bank tellers are vulnerable victims of a bank robbery where they have unique characteristics, such as working in a remote location with little police protection, that make them particularly susceptible to crime, but not considering whether tellers can

of the Guidelines, however, bank tellers are not victims of bank robbery at all, for the entity against whom the robber directs his efforts and that suffers pecuniary harm is the bank itself. Another case disapproved of applying an upward adjustment in the defendant's offense level because he had targeted a particularly vulnerable "victim."[36] The defendant was convicted of conspiring and endeavoring to obstruct justice for offering to arrange the favorable disposition of the case of a Mississippi state official indicted for extortion, bribery and tax evasion.[37] The Fifth Circuit held the state official was not a "vulnerable victim" within the meaning of section 3A1.1,[38] but neglected to consider whether he was a "victim" at all. There may be any number of cases in which the definition of "victim" makes a significant difference in the length of a defendant's prison term or the amount of restitution, but because many of these cases are not appealable – and those that do reach the circuit courts often focus on some other issue, such as whether the "victim" was in fact "vulnerable" – there has been a limited effort to standardize the understanding of victimhood.[39] This paper focuses on the permissibility of and means by which harm to a broad range of victims may be considered at modern federal sentencing hearings.[40] Although harm to non-victims conceivably could form the basis for departures from the prescribed Guidelines range, determine the particular sentence within the range, or be relevant in a post-Sentencing Guidelines regime, this paper does not focus on these issues.

Part I of this paper examines the theoretical tension between using the total harm caused by a convicted defendant to determine the proper punishment and limiting the categories of harm for which punishment can be imposed. This is the equivalent in the criminal context of the problem discussed in the classic tort case of *Palsgraf v. Long Island Railroad*:[41] How should a legal regime limit the universe of victims? Part II provides a brief overview

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be victims of crime of bank robbery at all); United States v. Lucas, 889 F.2d 697 (6th Cir. 1989) (upholding departure for extreme psychological harm suffered by bank tellers forced to disrobe during course of robbery but not questioning that tellers are in fact victims).

36. United States v. Moree, 897 F.2d 1329 (5th Cir. 1990).

37. *Id.* at 1331.

38. *Id.* at 1335-36.

39. Even within the field of victimology, the definition of "victim" is not particularly precise and, in fact, seems to encompass all individuals who have been affected by crime, terrorism, or political violence in some way. Augusto Balloni, for example, calls for the study of the experience of victims "in the broadest possible sense of the term." Augusto Balloni, *Victims, Crimes, and Social Context*, *in* CRITICAL ISSUES IN VICTIMOLOGY: INTERNATIONAL PERSPECTIVES 17, 22 (Emilio C. Viano ed., 1992).

40. This paper does not consider the form in which information about such harm is presented to the sentencing authority. It does not, for example, evaluate whether victim allocutions introduce an element of irrationality and disparity into the sentencing process or whether, on the contrary, they would be preferable to a more neutrally phrased presentencing report compiled by a probation officer.

41. 162 N.E. 99 (1928).

of pre-Guidelines decisions defining the term "victim" for sentencing purposes, focusing in particular on constitutional decisions about victim participation. Although the Sentencing Guidelines have made such cases of largely academic interest in the past, they might have renewed importance in a post-Guidelines world. Part III reviews how the courts have interpreted the term "victim" under the Sentencing Guidelines. It concludes that the judiciary has tended to expand the definition of "victim" in the context of the departure Guidelines, but the courts have not arrived at a suitable definition for either the purpose of the Guidelines themselves or for other purposes. Part IV argues that the current situation leads to confusion and proposes a standard by which judges should take into account harm suffered by a broad range of victims.

I. A THEORY OF HARM

The degree of harm a criminal defendant causes traditionally has been a major factor in the determination of his sentence. An action that does not harm anyone often has been considered an inappropriate basis for criminal liability.[42] Even legal systems that reject the talionic formula of "an eye for an eye, a tooth for a tooth"[43] often seek to achieve some correlation between the amount of harm the defendant caused and the severity of the punishment imposed. The aim of achieving some degree of proportionality is not unique to American law. Although in England, a large number of crimes that today would be considered petty were punishable by death up to and throughout the eighteenth century,[44] by the end of that era, reformers had begun advocating that the punishment fit the crime.[45] For example, Jeremy Bentham suggested that punishment should be proportionate to the "mischief" of the offense,[46] and Cesare Beccaria argued that the harshness of punishment should correspond to the degree of harm the defendant had caused society.[47]

Today, the principle of proportionality is so deeply rooted in the Anglo-American legal tradition that it is rarely even questioned.[48] A more subtle and

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42. *See* RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 26 (1979); STANTON WHEELER ET AL., SITTING IN JUDGMENT 55 (1988); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975); *see also* JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 8 (1946).

43. *See Exodus* 21:24 (King James).

44. *See* WHEELER, *supra* note 42, at 57.

45. *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH 73-74 (Alan Sheridan trans., 1977).

46. *See* Jeremy Bentham, *The Principles of Penal Law*, *in* THE WORKS OF JEREMY BENTHAM 396 (J. Bowring ed., 1838).

47. *See* JAMES ANSON FARRER, CRIMES AND PUNISHMENTS, INCLUDING A NEW TRANSLATION OF BECCARIA'S "DEI DELITTIE E DELLE PENE" 10 (1880).

48. *See* WHEELER, *supra* note 42, at 61-62.

difficult issue, however, is *what*, rather than *whether*, harm should be considered for sentencing purposes. Is some, but not all, harm caused by the defendant relevant to the sentencing decision? The difficulty arises in part because a rule that a defendant should be responsible for all harm he causes potentially conflicts with other long-cherished theoretical concepts. In the United States, neither the criminal law nor the law of torts embraces an all-harm rule of assigning liability. The *mens rea* requirement in the substantive criminal law, for example, reflects a normative judgment that a defendant should be held answerable only for those harms that were intentional, purposeful, or the result of negligent or reckless conduct.[49] Even where the defendant did not intend to harm the person actually hurt, the criminal law sometimes looks to foreseeability. Tort law highlights more starkly another difficulty with the all-harm rule: Identifying whether the defendant in fact caused a particular result is itself a normative judgment. To say that a defendant "caused" something where his actions were the but-for cause is a very low bar; while saying the defendant "caused" something only if his actions were the proximate cause is conclusory.[50] Not all harm caused to all potential victims falls within these categories. Especially in the case of psychological damage, the defendant's fate would depend not so much on his own actions and intentions as on the emotional state of the persons affected by the crime; in some instances, he could not reasonably have been expected to foresee such a result.

A. Theoretical Approaches

Although modern Western society appears to accept the principle of proportionality as a general proposition, it is much less clear how proportionality should be defined. Certainly an offender's punishment should be proportionate, but proportional to what? To his own moral blameworthiness? To the harm he caused certain individuals, identified by law? To the total harm he caused society? Thomas More typified the approach of those who focus on blameworthiness, describing in *Utopia* a society in which there were no fixed penalties for crime, and attempts were punished as successful crimes.[51] Cesare Beccaria, by contrast, wrote that the "true measure of crimes" is "the

49. Since about 1600, judges generally have defined common law crimes in terms that require, in addition to a prescribed action or omission, some prescribed bad state of mind, although that state of mind has varied from one common law crime to another. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980); *see also* Regina v. Faulkner, [1877] 13 Cox Crim. Cas. 550 (L.R.C.C.R. 1877) (Ir.). The Model Penal Code states explicitly that a person is not guilty of an offense unless he acted "purposely, knowingly, recklessly, or negligently" with respect to each material element of the offense. MODEL PENAL CODE § 2.02 (1997).

50. *See* JULES L. COLEMAN, RISKS AND WRONGS 270-71 (1992).

51. *See* THOMAS MORE, UTOPIA 67-68 (Robert M. Adams ed. & trans. 1992).

harm done to society."[52] Rejecting moral blameworthiness as a measure of punishment, he stated:

> They were in error who believed that the true measure of crimes is to be found in the intention of the person who commits them. . . . Others measure crimes rather by the dignity of the injured person than by the importance [of the offense] with respect to the public good. If this were the true measure of crimes, an irreverence toward the Being of beings ought to be more severely punished than the assassination of a monarch . . . . Finally, some have thought that the gravity of sinfulness ought to enter into the measure of crimes. . . . [But t]he weight of sin depends on the inscrutable malice of the heart, which can be known by finite beings only if it is revealed. How then can a norm for punishing crimes be drawn from this?[53]

Although there seems to be a fairly clear line between the "blameworthiness" and "harm" camps, especially in the context of the substantive criminal law,[54] relatively little has been written about "harm" as a measure for sentencing.

Even those scholars who insist that moral blameworthiness (as measured by the results the offender intended and attempted to bring about, not those that actually did come about) is the proper measure of punishment suggest the harm resulting from a particular action might be taken into account at sentencing, although only in limited ways. These theorists would note that the likelihood of actual harm should be a relevant factor in setting a range of penalties, and that a defendant's failure to accomplish the intended criminal result may indicate a relative lack of moral blameworthiness.[55] Under this approach, harm that occurs as a result of a fortuity, that is neither intended, foreseen nor foreseeable, would not support a finding of substantive criminal liability or more severe criminal sentences.

But that negative tells us only that we should not expand the definition of "victim" to include persons harmed in a way that is neither intended, foreseen nor foreseeable. It does not answer the question of whether all persons

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52. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 64 (Henry Paolucci trans. 1963).

53. *Id.* at 65-66.

54. This assumes, of course, a bright-line distinction between "blameworthiness" and "harm" as bases for assessing punishment, an assumption that modern scholars have begun to question. *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 336-40 (1986); THOMAS NAGEL, *Moral Luck*, *in* MORTAL QUESTIONS 24 (1979); BERNARD WILLIAMS, *Moral Luck*, *in* MORAL LUCK 20-39 (1981); *see also* Gewirtz, *supra* note 1, at 871 n.21.

55. *See* James J. Gobert, *The Fortuity of Consequence*, 4 CRIM. L.F. 1, 39-40 (1993).

injured by harm that is intended, foreseen, or foreseeable should be considered victims of the defendant's crime and enhance the defendant's sentence, or whether the defendant must be charged with (or sued civilly for) these other harms before being ordered to pay for them.[56] Furthermore, the scope of cognizable "harm" is open to debate. Theoretically, it could include everything from death to being made uncomfortable or embarrassed.[57] Often, there is a correlation between the distance of a harmed person from the offender's intent and the seriousness of the harm. For example, a citizen who reads about a murder in the newspaper, is concerned for ten minutes, and then forgets about the incident altogether, might be considered ineligible for victim status for two reasons: harm to her was too far from the defendant's intent and the harm was too inconsequential.

The "harm" theorists provide little more in the way of answers. Beccaria says no more than that punishment should be proportional to the seriousness of the crime and the seriousness of the crime should be measured by the harm done to society. It is not clear whether Beccaria means that sentencing authorities should attempt to evaluate each individual case and prescribe a punishment proportional to the total amount of harms suffered by all members of society as a result of the defendant's criminal action, or simply that legislatures, in prescribing statutory punishment ranges, should consider the harm that a typical crime of that nature is likely to cause.

Moreover, assuming he intended the former, Beccaria provides no guideline as to how "harm to society" is to be measured. Does the phrase mean harm to all individuals suffering any injury as a result of the defendant's actions? Harm to a certain limited universe of individuals? Harm to "society" as a whole, but not to individual persons? Perhaps surprisingly given his rejection of the blameworthiness approach, Beccaria's discussion of punishment for suicide suggests he means the last of these:

> A person who kills himself does less injury to society than one who abandons its confines forever; the former leaves his entire substance there, while the latter removes himself together with part of his possessions. Indeed, if the strength of a community consists in the number of citizens, by withdrawing and transferring himself to a neighboring nation [the expatriate] does a double injury as compared with [the suicide] who, by means of death, removes himself from society.[58]

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56. This question is, of course, also intimately related to the charge-offense vs. real-offense sentencing debate.

57. *See* Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 711-12 (1995).

58. Beccaria, *supra* note 52, at 81 (alterations in original).

Although Beccaria ultimately concludes that it is "useless and unjust" to punish suicides and expatriates,[59] the argument that the former cause less "harm to society" than the latter suggests that he intends the phrase in the sense of injury to a community's overall economic, political and emotional stability rather than as the aggregate pain suffered by citizens affected by the crime. The suicide may have less of a detrimental effect on a community's economic and military well-being than the expatriate, but it seems unlikely that he causes less pain. Thus, while Beccaria clearly advocates a system in which harm to parties other than an individual injured in his person or possessions is relevant to the sentencing decision, the other claimant is the community as a whole.[60] Moreover, it is not clear whether all types of harm are relevant; the discussion of suicide, for example, suggests that a society's economic, but not its emotional, injury constitutes "harm."[61]

Beccaria's and Bentham's arguments for proportionality were essentially utilitarian – that is, both philosophers assumed proportionality was necessary to convince offenders to commit the least amount of harm needed to accomplish their criminal objectives.[62] Their model fell out of fashion in the 1960s and 1970s with the rise of rehabilitation and incapacitation as favored justifications for punishment.[63] Recently, the just-deserts philosophy has received renewed attention,[64] and this approach also suggests some type of

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59. *Id.* at 83.

60. *Cf.* R.P. Peerenboom, *The Victim in Chinese Criminal Theory and Practice: A Historical Survey*, 7 J. CHINESE L. 63, 99 (1993) ("Numerous articles of the [Chinese] contemporary criminal code stipulate heavier or lighter punishment depending on the degree of victim harm, for instance the gravity of personal injury or the amount of property damage suffered by the victim. In socialist China, however, of even greater concern than victim harm [is] social harm. The criminal code explicitly provides that punishment is to be meted on the basis of the degree of harm to society." (footnote omitted)).

61. Beccaria's "harm to society" model of proportionality seems to stand in some tension with the view of some late twentieth century philosophers that punishment should restore the pre-existing cosmic order. *See* Golash, *supra* note 30, at 23.

62. *See* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 32 (1985).

63. *See* LESLIE SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 43-44 (1996). Sebba asserts that the relevance of harm in the sentencing decision is widely acknowledged, but warns that determining the extent to which modern courts have taken victim harm into account in sentencing is difficult due to a number of methodological hurdles. *See id.* at 44.

64. *See id.* at 8-10. Despite their proximity in time, however, Sebba warns that the causal connection between the return of the just-deserts philosophy and the rise of the so-called victims' rights movement is unclear.

> The development of the victim and the just-deserts movements have been coincident in time, and in one significant respect at least share a common goal, namely, the deemphasis of the personality of the offender as the focus of the criminal justice system. There has nevertheless been scant

proportionality requirement is appropriate. One modern sentencing theorist, Andrew von Hirsch, has argued that sentences should be proportional to the "seriousness" of the crime and "seriousness" should be measured by the harm and culpability associated with the act.[65] Harm, according to von Hirsch, includes only the foreseeable consequences of the act committed by the defendant;[66] culpability varies with the traditional states of mind – purposeful, knowing, reckless, or negligent.[67] But this approach, too, is hardly self-defining, requiring a moral theory of culpability, as well as theories of foreseeability and mental states.

B. The Victim in the Modern United States

A discussion of what kinds of harm, and to whom, may be considered in the sentencing decision leads naturally into a discussion of victimhood in modern American legal and social culture. Just as culture defines what we recognize as "harm" and "suffering,"[68] it also affects whom we see as victims. As a number of scholars have pointed out, "victim" is a steadily expanding category in society, if not in law. In popular usage, the term denotes almost anyone hurt in any way, not only directly by a particular act but also by societal discrimination and the vagaries of fate. Indeed, persons affected by such "victimless crimes" as drug abuse are claiming victim status, and convicted criminals themselves occasionally paint themselves as victims of discrimination, society or the "system."[69]

> analysis of the relationship between the theoretical underpinnings of the two movements. More particularly, little attention has been paid, until recently, to the implications of the development of a desert model of justice for the status of the victim, whether in symbolic or in practical terms.

Id. at 157 (citation omitted).

65. *See* VON HIRSCH, *supra* note 62, at 64. For a discussion of von Hirsch's views in the context of other just-deserts philosophers, see SEBBA, *supra* note 63, at 158-64.

66. *See* VON HIRSCH, *supra* note 62, at 65. Von Hirsch emphasizes in another work that the measure of the harm component is the "harm characteristically done or risked by the act of a *single* offender." Andrew von Hirsch, *Doing Justice: The Principle of Commensurate Deserts*, *in* SENTENCING 243, 249 (Hyman Gross & Andrew von Hirsch eds., 1981). According to Von Hirsch, the aggregate harm caused by the crime should not be enter into the sentencing debate; thus, he writes, shoplifting is a minor crime because the harm done by a single act of shoplifting is characteristically quite limited, although the harm caused by all acts of shoplifting might be significant. *See id.* at 249.

67. *See id.* at 71.

68. *See* JOSEPH A. AMATO, VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING 3, 15 (1990).

69. *See* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1415 (1993). Professor Minow points out that there are significant benefits to victimhood,

Outside the immediate context of the criminal justice system, some scholars have argued for a subtle broadening of the definition of "victim." Joseph Amato points out that "[e]ach person has some claim, however tenuous or spurious, to innocent suffering,"[70] thus making "[t]he language of victims, spoken by blacks, Native Americans, women, Latinos, the unemployed, the disadvantaged, animal rights advocates, representatives of wildlife, and others" a part of "standard public discourse."[71] Indeed, under some definitions of "victim," the term includes all those who at some point in their lives lacked emotional, intellectual and physical support and encouragement.[72] Mari Matsuda, for example, proposes a new paradigm for evaluating hate speech that focuses on the "victim's" perspective; she uses the term to apply to all members of an ethnic or racial group, some of whose members are the objects of a distinct act of racial or ethnic hostility.[73]

The broadening of the victim category represents a rejection of what Stephen Carter calls the "bilateral individualist construction of victimhood."[74] In that tradition, victimhood was linked to the specific actions of an identifiable individual; in the definitions of victimhood that appeared in the late 1980s and the early 1990s, victimhood could result from a wide variety of other factors. Not only could one be victimized by a combination of persons and forces, but a large group of individuals could be victimized by a single action directed toward only one individual. This new conception of victimhood would appear to justify and ratify a sentencing principle that would allow the apportionment of punishment based on harm to all members of society.

Some critics have suggested, however, that "victim talk" actually reduces the putative victim's agency and power.[75] Moreover, broadening the class of victims tends to obscure the distinctions between the types of harm suffered by the victims themselves.[76] For example, in the criminal context, recognizing family members who suffered emotional distress as victims may suggest an unfair and perhaps disturbing equivalence between a murder victim who lost her life, and her neighbor who temporarily lost sleep and her

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among them "obtaining sympathy, relieving responsibility, finding solidarity, cultivating emotions of compassion, and securing attention." *Id.* at 1414-15.

70. AMATO, *supra* note 68, at 18.

71. *Id.* at 156.

72. *See id.* at 178-89. *See generally* CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER (1992).

73. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-61 (1989).

74. Stephen L. Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 435 (1988).

75. *See* Minow, *supra* note 69, at 1429.

76. *See* WENDY KAMINER, I'M DYSFUNCTIONAL, YOU'RE DYSFUNCTIONAL: THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS 27 (1992).

sense of security.[77] But it is not easy to refine the concept of victimhood. Joel Feinberg attempts to do so, noting that although in general usage, a victim is anyone who suffers any kind of harm from any kind of cause,[78] the term properly should exclude those who have suffered only self-inflicted harm and harm to which they have consented.[79] But Feinberg's definition is still very broad, encompassing persons suffering "*any* kind of unconsented-to harm interest."[80]

Feinberg poses a hypothetical in which a pool lounger is confronted with two drowning babies, one twenty meters to his right and one twenty meters to his left. The lounger easily can save one baby, but there is not enough time to save both.[81] Feinberg suggests that because neither baby can claim as a matter of right that she be saved, each has only a right that the lounger save as many as possible.[82] But if the lounger refuses to save either child, which one is the victim of his inaction? Arguably, both, because both died as a result of his failure to act; on the other hand, arguably neither, because neither had a right to be rescued and, even if the lounger had saved one, the other would have perished. Feinberg's answer is that the victim is "the wronged party who would have survived but for that omission."[83] Translated into the terms of this Article, Feinberg's definition seems to imply that all persons harmed by a particular crime are properly considered victims.[84] But while there may be a moral imperative to respond to the suffering of innocent

77. *Cf.* SYKES, *supra* note 72, at 18 ("*If everyone is a victim, then no one is.*"); James E. Bayley, *The Concept of Victimhood, in* TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE 53, 58 (Diane Sank & David I. Caplan eds., 1992) ("When loss sufferers are indiscriminately called victims, meaningful differences . . . are lost, and this loss in turn entails loss of appropriate response . . . .").

78. *See* JOEL FEINBERG, HARM TO OTHERS 117 (1988).

79. *See id.* at 118.

80. *Id.*

81. *See id.* at 144.

82. *See id.* at 144-45.

83. *Id.* at 147.

84. James Bayley adopts a similar definition, although he is careful to exclude civilians who come to the aid of victims and to point out that in an anarchical society, there can be no victims. *See* Bayley, *supra* note 77, at 57. Bayley posits that

> [p]eople are victims if and only if (1) they have suffered a loss or some significant decrease in well-being unfairly or undeservedly and in such a manner that they were helpless to prevent the loss; (2) the loss has an identifiable cause; and (3) the legal or moral context of the loss entitles the sufferers of the loss to social concern.

Id. at 53. According to Bayley, a necessary feature of victimhood is that the putative victim suffer a loss unjustly or unfairly; since there are no laws in an anarchical society, there can be no injustice, and because all members of society are equally susceptible to harm, there is no unfairness. *See id.* at 57.

victims[85] – not only to aid them materially and emotionally but to recognize their suffering and condemn those who caused it – the serious incursions upon liberty implied by defining some individuals as victims requires a limiting principle.

C. Limiting the Universe of Victims

This problem is related to that of *Palsgraf v. Long Island Railroad*.[86] The plaintiff in *Palsgraf* was standing on a Long Island Railroad platform after buying a ticket for Rockaway Beach when a train bound for another destination stopped at the station.[87] A man carrying a package jumped aboard the train, which was already moving, but seemed as though he was about to fall; a guard on the train reached forward to help him inside, and another guard on the platform pushed him from behind.[88] At some point during this sequence of events, the man dropped the package onto the rails.[89] Although nothing in the package's appearance suggested its contents, the package in fact contained fireworks, which exploded upon falling.[90] The shock of the explosion caused a set of scales at the other end of the platform to fall and injure the plaintiff.[91]

Judge Cardozo rejected the plaintiff's claims:

> The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do." "Negligence is the absence of care, according to the circumstances." The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not

85. Joseph Amato devotes a significant section of his book to a discussion of how and when we should recognize suffering. He notes that although there is a general moral duty to respond to innocent suffering, *see* AMATO, *supra* note 68, at 175, questions remain about "what types of suffering we should respond to, what grounds we should use to choose between the contradictory claims of different victims, and why and how to respond appropriately to victims," *id.* at 176, not to mention the issue of whether we can arrange victims in some sort of hierarchy, *see id.* at 177.

86. 162 N.E. 99 (N.Y. 1929).

87. *Id.* at 99.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

> charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury."[92]

Palsgraf thus involves the question of how to limit a potentially infinite universe of persons who can claim compensation for injury. It is true that the plaintiff suffered harm as a result of the defendant's actions, as the scale would not have fallen if the railroad guards had not negligently pulled and pushed the firework-carrying passenger onto the train. But Cardozo concludes she may not recover because the defendant's actions were not "wrong" in relation to her, however tortious they might have been with respect to the man:

> The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary.[93]

How do we determine whether the defendant owes a would-be plaintiff a duty? Cardozo answers this question with the famous maxim that "[t]he risk reasonably to be perceived defines the duty to be obeyed."[94] The defendant owes a duty of care only to those who might naturally or probably be injured by his actions.[95]

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92. *Id.* at 99-100 (citations omitted).

93. *Id.* at 101.

94. *Id.* at 100.

95. *See id.* at 101 ("[W]rong is defined in terms of the natural or probable, at least when unintentional."). By the term "wrong" in this phrase, Cardozo apparently

The point of *Palsgraf* is not that there is no tort liability because the defendant cannot be expected to foresee that negligence in forcing a passenger aboard a train would result in the passenger's dropping his package of fireworks, which in turn would explode and dislodge a scale at the far end of the railroad platform, and that this scale as it fell would injure another individual. Rather, the majority opinion in *Palsgraf* represents an attempt to personalize liability; it establishes that only those to whom the defendant owes a duty may recover in tort.[96] In contrast, the dissent argues that "[d]ue care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."[97] As a result, the dissent contends, all persons the defendant does in fact injure should be permitted to recover in tort:

> Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain.[98]

The dissent points out several instances in which the law appears to have embraced a broad definition of plaintiff: Children of a negligently killed father, for example, are permitted to recover, and a husband of a negligently killed wife may be compensated for the loss of his wife's services.[99]

The *Palsgraf* problem exists in the criminal liability context as well. At its root, the question is the same: What harm, and to whom, is legally relevant? Where the defendant commits an intentional crime that results in harm to an unintended person – the classic transferred intent situation in which A

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means a negligent, but unintentional, act. In the criminal context that is the subject of this paper, however, the act to which criminal liability attaches often must have been committed purposefully, knowingly, or recklessly depending on the provisions of the substantive criminal law. *See* MODEL PENAL CODE § 2.02 (1997); *see also id.* at § 210.2 (stating that criminal homicide constitutes murder only when it is committed "purposely" or "knowingly"). As a result, many crimes should not be considered "unintentional" in the *Palsgraf* sense, and Cardozo's analysis therefore cannot apply literally to these instances. Nevertheless, as Part IV will demonstrate, some of the principles expounded in *Palsgraf* can provide a framework for considering total harm as part of the sentencing decision.

96. *See* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 439-40 (1987).

97. *Palsgraf*, 162 N.E. at 102.

98. *Id.* at 103.

99. *See id.* at 102.

aims a gun at B, meaning to kill him, but misses and hits and kills C instead – the defendant is guilty of the intentional crime.[100] In the case of criminally reckless or negligent behavior, criminal liability attaches in most jurisdictions only to the person or class of person the defendant recklessly or negligently endangered, as in *Palsgraf* in the tort context.[101] The sentencing process is inherently different from the area of substantive criminal liability, however, for two reasons.

First, sentencing does not involve the question of liability – which, presumably, already has been established – but rather that of punishment (damages in the tort context). The issue is not whether the state should criminalize a particular harm to a particular victim, but whether such harm may be considered when determining what punishment a convicted person should receive for a different but related crime. The problem has no equivalent in tort law, where there is generally a one-to-one correspondence between the source of liability and the source of damages.[102] Put more concretely, the issue is not whether psychological harm to a murder or kidnapping victim's family should constitute a crime; the legislature already has determined that it should not. The issue, instead, is whether this harm should be considered when deciding what punishment the defendant should receive.[103] Nor do the sentencing issues identified in this paper directly implicate the felony-murder rule[104] or the omission-as-*actus reus* doctrine.[105]

Second, it is difficult even to analogize from the substantive criminal context to the sentencing context. It does not do to say, for example, that we should consider in the sentencing decision the results that would incur liabil-

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100. *See* Mayweather v. State, 242 P. 864 (Ariz. 1926); Coston v. State, 190 So. 467 (Fla. 1940); Gladden v. State, 330 A.2d 176 (Md. 1974).

101. *See* LAFAVE & SCOTT, *supra* note 2, at 286.

102. The casebook exceptions in tort law prove the rule. *See, e.g.*, Summers v. Tice, 199 P.2d 1 (Cal. 1948) (finding joint and several liability where one of two defendant hunters hit the plaintiff but there was no means of determining which one).

103. Much of the literature on the relevance of harm as an organizing principle in criminal law focuses on the substantive definition of crime. *See, e.g.*, Larry Alexander, *Crime and Culpability*, 1994 J. CONTEMP. LEGAL ISSUES 1, 2-3 (arguing for centrality of culpable act, rather than social harm caused by act, as central organizing principle of criminal law); Lawrence Crocker, *A Retributive Theory of Criminal Causation*, 1994 J. CONTEMP. LEGAL ISSUES 65, 66-67 (suggesting that "A's actions are the criminal (legal) cause of a harm if and only if it is just to hold A criminally responsible for that harm."); Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 548-52 (1988) (arguing that individuals have "legal duty" to prevent particular societal harm only where failure to act can be said to have "caused" that harm, and that criminal liability can attach only to omissions that have "caused" harm).

104. *See* Lynne H. Rambo, Note, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drug*, 20 GA. L. REV. 671 (1986).

105. *See* Leavens, *supra* note 103; Susan Smith Hudson, Note, *The Broadening Scope of Liability in Child Abuse Cases*, 27 J. FAM. L. 697 (1989).

ity under the substantive criminal law. Rather than addressing a case of intended harm to a person that is then deflected onto another, or a case of reckless or negligent behavior that causes harm to a person outside the class of persons to whom injury foreseeably might occur, the sentencing process usually deals with a case of intended harm hitting its mark and causing somewhat foreseeable, but perhaps occasionally quite unforeseeable, injury to a wholly separate class of persons. For some of the same reasons, an analogy to *Palsgraf* is also somewhat inapposite: The famous torts case addresses only the issue of what harm resulting from negligent (not intentional) behavior should result in liability. We may think that intentional criminal actions justly should make the defendant responsible – although perhaps not substantively liable – for a broader range of harm than would noncriminally negligent (but nevertheless tortious) behavior.

In Sentencing Guidelines jargon, this is the question of "relevant conduct"[106] applied to that of the "relevant victim." The Commission gives the following example of a crime involving multiple elements:

> One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape.[107]

The Sentencing Commission initially attempted to resolve the tension between "real offense" and "charge offense" sentencing in favor of the former, but its early efforts in this direction proved unproductive, mostly because a pure real offense system would have required it to decide precisely what harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed elements.[108] The Commission's decision that federal judges should sentence based on the elements of the offense of which the defendant was convicted, with the possibility of a few limited grounds for departure,[109] re-

106. *See generally* Susan Alexander, Comment, *Criminal Sentences That Reflect Actual Conduct: How Courts Apply the Relevant Conduct Provision of the Federal Sentencing Guidelines*, 26 GONZ. L. REV. 537 (1991).

107. U.S. SENTENCING GUIDELINES MANUAL § 1A (2003).

108. *See id.*

109. For example, an upward departure might be warranted if the robber used a high-capacity, semi-automatic weapon, rather than an ordinary pistol, during the commission of the crime. *See id.*

solved the question of what constitutes relevant conduct for sentencing purposes. It did not, however, identify who constitutes a relevant victim. The seeds of this conundrum are present in the Commission's own example: Are the frightened bystanders and the injured bank teller victims for the purposes of a departure on the grounds of extreme psychological injury or extreme conduct? This example also demonstrates the intimate connection between the categories of relevant conduct and relevant victim.

Although the Sentencing Guidelines have been described as a move toward a harm, rather than offender-based penology, the Guidelines are laconic about the types of harms relevant to the sentencing decision.[110] Prior to the advent of determinate sentencing in the federal system, the Federal Victim and Witness Protection Act provided that the presentence report "shall contain . . . information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense."[111] The appendix to the hearings before the Criminal Law Subcommittee of the Senate Judiciary Committee indicates that such victim statements are "useful tools in determining equitable penalties during the sentencing of a convicted offender."[112] Nevertheless, both the Act and its legislative history left the meaning of the term "victim" unclear. Whatever form of common law review of sentencing emerges in the future, more attention must be paid to this issue if we are to achieve the goals that motivated the introduction of the Guidelines in the first place.

II. REDEFINING THE VICTIM: CONSTITUTIONAL CONSIDERATIONS

Are there constitutional limitations on the potential universe of victims who can demand that their suffering be factored into the sentencing decision? The U.S. Supreme Court has considered this question only in the context of Eighth Amendment challenges to victim impact statements at the sentencing phases of state capital trials, which differ in significant ways from the typical federal criminal case. Whereas sentencing in the cases the Supreme Court considered was carried out by juries endowed with broad discretion, federal district judges sentence according to the dictates of a structured sentencing scheme. Nevertheless, the Supreme Court's consideration of victim impact statements is worth examining in some detail because constitutional constraints may preclude certain definitions of the term "victim."

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110. *See* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908-09 (1991).

111. Fed. Victim & Witness Prot. Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (amending FED. R. CRIM. P. 32(c)(2)).

112. *Omnibus Victims Protection Act: Hearing on S. 2420 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 171 (1982) (testimony of Ronald A. Zweibel).

A. The Cases

In two decisions from the late 1980s, *Booth v. Maryland*[113] and *South Carolina v. Gathers*,[114] the Supreme Court held that the use of victim impact statements in capital cases violated the Eighth Amendment's guarantee against cruel and unusual punishment. The Court concluded that victim impact statements injected an unacceptable degree of arbitrariness into the death decision when the defendant was sentenced by a jury, therefore the resulting death sentences were too much a result of chance and emotion to meet the requirements of the Eighth Amendment.[115] In 1991, however, in the landmark case of *Payne v. Tennessee*,[116] the Court overruled *Booth* and *Gathers*.

Payne involved a state capital sentencing hearing during which the State introduced testimonial evidence regarding the effects of the defendant's murder on the victims' family.[117] The defendant had attacked a young mother and her two children in their apartment, killing the mother and her daughter and seriously wounding the three-year-old son, Nicholas.[118] At the sentencing phase, the prosecutor introduced the testimony of the children's grandmother, who commented that her grandson continued to suffer emotional distress:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[119]

In arguing for the death penalty, the prosecutor commented primarily on the continuing effects of Nicholas' experience:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.
>
> There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing

113. Booth v. Maryland, 482 U.S. 496 (1987).
114. South Carolina v. Gathers, 490 U.S. 805 (1989).
115. *Id.* at 810-11; *Booth*, 482 U.S. at 502-03.
116. Payne v. Tennessee, 501 U.S. 808 (1991).
117. *Id.* at 811.
118. *Id.*
119. *Id.* at 814-15.

> you can do to basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it for the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.[120]

The prosecution's rebuttal to the defendant's closing argument continued to focus on Nicholas' emotional trauma:

> You saw the videotape this morning. You saw what Nicholas Christopher will carry in his mind forever. When you talk about cruel, when you talk about atrocious, and when you talk about heinous, that picture will always come into your mind, probably throughout the rest of your lives . . . .
>
> . . . No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.
>
> [Defendant's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.[121]

120. *Id.* at 815.
121. *Id.* at 815-16.

The Supreme Court held that the introduction of the quoted testimony at the sentencing phase of a capital trial where the jury was responsible for sentencing did not violate the Eighth Amendment's ban on cruel and unusual punishment.[122] The Court first stated that "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment."[123] In addition, it ruled that the evidence introduced at the penalty phase of Payne's trial was illustrative of the harm caused by the crime.[124] The Court also pointed out, however, that it would be unfair to allow the defendant to introduce mitigating evidence and yet prohibit the prosecution from showing the "human cost" of the crime.[125]

In his concurrence, Justice Souter refers to the survivors of a murder as other "victims," whose anguish is a foreseeable element of the crime:

> Murder has foreseeable consequences. When it happens, it is always to distinct individuals, and, after it happens, other victims are left behind. Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. . . . Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt. The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.[126]

The dissent attacks the Court's decision to overrule *Booth* and *Gathers*. Justice Marshall focuses on the likely prejudicial effect of such victim impact evidence as the status of the victim in the community and the victim's personal characteristics.[127] Justice Marshall also expresses concern that the eloquence with which family members express their grief would influence the

122. *Id.* at 827.
123. *Id.* at 819.
124. *Id.* at 825.
125. *Id.* at 826-27.
126. *Id.* at 838.
127. *Id.* at 846 & n.1 (Marshall, J., dissenting).

sentencing decision.[128] Justice Stevens' dissent criticizes the evidence introduced at Payne's sentencing on two grounds. First, aspects of the victim's character that are "unforeseeable to the defendant at the time of his crime are irrelevant to the defendant's 'personal responsibility and moral guilt,'" and could not justify a death sentence.[129] Second, such evidence cannot be defined until after the crime has been committed, and therefore cannot be applied consistently in different cases.[130]

The substantive law also considers harm in defining crime. The existence of the Sentencing Guidelines, however, makes clear that the legislature has decided the defendant should be treated differently according to how much harm he causes prior to the crime itself, where it is reasonably foreseeable that the enhanced harm could result from the defendant's actions, and where the harm is identified as a class of harm that should in every case result in more severe punishment. For example, the rule that murder justifies more severe punishment than attempted murder, even though the defendant's moral blameworthiness is the same no matter what the result of his action, is mandated in advance of the crime, applies in all cases, and is justified by the fact that death is a foreseeable result of actions constituting attempted murder.[131] According to Justice Stevens, evidence of harm to a victim's family could only "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime."[132]

B. Payne *in the Sentencing Context*

Payne's relevance to the question posed in this paper is not entirely clear. The *Payne* line of cases says nothing about the type of evidence that may be adduced at sentencing hearings in non-capital cases. Furthermore, although the testimony and the prosecutor's arguments presented at Payne's trial focused primarily on the harm Nicholas Christopher and his grandparents suffered, many of the Justices – particularly those in the dissent – were deeply concerned with the potential effects of other kinds of "victim impact" evidence, particularly testimony as to the character of the victim and her standing in the community. Moreover, although some of the opinions frame the issue as whether a defendant should be held responsible for unforeseeable harms resulting from his criminal conduct, neither of the dissents focuses directly on this question.

Rather, Justice Stevens protests that using total harm to justify a death sentence is a post-hoc analysis and allows the jury too much discretion, as well as violating the general rule that only harms foreseeable by the defendant

128. *See id.* at 846.
129. *Id.* at 860-61 (Stevens, J., dissenting).
130. *Id.* at 861.
131. *Id.* at 862-63.
132. *Id.* at 865.

should be considered in the sentencing process.[133] Addressing Justice Souter's argument that harm to a victim's family is foreseeable by any defendant with the mental capacity to be held criminally liable, Justice Stevens responds that foreseeability should make evidence of such harm unnecessary.[134] Thus, neither dissent asserts that harm to a victim's family never should be a consideration during the sentencing process; their disagreement with the majority is whether such harm can be identified as an aggravating factor only after the commission of the crime, whether evidence of such harm can be presented to a jury, and whether the sentencing authority should be allowed unlimited discretion in weighing such evidence.

The Federal Sentencing Guidelines nullified many of these concerns. For example, the Guidelines eliminated the "post hoc" nature of considering harm to a victim's family by prescribing sentencing ranges for particular crimes and specifying adjustments in offense levels for certain harms. In addition, the Guidelines mandated sentencing by a judge, which may reduce the effects of emotional appeals, constrained the sentencing authority's discretion by requiring a difference of at most 25 percent between the low and high ends of a sentencing range and subjected sentences to appellate review. Because the Guidelines are now merely advisory, however, *Payne*'s meaning might reemerge as a significant issue.

C. What Payne *Really Says*

Despite the majority's insistence that *Payne* ratifies the use of a broad class of "victim impact evidence" at the sentencing phase of capital trials, the testimony and arguments actually presented at Payne's trial focused on a very particular kind of "victim impact" evidence: the emotional effect upon a member of the victim's family who witnessed his mother's murder. The testimony of the murder victims' mother and grandmother described the trauma Nicholas Christopher suffered, and the prosecutor's argument to the jury referred repeatedly to the fact that Nicholas would remember the horrifying details of the murder.

The Supreme Court of Tennessee, the jurisdiction from which appeal was taken to the United States Supreme Court, stated

> [w]hen a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental

133. *Id.* at 863.
134. *Id.* at 864-65.

> condition of the boy he left for dead is surely relevant in determining his "blameworthiness."[135]

Thus, despite the Supreme Court's insistence that *Payne* stands for the proposition that all forms of "victim impact" evidence are admissible, the lower courts focused on the narrow issue of whether harm to Nicholas Christopher could be considered at the sentencing phase. Indeed, the Court itself noted "the only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas' grandmother's description – in response to a single question – that the child misses his mother and baby sister."[136]

Despite the Supreme Court's broad holding, *Payne* turns on the fact that Nicholas Christopher witnessed the crime and continued to be affected by it.[137] In response to the dissent's argument that only those actions that have some bearing on the defendant's moral blameworthiness can be considered at the sentencing phase, the majority says only that harm relates to moral blameworthiness.[138] But the majority and the dissent were in agreement on the foreseeability of the harm in *Payne*, for Nicholas Christopher witnessed the murders in question. This fact may have made it easier for the majority to approve the use of Nicholas' grandmother's testimony; Payne was unquestionably morally blameworthy for the harm he caused Nicholas.

On the contrary, in *Booth*, the Supreme Court found the use in a capital case of victim impact statements violated the Eighth Amendment's guarantee against cruel and unusual punishment. The evidence consisted of interviews with the victims' son, daughter, son-in-law and granddaughter describing the emotional impact of the crimes on the family.[139] In doing so, the Court refused to consider the harm suffered by persons other than the murder victims themselves – the victim impact statement prepared by the state division of parole and probation described how the victims' son, daughter, and granddaughter suffered from sleep deprivation, panic attacks and sensitivity to vio-

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135. *Id.* at 817 (majority opinion) (quoting State v. Payne, 791 S.W.2d 10, 19 (1991)).

136. *Id.* at 826.

137. *Cf.* Dubber, *supra* note 27, 128-29 (arguing that the majority's lengthy description of the murder scene in Payne demonstrates that Rehnquist "considered the statement of facts relevant to the sole question raised in Payne: the constitutionality of victim impact evidence in capital sentencing proceedings," although the case presented no issue that required examination of factual evidence adduced at trial). Similarly, I suggest that the long quotes from Mary Zvolanek's testimony and the prosecutor's argument to the jury, although more relevant to the issue at hand, suggest that the Court was influenced by the fact that Nicholas was present at the murders. Moreover, the description of the murder scene brings home the horrific scene that the survivor witnessed and emphasizes the fact that he himself was attacked.

138. *Payne*, 501 U.S. at 825.

139. Booth v. Maryland, 482 U.S. 496, 507 (1987).

lent images.[140] The victims' family, however, had not been present at the murders, although their son had discovered the bodies.[141] The Supreme Court reasoned that only the defendant's "moral blameworthiness" is relevant to the sentencing defendant; therefore only factors which the defendant was aware of may be considered at the sentencing phase.[142] In *Gathers*, the Court extended the rule announced in *Booth* to statements made by a prosecutor to the sentencing jury regarding the victim's personal qualities.[143]

Thus, although *Payne* purports to overrule both *Booth* and *Gathers*, it in fact addresses a markedly different situation; one in which the harm that the prosecution argued should enhance the sentence clearly was foreseeable by the defendant.[144] Moreover, the *Payne* majority espoused a wholly different measure of crimes. According to the Justices in the majority, the gravity of a sentence should correspond to the harm caused by the defendant, not simply to his moral blameworthiness. The facts of *Payne* obscure the distinction between these two concepts, however, for the harm Nicholas Christopher suffered represents not only additional injury the defendant caused but additional moral blameworthiness as well, in that Nicholas survived a savage attack by the defendant and witnessed the deaths of his mother and sister. Although the difference in result between *Booth* and *Payne* often has been explained by reference to the change in the Court's personnel between 1987 and 1991,[145] the unique "victim impact" testimony in *Payne* avoided the stark contrast between the underlying theories on which the Court built its opinion.

III. SENTENCING GUIDELINES JURISPRUDENCE

This Part considers federal jurisprudence concerning the definition of "victim" in the context of the Federal Sentencing Guidelines. The existence of Guidelines provisions employing the term "victim" has provided the courts an opportunity to define that term. The analysis here, however, is relevant regardless of the extent to which judges continue to follow the Guidelines. The conceptual problem of arriving at a suitable definition will remain in any sentencing regime, and indeed likely will have renewed importance in a sentencing system that relies more on reasoning in the spirit of the common law and less on a system purporting to provide numerical precision.

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140. *Id.* at 510-15.

141. *Id.* at 510.

142. *Id.* at 504-05.

143. South Carolina v. Gathers, 490 U.S. 805, 811-12 (1989).

144. *But see* SEBBA, *supra* note 63, at 203 (noting that public perceptions attribute seriousness even to unforeseen harm).

145. Justices Powell, Brennan, Stevens, Marshall, and Blackmun were in the majority in *Booth*. *Booth*, 482 U.S. at 497. Chief Justice Rehnquist and Justices White, Scalia, and O'Connor dissented. *Id.* In *Payne*, Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Souter comprised the majority, while Justices Blackmun, Stevens, and Marshall dissented. *Payne*, 501 U.S. at 810.

A. The Place of the Victim in the Sentencing Guidelines

The term "victim" appears most frequently in the victim-related adjustments and departures provisions of the Federal Sentencing Guidelines. The Guidelines prescribe increases in the defendant's offense level, ranging from two to twelve levels, when the victim possesses a certain status or has been treated in a particular fashion. For example, if the finder of fact at trial or, in the case of a guilty plea, the court at sentencing, finds beyond a reasonable doubt that the defendant intentionally selected any victim as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of any person, the Guidelines direct the court to increase the offense level by three levels.[146] The Guidelines also specify that if the defendant knew or should have known a victim was unusually vulnerable due to age, physical or mental condition, or that the victim was otherwise particularly susceptible to the criminal conduct, the court should increase the offense level by two levels.[147]

Other Guidelines sections provide for offense level increases if the crime of conviction was motivated by the victim's current or former status as a government officer or employee or membership in the immediate family of such a person,[148] if during the course of the criminal conduct, the defendant assaults a law enforcement officer in a manner creating a substantial risk of bodily injury,[149] if the victim was physically restrained during commission of the crime,[150] or if the offense is a felony that involved international terrorism.[151] These adjustments generally do not operate where the offense Guideline incorporates the factor that would form the basis of the adjustment. The official victim adjustment does not apply to the crime of obstructing or impeding officers,[152] for example, and the restraint of victim adjustment is not used where the unlawful restraint of a victim is an element of the crime itself. Courts may depart upward, however, if the restraint was sufficiently egregious.[153]

The difference between the use of "person" and "victim" in the victim-related adjustments section appears to indicate something about the Commission's intentions regarding how broadly the term "victim" should be defined. Section 3A1.1 uses both terms, stipulating that the court may increase the offense level if it finds the defendant selected a "victim" because of certain prescribed characteristics of any "person."[154] This section seems to suggest

146. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (2003).
147. *Id.* § 3A1.1(b).
148. *Id.* § 3A1.2(a).
149. *Id.* § 3A1.2(b).
150. *Id.* § 3A1.3.
151. *Id.* § 3A1.4.
152. *Id.* § 3A1.2 commentary at 229.
153. *Id.* § 3A1.3 commentary at 229-30.
154. *Id.* § 3A1.1(a).

the "person" who triggered the criminal behavior should not be considered a "victim," even though the crime might have had significant effects upon, and might even have been designed to harm, such a "person." This does not necessarily follow, however, because it ignores the fact that the "person" may in some instances be a "victim" as well, and at other times may be so far removed from the actual circumstances or effects of the crime as not to qualify for that appellation.

Section 5K2.4 also uses the term "person" in a sense that seems to distinguish it from the term "victim."[155] This section suggests that while an upward departure would be warranted if an individual were abducted in order to facilitate, say, theft from a bank vault, that individual would not be considered a victim of the crime of theft. After all, the entity suffering the monetary loss is the bank, not the hapless abductee. But once again, this interpretation merely suggests there might be individuals who are somehow connected to or affected by the crime who are not victims; it does not address the question of which individuals are connected enough with the crime to be considered victims.

Part K of the Sentencing Guidelines describes a number of circumstances that may, but do not necessarily, warrant departures from the normal sentencing range.[156] The sentencing court may depart for several victim-related related reasons, among them extreme psychological injury and extreme conduct. In addition, the Guidelines specify that departures may be warranted where death[157] or physical injury[158] "resulted," or where a "person" was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate escape from the scene of the crime.[159] With respect to these last three factors, however, the Guidelines do not explicitly state whether the person killed, injured or abducted must have been a victim of the crime.

B. The Meaning of "Victim" According to the Guidelines

One of the most ambiguous aspects of both the victim-related adjustment and departure provisions is that the Commission provides no definition of the term "victim" for the purposes of the Sentencing Guidelines. Although the commentary to specific Guidelines often sheds some light on the meaning of particular terms, they provide only very limited glosses on the word "victim." The commentary to section 3A1.1(b), the vulnerable victim adjustment, notes "a bank teller is not an unusually vulnerable victim solely by virtue of

155. *See id.* § 5K2.4.

156. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 244-48 (1993).

157. U.S. SENTENCING GUIDELINES MANUAL § 5K2.1 (2003).

158. *Id.* § 5K2.2.

159. *Id.* § 5K2.4.

the teller's position in a bank."[160] This commentary seems to suggest a relatively broad definition of "victim"; after all, one could argue the teller is not a victim of a bank robbery at all because it is the bank (or the account holders or the Federal Deposit Insurance Corporation) and not the teller that suffers pecuniary damage as a result of the robbery. Yet although the commentary is clear that the teller is not a vulnerable victim, it appears to concede that the teller is a *victim*.

Similarly, the commentary to section 3A1.2, the official victim adjustment, specifies the adjustment "would not apply in the case of a robbery of a postal employee because the offense guideline for robbery contains an enhancement . . . that takes such conduct into account."[161] The sentencing Guideline for robbery directs the court to increase the offense level by two levels if the property of a post office was taken.[162] But if the robbers took only the property of the post office, one could argue that the postal employee who handed over that property is not a victim of the robbery. Rather, the post office itself is the "victim." But the Guidelines commentary does not explicitly disapprove the employee's victim status. These two examples provide some hints as to the Commission's interpretation of the term "victim." Still, they do not constitute a structured framework for determining who is a victim for the purposes of the Guidelines.

The proper interpretation of the term "victim" is also informed by other sections of the Sentencing Guidelines. Section 1B1.3(a)(3) instructs the district court, in determining the defendant's base offense level, to take into account "all harm" that results from the defendant's acts and omissions.[163] The commentary states that "[h]arm includes bodily injury, monetary loss, property damage and any resulting harm."[164] This principle of "all harm" favors a broad interpretation of "victim," at least in the context of victim-related adjustments. The commentary states explicitly that adjustments in Chapter Three of the Sentencing Guidelines "shall be determined" on, *inter alia*, the "all harm" principle.[165] Indeed, the Ninth Circuit has cited the "all harm" principle to support its holding that the term "victim" in the vulnerable victim provision should be interpreted broadly.[166]

A review of the Sentencing Guidelines as a whole suggests that the Commission did not have a specific definition of the term "victim" in mind when it promulgated the Guidelines. Although the Guidelines use the term in some instances to refer only to an individual to whom harm done is an ele-

160. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) commentary at 227 (1995).

161. *Id.* § 3A1.2 commentary at 229.

162. *Id.* § 2B3.1(b)(1).

163. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(3) (2003).

164. *Id.* at § 1B1.3 commentary at 21.

165. *Id.* at § 1B1.3(a).

166. United States v. Sherwood, 98 F.3d 402, 412-13 (9th Cir. 1996); United States v. Haggard, 41 F.3d 1320, 1326 (9th Cir. 1994).

ment of the crime of conviction, it occasionally refers to others hurt by a crime as "victims." For example, the Guideline addressing criminal sexual abuse directs the sentencer to increase the defendant's offense level by four where the "victim" had not attained the age of twelve years and by two if the "victim" had attained the age of twelve years but had not attained the age of sixteen years, or if the "victim" was in the custody of the defendant or a correctional institution.[167]

In *United States v. Graves*,[168] the Ninth Circuit concluded in dicta that the term "victim" referred only to the child who was sexually abused:

> For example, § 2A3.1, Criminal Sexual Abuse, provides for an increase of 4 levels 'if the victim has not attained the age of twelve years.' Surely it would be inappropriate to make this addition if the defendant, fleeing from the scene of sexual abuse of a child or other victim, negligently collided with another vehicle and injured a passenger under age 12.[169]

The court also asserted the "same use" of the term appeared throughout the sections on criminal sexual abuse and kidnapping, abduction, and unlawful restraint.[170] This narrow definition of "victim" is bolstered by the Guidelines' reference to drug offenses "involving" underage or pregnant individuals.[171] The Guidelines would thus seem to use the term "victim" in its narrowest legal sense, preferring the word "involving" to describe acts directed at individuals likely to be affected by the crime but not victims in the traditional sense.

In other sections of the Guidelines, however, the word "victim" appears to refer to a broader class of persons harmed by a crime. The Guideline dealing with unlawful manufacturing and importing of drugs, for example, refers the sentencer to another section if a "victim" is killed;[172] drug trafficking, however, does not have victims in the same sense as sexual abuse and, in fact, is one of a class of crimes commonly referred to as "victimless." In order for the Guideline to make sense, then, the term "victim" must refer to an individual harmed in the course of the drug enterprise. Furthermore, in the fraud section, the Guidelines suggest that the meaning of "victim" may vary according to context: "In this context [fraud], 'victim' refers to the person or entity from which the funds are to come directly," the Commission stated,

167. U.S. SENTENCING GUIDELINES MANUAL § 2A3.1 (2003).

168. 908 F.2d 528 (9th Cir. 1990).

169. *Id.* at 531.

170. *Id.*

171. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.2 (2003) (authorizing base offense level of two plus offense level from § 2D1.1 applicable to quantity of controlled substances "directly involving a protected location or an underage or pregnant individual").

172. *See id.* § 2D1.1(d)(1).

even though in the case of a fraudulently endorsed check the "maker, payee and/or payor all might be considered victims for other purposes, such as restitution."[173] The Guidelines also refer to victims in the context of providing false information or tampering with consumer products,[174] escape and instigating or assisting escape,[175] and refers to tellers as potential bank robbery victims.[176]

None of these situations involves a victim in the same sense as do the sexual abuse and kidnapping provisions; it is not entirely clear whether the victims of false information distribution and tampering include, say, the manufacturer of the maligned or adulterated product, the members of the public who suffer harm, or both. Escape seems to have no victims except the general public, although the Guideline uses this term in connection with its directive to add five offense levels for the use or the threat of force against an individual.[177] The fact remains, however, that a person threatened in the course of the escape is not, strictly speaking, a victim of the escape, at least not any more than a child harmed by a fleeing sex offender is a victim of the sexual assault. Finally, the assumption that bank tellers are victims of bank robbery is at odds with the commentary to the fraud Guideline, which quite unequivocally states that the "victim" of a fraud is only the entity from whom the money will come directly. The Commission clearly envisioned the meaning of the term "victim" would vary with context and did not rule out a broad definition.

C. The Meaning of "Victim" According to the Courts

1. Direct Victim

a. The Theory

A number of federal appellate decisions have construed the term "victim" narrowly to exclude persons outside the conventional definition. The Ninth Circuit, for example, held in *United States v. Hoyungowa*[178] that a murder defendant could not be subjected to an upward departure for extreme psychological injury to the murdered person's family under section 5K2.3.[179] The defendant, a jail escapee, was hitchhiking on the Hopi Indian Reservation in Arizona, when a police officer with the Bureau of Indian Affairs asked him

173. *See id.* § 2F1.1 commentary.
174. *Id.* § 2N1.2.
175. *Id.* § 2P1.1.
176. *Id.* § 3A1.1 commentary.
177. *Id.* § 2P1.1(b)(1).
178. 930 F.2d 744 (9th Cir. 1991).
179. *Id.* at 747.

to identify himself.[180] The defendant pointed a sawed-off rifle at the officer and tripped as he backed away, causing the rifle to fire.[181] The officer died and the defendant pleaded guilty to second-degree murder.[182] At sentencing, the district court decided to depart upward from the Guideline range to 210 to 300 months, explaining the defendant had "brought intense grief and suffering to the victim's wife and four children"[183] and therefore was subject to departure for "extreme psychological injury" under section 5K2.3 of the Sentencing Guidelines.[184]

On appeal, the defendant argued that section 5K2.3 – which authorizes upward departures if the "victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense"[185] – applies by its plain terms only to the "direct victim" of the crime, not to others affected by it.[186] The Ninth Circuit agreed, relying on the definition of "victim" in the context of section 2A2.2(b), the Guideline governing aggravated assault, developed in an earlier case, *United States v. Graves*.[187]

The defendant in *Graves* was convicted of assault and interfering with the duties of a law enforcement officer for threatening a federal undercover officer with a gun, and then attempting to drive away with the officer clinging to the moving car.[188] In the course of his flight, the defendant collided with and injured a surveillance officer in an unmarked car.[189] At sentencing, the judge increased the offense level by two to reflect the injury inflicted upon the surveillance officer; the defendant appealed, arguing that the Guideline under which his sentence was calculated, section 2A2.2, provides for offense level increases only when the "victim" sustains bodily injury.[190] The surveillance officer, the defendant contended, was not a "victim" of the assault, which was directed instead toward the undercover officer.[191]

The Ninth Circuit agreed, holding that the government's insistence that the surveillance officer was a "victim" of the assault upon the undercover

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180. *Id.* at 745.
181. *Id.*
182. *Id.*
183. *Id.* at 746.
184. *Id.* at 747.
185. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.3 (policy statement) (2003).
186. *Hoyungowa*, 930 F.2d at 747.
187. 908 F.2d 528, 531 (9th Cir. 1990).
188. *Id.*
189. *Id.*
190. *Id.* at 530.
191. *See id.* Although the defendant initially was charged with assault on the surveillance officer as well as on the undercover officer, that count was dismissed at the time of sentencing. *Id.* There was no evidence that the undercover officer received any injury as a result of the assault upon him. *Id.*

officer distorted the meaning of the term "victim" in the assault Guideline, which the court read as referring to the victim of the charged assault only.[192] The *Hoyungowa* court adopted this reasoning without question. It also warned that allowing departures for psychological injury to a victim's family would reintroduce unwarranted disparity into the sentencing process:

> If the Guideline for extreme psychological injury also applied to those affected by crimes[,] such as [the murdered person's] family, then the justice system would punish the murderer of the head of a household more harshly than the murderer of a transient. The Sentencing Guidelines admit of no such sentencing disparity.[193]

b. Critique

Hoyungowa's equation of "victim" as that term is used in the Federal Sentencing Guidelines with "direct victim" is deeply problematic for two reasons. First, as a matter of legal reasoning, the court's language is simply conclusory; it cites no Sentencing Guideline provisions that specifically forbid disparity in sentencing based on the harm caused persons other than the direct victim of a crime.[194] Second, and more troubling from a prospective point of view, the *Hoyungowa* court provides no criteria for determining whether a particular individual is a "direct victim." In the case of murder, it seems obvious the "direct victim" of the crime is the deceased, but it is not clear whether the murdered person alone is a direct victim or who the direct victims of other crimes are.

2. Targeted Persons as Victims

a. The Theory

Several other decisions, both from the Ninth Circuit and from other federal appellate courts, have construed the term "victim" more broadly to encompass persons outside the conventional definition of the term. In *United States v. Alber*,[195] the Ninth Circuit retreated from its ruling in *Hoyungowa* and held that a trial court could depart upward in sentencing an extortion defendant based on the crime's impact on the family of the individual from whom money was demanded.[196] Alber sent a letter to his former employer, Marc Kaplan, claiming

192. *Id.* at 531.

193. United States v. Hoyungowa, 930 F.2d 744, 749 (9th Cir. 1991).

194. Moreover, even if section 5K2.3 requires a narrow interpretation of the term "victim," the harm caused to members of the murdered person's family arguably constitutes a factor the Commission did not adequately consider in formulating the Guidelines and, if so, might be a permissible basis for departure.

195. 56 F.3d 1106 (9th Cir. 1995).

196. *Id.* at 1112.

that Kaplan's son would be harmed unless he paid $250,000 within one week.[197] At sentencing, the district court, relying on section 5K2.0, departed upward on the basis of the extreme psychological injury to Kaplan's wife and son; Kaplan himself suffered no such injury.[198] Section 5K2.0 is a general policy statement that discusses grounds for departure:

> Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines . . . (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate . . . .[199]

The defendant argued the court was foreclosed from applying section 5K2.0 by the existence of section 5K2.3, the extreme psychological injury provision, which the sentencing judge conceded would not apply to Kaplan's family under *Hoyungowa*.[200] The Ninth Circuit affirmed the upward departure based on the commentary to the extortion sentencing Guideline,[201] which noted that "[i]f the offense involved . . . a threat to a family member of the victim, an upward departure may be warranted."[202]

Alber is confusing because it upholds a departure on the basis of psychological harm suffered by non-victims on the grounds of the Guideline for extortion, a provision that by its terms refers only to threats to family members. If the Guideline is taken literally, the anguish of the employer's wife and son should be irrelevant; only the fact of the threat made against the son would factor into the departure decision, perhaps on the theory that the threat would cause anguish to the victim. The *Alber* court fails to make this point clear, however; indeed, it muddies the waters further by repeatedly referring to the extreme psychological injury suffered by the wife and son as the proper grounds for the departure. After explaining that the district court has legal authority to depart when an aggravating circumstance exists that the Sentencing Commission did not adequately take into account when formulating the Guidelines and if consideration of the aggravating circumstance must be consistent with the sentencing factors Congress prescribed, the court states:

197. *Id.* at 1108.
198. *Id.* at 1112.
199. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2003).
200. *Alber*, 56 F.3d at 1112.
201. *Id.*
202. U.S. SENTENCING GUIDELINES MANUAL § 2B3.2 commentary (2003).

> Here, the district court identified the extreme psychological injury suffered by [the employer's] wife and son as the aggravating circumstance. The Sentencing Commission expressly stated in Application Note 8 of U.S.S.G. § 2B3.2 that an upward departure may be warranted if the offense involved a threat to a family member of the victim. This express statement establishes beyond argument that departure was legally authorized.[203]

The application note does not establish that departure was legal where the aggravating circumstance is extreme psychological injury suffered by the wife and son. The Sentencing Guidelines authorize departure on the basis of threats to a family member, not of psychological harm sustained by such an individual, and the Ninth Circuit does not show that the district court had legal authority to depart upward on this basis, although it purports to do so. Indeed, the *Alber* court refers to "extreme psychological injury" several more times in the course of its opinion. After noting that its review of the sentence must determine whether the district court's findings of fact support the existence of the identified aggravating circumstance, the Ninth Circuit writes that "Alber did not even dispute that Marc Kaplan's wife and son suffered extreme psychological injury."[204]

Finally, the court concludes that "the district court did not err by departing upward on the basis of the psychological injury suffered by the members of the Kaplan family."[205] The point here is not that the district court erred in departing upward; it arguably was entitled to do so on the basis of the threat to Kaplan's son. Rather, the Ninth Circuit seems to cling to the concept that psychological harm to Kaplan's family should affect Alber's sentence and justifies what amounts to a departure on this basis by a reference to the wholly unrelated ground of threat. While the court might have justified the departure on the ground that Kaplan's family were "victims" because Alber intentionally inflicted psychological damage on them by making threats against the son, it chose not to do so.

Alber thus confirms *Hoyungowa*'s reasoning even while reaching the opposite conclusion. Whereas *Graves* based its decision on a definition of "victim" that excluded all but the individual actually assaulted, the *Alber* and *Hoyungowa* courts introduce a distinction between "direct victims" and others affected by the crime. The phrase "direct victim" appears neither in the Sentencing Guidelines themselves nor in *Graves*. *Hoyungowa*, however, states that section 5K2.3 "applies by its plain terms only to the *direct victim* of the crime and not to others affected by the crime,"[206] and *Alber* echoes this

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203. *Alber*, 56 F.3d at 1112.

204. *Id.*

205. *Id.*

206. United States v. Hoyungowa, 930 F.2d 744, 747 (9th Cir. 1991) (emphasis added).

language.[207] But what does "direct victim" mean? Although *Alber* unequivocally says this section "applies only to the direct victim of the crime; it does not apply to others affected by the crime" and the only direct victim in *Alber* was the employer himself, it provides no hints as to how such direct victims might be identified in future cases. This reluctance to broaden the definition of "victim" is absent in other federal appellate court decisions.

Another Ninth Circuit decision, *United States v. Haggard*,[208] construed the term "victim" broadly. In *Haggard*, the defendant falsely claimed that he knew the location of the body of an eight-year-old girl, Michaela Garecht, who had been abducted some four years before, and the identity of her murderer.[209] He pled guilty to obstructing a Federal Bureau of Investigation case, making false statements to the FBI, obstructing justice by giving false testimony to a grand jury, and lying to a grand jury.[210] The sentencing court found that Michaela's family were vulnerable victims and added a two-level adjustment to Haggard's offense level pursuant to section 3A1.1.[211] The court also relied upon two victim-related upward departures: a one-level increase under section 5K2.3, the extreme psychological injury provision, and an additional one-level increase under section 5K2.8, the extreme conduct Guideline.[212]

On appeal, Haggard argued the vulnerable victim adjustment was inappropriate because only the federal government, not Michaela's family, was a direct victim of his crimes.[213] Haggard claimed that the statutes under which he was convicted were designed to protect the government, not private individuals.[214] The Ninth Circuit disagreed, adopting instead a broad interpretation of the term "victim":

> We hold that courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a "vulnerable victim" under section 3A1.1. By the words of the provision itself, *no nexus is required between the identity of the victim and the elements of the crime charged.* Moreover, the Guidelines specifically instruct the district court to take into account in adjusting the defendant's base offense level "all harm" the defendant causes. We conclude that even though the harm Haggard caused Michaela's family members was not an element of any of the crimes of which he was convicted, the district

207. United States v. Alber, 56 F.3d 1106, 1112 (9th Cir. 1995).
208. 41 F.3d 1320 (9th Cir. 1994).
209. *Id.* at 1323-24.
210. *Id.* at 1324.
211. *Id.*
212. *Id.*
213. *Id.* at 1325.
214. *Id.*

court did not err in considering them "vulnerable victims" for purposes of section 3A1.1.[215]

This is the concept of "relevant conduct" applied to the problem of defining the victim. As discussed earlier, the concept of "relevant conduct" as expounded in the Guidelines includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."[216] In short, at least until the Supreme Court's recent decision in *Blakely*, there was no requirement of a nexus between the conduct deemed to be "relevant" and the elements of the crime charged. The *Haggard* interpretation of section 3A1.1 brings the definition of "victim" in line with that of "conduct." At least for the purposes of the vulnerable victim adjustment, a "victim" is any individual harmed in the course or as a result of the crime of conviction.[217]

Haggard also appealed the upward departures pursuant to the extreme psychological injury and extreme conduct provisions of Part K of the Sentencing Guidelines. For each departure, he argued that Michaela's family was not a victim within the meaning of the relevant Guideline section.[218] The Ninth Circuit disagreed, holding that *Haggard* was distinguishable from *Hoyungowa* because in *Hoyungowa* the murdered officer's family was an incidental victim of the crime, whereas in *Haggard* the defendant directly targeted the Garecht family as the subject of his fraudulent scheme.[219] The court noted that Haggard had not concocted a story about an imaginary murder victim but rather "deliberately and repeatedly lied for the express purpose of affecting Michaela's family."[220] Under such circumstances, the court held, the family was a "direct victim."[221] Citing the same reasons, the court also

215. *Id.* at 1326 (citations omitted) (emphasis added).

216. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(A) (2003).

217. Most of the federal circuits agree with the *Haggard* court. *See, e.g.*, United States v. Bolden, 325 F.3d 471 (4th Cir. 2003) ("In order to apply the vulnerable victim adjustment, a sentencing court must identify the victims of the offense, based not only on the offense of conviction, but on all relevant conduct."); United States v. Echevarria, 33 F.3d 175, 180-81 (2d Cir. 1994) (holding that vulnerable victim need not be victim of offense of conviction); United States v. Lee, 973 F.2d 832, 833-34 (10th Cir. 1992) (same); United States v. Yount, 960 F.2d 955, 957-58 (11th Cir. 1992) (same); United States v. Bachynsky, 949 F.2d 722, 735 (5th Cir. 1991) (same). *But see* United States v. Wright, 12 F.3d 70, 73 (6th Cir. 1993) (holding that vulnerable victim must be victim of defendant's offense of conviction).

218. *Haggard*, 41 F.3d at 1326.

219. *Id.* at 1327.

220. *Id.*

221. *Id.*

held that Michaela's family was a "direct victim" within the meaning of the extreme conduct provision.[222]

There are a number of distinctions between *Haggard* and *Hoyungowa* that flesh out *Haggard*'s interpretation of "direct victim." First, the fact that Haggard specifically singled out the Garechts as the object of his criminal scheme does not necessarily distinguish his case from that of Hoyungowa, who could be said to have specifically singled out the officer and his family as victims. The *Haggard* court points out that the defendant could have concocted a similar story about a wholly imaginary murder victim, but this ignores the practical fact that Haggard's scheme probably could not have attracted any attention at all had it not focused on an actual person.[223] Assuming, then, that Haggard could not simply have made up a story, the "specifically singled out" distinction seems to collapse.

Second, the court appears to focus on the fact that Haggard deliberately selected Michaela's family as a focus for his criminal scheme, whereas Hoyungowa killed the officer simply because he happened to chance upon him. Third, the court claims, Haggard deliberately and repeatedly lied for the express purpose of affecting Michaela's family, whereas Hoyungowa presumably had no knowledge of or concern for the officer's loved ones. The opinion cites to nothing in the record indicating that Haggard intended to affect Michaela's family, although the court reports he said in one interview that he hoped the discovery of Michaela's body and the apprehension of her killer would ease her mother's mind.[224] The only motive Haggard gave for his hoax, however, was that he had hoped it would win him favorable treatment from the parole board of the state where he was incarcerated for a burglary conviction.[225]

Thus, there is little evidence to support the court's contention that Haggard lied *for the purpose of* harming Michaela's parents, although he probably knew or should have known that his actions would have a deleterious effect on them. This latter fact, however, does not distinguish Haggard from Hoyungowa, for Hoyungowa presumably either knew or should have known that his crime was likely to have a severe psychological impact on the murdered person's family.[226] *Haggard* is an unusual case because it involves a crime without a conventional victim. As a result, it is merely a short leap of logic to regard the persons harmed by false statements as direct victims of the

222. *See id.* at 1327-28.

223. Indeed, skeptical investigators initially were unwilling to probe Haggard's allegations. *Id.* at 1324.

224. *Id.*

225. *Id.*

226. A distinction between the two cases might be made on the basis of the fact that Haggard planned out his scheme, while Hoyungowa apparently killed the officer only because his rifle went off when he tripped. But this is a matter of culpability, not whether certain individuals should be considered victims for the purposes of a departure provision in the federal Sentencing Guidelines.

crime. It is unclear how *Haggard* would apply in the case of a murderer who killed "for the express purpose of affecting [the murdered person's] family." Would the family constitute victims within the meaning of section 5K2.3? They clearly are not direct victims of the crime, but the reasoning underlying *Haggard* seems to demand classification as such under these circumstances. In short, *Haggard* suggests that individuals whom the defendant intended to affect qualify as victims, at least for the purposes of the extreme psychological injury and extreme conduct provisions of the Sentencing Guidelines.

b. Critique

The target test, as I will refer to the court's standard in *Haggard*, thus classifies as victims those persons who were harmed because the defendant acted for the purpose of affecting them, even if their injury is not an element of the crime of which the defendant was convicted. The standard is difficult to apply for several reasons. First, it turns on the defendant's intent and may necessitate additional fact-finding to determine why and with what state of mind the defendant acted. This may be a particularly significant problem in a post-*Blakely* regime where juries may need to make such fact-findings.

Second, as noted above, the cases themselves do not involve defendants who acted expressly for the purpose of affecting those who later were classified as victims by the court. As a practical matter, using purposeful behavior as the standard may exclude a number of injured persons from victim status, for defendants rarely act for the purpose of affecting anyone. Indeed, where a knowing, negligent or reckless state of mind is all that is required for criminal liability, the defendant may not have the requisite purpose even with regard to those persons whose injury is an element of the crime of conviction.

What, then, do the courts really mean by acting with the express purpose of affecting other individuals? Certainly the foreseeability of the injury is an important element; victims are persons who the defendant can foresee would be harmed. A simple foreseeability standard, however, fails to account for the differences in result among *Hoyungowa*, *Alber*, and *Haggard*. One distinction between *Hoyungowa* on one hand and *Alber* and *Haggard* on the other is that *Hoyungowa* knew nothing about the murdered police officer's family. The fact that they even existed, while foreseeable, was a fortuity. While it was perhaps likely that the officer was a husband and father, the defendant had no knowledge of that fact. In *Alber* and *Haggard*, the defendant knew the family existed and therefore were likely to be harmed, especially by criminal behavior that focused on the familial relationship. The harm suffered by the families in *Alber* and *Haggard* was different in kind from that felt by the family in *Hoyungowa* because the defendants in *Alber* and *Haggard* played on the familial relationship;[227] in *Alber*, the defendant threatened the son of the person

227. This phenomenon is similar to the hate speech described by Mari Matsuda. Matsuda identifies all members of a particular ethnic group as victims of hate speech

from whom he sought to extort money, and in *Haggard* the defendant specifically mentioned Michaela's mother in a televised interview. Harm in *Alber* and *Haggard* was thus more foreseeable.

3. Persons Protected by Statute as Victims

a. The Theory

In a more recent case, the Ninth Circuit attempted to distinguish *Haggard* and *Hoyungowa*. In *United States v. Sherwood*,[228] the court held that a kidnapped person is a victim within the meaning of statutes designed to protect the persons from whom the kidnappers demanded ransom money.[229] In *Sherwood*, the defendant was part of a group that kidnapped Kevin Wynn, the daughter of Las Vegas hotel magnate Steven Wynn, took nude photographs of her, and threatened to distribute the pictures to the media if her family contacted the police.[230] The defendant himself, however, was convicted only of conspiracy, interference with commerce by threats or violence, use of a firearm during a crime of violence, and conspiracy in the laundering of money instruments.[231] The court conceded that the statutes the defendant had been convicted of violating directly protected only Steven Wynn and his hotel, which ultimately provided the ransom money necessary to recover Kevin Wynn.[232] The defendant argued that because Kevin Wynn therefore was not a victim, his sentence should not have been enhanced pursuant to any of a number of Guidelines provisions.[233]

The court rejected this argument. Citing *Haggard*, it held that "it would be absurd to conclude that the person who was the focal point of the crime and severely harmed by it was not a direct victim."[234] The court asserted that the defendant deliberately intended to affect Kevin Wynn, knowing that if he failed to do so, he would not succeed in his extortion scheme.[235] The defendant's case, therefore, was more like *Haggard* than like *Hoyungowa* in that the family members of the direct victims were directly targeted.[236] The dis-

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directed toward individual members of the group because they are attacked precisely because of their membership in the group. Matsuda, *supra* note 73, at 2378. The families in *Alber* and *Haggard* are victims because the crime focused in some way on the familial relationship and therefore inevitably would injure family members.

228. 98 F.3d 402 (9th Cir. 1996).
229. *Id.* at 413.
230. *Id.* at 406-07.
231. *See id.*
232. *Id.*
233. *Id.* at 411.
234. *Id.*
235. *Id.*
236. *See id.*

sent argued that *Hoyungowa* was controlling.[237] "Here, there is no evidence that defendants' purpose was to affect Kevin Wynn. Any effect on her was incidental to the real object of their criminal scheme: To extort money from Steven Wynn and the Mirage Hotel."[238] The court thus found that *Haggard* did not authorize departure unless the defendant purposely intended to affect the secondary victim.[239]

b. Critique

The most problematic aspect of the protected-by-statute test is also perhaps the most obvious: It is very difficult to determine whom a statute is enacted to protect. There are two levels to this inquiry. The first requires identifying the primary harm the statute seeks to protect and the entity who would suffer that harm if the crime were successful. For example, if a law against murder seeks to prevent death, then the person who dies is the victim of the crime of murder. If a statute proscribing extortion aims to prevent the forced transfer of money from one party to another, the person or business compelled to pay the money is the victim of the crime of extortion. In some cases, however, it may be difficult to determine what the statute aims to prevent. The myriad federal laws forbidding drug trafficking, for example, might be said to have as their goal a number of things, from the prevention of narcotics importation or sales to the salvation of people who might otherwise become addicted to drugs. Even if we take importation and sale as the primary actions that the law seeks to prevent, who are the victims? If importation is the harm, then all the citizens of the importing country, or at any rate the members of a particular community, could be victims. If sale is the harm, the buyers must be the victims – but this does not square with current practice under the criminal law, which typically treats drug buyers as criminals. The problem is not completely solved by asserting that some crimes – drug trafficking, prostitution, and illegal pornography, to name a few – are "victimless."

The more deep-seated philosophical difficulty with the protected-by-statute test is that no criminal law is really enacted only to protect a certain person or class of persons. Indeed, in one sense, every criminal statute is designed to protect every member of society. Moreover, crimes are graded as petty or serious at least in part according to their effects upon persons other than the so-called direct victim. Murder is punished harshly in part because it has serious and far-reaching effects on the deceased's family, friends and community, and perhaps even because the violent killing of a member of society disturbs the emotional peace and temporal stability of all who hear about it. Therefore, it is unrealistic to say that a particular criminal statute protects only certain identifiable segments of the population; rather, the law

237. *Id.* at 416 (Kozinski, J., dissenting).
238. *Id.*
239. *Id.* at 413-14 (majority opinion).

against murder protects not only an individual from death, but also her family and friends from anguish and her community from the disturbing knowledge of the violence in their midst.

Indeed, the law may have been enacted to protect persons whom the legislators could not reasonably foresee as being in need of protection, with the simple but broad intent that it deter conduct likely to endanger any member of the community. To take a concrete example, Congress, in passing the anti-extortion statute involved in *Sherwood*, may have meant to protect all members of society against all the effects of extortion. Most foreseeable, perhaps, might be the emotional turmoil suffered by the family of the person from whom money is extorted and the potential job losses endured by his employees. But Congress probably also intended (or at least hoped) that the statute, by deterring extortion, would also reduce less foreseeable harms resulting from extortion, such as the kidnapping of Kevin Wynn.

Thus, the Ninth Circuit's protected-by-statute standard is unworkable and, taken to its logical conclusion, collapses into a rule that all persons affected by a crime are victims of that crime. The court's unspoken assumption, however, seems to be that the harm to an individual must to some degree be foreseeable given the crime in order for that person to be a victim of the crime in question. Indeed, saying that victims are those who are "protected by the statute" is a roundabout way of saying that the persons who wrote the statute (the legislature) and those who are governed by it (society in general, but more particularly the wrongdoer) must have been able to predict that some harm might come to that individual as a result or in the course of breaking that law. This may provide some insight into why the *Sherwood* court chose to label Kevin Wynn a victim of the crime of extortion: The defendant could have foreseen that harm to her would result from the commission of the crime.

Another meaning of "protected by statute," however, might simply be that an individual is a victim of a particular crime only if harm to her is an element of that crime. If harm is not an element of the crime, then the crime is "victimless," at least for the purposes of the victim-related adjustment and departure sections of the Guidelines. Another difficulty is that many crimes not defined in terms of specific harm do have victims in the usual sense of the word. The most troubling problem with this theory, though, is that the courts have refused to adopt such a narrow definition of "victim."

4. Affected Persons as Victims

a. The Theory

Other circuits have interpreted *Haggard* even more broadly. In *United States v. Borst*,[240] the Second Circuit discussed the "vulnerable victim" depar-

240. 62 F.3d 43 (2d Cir. 1995).

ture Guideline, and held that no nexus is required between the victim's identity and the elements of the crime charged.[241]

> Whether or not the three couples in the case before us were "unwitting instrumentalities" of Borst's criminal conduct in light of their apparent knowledge of Borst's misrepresentations to the bank, they were exploited and suffered harm as a result of his actions. Borst's criminal conduct resulted in harm to all three couples. . . . The three couples' financial and medical vulnerabilities made them easy targets for exploitation by Borst. Thus, we conclude that even though the harm Borst caused the three couples was "not an element of any of the crimes of which he was convicted, the district court did not err in considering them 'vulnerable victims' for purposes of section 3A1.1."[242]

The court thus focused on the presence of harm, implying that individuals are "victims" for the purpose of Guideline departures if the defendant's conduct caused them harm.

b. Critique

The all-affected test is not necessarily a problematic standard. But it would require that individuals much farther removed from the crime than those involved in *Borst* and *Ihegworo* be considered victims for the purposes of the Sentencing Guidelines. Perhaps the most obvious difficulty with this standard is that it, like the element of harm test, has been rejected by the courts, which have tended to draw lines somewhere in between the two extremes. Moreover, the all-affected standard allows the defendant to be punished for harm that is a result of a mere fortuity.

Of course, the courts can also skirt the problem of identifying the victim altogether by departing upward on the grounds that the harm to a non-victim takes the crime outside the heartland imagined under the Guidelines.[243] In *United States v. Merritt*,[244] for example, the defendant had contracted with the federal government to ship milk powder to the Sudan, which was facing a severe food shortage.[245] Instead of shipping milk, the defendant sent animal feed unfit for human consumption, thereby defrauding the government of nearly one million dollars.[246] The Second Circuit upheld the district court's

241. *Id.* at 47-48.

242. *Id.* at 48 (citations omitted).

243. *See* Gregory N. Racz, Note, *Exploring Collateral Consequences: Koon v. United States, Third Party Harm, and Departures from Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1489-91.

244. 988 F.2d 1298 (2d Cir. 1992).

245. *Id.* at 1300.

246. *Id.*

upward departure, noting that although the sentencing judge did not consider the potential harm to the Sudanese population, the

> crime of substituting animal feed, unfit for human consumption, in place of milk in shipments intended as famine relief to a starving country, is so heinous and goes so far beyond the 'heartland' of fraud, which prescribed Merritt's offense level, as to justify the conclusion that the nature of Merritt's offense was not adequately considered under the fraud guidelines. In our view, this consideration would have justified upward departure as far as Judge Martin went, or further, had the statute allowed.[247]

Thus, the court found the harm to the Sudanese people legitimately could be considered at sentencing, even though only harm to the federal government was an element of the crime of which the defendant was convicted. The court did not find that the intended recipients of the milk powder were victims of the defendant's fraud, however, and indeed such a finding would not have justified any of the victim-related adjustments or approved departures specified in the Guidelines. Even if the definition of "victim" were to be limited to those persons who must suffer harm in order for the defendant's actions to count as a crime, the court could depart upward to reflect harm to non-victims. For example, the *Haggard* court could have concluded the injury done to Michaela Garecht's family took the case out of the heartland of the crime of lying to FBI investigators; similarly, the *Sherwood* court could have held that while Kevin Wynn was not a victim, the attack upon her took the defendant's case out of the heartland of extortion.

A problem with defining "victim" narrowly and departing for harm to nonvictims, however, is that it is fundamentally at odds with the principles providing the foundation for the Guidelines and for sentencing theory more generally. The Guidelines rejected a pure charge-offense sentencing scheme,[248] thus clearly indicating that harmful conduct that is not an element of the crime of conviction should regularly be taken into account at sentencing.[249] Indeed, the Commission itself characterized the Guidelines sentencing

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247. *Id.* at 1312 n.11.

248. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A, at 4-5 (2003).

249. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988) ("The principal difficulty with a presumptive [charge] sentencing system is that it tends to overlook the fact that particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed."); Bruce M. Selya & Matthew Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 9 (1991) ("Under a 'charge offense' regime, a defendant's sentence would only be based on the conduct that made up the elements of the offense for which he was charged. Although such a system lends itself to straightforward codification, it

scheme as "contain[ing] a significant number of real offense elements," in that the Guidelines describe generic conduct rather than track specific statutory language and take account of "a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken," through alternative base offense levels, specific offense characteristics, cross references and adjustments.[250]

Thus, such foreseeable (or perhaps even intended) harms such as those listed in the victim-related adjustments – selection of a vulnerable victim or an official victim, restraint of the victim or international terrorism – should enhance the defendant's offense level, rather than serve as a basis for departure under section 5K2.0, even when they affect someone other than an individual whose harm suffered is an element of the crime. The harm-to-victim provisions of the departure policy statement present a more difficult question. Here, the issue is whether the term "victim," which is used in policy statements authorizing, but not requiring, departures on the basis of harm to "victims," should be broadened to include harm to persons whose harm suffered is not an element of the crime. There are two alternatives: We could adopt a broad definition of "victim"; or we could embrace a narrow definition of "victim" and leave harm to individuals whose harm suffered is not an element of the crime to be considered only under the general departure provision of section 5K2.0.

The first alternative is preferable to the second. The Guidelines clearly intended at least intentional or foreseeable harm to be factored into the sentencing decision, even when the harm is not an element of the crime of conviction. This is the core of the modified charge-offense system the Commission created, which focuses on the defendant's actual conduct rather than on the elements of the particular offense.[251] The Commission chose to address some of these harms in the adjustment chapter, where the judge is required to add a specified number of levels to the offense levels if, say, the victim is particularly vulnerable.[252] Other harms, such as extreme psychological injury or extreme conduct, are specifically named as permissible grounds for departure; this allows the sentencing judge more discretion as to whether to take these harms into account.[253] Still other harms, such as physical restraint of a victim, is listed both as a mandatory victim-related adjustment and as a permissible ground for departure, although it appears the court may depart for

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can overlook harmful offense conduct that is not integral to the statute of conviction. One convicted of bank robbery, for instance, would pay no premium for, say, brandishing a gun during the holdup or damaging property during the escape.").

250. U.S. SENTENCING GUIDELINES MANUAL § 1A, at 4-5 (2003).

251. A sentencing judge can consider even conduct of which the defendant was acquitted in determining the appropriate sentence. For a critique of this rule, see Barry L. Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. REV. 153 (1996).

252. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2003).

253. *Id.* § 5K2.3.

this reason only where the restraint was "sufficiently egregious."[254] Because the Commission declined to adopt a pure charge offense system, and was careful to incorporate many aspects of a real offense system into the Guidelines, it seems evident that it intended harms to individuals besides those whose suffered harm was an element of the crime to be considered at sentencing.

Put more directly, if an individual is someone whose suffered harm is an element of the crime of conviction, the Guidelines allow the consideration of many other kinds of harm suffered by that individual. For example, a person who is robbed in a federal courthouse suffers a loss of property that is an element of the crime of robbery. If that person is also bound and gagged in the course of the robbery, the Guidelines clearly require the addition of two offense levels under section 3A1.3, and if the restraint was egregious, an upward departure under section 5K2.3; similarly, if that individual were tortured to force her to reveal her ATM card pin number, an upward departure under section 5K2.8 might be justified. The single harm of property loss is sufficient to cause all the other harms the individual suffered at the defendant's hands to be considered.

Another individual may not have suffered the harm necessary to convict the defendant of the same crime, but may have been injured in the same way in the same general transaction. A system that considers real offense behavior should consider both sets of harms. But once we accept this proposition, it makes no sense to leave the second set of harms entirely to the judge's discretion, if common law principles are to constrain judges at all. Leaving to each judge's conscience the question of whether and what weight to give to injury inflicted upon an individual whose suffered harm is not an element of the crime of conviction raises the possibility of unwarranted disparity. Some judges, for example, may feel that extreme conduct to a person outside the narrow definition of victim never constitutes a valid ground for an increase in sentence, even though they may believe the same conduct directed toward a victim, in the narrowest sense of the word, might justify an increase. Other judges may regularly increase sentences on this ground. Of course, juries might be asked to consider harm to non-victims, but this only augments the disparity, because juries are likely to have little basis for comparing levels of harm across cases.

In the end, defining "victim" narrowly and considering harm to non-victims in sentencing merely moves the analytical problem from one box to another. At least an inquiry into the meaning of the word "victim" offers the promise of relatively predictable jurisprudence, at least if a suitable definition of "victim" can be achieved. Distinguishing among classes of non-victims seems like at least as difficult a task. It would be preferable for the law to consider as victims all of those who have suffered harm cognizable at sentencing and to work toward a predictable definition of "victim."

254. *Id.* § 3A1.3 commentary, at 309.

A final and speculative solution is to adopt a narrow definition of "victim" for the purpose of the victim-related adjustments and departures and encourage all other persons who are harmed as the result of a criminal act to sue the offender in tort. Thus, individuals such as Michaela Garecht's family would not be considered victims for the purposes of sentencing law but could recover compensation for the harm suffered at the hands of the defendant by suing for, say, intentional infliction of emotional distress. Similarly, Kevin Wynn could bring a tort suit for false imprisonment, among other things. The tort model of victimhood, however, has a number of drawbacks, among them the fact that criminal defendants often are judgment-proof and it lacks the strong condemnation of the state.[255]

IV. VICTIM: A PROPOSED DEFINITION

Of course, the ultimate issue is how to define "victim," whether in the context of the Sentencing Guidelines or for the purpose of some other regime. Taking a leaf from Judge Cardozo's *Palsgraf* opinion, this Article argues that the term "victim" of a particular crime and defendant should be defined as any individual (1) whom the defendant intended to affect as a result or in the course of the crime; or (2) whose harm suffered at the defendant's hand was an integral part of the manner in which the crime was committed. This second prong encompasses a number of situations, for example those in which the defendant must have known of the individual's existence or in which harm was the result of actions taken to plan and carry out the crime, or escape detection and punishment therefor.

At the risk of oversimplification, the first prong posits that a victim is a person whose harm suffered is an end of the crime of conviction, whereas the second prong holds that a victim is an individual whose harm suffered is a means by which the crime is committed. This test also rests on the concept that a crime is not merely the sum of its elements but is a whole; this vision of crime is consistent with the real-offense sentencing scheme. But why not a definition that considers as victims all those who foreseeably could suffer harm as the result or in the course of the defendant's crime? There are significant differences between the foreseeability test and the necessary knowledge test suggested above. The most important difference, perhaps, is that under the latter, the family members of injured or killed persons would be victims, since it is unquestionably foreseeable that the target of a criminal attack would have associates who would be affected by the crime. Under the necessary knowledge test, however, family members are not victims unless the defendant deliberately intended to inflict harm upon them or harm to them was a means of committing the crime. The foreseeability test sweeps too broadly. The criminal law focuses on intent, whereas the tort concept of foreseeability rests on a presumption that simple negligence is sufficient to sup-

255. *See* SEBBA, *supra* note 63, at 303-36.

port a finding of liability. Under the substantive criminal law, however, simple negligence is not enough for liability. Similarly, a victim of a crime must be an individual who suffered as a result of more than mere negligence.

A. Applying the New Definition

It is important to note that this definition excludes the consideration of a class of harm frequently at the heart of the victims' rights debate: Extreme psychological harm suffered by a murder victim's family who were not present at the scene and were not in any sense an integral part of the means by which the crime was committed. Thus, under the new definition of "victim," the Bronstein family and the murdered police officer's relatives in *Hoyungowa* would not be considered "victims" for the purposes of the extreme psychological injury departure Guideline. On the other hand, Nicholas Christopher, who the defendant knew existed and foreseeably would be injured by the murders of his mother and sister, would qualify as a victim, and had the case been tried in a federal courtroom, his extreme psychological injury would have been grounds for a sentencing enhancement, as an upward departure under section 5K2.3. Similarly, Marc Kaplan's wife and child and Michaela Garecht's family were known by the defendant to exist and suffered foreseeable harm. Kevin Wynn is covered by both prongs of the new definition: She suffered harm as a result of actions intentionally direct toward her in the course of the defendant's offense, and the defendant must necessarily have known of her existence in order to commit the crime as he did.

B. Defending the New Definition

This definition of "victim" comports with all the purposes of sentencing. From a retributive point of view, the standard holds the defendant responsible for almost all the harms that result from his criminal activity. Although the defendant does not pay a premium for harms suffered by a person that he does not know with any certainty existed, this exception is desirable for two reasons. First, the defendant is more morally blameworthy for inflicting harm upon persons he is certain exists than upon persons he supposes might exist, or even individuals whose existence is statistically probable. In the first case, he is inflicting foreseeable harm, whereas in the second he is merely taking a chance that he will inflict such harm. Second, balancing the requirements of retribution against those of rehabilitation dictate that the defendant should not be responsible for all harm that foreseeably results from his criminal conduct.

Though perhaps of increased importance now that the Guidelines are merely advisory, the broad definition of "victim" also comports with the sentencing scheme the Commission envisioned. First, as discussed above, the Commission intended a hybrid charge offense-real offense system; this is exactly what the new definition accomplishes. Second, the Commission focused primarily on offense conduct, rather than on offender characteristics or the harm resulting from the defendant's actions *per se*; similarly, the new

definition authorizes enhanced punishment on the basis of the defendant's actions rather than on the results, although the two necessarily are often intertwined. To put it another way, the new definition allows an individual to claim victim status only where the defendant has taken action aimed at the individual, even though harm to that person may not have been the motivation for the crime. Persons who suffer harm as a result of the defendant's actions but who are not the targets of conscious activity are not victims.

C. Difficult Cases

Let us consider some difficult cases to determine how this definition would apply, and what situations might be gray areas under the definition.

1. The Robber and the Bank Teller

Suppose the defendant is convicted of bank robbery. At sentencing, it is established that he bound and gagged the tellers in order to facilitate the robbery and his escape. None of the tellers' personal property is taken, and the bank robbery statute specifies only harm to the bank as an element of the offense. Are the tellers victims of the robbery such that their physical restraint would justify a two-level increase in the defendant's offense level under section 3A1.3, an upward departure under section 5K2.4? The answer is yes. The defendant's actions toward the tellers were an integral part of the means by which the crime was committed; the tying of the tellers facilitated both the robbery and the robber's ultimate escape.

2. The Vindictive Murderer

Now suppose a murderer bears a long-standing grudge against his enemy, and, in order to hurt the enemy, he shoots and wounds the enemy's son. He did not necessarily have knowledge of the enemy's existence to commit the crime in the manner he chose, but he was motivated primarily – perhaps even entirely – by his desire to harm the injured person's parent, although he never communicates the reason for the attack to the enemy in any way. As intended, the enemy suffers extreme psychological harm as a result of his son's injury.

Is the parent a victim such that the defendant is vulnerable to an upward departure for causing extreme psychological harm under section 5K2.3? According to the broad definition of victim, the answer is yes. Although the defendant did not necessarily have to know of the existence of the injured person's parents in order to commit the crime as he did, he acted with the intention of affecting them. Therefore, he should be fully responsible for the harm they suffer; it is, after all, his motivation for committing the crime and the intended result of his actions. To limit the penalty to the Guideline range for aggravated assault would under-represent both the defendant's moral blameworthiness and the harm he caused and, in practical terms, simply would award him a windfall.

3. The Robber and the Schoolchildren

Suppose our robber in the first example successfully leaves the bank with a million dollars in small bills. He jumps into his car and drives as quickly as he can out of town, with the police in hot pursuit, and collides head-on with a van full of children on their way home from school. The children suffer mild physical injuries and extreme psychological harm. The robber is convicted only of bank robbery. Are the schoolchildren victims of the robbery?

This is a much harder question than the previous ones. First, let us examine whether the children would be victims according to the new broad definition of that term. Are they an integral part of the manner in which the crime was committed? The answer seems to be no; the robbing of the bank itself certainly did not require the defendant's knowledge of the schoolchildren's existence, and even the means of escape does not demand such knowledge, although at some point during the defendant's ill-fated flight one might expect him to be able to foresee that he might have an accident. Only when the definition of "in order to commit the crime in the manner that he did" is stretched as far as possible – to mean, for example, that the defendant must necessarily have had knowledge of the putative victim's existence at the time the act causing harm to the victim was consummated – could the defendant be said to know of the children's existence.

Is the harm a "result" of the crime? This is another difficult question. The robbery is no doubt a but-for cause of the injuries. The accident would not have occurred had the defendant not robbed the bank. But what about proximate cause? Again, we must define "in the course of the crime" in a very broad manner – for example, all activities in furtherance of the crime or immediate flight therefrom – in order to ensure that the children are victims under our new definition.

There is, of course, another way of addressing this problem, which is simply to hold that the children are not victims of the robbery, and if they are victims at all, they are victims of some separate crime, such as reckless driving. Such an answer merely brings us out of the frying pan into the fire, however, for a defendant guilty of a crime requiring only a reckless or criminally negligent state of mind cannot necessarily know of the putative victim's existence in order to commit the crime as he does. The nature of the crime is that the defendant is reckless or negligent as to what harm his actions may cause. Thus, in order for the children in this example to be victims of reckless driving, we must again expand our definition of knowledge to encompass knowledge of the children's existence at the time the act causing harm is consummated – that is, at the time the crash occurs. The difficulty with this definition is that the point of knowledge is well past the point where the defendant can turn away from his harmful course of action.

In addition, one can imagine a host of other scenarios in which the harm occurs precisely because the defendant is in an insensible state. For example, a defendant convicted of vehicular homicide for killing a pedestrian as a re-

sult of driving drunk and passing out is probably utterly unaware of the hapless stroller's existence at the instant of the crash. It seems then, that the knowledge requirement might allow a number of defendants to avoid sentence enhancements on the basis of extreme psychological injury suffered by their victims; the rule would mandate that persons killed by unconscious drivers were not victims at all, a result that is clearly inconsistent with the common understanding of the term.

There is, however, a possible solution to the problem of the reckless or negligent crime that derives from the criminal law's treatment of substantive liability for such crimes. Under the substantive law, a reckless or negligent state of mind is sufficient for liability. There is no reason why, if defendants are to be held substantively liable, their victims should be determined according to a more lenient standard. The substantive law essentially assumes that when a defendant acts with criminal recklessness or negligence, he is to be considered as liable as though he had intended the foreseeable results of his actions. Therefore, victims should be those individuals suffering harm as a result of or in the course of the crime, if the crime were committed purposefully or knowingly, of whose existence the defendant must necessarily have been aware. Thus, if the defendant had set out to kill the busload of schoolchildren, he must necessarily have known of their existence. Their parents are not, however, victims, because the defendant's knowledge of their existence was not necessarily to his commission of the crime.

Let us go back to our expanded definition of "knowledge." This immediately brings us into new difficulties. Suppose that in order to facilitate his escape, our robber detonates a car bomb near a children's hospital so as to distract the authorities. The robber had no idea the car was near a hospital; he merely selected a parking lot at random in which to park. None of the children is hurt, but many suffer extreme psychological injury as a result of the explosion and the ensuing panic. Indeed, many are more severely psychologically damaged than the bank tellers whom the defendant robbed at gunpoint. Again, the defendant is convicted only of bank robbery. Are the children victims of the robbery such that the defendant is subject to an adjustment under section 3A1.1, the vulnerable victim enhancement, or an upward departure for extreme psychological harm under section 5K2.3?

The robber did not necessarily know the children existed even at the moment he committed the act causing them harm. As stipulated above, he had no idea the car was near a children's hospital when he parked it there, nor did he gain such knowledge at any point before he detonated the bomb. Perhaps this hypothetical is better handled in the following way. The children are not victims of the crime of robbery, but they are victims of the wholly separate crime of, say, reckless endangerment. Our response to the problem of reckless and negligent crimes requires us to assume the defendant intended the results he ultimately achieved: that he set out to hurt the children. Therefore, he must have known that they existed, and so they are therefore victims. Their parents, however, are not.

4. The Murderer Who Kills Her Best Friend

It is also necessary to address the problem of actual knowledge. Even if the defendant need not necessarily know of the existence of a particular individual in order to commit the crime as she did, should that individual nevertheless be considered a non-victim if the defendant did in fact know of her existence? Suppose, for example, that a defendant is convicted of the first degree murder of her best friend. The murderer knows her friend is very close to his elderly parents and, if she had stopped to think about it, would have realized they were likely to suffer great anguish as a result of their son's death. In fact, however, she neither acted in order to affect the parents nor considered the potential effects of the murder upon them. She did, however, have actual knowledge of their existence. The parents do indeed suffer extreme psychological injury as a result of the murder. Are they victims such that the defendant would be subject to an adjustment under section 3A1.1, the vulnerable victim provision, or an upward departure under section 5K2.3?

Under the literal terms of our new definition of victim, they are not. On the one hand, to impose additional duties on defendants who had actual knowledge of individuals who might be harmed by their actions might create unwarranted disparity. For example, a defendant who was told or happened through chance to discover the persons he intended to harm had others who might be hurt by their injury would be susceptible to harsher penalties than their counterparts who lacked such knowledge merely as a result of a fortuity. On the other hand, a defendant who inflicts harm despite the knowledge of potential and even probable harm to others is more morally blameworthy than one who harms in the absence of this knowledge.

There are a number of reasons that actual knowledge should not affect the determination of victim status. First, from a purely practical point of view, the broad definition of victim adopts the "necessarily known" standard because it will often be difficult to determine whether the defendant in fact knew of persons who potentially might suffer harm as a result of her criminal activity. If actual knowledge were grounds for enhancing sentences through victim-related adjustments and upward departures, defendants would always insist they lacked such knowledge, and valuable judicial resources would be expended to determine whether they were telling the truth.

Second, enhancing sentences on the basis of actual knowledge amounts to a punishment premium for defendants who harm persons they know. This is problematic insofar as it rests on the presumption that a defendant who injures an acquaintance is invariably more morally blameworthy than his counterpart who plans and carries out an identical crime designed to harm a complete stranger. The broad definition of victim recognizes as victims only those against whom some criminal action was directed.

5. The Potential Victim

How does the definition of the victim apply when the crime of conviction is conspiracy or attempt, rather than a substantive, completed crime? The case of *United States v. DePew*[256] illustrates the problem. Defendant DePew was convicted of conspiracy to kidnap and conspiracy to exploit a minor in a sexually explicit film. He had planned to abduct a twelve-year-old boy for the purpose of making a pornographic film that would depict the sexual abuse, torture, and murder of the boy.[257] At sentencing, the district court added two levels to the defendant's offense level pursuant to the vulnerable victim adjustment after finding that the intended victim was unusually vulnerable because of his age.[258] The defendant asserted that because he never completed the crime, there was no victim, and the court therefore erred in applying section 3A1.1.[259] The Fourth Circuit rejected this argument, holding that since application note 1 to section 3A1.1 states that it "applies to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant," section 3A1.1 properly applied, as "[a]n innocent 12 year old boy was, from the beginning of the conspiracy, to be the target of the crime. A boy of such age would certainly be 'unusually vulnerable,' if he fell into the hands of the appellant."[260]

The *DePew* case raises a number of questions about attempted crimes. First, should sentences be increased based on the vulnerability of potential victims where not all members of the targeted group of potential victims are vulnerable? To alter the facts of the case a bit, suppose DePew had not intended to kidnap a twelve-year-old boy, but rather to kidnap a young man anywhere between the ages of twelve and twenty-two. Whereas potential victims at the lower end of this age spectrum might be necessarily vulnerable because of their age, those at the other extreme might not normally be considered particularly vulnerable. May the sentencing court in such a case still apply the vulnerable victim adjustment?

To make the hypothetical even more difficult, imagine a case in which there is a possibility – but nowhere near a probability – that one of the victims of the completed crime will be particularly vulnerable. For example, suppose that the defendant is planning a telephone fraud in which callees are asked to donate money to a public school when in fact the cash is pocketed by the defendant. Although she does not target elderly or particularly lonely persons, the chances are quite good that at least one of the persons she randomly telephones will fit this description. The defendant is arrested before she makes any calls. Assuming that elderly or lonely persons are considered vulnerable

256. 932 F.2d 324 (4th Cir. 1991).
257. *Id.* at 326.
258. *Id.* at 328.
259. *Id.* at 328, 330.
260. *Id.*

victims vis-à-vis this type of fraud,[261] is the defendant subject to an adjustment under section 3A1.1? The application note from an earlier version of the Guidelines clearly stated the adjustment would not apply "in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile."[262] That phrase has been deleted from the current version of the Guidelines, leaving the state of the law unclear.

Whether the vulnerability of potential victims should matter at all in a case like *DePew* depends on the ultimate motivation behind increasing sentences for vulnerable victims. For example, if the vulnerable victim adjustment in the Federal Sentencing Guidelines is designed to punish defendants for their greater culpability in choosing a vulnerable victim, then it certainly should apply even when the defendant fails to carry out his plan and therefore does not choose a particular victim. If the adjustment is intended to punish the greater harm inflicted upon a vulnerable victim – perhaps under the theory that a particularly vulnerable victim is likely to suffer more harm as a result of the crime, even from increased psychological injury stemming from the knowledge that her own mental or physical condition contributed to the crime[263] – then the adjustment should not be applied unless and until the harm occurs.

There is considerable support for the former view in Guidelines cases. The *DePew* court, for example, viewed the Commission's statement that the adjustment applies to situations in which the defendant "targets" an unusually vulnerable victim as dispositive of the issue.[264] In *United States v. Long*,[265] the Eleventh Circuit held that the vulnerable victim adjustment is designed to punish a defendant for the additional moral depravity evidenced by his selection of a particularly vulnerable defendant, not for the additional harm caused by such a choice.[266] In *United States v. Morrill*,[267] the Eleventh Circuit reaffirmed this interpretation, stating that "section 3A1.1 was intended to apply only when the special vulnerability of the victim makes the offender more culpable than he otherwise would be in committing the . . . offense."[268]

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261. This is not a wholly imaginary situation. *See, e.g.*, United States v. Whatley, 133 F.3d 601 (8th Cir. 1998) (approving vulnerable victim adjustment where defendants had deliberately targeted elderly and particularly lonely persons for telephone fraud).

262. U.S. SENTENCING GUIDELINES MANUAL § 3A.1. commentary (2003).

263. The study of the ways in which victims contribute to crimes is the subject of a sub-branch of criminology known as victimology. For more on this area, see generally CRITICAL ISSUES IN VICTIMOLOGY: INTERNATIONAL PERSPECTIVES (Emilio C. Viano ed. 1992); R.I. MAWBY & S. WALKATE, CRITICAL VICTIMOLOGY: INTERNATIONAL PERSPECTIVES (1994); TOWARDS A CRITICAL VICTIMOLOGY (Ezzat A. Fattah ed., 1992); SANDRA WALKLATE, VICTIMOLOGY: THE VICTIM AND THE CRIMINAL JUSTICE PROCESS (1989).

264. *DePew*, 932 F.2d at 330.

265. 935 F.2d 1207 (11th Cir. 1991).

266. *Id.* at 1211; *see also* Garry, *supra* note 31, at 155-56, 168.

267. 984 F.2d 1136 (11th Cir. 1993) (en banc) (per curiam).

268. *Id.* at 1137 (citations omitted).

Therefore, where the purpose of a victim adjustment is to punish the defendant for moral culpability, it makes sense to apply the adjustment in all cases in which the defendant shows such culpability. Thus, victim-related adjustments and departures designed to punish for additional culpability, rather than harm, demand a broader definition of the term "victim." That term, when used in the context of such provisions, should encompass all persons who the defendant unequivocally targeted. In addition, when judges enhance sentences for reasons other than those provided in the Guidelines, they ideally should make clear the theoretical basis for the enhancement. If the theoretical basis for a victim-related enhancement is moral culpability, then the judges should still apply the enhancement in cases involving potential victims. If there are multiple theoretical bases, including both concern about culpability and concern about actual harm suffered, the judges should apply the enhancement, but not to the full extent. One advantage of a common law system of sentencing is that courts might develop distinctions among cases over time and recognize that increases appropriate in one case might be inappropriate or only partly applicable in another.

But what of other victim-related adjustments and departures in the Guidelines or other statutory sentencing schemes? How are we to tell whether a particular provision is culpability-centered or harm-centered? In many cases, a particular provision will go to both concerns. The extreme conduct departure policy statement, for example, seems designed to punish both greater culpability and greater harm, and, at least as previously construed, the Guidelines do not allow for partial adjustments on the basis of factors specified in the Guidelines. By torturing his victim, for example, a kidnap defendant both demonstrates a higher degree of moral depravity and causes more harm than his counterpart who does not engage in such extreme behavior. If any provision that is at least in part designed to punish moral depravity were treated as the vulnerable victim adjustment was treated in *DePew*, then defendants who planned to torture their victims but were apprehended before they were able to consummate the scheme would be subject to the enhancements. Thus, under such a theory, DePew himself should have been subjected to sentence increases for restraining his victim and for extreme conduct.

Of course, in the Federal Sentencing Guidelines, there seems to be a clear distinction between the hate crime motivation, vulnerable victim and official victim provisions, which concern themselves essentially with the victim's status and the reasons the defendant selected him, and the restraint, extreme psychological injury, and extreme conduct section, which primarily address the result of the criminal act. In addition, the first three provisions apply as soon as the criminal act is begun, whereas it is possible that a crime could be concluded without triggering the last three. Thus, if any crime is to be committed at all, the first three sections will immediately be triggered, whereas a crime could be committed without triggering the last three. Accordingly, for the purposes of conspiracy, a "victim" under the first category of provisions should be defined as anyone who the defendant targeted,

whereas a "victim" for the purposes of the last three must actually have suffered harm. The language of the Guidelines supports this distinction.

6. The Guilty Victim

In some cases, an individual could be used as the means of committing a crime – thus meeting the definition of "victim" – and yet also, under another statute, be considered a criminal as well. Can injury to such an individual justify victim-related adjustments and upward departures? This situation is a variation on *United States v. Ihegworo*,[269] in which a buyer to whom the defendant sold unusually pure heroin died from an overdose of that heroin.[270] The courier who had delivered the heroin to the buyer for the defendant then became a government informant, and the defendant was arrested and convicted of possessing heroin with intent to distribute.[271]

The sentencing court departed upward on the basis of section 5K2.1, which permits an upward departure "[i]f death resulted."[272] The defendant appealed, arguing the buyer's death could not constitute grounds for upward departure because she was not a victim of the offense for which he was convicted.[273] The defendant claimed that section 5K2.0's requirement that the harm on which a departure was based must be "relevant" to the offense of conviction precluded the application of section 5K2.1 to cases in which the death in question was not that of a victim of the offense or even a person involved in the transaction that led to the defendant's conviction.[274] The Fifth Circuit disagreed, holding that the mere fact that someone died from an overdose of the heroin the defendant had been convicted of distributing was enough to trigger section 5K2.1.[275]

Ihegworo was an easy case, however, because the departure provision involved did not require that death be suffered by a victim of the crime of conviction. Suppose, rather, that a drug dealer sells unusually pure heroin to a customer who, rather than dying, suffers extreme psychological harm as a result of ingesting those doses. The dealer is convicted only of a drug offense. Is he nevertheless subject to an upward departure under section 5K2.3?

Whereas many philosophical definitions of "victim" require that the individual claiming such status must be free of blame for the harm she suffers,[276]

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269. 959 F.2d 26 (5th Cir. 1992).
270. *Id.* at 27.
271. *Id.*
272. *Id.* at 28.
273. *Id.*
274. *Id.* at 29-30.
275. *Id.* at 30.
276. *See* AMATO, *supra* note 68, at 151-70 (describing victims as innocent); SYKES, *supra* note 72, at 11 ("The ethos of victimization has an endless capacity not only for exculpating one's self from blame, washing away responsibility in a torrent of explanation — racism, sexism, rotten parents, addiction, and illness — but also for

the disturbed drug consumer has chosen to break the law. It thus seems ridiculous, or at least overgenerous, to classify her as a victim. On the other hand, the defendant has caused more harm and probably is more morally depraved (assuming he knew of the unusual purity of the drug or was reckless or negligent as to whether it was more dangerous than expected) than another dealer who sells heroin of a merely normal purity. Given the defendant's enhanced culpability and harmfulness, it seems to award him a windfall to deny upward adjustments and departures because he was lucky or prescient enough to select a crime in which the putative victims are partially blameworthy for any harm they suffer. Moreover, if the goal of the victim-related adjustments and departures is to punish more severely greater culpability and harmfulness, the term "victim" must encompass those who are not fully "innocent."

There is a variation on the problem of the guilty victim, one which the substantive criminal law has addressed at length but that has not been reviewed closely in the sentencing context. What if the defendant harms a co-defendant?[277] Suppose, for example, that in the course of committing a kidnapping together, the defendant turns on his partner in crime and tortures him as well as the kidnapped person. Or the co-defendant suffers severe psychological harm as a result of the defendant's extreme behavior toward the kidnapped person. In each case, the defendant is convicted only of kidnapping. Should he receive an increase in sentence for the harm he caused to his co-defendant? Under the same reasoning as applies under the previous example, the co-defendant should be considered a victim, but the definition of "victim" does not clearly account for these situations.

In the first hypothetical – in which the defendant attacks his co-defendant – we could say the defendant acts with the intention of affecting the co-defendant and that therefore the co-defendant is a victim. This conclusion is a bit too facile, however, because the early examples in this section assumed the first prong of the victim definition envisions a situation in which the defendant commits the crime of conviction in order to affect a third party, who then rightfully may be considered a victim of that crime. Here the situation is quite different; the defendant did not choose to kidnap in order to hurt his co-defendant; rather, he simply attacked his co-defendant during the course of another crime. The second prong of the victim definition states that an individual is a victim of the crime of conviction if he is an integral part of the manner in which the crime is carried out. The co-defendant is a victim much as Nicholas Christopher, in *Payne*, is a victim. Similarly, if the co-

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projecting guilt onto others."); Bayley, *supra* note 77, at 54 ("Victims must be innocent; they must not be guilty of having contributed to their loss."). Mawby and Walklate make the provocative suggestion that under the Anglo-American presumption of innocence, the victims' "innocence is not established until the guilt of the defendant is decreed." MAWBY & WALKLATE, *supra* note 263, at 129.

277. *See, e.g.*, State v. Hoang, 755 P.2d 7 (Kan. 1988); Robbins v. People, 350 P.2d 818 (Colo. 1960) (en banc).

defendant suffers extreme psychological injury as a result of the defendant's behavior toward someone else, he also is a victim.

V. CONCLUSION

Defining the term "victim" not only has implications for federal and state sentencing schemes but also implicates a number of contemporary policy debates. In particular, the victims' rights movement, which seeks to guarantee victims of crime everything from social, emotional, and pecuniary support to a role in criminal pre-trial, trial and sentencing proceedings, must define what it means by the term "victim." Excessive broadening of the term "victim" devalues those to whom that term is more properly applied. A careful definition is especially necessary in the context of a constitutional amendment that would ensure that victims enjoy certain rights; the drafters should determine who, in the almost infinite universe of persons who may be affected by a crime, should enjoy the constitutional rights guaranteed by the amendment. As they struggle to define "victim," policymakers should keep in mind that the "proper" definition will vary according to the purposes of the definition. For example, it may be a wise policy decision to accord financial and emotional support to all persons directly affected by a crime, whereas a particular model of justice might not allow such a broad definition when it will be used to enhance the sentences of criminal offenders.

The definition of "victim" and its attendant issues also has implications for the budding field of victimology, which generally seeks to elucidate the relationship between victims and crime. For example, victimologists consider how victims help create the conditions in which they are victimized,[278] how victims contribute to and even provoke their own victimization,[279] and the demographic relationship between victims and offenders.[280] Central to this discussion, however, must be a definition of who the victims – ostensibly the center of the study – are. Thus, there is a sweeping need to refine our understanding of this commonly – and often carelessly – used term.[281]

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278. *See, e.g.*, WALKLATE, *supra* note 263, at 6-13.

279. *See, e.g.*, MAWBY & WALKLATE, *supra* note 263, at 9-13; Ranjana S. Jain, *Familial Violence in India: The Dynamics of Victimization*, *in* CRITICAL ISSUES IN VICTIMOLOGY: INTERNATIONAL PERSPECTIVES, *supra* note 263, at 80, 82-85.

280. *See, e.g.*, Ezzat A. Fattah, *Victims and Victimology: The Facts and the Rhetoric*, *in* TOWARDS A CRITICAL VICTIMOLOGY 29, 33-41 (Ezzat A. Fattah ed., 1992).

281. The academic field of victimology and the social agenda of victims' rights have received considerable attention abroad as well. In England and Wales, for example, the Home Office has issued a Victim's Charter, which sets forth the appropriate response of the various parts of the criminal justice system to the crime victim. *See* MAWBY & WALKLATE, *supra* note 263, at 169-86. At the international level, the United Nations has promulgated the U.N. Declaration of Basic Principles of Justice for the Victims of Crimes and Abuse of Power. Declaration of Basic Principles of Justice for Victims of Crime and Power, G.A. Res. 34, U.N. G.A.O.R., 40th Sess. Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985).