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The Wrongs of Victim's Rights

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In the last few years, the issue of "rights" for victims of crime has become influential in shaping criminal law and procedure. In 1982 alone, California voters approved a "Victim's Bill of

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Rights" that made substantial changes in California law,[1] and the President's Task Force on Victims of Crime issued its final report, recommending numerous changes in the criminal justice system.[2] The influence of the victim's rights "movement" appears to be creating a new era in American criminal law and procedure.

This article examines the impact that current victim's rights proposals and programs will likely have both on the criminal process and on victims, and explores the rationales offered in support of these proposals. The discussion focuses on whether changes in the criminal law and criminal process are desirable for those who have already been victimized.[3] The article also makes some observations on whether these changes have any salutory effect on the goal of crime prevention. Part I examines the increasingly public structure of the criminal process and presents a brief history of the victim's rights movement. Part II proposes a theory of victimization which emphasizes its highly individual and experiential nature. Part III outlines a composite victim's rights proposal. Part IV looks at the proposed changes in the legal process bearing on the guilt stage of the trial and examines the usefulness of these changes to victims. Part V then explores whether victim participation at sentencing can be justified in terms of traditional rationales for the criminal sanction, on due process-like grounds, or on individually based, existential grounds. Finally, Part V discusses the problems created by the issue of restitution to crime victims.

I. THE ORIGINS OF VICTIM'S RIGHTS

A. *The Historical Role of the Victim in Criminal Law*

The available historical work in the field of the criminal law reveals a steady evolution away from the "private," or individual, sphere to the "public" or societal one. In Europe and England after the collapse of the Roman Empire, the victim and the criminal process were intimately linked. No formal government structure existed; thus, "criminal justice" largely depended on self-

1. *See* note 87 *infra.*

2. *See* note 71 *infra.*

3. The author draws on her experiences as both a public defender and a victim of a violent crime for insight as to effects of crime on the victim and of recent changes in the criminal process.

help or the help of kin.[4] The blood feud constituted the major enforcement mechanism, both in England and on the continent:[5] The victim, or his or her kin, exacted vengeance against and repayment from the perpetrator or his kin.[6] At the same time, however, a rudimentary public enforcement mechanism, "outlawry," existed both on the continent and in England.[7]

As English society became more organized, and feudal lords began to assert dominion over others, the law of the blood feud became more refined and subordinated to "public" interests. It became unlawful to begin a blood feud unless an effort was made to extract a sum of money from the offender.[8] At the same time that use of the blood feud was declining as the primary vehicle for enforcing criminal law, monetary compensation to victims or their kin ("bot" and "wer"), and fines payable to the king ("wite"), developed into a complicated system of tariffs that carefully set out the value of every sort of injury imaginable.[9] This system of compensation would appear to be solicitous of a victim's right to restoration from the wrongdoer, but in practice, victims seldom received compensation.[10]

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4. 1 J. GOEBEL, FELONY AND MISDEMEANOR 15–21 (1937); Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553 (1978).

5. *See, e.g.*, 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 449–51 (2d. ed. 1899); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 60 (1883); Berman, *supra* note 4, at 554–55.

6. Berman, *supra* note 4, at 557; *see also* 1 J. GOEBEL, *supra* note 4, at 341. But even the blood feud had certain social rules and rituals: In the "law" of homicide, for example, not all lives were of equal worth; thus a blood feud might require the deaths of several persons, or the expropriation of cattle or more assets, to atone for the loss of a single individual. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 5, at 450; Berman, *supra* note 4, at 556–57.

7. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 5, at 450. Under the idea of outlawry, a person who broke the law could be attacked by the entire community in which he lived. Because the lawbreaker was considered to have gone to war with the community, the community's response was to go to war with him—to banish him, pursue him, kill him, ravage his land, burn his house. *Id.* at 449. Thus, even in pre-modern Western society, a public as well as private form of reaction to crime existed.

8. *Id.* at 451. A killer, for example, was given a year to pay the victim's family the value of the victim's life, generally determined by a complex set of class-based rules, before the family could begin the blood feud. *Id.* The kin of the killer were exempt from the feud unless they had harbored him. *Id.*

9. *Id.* at 449, 451.

10. The crime tariffs were oppressive. Pollock and Maitland observed:

> From the very first, it was an aristocratic system; not only did it make a distinction between those who were "dearly born" and those who were cheaply born, but it widened the gulf by improverishing the poorer folk. . . . When we

In England, as the kings gained and solidified authority, the concept of "the king's peace" prevailed, and criminal acts were seen by the legal system as offenses against the crown rather than against the individual.[11] Outlawry was transformed from a punishment to a process for compelling the attendance of the accused at trial.[12] Severe punishments, such as the taking of life and limb, were placed solely in the hands of the king and his representatives.[13] Minor crimes were punished chiefly by monetary fines instead of the wite,[14] and damages to victims or their families were determined and assessed by a tribunal rather than a system of tariffs.[15]

As early as the thirteenth century in England, the law of felony appeared to serve the feudal system and the lords far more than it did the victims.[16] The lords' consolidation of power, the greed of kings, and the need for a coherent system of laws transformed criminal law from a mixture of public and private law, to law of an exclusively public nature.[17] A similar shift from a mixed system to an exclusively public system took place on the continent.[18] As English criminal law became more public, victims lost some discretion once they initiated a prosecution,[19] but still re-

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reckon up the causes which made the bulk of the nation into tillers of the lands of lords, bot and wite should not be forgotten.

Id. at 460. While the system "outwardly reconciled the stern facts of rough justice with a Christian reluctance to shed blood," *id.*, Pollock and Maitland submitted that the demand for money instead of life was essentially delusive, because few persons were likely to pay, and most were outlawed or sold into slavery. *Id.* at 460–61.

11. *Id.*

12. *Id.* at 457–58; 1 J. GOEBEL, *supra* note 4, at 429–33.

13. F. POLLOCK & F. MAITLAND, *supra* note 5, at 457–61.

14. *Id.* at 458.

15. *Id.* at 458–59.

16. For example, willful homicide became a capital offense, and the kin of the slain lost their right to wer and to compensation. Only later was a statute specifically enacted to create a claim for damages in homicide cases. *Id.* at 459. A felon's lands went to the king; his chattels were confiscated. *Id.* at 465–66.

17. *Id.* at 454–64; 1 J. STEPHEN, *supra* note 5, at 102. Although this summary obviously simplifies a complex historical change, it does so to emphasize that the focus and function of criminal law shifted substantially from the individual to the state. *See also* Greenberg, *The Victim in Historical Perspective: Some Aspects of the English Experience,* 40 J. SOC. ISSUES 77 (1984).

18. Berman, *supra* note 4, at 553–54.

19. *See* Langbein, *Albion's Fatal Flaws,* 98 PAST & PRESENT 96, 102 (1983); Langbein, *The Origins of Public Prosecution at Common Law,* 17 AM. J. LEGAL HIST. 313, 317–23 (1973). *But see* Hay, *Controlling the English Prosecutor,* 21 OSGOODE HALL L.J. 165, 167–80 (1983) (English private prosecution in eighteenth and nineteenth century was largely discretionary).

tained an important role in the process through the unique English system of "private" prosecution.[20] Private prosecution initially appears to demonstrate a solicitude towards victims absent in every other system,[21] but in fact, it was not very beneficial to the victim.[22] By the nineteenth century, the British system of private prosecution had little to do with concern for victims of crime.[23] In England today, serious cases are reviewed and sometimes prosecuted by the Director of Public Prosecutorions, and

20. *See* Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources,* 50 U. CHI. L. REV. 1, 47–51 (1980) (larceny victims had discretion both in bringing charges and in determining whether larceny would be a capital offense). *But see id.* at 55–56 (although victim or private accuser was called prosecutor and played an "essential role" in prosecuting, prosecutor had official support of constables and justices of the peace; the coroner handled homicide cases).

21. *See* Goldstein, *Defining the Role of the Victim in Criminal Prosecution* 52 MISS. L.J. 515 (1982); Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction,* 65 YALE L.J. 209 (1955). Although the idea of having private prosecutions in the United States has been proposed as a remedy for victims of crimes, *see* Goldstein, *supra,* at 558–61; Comment, *supra,* and there are occasional "private prosecutions" or instances of private aid to district attorneys, private prosecution has never really played a prominent part in American criminal justice.

Goebel and Naughton's history of the development of a criminal justice system in colonial New York notes the system was a mixed one of public and private prosecutions, depending on the location of the prosecution. Officials frequently brought formal accusations, however, and the office of the attorney general conducted many criminal prosecutions in the name of the Crown by the 1700s. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 329 n.14, 330–31, 337, 619–21 (1944) (in Easthampton, offenses were prosecuted on complaints of injured persons or informers; in New York City, the sheriff filled role of law enforcement official and prosecutor; the Attorney General's power increased throughout 1700s as direct representative of the Crown's interests). Public prosecution developed throughout the colonies, apparently, and certainly was firmly in place by the time the English were debating the issue.

22. By the nineteenth century, the expense of conducting investigations and of bringing private prosecutions placed a heavy burden on victims, Kurland & Waters, *Public Prosecutions in England, 1854–79: An Essay in English Legal History,* 1959 DUKE L.J. 493, 512, and while compensation and reward schemes were used to encourage prosecution, they frequently were insufficient, *id.* The poor could not prosecute at all. *Id.* at 515. Moreover, in serious cases the constable had played an important role, and the coroner had become largely responsible for prosecuting homicide. Langbein, *supra* note 20, at 55–56. Finally, the severity of criminal penalties in England for hundreds of crimes—death or transportation—effectively foreclosed any chance for victims to obtain tort damages. *See also* note 10 *supra.*

23. Kurland & Waters, *supra* note 22. The English debates leading up to the institution of the public prosecutor's office are mostly silent on the burden private prosecution placed on crime victims. Instead, the conflict centered on abuse of authority and loss of lawyers' jobs and the need for coordination and effective prosecution. *See id.* at 528–60. The English use of private prosecutions to enforce criminal statutes for most of England's history may simply have been a peculiar result of inertia, vested interests that had grown over time, and suspicion of authority. *Id.* at 561–62.

police prosecute most of the other cases.[24] Historically then, even in England, the victim has gradually ceased to be a significant actor with a formal role in the criminal process.[25] But the fact that the victim's role in the process steadily lessened over time does not necessarily justify the lack of a formal role for victims today.

The apparent visibility of the criminal process and the unlikelihood that most victims can successfully pursue the offender through tort law[26] may be partially responsible for the current view that the victim should have a greater role in the criminal process. The following section will discuss the rise of this view in American criminal law and procedure.

B. *The Role of the Victim in Recent American Criminal Law*

The American system of criminal law and procedure has re-

24. *See, e.g.*, R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 214 (7th ed. 1977) (people are usually "content" to leave the conduct of the prosecution to the police); Hay, *supra* note 19, at 180 (fewer than three percent of English prosecutions are conducted by private individuals; about nine percent of shoplifting cases are prosecuted by retail stores). *But see Proposed Independent Prosecuting Service: The Prosecutor's Viewpoint*, 48 J. CRIM. L. 302 (1984); *Independent Prosecutors*, 134 NEW L.J. 1001 (1984) (both criticizing a government proposal to create a centralized national prosecution office). For a recent discussion of the English criminal process, see Hughes, *English Criminal Justice: Is it Better Than Ours?*, 26 ARIZ. L. REV. 507 (1984).

25. Of course, crime victims retain a private right of action in tort against criminals. Today, just as in the fourteenth century, the tort right to compensation in damages theoretically addresses the harm to the individual, while criminal prosecution theoretically addresses the social or public harm of criminal acts. In theory, the law has recognized the harm that victims have suffered and has provided a mechanism for redress. The separation of the treatment of individual claims from that of societal claims for criminally caused harms, and the resulting separation into the private and public spheres, however, creates the appearance that the law virtually ignores victims of crimes. *See* R. REIFF, THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY xi (1979) ("Society—sensitive to the issues of social justice for the offender—spends millions of dollars on programs for offender-oriented court reform and rehabilitation. On the other hand, society fails to protect crime victims, degrades them socially, and refuses them aid."); M. HYDE, THE RIGHTS OF THE VICTIM 4 (1983) ("for the most part, victims are the innocent and neglected element in the criminal justice system"); Goldstein, *supra* note 21, at 519 ("the victim has been left to play a distinctly secondary role" in the criminal justice system). And while in theory the tort system provides redress for the individual, in fact victims often have no hope of recovery because many identified offenders are unable to pay damages. *See* notes 311–324 *infra* and accompanying text.

26. Those who do find a "deep pocket" can and do pursue the offender in actions for civil damages. *See* Rios, *Drunken Driving Victim and Family Get $11 Million*, San Jose Mercury News, Sept. 24, 1983, at 1A, col. 3; *S.F. Jury Gives Burgled Homeowners $400,000*, San Francisco Chron., July 28, 1983, at 2, col. 2.

flected a tension between social and individual approaches to crime prevention:[27] Liberals have focused on isolating and curing perceived *social* causes of crime; conservatives have concentrated on perceived *individual* wickedness as the cause of crime.[28] From the post-World War II period to the mid-1960s, liberal theories were ascendant, with respect to both the social welfare approach to crime prevention and offenders and the classic liberal ideology of protecting the individual from the overreaching power of the state.[29] Liberals emphasized the social origins of crime—poverty, alienation, lack of education, discrimination—and sought to remedy these perceived causes of crime.[30] They advocated rehabilitation, rather than punishment, of convicted criminals.[31] And they sought to protect the constitutional rights of the accused, finding a responsive majority in the United States Supreme Court.[32] Some of the liberal experiments failed,[33] and

27. Perhaps it is the influence of the crime control ideology, *see* notes 47–51 *infra* and accompanying text, that causes us to rely so heavily on tinkering with law enforcement and the conviction process to eliminate crime. Perhaps it is that the costs of doing so remain hidden, while the costs of other crime prevention methods are more obvious and direct. It is far easier for legislatures to enact "tough" penalties than to consider what might be done to prevent crime generally. Another reason why we focus on the criminal justice system may be that it not only has a "unique visibility," but it also provides a powerful apparatus for the support of a particular ideology. J. REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 162–63 (2d ed. 1984). That ideology "conveys the message that there are no dangerous crimes unique to the wealthy" and that it is the poor who are responsible for crime. *Id.* at 166. It conveys the image of equal treatment of rich and poor, however, to avoid any charge of class bias, and it "conveys the message that crime is not the result of the deprivations of poverty but rather of individual moral failings." *Id.* The implicit ideology of criminal law focuses on individual offenders, diverting attention from the evils present in the social order and in established institutions. *Id.* at 144.

28. *See* Kelman, *Criminal Law: The Origins of Crime and Violence,* in THE POLITICS OF LAW 214, 220 (D. Kairys ed. 1982); *see also* R. CLARK, CRIME IN AMERICA 3–4 (1970).

29. *See, e.g.*, Bayer, *Crime, Punishment, and the Decline of Liberal Optimism,* 27 CRIME & DELINQ. 169, 172 (1981) (the main current of liberal thought is optimistic, focusing on social roots and psychological bases of crime as remediable); Currie, *Crime and Ideology,* WORKING PAPERS May–June 1982, at 26 (in the 1960s, public debate about crime was dominated by a liberal vision that linked violence to social disadvantage and held out promise that "social rehabilitation programs" would reduce the crime rate); *see also* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 227–30 (1978) (reflecting mainstream liberal ideology and solutions throughout). *See generally* R. CLARK, *supra* note 28.

30. *See* Bayer, *supra* note 29; Currie, *supra* note 29.

31. *See* Bayer, *supra* note 29, at 179–86; *see also* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL POLICY (1981).

32. The Warren Court's concern for the rights of the accused and its selective incorporation of provisions of the Bill of Rights amounted to a "revolution" in criminal procedure. *See* L. BAKER, MIRANDA: CRIME, LAW, AND POLITICS (1983); Allen, *The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases,* 1975 U. ILL. L.F. 518.

some never had a chance of succeeding as the funds and interest that supported programs disappeared.[34] Nevertheless, some remnants of liberal programs remain today, including the application to the states of important provisions of the Bill of Rights by the Warren Court.[35]

Concern for victims of violent crime—at least "innocent" victims of violent crime—was also on the liberal agenda and took the form of advocacy of "victim's compensation" statutes in the early and mid-sixties.[36] The impulse behind the enactment of victim's compensation statutes was largely humanitarian and "liberal": A social welfare argument pervades the victim's compensation literature of that era.[37] By the mid 1970s, many states had adopted some form of victim's compensation program,[38] and law journals published numerous articles on the subject.[39]

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33. Indeterminate sentencing is a prime example of a failed experiment. Based on a rehabilitative approach to the criminal sanction, the indeterminate sentence could not withstand criticism of rehabilitation itself as a proper function of the criminal sanction. *See* text accompanying notes 247–248 *infra; see also* C. SILBERMAN, *supra* note 29, at 504–05.

34. *See* Bayer, *supra* note 29, at 170–79; Curtis, *The Conservative New Criminology,* SOC'Y Mar.–Apr. 1977, at 8, 12–13; Silver, *Crime and Conventional Wisdom,* SOC'Y Mar.–Apr. 1977, at 9, 17. Longitudinal studies of social welfare programs instituted in the 1960s reveal that at least one program, Head Start, has had a salutory effect in reducing crime rates. *See Science and the Citizen, Head Starts,* SCI. AM., Mar. 1981, at 82 (commenting on Schweinhart & Weikart, *Young Children Grow Up: The Effects of the Perry Preschool Program on Youths Through Age 15,* in THE HIGH/SCOPE EDUCATIONAL RESEARCH FOUNDATION (1980) (preschool-age students who participated in enrichment program had lower arrest rates up to age 15 than members of control group)).

35. Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts,* 69 GEO. L.J. 151 (1980).

36. Penal reformer Margaret Fry first proposed victim's compensation in 1957. *See* Fry, *Justice for Victims,* in CONSIDERING THE VICTIM: READINGS IN RESTITUTION AND VICTIM COMPENSATION 54–56 (J. Hudson & B. Galaway eds. 1975)[hereafter cited as READINGS]. Fry's efforts led directly to the establishment of victim's compensation programs in New Zealand and Great Britian. The *Journal of Public Law* published a symposium on victim compensation in 1959. The *Minnesota Law Review* followed suit in 1965. In 1965 California became the first state in this country to adopt a victim's compensation program. *See* S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 153 (2d ed. 1970).

37. *See* note 358 *infra.*

38. As of 1970, California, Hawaii, Maryland, Massachusetts, and New York had adopted victim's compensation programs. *See Governmental Compensation for Victims of Violence,* 43 S. CAL. L. REV. 1, 158–93 app. (1970). Wisconsin adopted its first compensation statue in 1975. *See* 1975 WIS. LAWS ch. 344, § 3. Minnesota enacted its victim's compensation statue in 1974. *See* 1974 MINN. LAWS ch. 463, § 3. New Jersey adopted victim compensation in 1971, Alaska in 1972. *See* 1971 N.J. Laws ch. 317, § 1; 1972 Alaska Sess. Laws ch. 203, § 1.

39. *See, e.g., Compensation to Victims of Personal Violence: An Examination of the Scope of the*

Then the liberals began to lose momentum and initiative in dealing with the problem of crime. The disappearance of liberal influence has several possible and related explanations. First, the "crime rate" kept climbing, seemingly refuting liberal theories of crime prevention.[40] Second, crime, in the American mind, was often associated with race.[41] The liberals' arguments for racial equality created a political paradox that prevented them from confronting the relationship between race and crime[42] and the ever-present national fear of interracial crime.[43] Third, the fact that many "crime prevention" techniques historically had been used to oppress blacks and other minorities made liberals cautious: The techniques of crime control were also the techniques of oppression.[44] Finally, liberal rhetoric failed to overcome the reality and fear produced by photographs and news reports of riots, burning cities, and vicious and barbaric crimes.[45]

The decline of support for liberal approaches and the inability of liberals to solve the apparent paradoxes created by their beliefs left the crime issue to the conservatives.[46] Conservatives pointed to the failures of liberal programs and emphasized that crime was a matter of individual choice and wickedness. They adhered to the "crime control" model of criminal justice[47] that

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Problem, 50 MINN. L. REV. 213 (1965) (symposium); *Governmental Compensation for Victims of Violence*, *supra* note 38, at 1 (symposium).

40. *See* M. FLEMING, OF CRIMES AND RIGHTS: THE PENAL CODE VIEWED AS A BILL OF RIGHTS 15 (1978); E. VAN ALLEN, OUR HANDCUFFED POLICE: THE ASSAULT UPON LAW AND ORDER IN AMERICA AND WHAT CAN BE DONE ABOUT IT 35–36 (1968); J. WILSON, THINKING ABOUT CRIME 4 (1975). All of these works contain conservatively oriented chronicles of rising crime rates. *See also* Currie, *supra* note 29 (rising crime rate of 1960s made liberal vision "a shambles").

41. *See* C. SILBERMAN, *supra* note 29, at 159–61.

42. *Id.*

43. "No single event ticks off America's political schizophrenia with greater certainty than the case of a black man raping a white woman. . . . Racism and sexism and the fight against both converge at the point of interracial rape, a baffling crossroads of an authentic, peculiarly American, dilemma." S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN & RAPE 230 (1975).

44. *See* INSTITUTIONAL RACISM IN AMERICA 58–77 (L. Knowles & K. Pewitt eds. 1970). When *Furman v. Georgia* was decided by the Supreme Court, some of the Justices relied on the obvious racial discrimination in death penalty cases to strike down Georgia's death penalty statute. Furman v. Georgia, 408 U.S. 238, 242–57 (Douglas, J., concurring); *id.* at 364–65 (Marshall, J., concurring).

45. *See* Bayer, *supra* note 29, at 178–79.

46. The crime problem became "an official Republican campaign issue" by April of 1968. L. BAKER, *supra* note 32, at 210 (1983); Currie, *supra* note 29, at 26–27.

47. I will be using Herbert Packer's description and definition of the crime control model when I refer to it throughout this piece. H. PACKER, THE LIMITS OF THE CRIMINAL

emphasizes "efficiency" in the criminal process.[48] The model envisions a summary process, much like an assembly line, with reliance placed on administrative rather than judicial decisionmaking.[49] Central to the ideology of the crime control model are "the presumption of guilt"[50] and the belief "that the criminal process is a positive guarantor of social freedom."[51] The conservatives thus complained that the courts were "handcuffing" the police[52] and that swift and sure punishment was the only practical solution for the crime problem.[53] They also invoked the part of nineteenth century liberalism—often ignored by the post-World War II liberals—that rested on the premise that the individual is entirely rational and responsible for his or her actions.[54] Today, refusing to acknowledge the possible social causes of crime,[55] or dismissing those causes as insoluble,[56] con-

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SANCTION 149–73 (1968). The rhetoric and ideology of "crime control" (or "law and order") have changed little since Roscoe Pound first lectured on the issues of criminal justice sixty-one years ago. *See* R. POUND, CRIMINAL JUSTICE IN AMERICA (1945). Then, as now, the complaints were that the courts were "soft on crime" and that the crime rate had the good citizens of the nation terrified, yet the procedural protections afforded defendants then were far fewer than those available now.

48. H. PACKER, *supra* note 47, at 158.

49. *Id.* at 160.

> The model, in order to operate successfully, must produce a high rate of apprehension and conviction . . . . There must then be a premium on speed and finality. . . . [E]xtrajudicial processes should be preferred to judicial processes, informal operations to formal ones. . . . The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model.

Id. at 159.

50. *Id.* at 160 ("presumption of guilt is what makes it possible for the system to deal effectively with large numbers").

51. *Id.* at 158. Packer observes that the values contained in the crime control model are grounded "on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order. . . ." *Id.*

52. One conservative book attacking the Warren Court's decisions used this phrase for its title. E. VAN ALLEN, *supra* note 40. The law enforcement and conservative communities launched a number of stinging attacks on the Court after it decided *Miranda*. *See* L. BAKER, *supra* note 32, at 200–05.

53. *See, e.g.*, E. VAN DEN HAAG, PUNISHING CRIMINALS 157–63 (1975) (arguing that offenders are not caught or punished as a result of court decisions and that police and trial court judges are thwarted by laws and appellate decisions that favor defendants).

54. Van den Haag, *Crime, Punishment, and Deterrence*, SOC'Y, Mar.–Apr. 1977, at 11.

55. E. VAN DEN HAAG, *supra* note 53, at 155–57.

56. *See* Wilson, *Thinking About Crime*, ATL. MONTHLY, Sept. 1983, at 72 [hereafter cited as Wilson, *Thinking*]; Wilson, *Thinking About Thinking About Crime*, SOC'Y, Mar.–Apr. 1977, at 10.

servatives place most of the responsibility for crime and crime control on the "criminal justice system" and particularly on the courts.[57]

According to the conservative argument, deterrence often doesn't work,[58] rehabilitation doesn't work,[59] and retribution[60] and incapacitation[61] are the only tenable justifications for punishment of criminals. Throughout the 1970s, "tough" sentencing laws passed legislatures with regularity.[62] Yet even with record numbers of persons in prison,[63] and later with the reappearance

57. Van den Haag asserts: "The probability of convicting the guilty is greatly reduced in the U.S. by (a) delay, (b) the exclusionary rule, and (c) literally endless appeals allowed defendants from state to federal courts." E. VAN DEN HAAG, *supra* note 53, at 164.

58. One conservative author has been unwilling to abandon deterrence theory, entirely, however. *See* Wilson, *supra* note 56, at 72–84.

59. *See, e.g.*, E. VAN DEN HAAG, *supra* note 53, at 184–91 (arguing that rehabilitation is impossible without retributive punishment and that rehabilitation does not affect recidivism rates).

60. When the California legislature enacted determinate sentencing after almost 60 years of indeterminate sentencing based on a rehabilitation premise, the determinate sentencing law began: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL. CODE § 1170(a)(1) (West 1984); S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 205 (4th ed. 1983).

61. Renewed interest in incapacitation has resulted in "habitual offender" or "career criminal" statutes in many states. *See, e.g.*, CAL. PENAL. CODE §§ 999b–h (West Supp. 1984) (establishing "career criminal" program); CAL. PENAL. CODE §§ 667, 667.5, 667.7 (West 1982) (increasing sentences for "habitual offenders"); KY. REV. STAT. ANN. § 532.080 (Baldwin 1984) (providing that the jury determine whether the offender is a "persistent felony offender" and allowing imposition of life imprisonment on such finding); LA. REV. STAT. ANN. § 15:529.1 (West 1981) (making life imprisonment without possibility of parole a possibility for people convicted of a prior felony); N.Y. PENAL LAW § 70.10 (McKinney 1975) ("persistent felony offender" may be sentenced to a minimum of 15–25 years or a maximum of life imprisonment).

62. The oft-cited example is the change in California's indeterminate sentencing law in 1976, when the penal code was revised to declare "that the purpose of imprisonment is punishment." CAL. PENAL CODE § 1170(a)(1) (West 1984). Governor James Thompson of Illinois recently wrote that "[t]he tough sentencing laws I fought for in the General Assembly and which are now law . . . are not the primary causal factor in prison overcrowding." Thompson, *Introduction: Illinois' Response to the Problem of Prison Crowding*, 1984 U. ILL. L. REV. 203, 204. Those "tough sentencing laws" became effective in 1978. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U. ILL. L. REV. 231, 237; *see also* B. JACKSON, LAW AND DISORDER 25–26, 151–54 ("tough on crime" postures used by New York gubernatorial candidates in the 1970s; legislators respond to the level of fear and anger transmitted to them by their constituents).

63. In 1970, there were approximately 196,000 persons incarcerated in prisons in the United States, or 97 prisoners per 100,000 in the population. In 1980, there were approximately 321,000 prison inmates, or 142 prisoners per 100,000 people. By 1983, the number of prisoners had grown to 455,000. Since the beginning of 1983, the prison

of the death penalty,[64] the "crime rate" continued to increase.[65] In part, conservatives attributed this failure to control crime to the courts. Conservatives had never truly accepted the Warren Court's concern for the rights of the accused: The exclusionary rule and *Miranda* requirements particularly irritated them, because they firmly believed that these rules interfered with efficient law enforcement and crime control.[66] In their view, the courts were letting desperate criminals loose on "legal technicalities" and preventing the police from protecting the innocent public, and therefore were to blame for the high rate of crime. Yet the Bill of Rights speaks of restraints on the state's power to act against the *individual*, and the procedural protections adopted by the Warren Court sought to remedy the imbalance of the power of the state against the individual accused of a crime. The "discovery" of the crime victim provided an individual to substitute for the state on the side of the scales opposite the accused, thus making it appear that the balance was more "equal."[67]

While law enforcement officers and prosecutors have long understood the symbolic value of the victim, the politicization of the

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population in this country has increased by approximately 222 inmates per day. *See* Bencivenga, Book Review, Christian Sci. Monitor, Mar. 14, 1984, at 18, col. 1.

64. After nearly a decade in which no one was executed in the United States, the Supreme Court upheld Georgia's death penalty statute. Gregg v. Georgia, 428 U.S. 153 (1976). The pace of executions did not accelerate, however, until 1983, after the Court decided four cases that arguably overruled its decision in Furman v. Georgia, 408 U.S. 238 (1972). *See* Weisberg, *Deregulating Death,* 1983 SUP. CT. REV. 305 (explaining the Court's doctrinal retreat from death penalty cases); Press, *Rate of Executions Picks up in U.S.*, Christian Sci. Monitor, Nov. 15, 1984, at 3, at col. 2 (six persons executed between 1977 and 1983, five executed in 1983, and nineteen executed as of November 8, 1984).

65. The crime rate has, for the moment, decreased slightly. Explanations for the slight decrease in index offenses vary enormously, depending on ideology. Criminologists have observed that the aging of the population accounts for much of the decrease, while political conservatives attribute the phenomenon to tougher law enforcement and penalties.

66. *See* Gross, *Some Anticrime Proposals for Progressives,* 234 NATION 137 (1982) (after 1980 election, President Reagan made "sweeping attack" on ideology of 1950s and 1960s and proposed that the exclusionary rule be reformed, preventive detention statutes be enacted, and longer prison terms be imposed). *See generally* L. BAKER, *supra* note 32.

67. In 1968, for example, Van Allen wrote: "What good are our police. . . . if a court like the U.S. Supreme Court continues to put what is tantamount to a premium on lawlessness while it in effect penalizes the victim. . . . We have seen what the criminal-protecting U.S. Supreme Court decisions have done to the cause of justice. They have made the criminal's rights superior to those of their victim." E. VAN ALLEN, *supra* note 40, at 119. Most of the political rhetoric of the late 1960s and the 1970s, however, focused on public fear of crime—a "future victim" posture—and largely overlooked the symbolic value of past victims.

symbol is of more recent origin. The complaint of officers and prosecutors that the courts "never think about the victim" when deciding cases in favor of defendants made "intuitive" sense: A violent crime involves at least two persons, but the focus seemed to be only on the one least "deserving" of attention or regard—the offender. Although for quite some time this argument had been only sporadically raised, by the middle of the 1970s different groups began to focus their attention on the victims of particular crimes. For example, the women's movement did much to emphasize the plight of rape victims in the legal process,[68] while the more recently formed group, "Mothers Against Drunk Driving" (hereinafter referred to as MADD), brought the victims of drunk drivers to public attention.[69] The success of these groups concerned with particular crimes and crime victims served to highlight the general importance of "victims" as an effective political symbol.[70] Conservatives thus began rhetorically to paint "the victim" as a sympathetic figure whose rights and interests could be used to counterbalance the defendant's rights, and called for a new balance to be struck by courts and legislatures.[71]

As a result of the convergence of these factors, the subject of "victim's rights" has received enormous political, media, and

68. As the women's movement gained strength, focus on deconstructing the mythology of rape grew in both medical and legal circles. *See, e.g.*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 3 (1977) ("[I]t is fitting that the 'rediscovery' of rape should coincide with the growth of the Women's Movement. . . . Women have . . . played a key role in lobbying for reforms in the law of rape."); *Rape: "The Ultimate Violation of the Self,"* 133 AM. J. PSYCHIATRY 436, 437 (1976) ("Recent attitudinal shifts have been largely due to the initiative taken by countless numbers of women who have begun to sensitize our medical, social and legal institutions about the extent to which cultural biases have determined the maltreatment of the [rape] victim.").

69. *See* note 76 *infra* and accompanying text.

70. The forces of "law and order" have been quite receptive to the lobbying by groups representing specific classes of victims. For example, the California rape shield statute, CAL. EVID. CODE §§ 782, 1103 (West 1974), was titled the Robbins Rape Evidence Law after its co-sponsor, conservative Republican Senator Alan Robbins. The name of liberal Senator George Moscone, a co-author, is not associated with the rape shield law in California. Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1554 n.15 (1975).

71. *See, e.g.*, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982)(recommendations for action by governmental agencies) [hereinafter cited as TASK FORCE]; N.Y. STATE COMPENSATION BOARD, A BILL OF RIGHTS FOR CRIME VICTIMS, *in* 5 VICTIMOLOGY 428 (1980) (recommendations similar to those of the President's Task Force); Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 AM. PSYCHOLOGIST 107 (1985) (recommending, inter alia, greater victim participation in criminal process).

legal attention.[72] Both Congress[73] and the states[74] have enacted victim's rights legislation, the President's Task Force on Victims of Crime has published its final report,[75] and groups such as MADD and "Parents of Murdered Children" continue to receive national attention.[76] Victim's rights proponents have succeeded in inducing the adoption of preventive detention laws in at least nine states.[77] Victim's rights advocates have played a role in bringing about other changes in criminal law and procedure.[78] Partly as a result of victim's rights advocacy, the number of laws requiring mandatory restitution to victims by offenders has also increased.[79]

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72. *See, e.g.*, L. FORER, CRIMINALS AND VICTIMS (1980); M. HYDE, *supra* note 25; R. REIFF, *supra* note 25; Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587 (1982); Goldstein, *supra* note 21; Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 U.C.L.A. L. REV. 52 (1982); R. ELIAS, VICTIMS OF THE SYSTEM: CRIME VICTIMS AND COMPENSATION IN AMERICAN POLITICS AND CRIMINAL JUSTICE (1983) (empirical study of victims and victim compensation programs in New Jersey and New York); Burgess & Holstrom, *Coping Behavior of the Rape Victim*, 133 AM. J. PSYCHIATRY 413 (1976) (stages of coping with the event); Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408 (1976) (discussing reactions to victimization of rape victims); *Reactions to Victimization*, 39 J. SOC. ISSUES 1 (1983) (collection of articles and studies dealing with effects of criminal victimization and of victimization by disaster or disease). *See generally Victimology*, a journal, started in 1976, which specializes in criminal victimization topics.

73. Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified at 18 U.S.C. §§ 1501, 1502, 1512-15, 3579-80 (1982)).

74. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 258B (West 1983); R.I. GEN. LAWS §§ 12-28-1, 12-28-8 (Supp. 1983); W. VA. CODE §§ 61-11A-7 (Supp. 1984).

75. *See* TASK FORCE, *supra* note 71.

76. Mothers Against Drunk Driving (MADD) was founded in 1980 by a California woman, Candy Lightner, after her daughter was killed by a drunk driver. *See Lightner to Speak in Palo Alto*, Peninsula Times Tribune, May 17, 1984, at E-1, col. 4. MADD now has at least 258 chapters nationally and approximately "300,000 supporters." *President's Message*, 3 MADD NATIONAL NEWSLETTER 1 (Spring 1984).

Bob and Charlotte Hunninger of Cincinnati, Ohio, founded "Parents of Murdered Children" in 1978, for the purpose of providing support for parents whose children had been killed. *See* Miller, *Read This if You Have Kids*, San Jose Mercury News, Apr. 17, 1984, at 1B, col. 1.

77. ARIZ. CONST. art. I, § 22(2), (3); CAL. CONST. art. I, § 28(e), (g) (as amended on June 8, 1982); COLO. CONST. § 19(1)(b); MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; TEX. CONST. art. I, § 11a; WIS. CONST. art. I, § 8(3); GA. CODE ANN. § 17-6-1(b)(2), (c) (Supp. 1984); UTAH CODE ANN. § 77-20-1 (1980).

78. The California initiative passed in 1982 instituted radical changes in California law. *See* note 87 *infra*. And in New Mexico, for example, a murder victim's mother has been successfully lobbying for changes in criminal procedure similar to those contained in California's victim's rights initiative. *See Outrage: Crime Victims Strike Back*, broadcast by KPIX in San Francisco (Apr 13, 1984); *see also* Frymer, *Documentary Details Crime Victims' Outrage*, San Jose Mercury News, Aug. 18, 1983, at 9C, col. 1.

79. *See* notes 315-317 *infra*; *see also* Schmalz, *Crime Victims Seek a Greater Voice*, N.Y.

Most of the victim's rights activity has been far from dispassionate, and currently, the victim's rights "movement" has a decidedly conservative bent.[80] Although "victim's rights" may be viewed as a populist movement responding to perceived injustices in the criminal process, genuine questions about victims and victimization have become increasingly coopted by the concerns of advocates of the "crime control" model of criminal justice.

The phrase "victim's rights" has been used by the conservatives to invoke two symbols that tend to overwhelm critical analysis of proposals made in the name of victims. In the criminal law context, the word "victim" has come to mean those who are preyed upon by strangers: "Victim" suggests a nonprovoking individual hit with the violence of "street crime" by a stranger. The image created is that of an elderly person robbed of her life savings, an "innocent bystander" injured or killed during a holdup, or a brutally ravaged rape victim. "Victims" are not prostitutes beaten senseless by pimps or "johns," drug addicts mugged and robbed of their fixes, gang members killed during a feud, or misdemeanants raped by cellmates. Nor does the meaning of "victim" encompass the computer corporation whose trade secrets are stolen or the discount store that suffers petty pilfering. In short, the image of the "victim" has become a blameless, pure stereotype, with whom all can identify.

This image also takes two temporal forms. "Past victims" are those who have already been victimized and who give concrete meaning to the symbol. It is the past victim who, through lurid newspaper stories, "crime scene" shots on newscasts, and anguished statements, is drawn upon to provide the popular image of "victim." "Future victims" are those necessarily unidenti-

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Times, Mar. 6, 1985, at 17, col. 2 (describing recent lobbying efforts of crime victims in New York).

80. Conservative Republicans were the progenitors of Proposition 8, California's victim's rights initiative. Galante, *Exclusionary Rule Struck in California,* Nat'l L.J., Feb. 18, 1985, at 11, col. 1. Proponents of the sweeping constitutional amendment, mainly conservative Republicans, said the initiative was meant to stop California's traditionally liberal Supreme Court from giving defendants greater rights under the state constitution than they enjoy under the U.S. Constitution. *Id.* And, in *In re Lance W.*, a divided California Supreme Court held that Proposition 8 effectively abolished independent state grounds for the exclusion of evidence seized by the police. *In re* Lance W., 37 Cal. Adv. Sh. 3d 873, 210 Cal. Rptr. 631 (1985). *See also* Turpen, *The Criminal* In*Justice System: An Overview of the Oklahoma Victims' Bill of Rights,* 17 TULSA L.J. 253 (1981) (the Oklahoma District Attorneys Association drafted the state's victim's rights legislation; lobbying by district attorneys, law enforcement officers, and "citizens" through petition led to eventual passage).

fied persons who have not yet been mugged, robbed, assaulted, raped, or burglarized, but who may become victims at some future time. Past victims may be said to represent individual and private interests, while future victims represent the public's fear of crime and its interest in crime control. Proponents of the crime control model confuse the images of past and future victims by exploiting the public's emotional identification with the anguish of past victims simultaneously with its fear of crime and victimization.[81]

"Rights" is also a powerful rhetorical device, particularly in American history and culture.[82] The term suggests both freedom from something and freedom to do something: It suggests a certain vision of independence and autonomy.[83] In the American political context, the word almost automatically raises suspicions of oppression or deprivation and has been called into service by disparate groups seeking power, entitlements, equality, or liberty, often with great success. Hence, the terms "civil rights," "women's rights," "gay rights," "the right to life," and "the right to work" pervade the current political lexicon. Similar force attaches to the concept of "victim's rights." The term has come to mean some undefined, yet irreducible right of crime victims that "trumps" the rights of criminal defendants.[84] Although the rhetoric of proponents of "victim's rights" vacillates between notions of "past victim's rights" and "future victim's rights" without explanation or clarity, the term's predominant meaning in the political context has become that of "future victim's rights."[85]

Unfortunately, the symbolic strength of the term "victim's rights" overrides careful scrutiny: Who could be anti-victim? Thus, liberals find themselves caught in yet another apparent paradox: To be solicitous of a defendant's rights is to be anti-

81. *See* notes 170–184, 214–225 *infra* and accompanying texts.

82. L. STRAUSS, NATURAL RIGHT AND HISTORY 181–82 (1959); Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 165–66 (1970).

83. J. FEINBERG, SOCIAL PHILOSOPHY 58–59 (1973).

84. *See* texts accompanying notes 181, 220–229 *infra*.

85. The rhetoric in support of Proposition 8 repeatedly emphasized the fear of future victimization and the handcuffing of law enforcement by the courts. By contrast, the *text* of Proposition 8 mentions victims in only 3 of its 21 substantive provisions: Section 3(b) provided the victim a "right to restitution," section 6(a) promised the victim a "right to a hearing" at sentencing, and section 6(b) provided the victim a right to a hearing at parole proceedings. *See* Brosnahan v. Brown, 32 Cal. 3d 236 app., 651 P.2d 274 app., 186 Cal. Rptr. 80 app. (1982) (ballot statements and provisions of Proposition 8).

victim.[86] As a result, "victim's rights" has produced an emerging structure of criminal law and procedure that closely resembles the "crime control" model so antithetical to liberal thought. Based on a simplified concept of "victim" and an unarticulated concept of "rights," the changes in the criminal process proposed or spawned by the victim's rights movement are the same changes that have long been advocated by conservatives.[87] Ironically, these changes may do little to help even the very narrow category of past victims who give meaning to the symbol. Moreover, the symbolic manipulation of the victim successfully avoids a more serious debate about how the criminal justice process should be structured and disguises the truly revolutionary nature of the reforms proposed. Whether the reforms have anything to do with victims, and whether they are desirable, are unanswered questions. Upon examination, many of the reforms appear to fail under either line of inquiry.

II. A THEORY OF THE IMPACT OF CORE CRIME ON VICTIMS

Before exploring what role if any a victim should play in the criminal law process, it is necessary to explore what it means to be a "victim." Although a subspecialty of criminology called "victimology" has existed for approximately 35 years,[88] little information about the *experience* or psychology of crime victims is available.[89] Instead, the study of "victimology" has focused more

86. At least one liberal explicitly ignored the contradictions in trying to regain the momentum liberal programs had enjoyed in the 1960s by asserting that "[a] logical next step would be a Victim's Bill of Rights, which could provide for witness compensation, protection against reprisals, prompt return of confiscated property, progress reports on the prosecution of offenders, free legal services and restitution payments by *the criminal* or, failing that, by the government." Gross, *supra* note 66, at 139 (emphasis added).

87. The California referendum, for example, effectively abolished the right to bail in noncapital cases, CAL. CONST. art. 1, §§ 12, 28(c), attempted to abolish the fourth and fifth amendment exclusionary rules, *id.* at art. 1, § 28(d), increased minimum mandatory sentences, *see, e.g.*, CAL. PENAL CODE § 667 (West 1982), and attempted to abolish plea bargaining, *id.* at § 1192.7. The act also requires restitution to victims, CAL. CONST. art. 1, § 28(b), provides for victim participation at sentencing hearings, CAL. PENAL CODE § 1191.1 (West 1982), and allows victims to oppose parole of offenders, *id.* at § 3043 (adult offenders); CAL. WELF. & INST. CODE § 1767 (West 1982) (juvenile offenders). These changes seem to reflect reforms advocated by conservatives. *See* note 66 *supra.*

88. Hans von Hentig is usually credited with founding this subspecialty in H. VON HENTIG, THE CRIMINAL AND HIS VICTIM: STUDIES IN THE SOCIOLOGY OF CRIME (1948). *See also* S. SCHAFER, THE VICTIM AND HIS CRIMINAL, A STUDY IN FUNCTIONAL RESPONSIBILITY 39–59 (1968). *See generally* VICTIMOLOGY (I. Drapkin & E. Viano eds. 1974). The victimologists now have their own scholarly journal entitled *Victimology.*

89. Explicitly recognizing the relative lack of psychological studies of the conse-

on sociological questions—for example, who is likely to be victimized, what is the incidence of victimization, and what are the outcomes of social services for victims. Thus, while we may *assume* many things about crime victims, few of us *know* much about the experience and its effects.

It is difficult to assign any role to victims in our criminal system without some appreciation of the experience of the victim and the psychological consequences of victimization for the individual. This part proposes a unifying theory of the individual experience of victimization as it relates to the individual[90] and discusses the psychological effect of violent crime[91] on victims as a result of the victims' sudden confrontation with the existential issues of mortality, meaning, responsibility, and isolation.[92] If this theory is correct, and recent research supports many of its propositions,[93] it indicates that many current victim's rights pro-

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quences of victimization, the *Journal of Social Issues* has published one symposium on the effects of various types of victimization, *see Symposium, Reactions to Victimization*, 39 J. Soc. Issues 1-227 (1983), and another exclusively addressing the effects of criminal victimization, *see Symposium, Criminal Victimization*, 40 J. Soc. Issues 1–115 (1984); *see also* Fischer, *A Phenomenological Study of Being Criminally Victimized: Contributions and Constraints of Qualitative Research*, 40 J. Soc. Issues 161 (we know more about reported fear of crime and indices of fear than experience of victimization); Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974) (literature on rape provides little information on physical and psychological effects of rape).

90. The basic theory this piece proposes is not original, but rather follows closely the concepts and analysis developed by Dr. Irvin Yalom. *See* I. Yalom, Existential Psychotherapy (1980); *see also* R. May, Discovery of Being: Writings in Existential Psychology (1983); R. May, Power and Innocence: A Search for the Sources of Violence (1978) [hereinafter cited as R. May, Power]; R. May, The Meaning of Anxiety (rev. ed. 1977); R. May, Man's Search for Himself (1953); R. May, Love and Will (1969); B. Bettelheim, Surviving and Other Essays (1979); V. Frankl, Man's Search for Meaning (3d ed. 1984); K. Erikson, Everything in Its Path (1976).

91. Throughout the piece, I will discuss only the effects of "core" crimes on victims, because the effects of other crimes are unlikely to be as severe in most instances and because the victims of core crimes provide the symbol that gives force to the entire victim's rights movement.

92. Objective writing does not, and perhaps cannot, capture the nature of experiences relating to death, meaning, freedom and responsibility, and existential isolation as well as perhaps fiction or poetry can. What follows is an effort to sketch a simple analytical framework, rather than an effort to impart a complete understanding of these issues.

93. *See, e.g.*, Burgess & Holstrom, *supra* note 89 (rape victims experience acute stress reaction to life-threatening situation; fear of death is the primary component of the experience of rape); Janoff-Bulman & Frieze, *A Theoretical Perspective for Understanding Reactions to Victimization*, 39 J. Soc. Issues 1 (1983) (studies indicate that victimization causes the destruction of the assumption of invulnerability and the loss of a sense of meaning and of control); Silver, Boon & Stones, *Searching for Meaning in Misfortune: Mak-*

posals are problematic at best and may actually be psychologically destructive to the victim.

For many years mental health professionals assumed that psychological disturbances experienced by victims of disasters had their source, in part, in the individual's preexisting emotional pathology.[94] But studies of prisoners of war,[95] survivors of the Holocaust,[96] and victims of "natural" disasters[97] indicate that this assumption is inaccurate.[98] These studies of victims are particu-

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ing Sense of Incest, 39 J. Soc. Issues 81 (1983) (studying whether finding meaning aided incest victims in coping with experience).

94. *See* K. Erikson, *supra* note 90, at 184. This assumption persists to some extent today. The *Diagnostic and Statistical Manual* of the American Psychiatric Association notes that "Post-Traumatic Stress Disorders" caused by severe trauma are influenced by prior adjustment: "[P]reexisting psychopathology apparently predisposes to the development of the disorder." 3 American Psychiatric Association, Diagnostic and Statistical Manual 237 (1981). But this somewhat glib conclusion has been contradicted by some prominent psychiatrists. Bettelheim, for example, rejects the hypothesis that reactions to extreme trauma are necessarily defined by preexisting emotional problems. B. Bettelheim, *supra* note 90, at 28–35. And the evidence from studies of Vietnam veterans suffering from the disorder is inconclusive as well. *See* M. MacPherson, Long Time Passing: Viet Nam and the Haunted Generation 192–93, 197–207 (1984); *see also* Lyons, *More Vietnam Veterans Are Turning to Therapy,* N.Y. Times, Nov. 13, 1984, at C1, col. 1 (American psychiatrists refused to believe that Post Traumatic Stress Disorder existed at all for a long time, despite studies and speculation dating back to World War I that war and other catastrophes leave deep traumatic scars).

95. *See, e.g.,* R. Lifton, Thought Reform and the Psychology of Totalism (1961) [hereinafter cited as R. Lifton, Thought Reform]; *see also* R. Lifton, Home From the War (1973).

96. *See, e.g.,* B. Bettelheim, *supra* note 90, at 24–33, 105–11. By making the comparison and noting the similarities, I do not wish in any way to trivialize the monstrous horror of the death camps, nor the long-lasting consequences of the camp experience for survivors.

97. Kai Erikson's study of the effects of a flood that destroyed several small towns in West Virginia and killed many people contains the same themes as do other studies of extreme experiences. *See* K. Erikson, *supra* note 90. Accounts of other forms of disaster—no matter how relatively horrifying to outsiders—also reflect reactions of loss, grief, fear, and disorientation in the aftermath of the experience. *See* R. Lifton, History and Human Survival 117–94 (1970) (detailing reactions of Hiroshima survivors); Quanstrom, *Burning Memories,* San Jose Mercury News, Sept. 26, 1983, at 1A, col. 3 (detailing reactions of neighborhood in San Diego, California, five years after a jet crashed).

98. In some instances, prior experiences do impede recovery from a disaster. When an individual "has undergone too severe or too frequent early traumatic experiences" and later experiences sudden and severe trauma, recovery from the later experience may be extremely difficult. *See* F. Fromm-Reichman, Psychoanalysis and Psychotherapy 93–94 (1959). But even "normal" people depend on dissociation of traumatic events to master their existence. *Id.* Although a recent study of rape victims indicated that pre-assault psychological symptoms were the most likely predictors for long term retention of symptoms, the relationship diminished over time. Sales, Baum & Shore, *Victim Readjustment Following Assault,* 40 J. Soc. Issues 117, 122–23 (1984). Moreover, the authors found that other variables influenced manifestations of symptoms at

larly relevant because the recent literature on rape indicates a degree of common experience between rape victims and other disaster victims.[99] Anecdotal evidence[100] and other studies[101] also suggest that a similar community of experience exists among victims of other crimes.

A. *Psychological Issues Raised by Victimization*

Sudden victimization can lead to extreme trauma.[102] Kai Erikson has defined extreme trauma as "an assault on the person so sudden and so explosive that it smashes through one's defenses and does damage to the sensitive tissues underneath."[103] What I term the "core crimes" of homicide, rape, kidnapping, robbery, and aggravated assault are the crimes feared most; the effects of these crimes on individuals would appear to fall within the definition of extreme trauma. Core crimes threaten our existence,

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various times. *Id.* at 129. *Cf.* R. LIFTON, THOUGHT REFORM, *supra* note 95, at 86 (personal responses, while similar, depended "largely upon" character traits, "emotions and identities developed within [the person] during. . . . entire previous life"); Lyons, *supra* note 94, at 21, col. 1 (Veterans Administration estimates that 350,000 to 400,000 Vietnam veterans suffer from disorder in some form: " 'every patient is different' ").

99. *Compare* Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations,* 133 AM. J. PSYCHIATRY 405 (1976) (rape is traumatic external event that breaks balance of ego adaptation and environment, resulting in guilt, phobic reactions, anxiety, and depression), *with* K. ERIKSON, *supra* note 90, at 156–57 (medical terms for conditions present in 93% of flood survivors include depression, anxiety, phobia, post-traumatic neurosis; Erikson's terms include confusion, despair, hopelessness).

100. Strikingly common themes run through confidential conversations that I have had with crime victims and their families. Although each person with whom I have talked has had various behavioral responses to the crime and its aftermath, all of these people experienced feelings of fear, anxiety, and loss of security or control. Many have asked why they were victimized; those who have not explicitly asked "why," devised their own explanations for their victimization. Most have attempted to find some meaning in the event, whether by blaming themselves or by searching elsewhere. A few have become totally isolated from others. But all have limited their activities in one way or another.

101. The sexual assault victims with whom I have spoken experienced reactions similar to those reported in formal studies. Some of the victims had specific fear reactions to the location of the assault, and others experienced a more generalized fear reaction. All but one had moved from the area where the assault had taken place. Similar reactions were found by Scheppele and Bart. Scheppele & Bart, *Through Women's Eyes: Defining Danger in the Wake of Sexual Assault,* 39 J. SOC. ISSUES 63 (1983). *See generally* K. ERIKSON, *supra* note 90; Metzger, *It Is Always the Woman Who Is Raped,* 133 AM. J. PSYCHIATRY 405 (1976); Maganini, *Crime Victim Aid Plan Suffering From Neglect,* San Francisco Chron., Oct. 17, 1983, at 1, col. 5 (statements by assault, mugging, and rape victims about experiences); *Rape,* Stanford Campus Report, Jan. 27, 1982, at 5 (anonymous interviews with two victims of sexual assaults).

102. B. BETTELHEIM, *supra* note 90, at 28.

103. K. ERIKSON, *supra* note 90, at 253.

either literally, as in homicide, or indirectly, as in assault, and remind us of the fragility of life. The intrusiveness of these crimes threatens and denies a victim's "personhood," subjecting the victim to devastating psychological consequences. In short, these violent crimes create an "urgent experience that propel one into a confrontation with one's existential 'situation' in the world."[104] The more extreme the experience, the more likely the resulting psychic damage.[105] The crimes of robbery, rape, kidnapping, and attempted murder directly force victims to confront their own mortality, an experience that "has the power to provide a massive shift in the way one lives in the world."[106]

The terror of death, however, "is of such magnitude that a considerable portion of one's life energy is consumed in the denial of death."[107] Thus, many people engage in "death denial"—the belief by an individual that while others can die, he or she is immune to death.[108] In the context of criminal victimization, this

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104. I. YALOM, *supra* note 90, at 159.

105. Bettelheim has observed that the worst situation for an individual is "[w]hen we are abandoned and immediate death is possible and likely . . . . Then the effects are catastrophic. The combined sudden breakdown of all . . . defenses against death anxiety projects us into . . . an *extreme situation*." B. BETTELHEIM, *supra* note 90, at ll (emphasis in original). In his study of Westerners imprisoned by the Chinese and subjected to "thought reform," Lifton found that four years after the experience, "my subjects still bore marks of both fear and relief. The fear was related to . . . the fear of total annihilation." R. LIFTON, THOUGHT REFORM, *supra* note 95, at 238.

106. I. YALOM, *supra* note 90, at 159. Studies of the impact of near-death experiences have not concentrated as much on victims of violent crime as they have on accident victims, unsuccessful suicides, and people with terminal illnesses. Some of these studies indicate that *positive* changes may result from the experience—that realization of the previous nature of life may sharpen one's awareness, *see id.* at 33–38, result in a change in priorities, and lead to enhanced relationships with others, *id.* at 35. This may not be as true for crime victims, however. A failure of crime victims to benefit from their confrontation with death may be an effect of being labelled a "victim" or may be a result of a lack, caused by society's intense ambivalence toward crime victims, of any social support. *See* notes 139-147 *infra*. Whether crime victims experience an enhanced appreciation for life because of their confrontation with death is an open question at this time.

107. I. YALOM, *supra* note 90, at 41.

108. *See* Perloff, *Perceptions of Vulnerability to Victimization*, 39 J. SOC. ISSUES 41 (1983) (nonvictims tend to underestimate likelihood or frequency of negative life events and appear to maintain illusion of unique invulnerability). Dr. Yalom borrows from Tolstoy's *Death of Ivan Ilych* to illustrate the belief in special protection from death and harm:

> The syllogism he had learnt from Kiezewetter's Logic: "Caius is a man, men are mortal, therefore Caius is mortal," but certainly not as applied to himself. That Caius—man in the abstract—was mortal, was perfectly correct, but he was not Caius, not an abstract man, but a creature quite, quite separate from all others. . . . It cannot be that I ought to die. That would be too terrible.

I. YALOM, *supra* note 90, at 117–18 (*quoting* L. TOLSTOY, THE DEATH OF IVAN ILYCH AND OTHER STORIES 131-32 (1960)).

denial is related to the belief that although violent crime happens to others, it won't happen to oneself. Actual victimization shatters these assumptions, and the lack of control that a victim feels during an assault deprives her not only of her belief in invulnerability, but also of her sense of control and autonomy in the world.[109] In this way, victimization forces individuals to confront their own mortality, but because people cannot sustain the experience of pure death anxiety for long, the anxiety may be displaced, denied, or repressed.[110] As a result, fear of revictimization,[111] feelings of helplessness,[112] loss of a sense of control over one's destiny, and lack of security[113] become "typical" reactions to an intrusive confrontation with death. Indeed, survivors of disasters may conclude that life owes them something,[114] or may commit suicide in response to death anxiety.[115] And victims of violent crime respond similarly.[116]

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109. Scheppele and Bart found that women who had followed "the rules of rape avoidance" were more likely to have severe reactions to the assault than those who knew that they were in a dangerous situation at the time of the attack. To be assaulted when one has taken all appropriate measures to avoid assault is a horrifying reminder that one is not in control of one's fate. Scheppele & Bart, *supra* note 101, at 76–78. The severity of the reaction to being attacked in "safe circumstances" is related to the loss of control, not just of the attack itself, "but for the future as well." *Id.* at 79. Peterson and Seligman suggest that criminal victimization may increase feelings of helplessness or reinforce already existing learned helplessness, for "when uncontrollable bad events *precede* helpless behavior, and when the helpless individual expects future responding to be futile, it may well be that learned helplessness is operative." Peterson & Seligman, *Learned Helplessness and Victimization,* 39 J. SOC. ISSUES 103, 107 (1983).

110. *See* R. LIFTON, THOUGHT REFORM, *supra* note 95, at 148–49 (apparent resisters to thought reform used denial and repression as coping strategies); *see also* I. YALOM, *supra* note 90, at 44–45.

111. *See* Krupnick, *Brief Psychotherapy with Victims of Violent Crime,* 5 VICTIMOLOGY 347, 348 (1980). Once the illusion of invulnerability is shattered by an assault, victims may even overestimate the likelihood of another assault. Tyler, *Assessing the Risk of Crime Victimization: The Integration of Personal Victimization,* 40 J. SOC. ISSUES 27, 45 (1984).

112. *See* Peterson & Seligman, *supra* note 109.

113. *See* Scheppele & Bart, *supra* note 101.

114. *See* C. SILBERMAN, *supra* note 29, at 19–21.

115. Suicide paradoxically "relieves" death anxiety by giving the individual ultimate control over his or her own death. I. YALOM, *supra* note 90, at 122, 197–99. Numerous rape victims, Vietnam veterans, and survivors of Hiroshima have responded to their victimization with suicide attempts or successful suicides. *See, e.g.,* T. BENEKE, MEN ON RAPE 164 (1982) (suicide attempts by rape victims are not uncommon); M. MACPHERSON, *supra* note 94, at 239 (detailing suicide rates of Vietnam veterans); R. LIFTON, *supra* note 97, at 117-94 (discussing suicide as a response to the nuclear attack on Hiroshima); *see also* Stipp, *Cancer Threat Seen for Vietnam Vets in Study of Deaths,* Wall St. J., Jan. 29, 1985, at 42, col. 6 (suicide rate among Vietnam veterans in Massachusetts is 58% above the expected rate).

116. One recent study of 94 sexual assault victims found that 91% of women who

Victimization can also lead to a shift in psychological perspective from believing that one is "at home in the world" to believing that the world is a frightening or indifferent place. This shift is closely linked to the confrontation with one's own mortality, and ultimate—and inevitable—isolation from others.[117] The experience of being a victim makes all things and all other people seem unfamiliar and frightening. This unfamiliarity creates a sense of "dread"—and a feeling of nothingness—that is horrifying and objectively indescribable.[118] The support of friends and relatives may help to mitigate a victim's sense of dread and isolation by helping the victim begin to feel secure in the world again. But to feel at home in the world, to dispel dread, the victim may also seek to find meaning in the experience.

The question "for what?"[119] exemplifies the search for the meaning of existence that in turn allays death anxiety: Because "death anxiety frequently masquerade[s] as meaninglessness,"[120] victims will often try to come to terms with their own mortality by attempting to find meaning in their victimization or in life itself.

But noninstrumental violence is terrifying precisely because it has no apparent meaning in the ordinary sense of reason or justification. "Why?" or "Why me?" are questions associated with meaning that victims frequently ask of themselves and others.[121]

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were raped in a "safe situation"—at home with the doors locked, for example—suffered from either a "diffuse" fear reaction—a view of numerous situations as dangerous— or a "total fear" reaction—a life characterized by constant, "almost unbearable" fear. Scheppele & Bart, *supra* note 101, at 78. These extreme reactions are not surprising given the intrusiveness of the crimes described; such an invasion could easily shatter the victim's illusion of invulnerability and her confidence in her ability to control life.

It is not atypical for a victim of a sexual assault to state, "I wish he'd killed me" or "if it happens again, I hope I die." *See* S. BROWNMILLER, *supra* note 43, at 406; *see also* Frazier & Borgida, *Rape Trauma Evidence in Court*, 40 AM. PSYCH. 984, 990 (1985) (a recent survey found sexual assault victims five times as likely to attempt suicide as nonvictims); Dowd, *Rape: The Sexual Weapon*, TIME, Sep. 5, 1983, at 27, 28 ("Studies show that . . . suicide attempts are fairly common after rape.").

117. *See* I. YALOM, *supra* note 90, at 356.

118. *Id.* at 43. This form of dread—of fear of nothingness—causes the world to become foreign. It is a sensation of falling, of not perceiving, of being lost. It is more than anxiety or panic in the classic meaning of those words; it is, indeed, dread.

119. P. TILLICH, THE COURAGE TO BE 111 (1952). Tillich sees death and meaning as separate existential issues, but acknowledges that the question of life's meaning is related to the consciousness of mortality. *Id.* at 170. *See also* B. BETTELHEIM, *supra* note 90, at 4.

120. I. YALOM, *supra* note 90, at 466.

121. The questions asked by the crime victim may range from the simplest inquiries to the anguished cry of Job. They may transcend causal explanations or attributions, encompassing the search for life's ultimate meaning. Human suffering seems to demand

Crime victims may seek meaning to their victimization either retrospectively by blaming themselves or others,[122] or prospectively by collapsing into helplessness,[123] feeling a duty to help other victims,[124] devoting themselves to remedying an evil,[125] or seeking to live their lives more constructively.[126] But making assumptions about victims based on their initial attributions of meaning to the event is difficult, because an individual's attribution of meaning to an event may change over time:[127] A meaning that was once adequate to explain the event may be inadequate in

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an explanation and, as Frankl observes, a victim's search for meaning in the aftermath of the event may operate at two levels: On one level is a search for meaning in one's own suffering; on the other level is a search for meaning to human suffering in general. V. FRANKL, *supra* note 90, at 178–88. Not all victims consciously pursue meaning, however. *See* Silver, Boon & Stones, *supra* note 93, at 94.

122. Most commonly, victims will blame the perpetrator, but they also frequently blame the police for failing to protect them and blame society for creating the circumstances leading to the crime.

If the word "attribution" is substituted for "blame," the questions of meaning become more apparent. *See* Miller & Porter, *Self-Blame in Victims of Violence,* 39 J. SOC. ISSUES 139 (1983) (self-blame is defined as attribution; control and meaning are supplied for victims through attribution).

123. *See* Peterson & Seligman, *supra* note 109.

124. John Walsh, the father of a boy who was abducted and murdered in 1981, has worked diligently and successfully to publicize the need for effective law enforcement in locating missing children and to obtain federal support for a national system for locating abducted children. *See* Anderson, *Missing Children's Center Gets Funding,* San Jose Mercury News, Apr. 19, 1984, at 2A, col. 5. Many rape victims eventually become involved with rape crisis counseling. Moreover, one of the factors motivating the founders of Mothers Against Drunk Driving was a desire to help families of victims.

125. Although much publicity has been given to Mothers Against Drunk Driving and their "tough" policies against drunk driving, some relatives of victims may choose to remedy what they perceive to be a greater evil. The daughter-in-law of a homicide victim, for example, chose to start a group to oppose the death penalty because "[w]e simply wanted to prevent violence from being added to violence." *See* Deans, *Murder Most Foul, But Vengeance Kills the Soul,* San Jose Mercury News, July 17, 1983, at 4C, col. 1.

126. A near-death experience can result in a reorganization of priorities and a desire to concentrate on what one finds to be meaningful. *See* I. YALOM, *supra* note 90, at 33–35. Occasionally, however, crime victims will identify with the aggressor and court danger or enter a criminal life. Scheppele & Bart, *supra* note 101, at 71 (one rape victim became a prostitute, thief, and drug abuser; another carried a knife and "became promiscuous"). The case of Patricia Hearst, who was kidnapped, tortured, and raped, only to be convicted of armed robbery, may be the most widely known example of the phenomenon of identifying with the aggressor. Ideologically the "perfect" victim symbol, Ms. Hearst received remarkably little sympathy for her plight.

127. Just as with other traumatic events, such as the loss of a significant and loved other person, there are stages of recovery and reintegration. *See* Burgess & Holmstrom, *supra* note 89, at 981, 982–84 (1974) (acute phase during first several weeks after sexual assault; long term reorganization took place at different rates for different victims); *see also* B. BETTELHEIM, *supra* note 90, at 36 ("Personal integration, and with it achievement of meaning, is a highly individual, lifelong struggle.").

light of new experiences or reflection. Finding some meaning, however, is important in helping an individual understand and accept even the most extreme experiences.[128]

Taking individual responsibility for the experience may help the victim to find meaning, because responsibility, if defined as the choosing or creating of one's experiences,[129] is related to meaning and autonomy in life. Responsibility in this sense means being "the uncontested author of an event or a thing,"[130] and "[t]o be aware of responsibility is to be aware of creating one's own self, destiny, life predicament, feelings, and . . . one's own suffering."[131] How a person perceives and defines an event, a thing, or another person, ultimately depends on his or her awareness of responsibility or authorship.[132]

Assuming responsibility for a traumatic experience is a process requiring an assertion or reassertion of control in one's life. Responsibility initially requires an individual to accept that the criminal event occurred. But a frequent first reaction to traumatic experience is a denial that the event occurred at all, in part to avoid the death anxiety produced, but also in part to avoid

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128. B. BETTELHEIM, *supra* note 90, at 34–35; V. FRANKL, *supra* note 90, at 121–23. A study of father-daughter incest victims found that, even after an average time of twenty years since the crime, over 80% of the victims responding stated that they were still searching for an understanding of the experience. *See* Silver, Boon & Stones, *supra* note 93, at 99. Those victims who had found at least some meaning coped with life significantly better than those who could not find any meaning, *id.* at 93, even though the search for meaning might not have produced a totally sufficient explanation for them.

129. *See* I. YALOM, *supra* note 90, at 218–21.

130. J.P. SARTRE, BEING AND NOTHINGNESS 633 (1956).

131. I. YALOM, *supra* note 90, at 218. Dr. Yalom adopts Sartre's definition. *Id.* In a section titled "Responsibility Awareness American Style—Or, How to Take Charge of Your Own Life, Pull Your Own Strings, Take Care of Number One, and Get 'It'," Yalom quotes an exchange between an EST (Ehrhard Sensitivity Training) trainer and a participant that illustrates "that one is responsible for being mugged." *Id.* at 256.

> EVERYTHING THAT YOU EXPERIENCE DOESN'T EXIST UNLESS YOU EXPERIENCE IT. EVERYTHING A LIVING CREATURE EXPERIENCES IS CREATED UNIQUELY BY THAT LIVING CREATURE WHO IS THE SOLE SOURCE OF THAT EXPERIENCE. WAKE UP, HANK.

Id. at 257 (quoting L. REINHART, THE BOOK OF EST 142–44 (1976) (emphasis in original)).

132. While this concept of responsibility sounds very abstract, it actually exists even at an everyday level: You see a friend on the street, you smile and say hello, but the friend does not acknowledge you. *You* respond by deciding that the friend is angry with you, or did not notice you, or is preoccupied. *How* you saw the friend was a matter of choice: You may have missed her sad expression or failed to see that she was looking in another direction.

acknowledgement that such a horrible thing could be a part of life.[133] Yet until the victim acknowledges the actual experience as hers or his alone—that *she* was raped, that *he* was mugged—the victim is virtually powerless to be free from the rapist or the mugger,[134] or to take responsibility for, and thereby reassert control over, the event and the direction of her or his life.[135]

Unfortunately for many crime victims, American culture discourages this kind of personal responsibility and instead emphasizes another type of responsibility—"blame" and fault finding. By blaming others, the victim escapes responsibility. By blaming the victim for his plight,[136] society further discourages the victim from taking responsibility for the event. Accordingly, the societal emphasis on innocence as a prerequisite to being a "real" victim, taken in combination with the confusion between "innocence" and "responsibility,"[137] make it very difficult for a victim to avoid displacing the criminal event from her experience. Moreover, the inability of other people, even those close to the victim, to accept the crime victim's experience can further isolate the victim

133. Burgess & Holstrom, *Coping Behavior of the Rape Victim,* 133 AM. J. PSYCHIATRY 413, 416 (1976) (some women denied the event; some dissociated the experience; some suppressed it). One sexual assault victim captured this phenomenon perfectly: "You don't want to believe it happened . . . . It's so unreal that you don't want to believe it happened or that it can happen." *Rape, supra* note 101, at 5, col. 3.

134. *See* note 131 *supra.*

135. Robert Lifton's formulation of responsibility postulates that adjustment occurs in three phases. The first is "confrontation," a recognition of the impact of external forces and of the potential for choice. The second is "reordering," an exploration of existential guilt and a testing of new ideas and behaviors. The third is "renewal," the choice of an ideological path. R. LIFTON, THOUGHT REFORM, *supra* note 95, at 463–67.

136. *See* W. RYAN, BLAMING THE VICTIM (rev. ed. 1976). Blaming victims for their plight tends to make them feel guilty. The trap of blame and guilt creates a bond between the victim and the event that may come to dominate the victim's life, making it impossible for the victim to live independent of the criminal event. *See* notes 268–275 *infra* and accompanying text.

137. In discussing innocence, Rollo May distinguishes between two kinds of innocence. One is "authentic innocence"—"a quality of imagination . . . [F]rom this innocence spring awe and wonder . . . . It is the preservation of childlike attitudes into maturity without sacrificing the realism of one's perception of evil, or as Arthur Miller puts it, one's 'complicity with evil.' " R. MAY, POWER, *supra* note 90, at 48–49. Naivete characterizes "pseudoinnocence," the second kind of innocence: "It is childishness rather than childlikeness . . . . [which leads us to] make a virtue of powerlessness, weakness, and helplessness." *Id.* at 49. This second form of innocence is a defense against responsibility. *Id.* at 63–64. To May, pseudoinnocence is a profound problem in American culture. *Id.* at 50, 56–57. To emphasize this form of innocence may be to discourage crime victims from taking responsibility for their experiences and lives and to encourage them to engage in ultimately self-defeating attitudes of helplessness, powerlessness, denial, or repression.

from the experience, thereby blocking successful resolution of the crisis.[138]

Victims frequently encounter social isolation and an invalidation of their efforts to come to terms with their experience, while at the same time confronting the existential isolation presented by the reality of death.[139] Experiencing a violent crime—confronting one's own death—powerfully reminds the individual that he or she *is* alone. Although others may commiserate or empathize, they cannot negate the reality of the event.[140] But friends, relatives, and others can help a victim to escape the dread of isolation. Simply because victims are isolated at one level does not mean that relationships with others are not fundamentally important for them. Indeed, it may be just the opposite: A sense of relatedness—of belonging to a larger community, of still *being*—may be essential to recovery.[141] As Buber observed, "[a] great relationship breaches the barriers of a lofty solitude, subdues its strict law, and throws a bridge from self-being across the abyss of dread of the universe."[142] The inability of friends and relatives of victims to confront the issues raised by victimization—either by "blaming the victim,"[143] minimizing the event,[144]

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138. If the victim becomes a sterotype, an "it," to other people, the potential for relationship is negated; the victim becomes objectified and relationship of the kind that mitigates isolation is precluded.

139. *See* I. YALOM, *supra* note 90, at 353.

140. *Id.* at 356. It may be the common wisdom that "the one thing that victims of crime would cherish most: to somehow wipe out the moment when assailant and victim came together; to turn back the clock 10 seconds before the crime and allow the victim to walk away . . . ." Greene, *A Violent Stranger Becomes a Lifelong Companion*, San Jose Mercury News, May 7, 1984, at 14B, col. 3. But ultimately victims cannot be free from the assault until they acknowledge that it happened.

141. "Being" is both internally and externally defined. J.P. SARTRE, *supra* note 130, at 303. Even the hermit, who eschews human contact, relates to his environment and thereby realizes his existence.

142. M. BUBER, BETWEEN MAN AND MAN 11 (1965).

143. *See generally* W. RYAN, *supra* note 136 (describing American proclivity for blaming victims for their misfortunes). Blaming victims may serve a protective function for others: If one can perceive a difference between a victim and oneself, it may be possible to maintain one's own illusion of invulnerability. A concrete example of this phenomenon appears in the book *The Onion Field*, which chronicles the kidnapping of two police officers, one of whom was murdered. The victims were blamed officially and indirectly for their fate. J. WAMBAUGH, THE ONION FIELD 235–41, 368–72 (1973).

144. In a perhaps misguided effort to console a person who has been victimized, friends or relatives frequently make such remarks as "it could have been worse," "at least you're alive," "at least they caught the guy," or "its over with; you're safe now." These statements are less than comforting when one realizes the nature of severe trauma. *See* Coates & Winston, *Counteracting the Deviance of Depression: Peer Support Groups*

or by withdrawing from the victim's distress[145]—may deprive the victim of the reassurance of relationship to others. Frequently, like Job's comforters, we are not content simply to console or to provide victims with the connection to others that they need. Rather, we tell the victim what the victim should feel or think, or we blame the victim for his or her plight. In part, nonvictims tend to blame victims, misunderstand the particular experience of victims, and expect victims to return to their "old selves" quickly in order to protect themselves from perceived threats to their own sense of invulnerability.[146] Even if members of the victim's family or community are initially responsive and supportive, tolerance for a victim's feelings of loss, anger, fear, or meaninglessness is likely to wane long before the victim has time to begin to integrate the experience.[147]

Answers to the questions of death, meaning, responsibility, and isolation vary from individual to individual, just as behavioral and psychological manifestations of these existential issues differ from victim to victim.[148] And these questions do not follow each other in the orderly way in which this discussion has presented them. They merge, overlap, and differ in saliency at particular times. The issues of victimization seldom manifest themselves clearly as "death anxiety" or crisis of meaning: Anger, fear, frustration, loss, grief, confusion, and guilt are feelings that may relate to or mask these issues, and the underlying issues may take years to express or understand.

B. *The Implications of the Theory*

Common assumptions about crime victims—that they are all "outraged" and want revenge and tougher law enforcement—

for Victims, 39 J. SOC. ISSUES 169, 174–75 (1983) (summary of studies of reactions of nonvictims to victims).

145. *Id.* Our culture places a great emphasis on "happiness" and the absence of distress. Seeing another's distress makes us uncomfortable, so we often withdraw contact.

146. *See* notes 108–109 *supra* and accompanying text.

147. Coates & Winston, *supra* note 144, at 175 ("It would appear, then, that when victims fail to quickly 'snap out of it,' others try to enforce standards indicating they should do so.").

148. Given the profound nature of the experiences of victims, it would be foolish to say that there is one "right" way to cope with the experience. Although some generalizations about the effect of extreme trauma on individuals are possible, the resolution of the crisis depends on an infinite number of external and internal variables influencing the individual. Moreover, as Bettelheim observes, "[a] survivor has every right to choose his very own way of trying to cope." B. BETTELHEIM, *supra* note 90, at 37.

underlie much of the current victim's rights rhetoric.[149] But in light of the existing psychological evidence, these assumptions fail to address the experience and real needs of past victims. The theoretical outline just presented speaks to the experience of being a past victim; the prospect of becoming a past victim as the concern of society is evidenced by the concern for future victims. In this way, violent crime touches all of us with the reality of the unpredictable, the threat of death, the dilemma of meaning, the responsibility for choice, and the reality of isolation. To the extent that we examine these issues of our own accord—to the extent that resolution comes through more voluntary reflection and experience—the concern for future victims is very different than that for past victims. For future victims, we can seek to prevent the experience, but for past victims, the experience is already a reality. For past victims, we can only seek to avoid interfering with or denying the individual victim's efforts to resolve these questions.

While questions of existence rarely manifest themselves in a pure, abstract form, the issues are nevertheless unavoidably present for all victims at some level. Past victimization catapults individuals beyond what nonvictims or future victims can know; the ontological rules change. What is "good" for future victims—the prevention of harm, the diminution of evil—is no longer applicable to past victims, who, for at least an instant, have seen the abyss. The rape victim who becomes hysterical soon after police arrive provides an illustration of this tension: Hysteria may be a necessary release of tension and an affirmation of being for someone who has just seen the prospect of nonbeing.[150] But in the interests of future victims—apprehension of the culprit before he creates more damage and punishment of the guilty—the police necessarily seek rationality, information, and evidence.

A victim's contact with the criminal justice system may hinder him or her from coming to grips with death, meaning, responsi-

149. *See* notes 70–71 *supra*, 266–267 *infra* and accompanying texts.

150. Ironically, the hysterical reaction is the one most likely to give the victim credibility in the eyes of the police. Although a lack of a perceptible response or affect is not unusual, it may lead the police to believe no crime occurred. *See* Berger, *supra* note 68, at 23–24 & n.150; *see also* Burgess & Holstrom, *supra* note 89, at 982 (discussing two forms of immediate emotional response to rape: one, "the expressed style, in which feelings of fear, anger, and anxiety were shown through such behavior as crying, sobbing, smiling, restlessness, and tenseness"; the other, "the controlled style, in which feelings were masked or hidden and a calm, composed, or subdued affect was seen").

bility, and isolation in innumerable ways. The criminal justice system provides a ready set of opportunities for blame and denial, proceeds on the basis of mistaken normative assumptions about victims, and emphasizes rationality—or the appearance of it.[151] To be of value to past victims of core crimes, victim's rights proposals ideally ought to assist, rather than interfere with, the victim's resolution of the experience. The remainder of this article examines the meaning of victim's rights proposals in light of both traditional legal thinking and the existential nature of victimization. Of course, the criminal justice system cannot ultimately answer the individual's questions of death, meaning, and responsibility because its focus is on the event itself; its concern is with the narrower issues of identifying the offender and determining legal responsibility. But insofar as the isolation of past victims is concerned, the criminal justice system may provide a social context in which some meaningful "connection" for the victim exists. Whether or not "victim's rights" provides this connection will be a central part of the remaining inquiry.

III. A Composite of Victim's Rights Proposals

One persistent image of the American criminal process is that it "revictimizes" the victim. The President's Task Force *Final Report*,[152] for example, portrays the ill-treatment of crime victims in a particularly apocryphal story. The *Final Report* describes the insensitive treatment of a widowed 50-year-old rape victim by the police and hospital personnel. It then details the numerous abuses that the criminal justice system inflicted upon the victim, including an indifferent and ineffective attempt at preventing threatening phone calls to the victim by her attacker from jail, an inconvenient scheduling of line-ups, unethical activities by de-

151. One study of assault and robbery victims in Brooklyn and Newark found that the motivations of victims differed from the goals of the criminal process and that victims were often dissatisfied with the performance of prosecutors, judges, and police. R. Elias, *supra* note 72, at 83–140. Twenty percent of those surveyed had negative feelings toward the "system" that manifested a transfer of blame. Typical comments included: " 'The law doesn't protect the citizen,' " and " 'I'm frustrated. I won't deal with the . . . system anymore. Next time I'll just kill him and when they take me to court I'm going to tell the judge that I want the same treatment as this guy got!' " *Id.* at 134. Although many of the victims surveyed saw a need for better law enforcement or stricter sentencing, 26% had no suggestion for improving the situation for future crime victims because they were apparently satisfied with the way in which their cases were handled. *Id.* at 135.

152. Task Force, *supra* note 71.

fense counsel, repeated failures by the prosecutor to inform the victim about her role in hearings and the trial and to promptly notify her about postponements, the emotional and financial burden of delays in the process on the victim, the enormous pressure and humiliation of testifying, and the short sentence that was eventually imposed on the rapist.[153]

The scenario presented in the *Final Report* is indeed horrifying. It is also somewhat incredible to anyone acquainted with criminal law practice, and it is insulting to judges, prosecutors, defense attorneys, and law enforcement officers. It is a composite of everything that could go wrong in the process, rather than a chronicle of an actual case.[154] Yet the scenario presented in the *Final Report*, and other horror stories like it, have led to numerous victim's rights proposals that purport to remedy the situation.[155] These proposals typically contain one or more of the following elements:

(a) that the suspect remain in custody after arrest;[156]

(b) that few, if any, delays exist between arrest and preliminary hearing, and between hearing and trial;[157]

(c) that plea bargaining either be eliminated or be victim-determined;[158]

(d) that there be minimal, if any, cross-examination of victims by defense counsel;[159]

(e) that exclusionary rules be abandoned;[160]

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153. *Id.* at 3–13.

154. The President's Task Force admits as much: "Based on the testimony of . . . victims, we have drawn a composite of a victim of crime in America today." *Id.* at 3. It nonetheless asserts, however, that the composite victim "is every victim." *Id.*

155. Senator Edward Kennedy heard "horror stories of murder, rape and torture" from witnesses advocating the abolition of parole in a hearing before the Senate Judiciary Committee, for example. *See Crime Victims' Agony*, San Francisco Chron., May 24, 1983, at 8, col. 1. One seldom hears from victims for whom the system has "worked." *But see* Silverberg, *My Mugging: Justice Is Done*, NEWSWEEK, July 4, 1983, at 13 (arguing that the press may have overemphasized those instances where malfunctions in the criminal justice system have occurred).

156. *See, e.g.*, WIS. CONST. art. I, § 8 (1981); TASK FORCE, *supra* note 71, at 22.

157. *See, e.g.*, TASK FORCE, *supra* note 71, at 57–68, 75–76.

158. *See, e.g.*, CAL. PENAL CODE § 1192.7 (West 1983); R. REIFF, *supra* note 25, at 114–17; TASK FORCE, *supra* note 71, at 65–66; Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90–92.

159. *See, e.g.*, TASK FORCE, *supra* note 71, at 21 (recommending that victims not be required to appear at preliminary proceedings and that hearsay testimony of police or other law enforcement officers be admissible instead).

160. *See, e.g.*, CAL. CONST. art. I, § 28(d); TASK FORCE, *supra* note 71, at 24 (fourth amendment exclusionary rule only); *see also* CALIFORNIA LEGISLATIVE ASSEMBLY COMM. ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8, at 9–10, 14–17 (1982).

(f) that victims be allowed to participate in sentencing;[161]
(g) that victims receive full restitution.[162]

This composite portrays an "ideal" criminal process, one that more closely resembles a model produced by crime control ideology than by supporters of a program designed to spare victims unnecessary trauma.[163] Nevertheless, it may be that these proposals do in fact benefit past victims. The composite victim's rights proposal just presented has two components: One involves the process leading up to conviction, and the other involves the process of imposing sanctions. Part IV addresses the relationship of the pre-conviction component to the psychological effects of crime on victims; Part V makes a similar inquiry with regard to the sentencing component.

IV. PRECONVICTION CHANGES AND THEIR RELATIONSHIP TO THE PSYCHOLOGICAL NEEDS OF THE VICTIM

A. *Denial of Bail and Preventive Detention Statutes*

Although the eighth amendment's prohibition against excessive bail would seem to preclude pretrial incarceration of individuals who can pay bail,[164] the Supreme Court has declined to apply the provision to the states or to address the issue of "preventive detention" of adults.[165] "Preventive detention" is the im-

161. *See, e.g.*, note 233 *infra*.

162. *See, e.g.*, notes 315–317 *infra*.

163. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 305–06 app., 651 P.2d 274, 319 app., 186 Cal. Rptr. 30, 75 app. (1982) (reprinting ballot statements); *Victim Rights Bill Fuels Get-Tough Stand*, 68 A.B.A. J. 530, 530 (1982) ("George Nicholson, a candidate for California attorney general and a member of a five-man committee pushing the initiative, said the move is an effort to counteract liberal decisions by the California Supreme Court.").

164. As of this writing, the Supreme Court has declined to decide whether preventive detention statutes violate the eighth amendment. *See, e.g.*, Murphy v. Hunt, 455 U.S. 478 (1982) (vacated as moot); United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982). *See generally* Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982) (arguing that the historical meaning and development of a right to bail and the intent of the Framers precludes the use of preventive detention).

165. *See* note 164 *supra*. The Court did seem to approve preventive detention of juvenile offenders last term. *See* Schall v. Martin, 104 S. Ct. 2403 (1984). No suggestion of incorporating eighth amendment concerns appears in the opinion; however, Justice Rehnquist, writing for the majority, may have indicated a broader interest in preventive detention by emphasizing the existence of a " 'legitimate and compelling state interest' in protecting the community from crime" while, at the same time, stating that "the harm to society may even be greater . . . given the high rate of recidivism among juveniles."

prisonment of a person *before* a formal determination of criminal culpability based on an assumption that the individual is guilty, dangerous, and should be removed from society.[166] Conservatives have supported preventive detention statutes since the Nixon era, and preventive detention can be viewed as part of the conservative support of the crime control model.[167]

Although preventive detention has slowly gained acceptance in the law, first in the area of civil commitment,[168] then by means of a specific statute adopted in the District of Columbia,[169] the rate of its acceptance has quickened because of the emergence of "victim's rights." By using both "past victim" and "future victim" rationales, conservatives have made substantial progress in formally legitimizing preventive detention.[170] Both rationales fo-

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Id. at 2410 (quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)). The majority also concluded that detention of juveniles in a juvenile facility is not "punishment," *id.* at 2414, a conclusion sharply disputed by the dissenters, *id.* at 2429 (Marshall, J., dissenting).

166. These justifications are characteristic of crime control ideology, *see* H. PACKER, *supra* note 47, at 210–14, and of conservative ideology as well, *see, e.g.*, Borman, *The Selling of Preventive Detention, 1970,* 65 NW. U.L. REV. 879, 881–84, 926–28 (1971); Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 VA. L. REV. 1223 (1969).

167. *See* Mitchell, *supra* note 166 (Nixon's Attorney General John Mitchell arguing in favor of preventive detention); *The Case for Pretrial Detention,* address by Kleindienst, ALTA Midwinter Meeting (Jan. 30, 1970), *reprinted in Preventive Detention: Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 1187, 1190 (1970) [hereinafter cited as *Preventive Detention Hearings*] ("We in the Department of Justice believe that pretrial detention is essential to any serious effort to reduce crime in the District of Columbia").

168. For example, the argument of then-Attorney General John Mitchell in support of preventive detention rested in part on an analogy to civil commitment of the mentally ill. *See* Mitchell, *supra* note 166, at 1233–34, 1241. The analogy is not entirely appropriate, however, because civil commitment is based on a treatment model rather than a punitive model. Moreover, subsequent decisions by the United States Supreme Court and other courts have required the state to prove, by at least clear and convincing evidence, dangerousness as a result of mental illness. *Compare* Addington v. Texas, 441 U.S. 418 (1979) (clear and convincing evidence required in civil commitment proceedings), *with* Estate of Roulet, 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 424 (1979) (proof beyond a reasonable doubt required for civil commitment). In O'Connor v. Donaldson, 422 U.S. 563 (1975), the Supreme Court indicated that civil commitment of the mentally ill *without* treatment might violate the due process clause. *Id.* at 577. Thus, a purely preventive detention rationale, even in the context of civil commitment, might not pass constitutional scrutiny.

169. D.C. CODE ANN. § 23–1322 (Supp. 1982). The statute provides that defendants accused of crimes of violence can be detained for 90 days if the prosecution certifies that the detention will "protect the community" or if the defendant has been convicted of a violent crime within ten years of the current offense charged. *Id.*

170. Past victims who were victimized by someone released on bail are a perfect symbol of what can happen to the innocent public and are therefore used to raise fears of future victimization. The fact that some innocent people become victims of persons

cus on fear: the fear experienced by the past victim that results from his victimization and the more generalized public fear of being a future victim. In response to both fears, several states have passed preventive detention statutes.[171] Congress, having already approved preventive detention in the District of Columbia, enacted a bill in 1984 that would make the nature of the charge presumptive evidence that a defendant should be detained in all federal criminal proceedings.[172]

1. *The use of a "past victim" rationale.*

Supporters of preventive detention have emphasized the fact that some offenders have threatened or harassed their victims to discourage prosecution.[173] Three immediate criticisms of this rationale exist: First, because some defendents threaten victims does not necessarily justify incarcerating all defendents. Second, little reliable data on the incidence of victim harassment presently exist.[174] Finally, incarcerating the accused does nothing to

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released either on bail or on their own recognizance has provided ample symbolic support for pretrial detention. *See* TASK FORCE, *supra* note 71, at 22–23.

The Justice Department recently concluded that approximately 16% of offenders released on bail were rearrested for another offense while they were out of jail. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES (1981). The study does not indicate what type of offenses resulted in the rearrest of persons on bail, nor does the percentage seem significant as a raw figure. A 1970 study by the National Bureau of Standards showed that 11% of defendants released before trial in the District of Columbia were rearrested for subsequent offenses, 25% of those charged with "dangerous" crimes were rearrested for a second misdemeanor or felony, and 17% of those defendants charged with "violent" crimes who were released were rearrested for a subsequent felony or misdemeanor. Borman, *supra* note 166, at 898–99. Thus, it may not be true that most innocent victims are victimized by persons who are out of custody awaiting adjudication of serious charges. But statistics do not respond to the emotions of fear and loathing that are raised when a person released on bail is subsequently rearrested for a serious offense.

171. *See, e.g.*, CAL. CONST. art. I, § 12; MICH. CONST. art. I, § 15; WIS. CONST. art. I, § 8(3); UTAH CODE ANN. § 77–20–1 (1980).

172. Bail Reform Act of 1984, § 203, Pub. L. No. 98–473, 98 Stat. 1976 (codified at 18 U.S.C. § 3141 (1985)).

173. *See, e.g.*, G. DEUKMEJIAN, OF JUDGES, JUSTICE, AND CRIME VICTIMS 7–8 (1980); Graham, *Lecture: Witness Intimidation,* 12 FLA. ST. U.L. REV. 238, 239 (1984) ("[w]itness intimidation is an extremely serious obstacle in the *quest for law and order* that is only now receiving the attention which it deserves") (emphasis added). *Cf.* TASK FORCE, *supra* note 71, at 19 (asserting that "threats and actual retaliation are not uncommon" in justifying proposal that addresses of witnesses not be available to defense absent "a clear need"). Ironically, intimidation of victims and witnesses was not an issue in the debates over the enactment of the District of Columbia preventive detention statute. *See Preventive Detention, supra* note 167.

174. The President's Task Force asserts that "many victims and witnesses are

prevent his friends or relatives from harassing the victim.

The most important indictment of the harassment rationale for preventive detention, however, is that it relies on a misapprehension of the fear reaction of victims. Even if the defendant is in jail, the victim may still not feel "safe."[175] Fear reactions to violent crime can generalize far beyond what the law can address: The fear reaction, based on existential terror of death, is very real to the victim, who is likely to be acutely sensitive to possible danger and may perceive a threat even where no threat exists. While locking up the accused may eradicate a specific fear, albeit an often rational one, it does not alleviate the larger existential fear reaction to victimization.[176] Although victim harrassment cannot be ignored when it exists, it hardly serves as a justification for wholesale use of preventive detention.

The second argument offered in favor of preventive detention that uses past victims is that by permitting defendants to be released on bail, the criminal justice system leaves the victim wondering whether there is "any justice in the world."[177] "Justice" in this context presumably means that the victim should be entitled to have the accused incarcerated without any formal adjudi-

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threatened or intimidated by defendants and others," TASK FORCE, *supra* note 71, at 61, but this conclusion is based on a carefully selected and impressionistic sample. By contrast, a careful study of crime victim compensation programs in Brooklyn, New York, and Newark, New Jersey, found that a total of 30% of the victims participating in the study had been threatened. However, only 19% had been threatened "sometime" after the crime had occurred; 11% were threatened at the crime scene. Moreover, 70% of the victims said that "they had never been threatened." R. ELIAS, *supra* note 72, at 99 (1983).

George Deukmejian relied on a study by the ABA Commission on Victims that found "nearly" one-third of all noncooperating witnesses "cited fear of reprisal as the reason for noncooperation" to justify his conclusion that victim intimidation seriously impedes law enforcement and prosecution. G. DEUKMEJIAN, *supra* note 173, at 7–8. Deukmejian's failure to distinguish between victims and witnesses—the latter category being broader than the former—weakens his argument. Moreover, other studies contradict the ABA study. For example, Robert Elias found that the release on bail of an assault or robbery defendant had little influence on whether victims pursued their cases in court. *See* R. ELIAS, *supra* note 53, at 106 (81% of respondents said release had no effect at all, and 18% said release had an effect; of those affected, about half said release made them fearful, and about a quarter said it made them angry). *Cf.* W. SPELMEN & D. BROWN, CALLING THE POLICE: CITIZEN REPORTING OF SERIOUS CRIME 181–82 (1981) (while delay in reporting crimes is largely attributed to inconvenience, fear of reprisal, and embarrassment and culpability, authors argue that "[o]ffenders do not retaliate against victims and witnesses very often").

175. *See* notes 112–116 *supra* and accompanying text.

176. *See* note 109 *supra*.

177. *See* note 182 *infra*.

cation of guilt. Such an egocentric demand might be a normal reaction for the individual, but personal frustration with the process of condemnation and punishment does not justify punishment before guilt is established: Imposition of the criminal sanction is largely a public response to crime, rather than an exclusively private one.[178] Although proponents of pretrial incarceration do not argue that preconviction punishment is a legitimate function of the criminal law, they assert that imprisonment prior to a guilt determination is not "punishment."[179] Theoretically, this may be true, but practically there is little difference. Indeed, the distinction between preventive detention and punishment has become infinitesimal, because most existing preventive detention statutes authorize detention upon a presumption of guilt or prior determinations of guilt.[180]

2. *The use of a "future victim" rationale.*

A final rationale in support of pretrial incarceration is that it is necessary to protect future victims. Under this "public safety" rationale,[181] past victims are relevant to demonstrate the need for

178. *See* notes 319–324 *infra.*

179. The House Report on the Comprehensive Crime Control Act of 1984 states that pretrial detention does not violate due process nor does it constitute punishment, because preventive detention "is not intended to promote the traditional aims of punishment such as retribution or deterrence." H.R. REP. No. 1030, 98th Cong., 2d Sess., 8–9, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 473. Former Attorney General John Mitchell's article in support of preventive detention never discusses the precise issue of punishment and only gives passing notice to the related problem of the "presumption of innocence." Mitchell, *supra* note 166, at 1231–32. *But see* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell,* 56 VA. L. REV. 371, 378–80, 394–96 (1970) (arguing that preventive detention is unavoidably a form of punishment because it relies on determinations of moral culpability).

180. *See, e.g.,* Pub. L. No. 98–473, tit. II, ch. I, 98 Stat. 1979–1980 (1984) (pretrial detention includes consideration of nature of offense, prior convictions, and evidence against accused); CAL. CONST. art I, § 12 (bail may be denied in felony cases where facts are evident or the presumption great and clear evidence exists that the accused is likely to cause great bodily harm to others if released); MICH. CONST. art. I, § 15 (where proof is "evident," bail may be denied if a violent felony has occurred and accused has prior convictions for violent felonies, or if a particular felony, such as robbery, was committed).

181. Public safety has been the predominant justification for preventive detention statutes. The preventive detention portion of the Victim's Bill of Rights adopted by initiative in California bore the headings "Public Safety Bail." Brosnahan v. Brown, 32 Cal. 3d 236, 300 app., 651 P.2d 274, 314 app., 186 Cal. Rptr. 30, 70 app. (1982). Justice Rehnquist's opinion in Schall v. Martin, 104 S. Ct. 2403 (1984), a juvenile preventive detention case, emphasizes the legitimacy of a governmental interest in public safety as a justification for pretrial detention of juveniles.

preventive detention *only* if they were victimized by a person who had been released from custody pending trial.[182]

Preventive detention denies free will or choice and rests on a deterministic, wicked person theory of crime.[183] The accused become "criminals," and as such, they may be removed from society for society's protection. The transformation of human beings into criminals justifies incarcerating them whether or not they have formally been found guilty of an offense.[184] Moreover, if arrest is taken as sufficient evidence of guilt, the question of punishing the innocent never arises under this rationale.[185]

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182. *See* TASK FORCE, *supra* note 71, at 22–23 ("Victims of violent crime have expressed with outrage and indignation their dissatisfaction with bail laws . . . . Victims who have been robbed or raped, and the families of those murdered by persons who were released on bail while facing serious charges and possessing a prior record of violence, simply cannot understand why these persons were free to harm them."). Elias found that, although the vast majority of victims in his study were opposed to granting bail, the opposition in part was because of confusion about pretrial detention: "Many seemed to think that pretrial detention was part of the defendant's punishment for committing the crime, and that by being released, he was 'getting off' from his crime." R. ELIAS, *supra* note 72, at 105.

183. This characterization is Kelman's. Kelman, *supra* note 28, at 216. The President's Task Force embraces this theory: "In deciding issues of bail, the court must. . . . balance the defendant's interest in remaining free on a charge of which he is presumed innocent *with the reality that many defendants have proven, by their conviction records, that they have committed and are likely to commit crimes* while at large." TASK FORCE, *supra* note 71, at 23 (emphasis added).

Despite the Supreme Court's recent acceptance of the notion that psychiatrists can predict future dangerousness for the purposes of imposing the death penalty, the ability of anyone to predict future dangerousness with much accuracy is questionable. *Compare* Barefoot v. Estelle, 463 U.S. 880 (1983) (psychiatric testimony that capital defendant is likely to commit future dangerous acts if not executed is admissible in penalty phase of capital trials), *with id.* at 916 (Blackmun, J., dissenting) (there is no evidence that psychiatrists can accurately assess future dangerousness; use of such expert testimony in penalty phase is unjustifiably prejudicial to defendants). *See also* Slobogin, *Dangerousness and Expertise,* 133 U. PA. L. REV. 97, 109–27 (1984) (clinical and actuarial predictions of dangerousness, while more accurate than random decisions, produce a significant number of false predictions of serious assaultive behavior); Wilson, *Dealing With the High-Rate Offender,* 72 THE PUB. INTEREST 52, 61–63 (1983) (the nature of the present offense and prior record are not accurate predictors of who is a high-rate offender; factors that do identify likelihood of person being especially dangerous may lead to substantial errors when applied to a specific individual).

184. For example, the President's Task Force characterizes the eighth amendment right to bail as a mere "interest" in remaining free. TASK FORCE, *supra* note 71, at 23. The transformation of a constitutional right into an interest may be justified because constitutional rights only attach to "us." Since the accused is seen as a "criminal," not as a human being, it is relatively easy to treat him differently. Negative labels have long served the purpose of justifying atrocities against others: "Gook," "Nigger," and "dirty Jew," all have taken their place as labels inescapably linked to atrocity.

185. H. PACKER, *supra* note 47, at 162–63.

Preventive detention does encourage efficiency and expediency in the criminal justice system, a central goal of the crime control model. In-custody defendants are pressured, directly or indirectly, to plead guilty to the crimes with which they are charged. If they are locked up in an overcrowded, vermin-infested, stuffy, dark, and dangerous jail, they may be motivated primarily by a desire for release, and will be much more amenable to a plea or a "deal."[186] Moreover, in-custody defendants frequently are at a disadvantage in developing factual defenses, and may even be subjected to theoretically impermissible, yet all too real, pressures from law enforcement officials to confess or to provide information.[187] In contrast, a defendant released on bail may not be as eager to proceed to trial or to plead guilty.

No convincing demonstration exists that preventive detention statutes will result in victims being harassed less frequently. Moreover, although proponents of these statutes invoke the symbol of the past victim in their campaigns to get the statutes enacted, the statutes do little to assist past victims in resolving the psychological crisis of victimization. Thus, the proponents of the crime control model have exploited the past victim to further their agenda.

B. *Rapid Processing*

A second major victim's rights proposal gives victims a "right" to a speedy trial by giving them a right to oppose continuances.[188] Victim's rights advocates frequently blame defense lawyers for obtaining continuances that unduly prolong the ag-

186. In 1978, Charles Silberman observed that "a jail sentence constitutes far more severe punishment than comparable time in prison" because of the terrible conditons in many local jails. C. SILBERMAN, *supra* note 29, at 351–52. In my experience as a public defender, clients often preferred "the joint" to the Santa Clara County main jail, and would plead even if it meant a prison term. Conditions at the jail were seen to be worse than conditions in the California prison system at that time. This may not hold true today as prison populations increase, and it may not be true in all jurisdictions, but the fact remains that many jails are so dreadful that defendants will be anxious to get out as quickly as possible.

187. In several cases, I had clients who were questioned by police officers while they were in custody, despite the fact that the officers knew they were represented by the Public Defender's Office. In one juvenile case, for example, I explicitly informed the investigating officer that my client did not wish to talk to him, only to find the officer attempting to interview my client in the detention facility a day or two later. In another case, an investigating officer persisted in asking an adult client about an offense, despite the fact that I had told the officer the client was represented by the Public Defender.

188. TASK FORCE, *supra* note 71, at 63, 67–68, 75–76.

ony of the crime victim by rendering it impossible for victims "to put their experience behind them."[189] Proponents of the crime control model view so-called stalling tactics of defense attorneys to be an overwhelming block to both efficiency and swift and sure punishment, two hallmarks of this model.

While defense abuse of continuances occurs, the development of both the prosecution and the defense in a serious case can, and does, take time.[190] Investigation, forensic tests, interviews, and visits to crime scenes, among other things, are often time-consuming.[191] And in many cases, motions must be researched, prepared, and argued. Although many of those accused of a crime turn out to be guilty, investigation and preparation in even the most seemingly impossible cases occasionally do demonstrate that the accused is in fact innocent.[192] Moreover,

189. *Id.* at 67–68, 75–76, 99.

190. In the book *Helter Skelter,* for example, the prosecutor admits that had Charles Manson insisted on his statutory right to a speedy trial after his indictment on multiple murder charges, the prosecution would have been "in deep trouble" because it did not yet have sufficient evidence to convict Manson at trial. V. BUGLIOSI & C. GENTRY, HELTER SKELTER 279 (1975).

191. Some rapid process advocates argue that Anglo-American criminal law causes artificiality in guilt determinations and that an "inquisitorial" model would "cure" the problem of delay. *See, e.g.,* M. GRAHAM, TIGHTENING THE REINS OF JUSTICE IN AMERICA: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES (1983); J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977). This is an inaccurate assumption, however. Under continental systems, preparation and investigation are also subject to the constraints of time.

192. As Packer suggests, the presumption of innocence is honored more in the breach; the criminal process actually operates on an assumption of guilt. H. PACKER, *supra* note 47, at 160, 239. As a result, the rush to judgment can result in erroneous conviction and imprisonment of the innocent before an error is discovered or admitted. For example, Lenell Geter, a black engineer tried and convicted of armed robbery, was sentenced to life in prison in Texas, despite the fact that he had no record and several of his co-workers had insisted to the prosecutor that Geter was at work at the time of the robbery. Geter served 14 months in a Texas prison before the efforts of his supervisor, co-workers, and others induced the District Attorney to acknowledge his error; the apprehension of another suspect probably also helped to convince the prosecutor. *See* Applebome, *Wedding on Again After Mistaken Life Sentence,* N.Y. Times, Mar. 23, 1984, at A14, col. 1.

In Seattle, a man was tried and convicted for a rape he insisted he had not committed. The man contacted a reporter for assistance in proving his innocence, and eventually, the police arrested another suspect who confessed. The reporter won a Pulitzer Prize for his investigative work; the innocent man lost his job and his reputation as a result of the conviction. *See* Curry, *The Wrong Man,* San Francisco Chron., Jan. 23, 1983 (Sunday Punch), at 2, col. 2; *see also* Jones, *Drifter's Lies Lead to Nightmare for 2 Innocent Black Men,* San Francisco Chron., Oct. 16, 1983, at A15, col. 1 (drifter lied to police about having been robbed by two blacks, one of whom was then convicted of robbery; drifter admitted lying before sentencing). Mandell, *Justice System Goes Astray: Victim Loses*

rushing to a judgment because of a presumption of guilt serves neither the victim nor society, particularly if the real culprit remains at large.[193]

Victims *are* likely to want a psychological "resolution" of the matter, but this kind of resolution does not ultimately depend on the outcome of the criminal case. It is simplistic to assert that the rituals of condemnation will erase so profound an experience for an individual. Continuances and delays may cause a victim to relive the event, but a victim is likely to relive portions of the event whether or not there is a delay.[194] Issues raised by victimization do not resolve themselves quickly: A reintegration and understanding of such questions as mortality, meaning, and responsibility take time. Therefore, delay may be of great benefit to a victim's psychological state,[195] and time is necessary to heal the psychic wounds created by victimization. Only for those victims who completely deny or repress their experience is a delay likely to be traumatizing, because in having to recover the experience,

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Job, Self-Respect, San Francisco Chron., June 24, 1984, at A2, col. 1 (charges against a woman accused of embezzling $50,000 were dropped after persistent efforts by defense lawyers and reporter to point out numerous defects in investigation leading to the charges).

193. In one well-publicized case involving numerous rapes of women in their homes in Columbus, Ohio, an innocent man was convicted for two rapes and served five years in prison, while the real culprit remained at large and continued to attack women until police noted the similarities in the incidents and apprehended the guilty person. *See Doctor Guilty in Rapes of 21 Ohio Women,* San Francisco Chron., Sept. 23, 1983, at 25, col. 1.

194. The President's Task Force asserts that "[v]ictims . . . are burdened by irresolution and the realization that they will be called upon to relieve [sic] their victimization when the case is finally tried. The healing process cannot truly begin until the case can be put behind them." TASK FORCE, *supra* note 71, at 75. This assertion simply is not supported by existing psychological evidence: The healing process begins immediately after a traumatic experience, although it may easily be interfered with if the victim receives improper signals from others. *See* notes 144–220 *supra* and accompanying text. Moreover, re-experiencing the event is itself part of the healing process. In re-experiencing the event, the victim can gain perspective and control over the experience.

195. It is, of course, not beneficial for victims to arrive at the courthouse only to learn that their matter has been continued to a later time. This problem, however, exists more because of miscalculations, problems of coordination, and poor communication than because of fundamental defects in the process. It can be controlled by allowing the victim-witnesses to be "on-call," *see, e.g.,* TASK FORCE, *supra* note 71, at 68, or by an effort on the part of prosecutors to make sure that the victim-witness is aware of possible delays. An explanation of structural problems such as the availability of courtrooms, the need for preparation, and the nature of the procedural steps that need to be taken is more likely to be of benefit to victims than is rushing the case through the system without regard for preparation by either side or for the victim's psychological state.

they will be without defenses or understanding.[196]

Sometimes a delay enables victims to be better prepared for the evidence that will be introduced at trial. In one case, for example, a prominent athlete was savagely murdered and dumped in an abandoned house. The police found drugs and evidence of a sexual assault at the scene. Many people, including the victim's father, were unaware that the victim had used drugs, had been bisexual, and had frequented very rough homosexual bars. The horror of learning of his son's hidden life, which police believe had a role in the son's gruesome end, was as hard a blow to the father as was the loss of his only son. Many of the victim's friends were also shocked by the information. The police arrested two suspects, but a writ filed by their attorneys caused a substantial delay in the case. Nevertheless, the delay helped the victim's father and friends recover from their shock. During the delay, they had accepted the reality of the victim's flaws as well as his truly great characteristics. If the defense were to pursue "drug-crazed homosexual panic" as the reason for the homicide, the prosecution and its witnesses would be able to withstand the accusations against the victim, and indeed, anticipate and disarm the potentially prejudicial effect of this information on the jury. It would not be easy for any of the witnesses or for the victim's father, but it would certainly be better for them than if the trial had proceeded rapidly.

Endless delays and confusion can harm victims, but rushing towards a conclusion can be equally harmful. Temporal distance from the event is important to healing, and treating the victim with respect may ultimately benefit the victim more than rapid process.

C. *Restrictions on Plea Bargaining*

Plea bargaining serves a number of pragmatic and instrumental purposes.[197] In fact, guilty pleas constitute the major propor-

196. *Cf.* Sales, Baum & Shore, *supra* note 98, at 130 (study found rapid return to normal behavior followed by increase in symptoms; further research necessary to clarify significance); Burgess & Holstrom, *supra* note 89, at 985 (victims who had not reported previous molestation or assault and who were subsequently raped had not processed earlier trauma).

197. There are three general types of pleas bargains: a plea to some charges in return for the dismissal of others; a plea to a lesser included offense in exchange for dismissal of more serious charges, with a corresponding reduction in penalty; or a plea to charges with some sentencing considerations.

tion of convictions in the United States.[198] Plea bargaining can have a "salutory" effect for the prosecution in some instances, as when a minor participant in a crime pleads to lesser charges and testifies against his coparticipants, or has the charges dismissed in exchange for truthful testimony against more culpable defendants.[199] It also permits a degree of flexibility in cases where the application of a rule would produce an unduly harsh result.[200]

Many crime control advocates and others view plea bargaining in its current form as a nefarious practice that routinely places muggers and rapists back on the streets to terrorize society.[201] This view of plea bargaining produced a provision in the

198. As high as 90% of the convictions in the United States may be the result of guilty pleas, a great number of which are undoubtedly the result of plea bargaining. *See* S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 60, at 154–55 (1983) (empirical studies show a wide range of guilty plea rates; in one study, New York had a 92.7% rate, while Pennsylvania only had a 65.5% rate); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1222 (5th ed. 1980) (quoting Chief Justice Burger's estimate that approximately 90% of defendants plead guilty); JUDICIAL COUNCIL OF CALIFORNIA, 1983 ANNUAL REPORT, 120–21 (1983) (in 1981–1982, 78% of the felony cases filed in California superior courts, other than in Los Angeles County, were disposed of by guilty plea; Los Angeles had a ratio of 82%); *see also* H. ZEISEL, THE LIMITS OF LAW ENFORCEMENT 34 (1982). *But see* Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (arguing that Philadelphia courts have largely and successfully abolished plea bargaining as chief method of disposition of cases).

199. For example, the prosecution offered immunity from prosecution to Linda Kasabian, an accomplice in the murders of seven people, if she agreed to testify truthfully against Charles Manson at trial. *See* V. BUGLIOSI & C. GENTRY, *supra* note 190, at 342.

200. A prosecutor in Santa Clara County related the following case that he had been assigned for trial: A mentally ill, but not legally insane, man who lived in his car apparently was hungry and decided to steal some food to eat. His solution was to enter a house at night, and "walk past the stereo, the television, and the cameras" to the kitchen. He opened the refrigerator and took "a jar of Skippy peanut butter and a loaf of Buttertop bread" and left. The police found him not long afterwards in his car; during the search they found a jar of crunchy Skippy peanut butter and a partial loaf of buttertop bread. The defendant admitted that he had taken them. Although the deputy district attorney assigned to try the case felt that he would have problems proving exactly whose peanut butter and bread the defendant had, he was more troubled by the fact that a strict interpretation of case law and the California Penal Code made this offense a first degree burglary, with a mandatory state prison term. The plea-bargaining policies of the office were very strict; the defendant's choice of private refrigerator instead of a grocery store made him technically guilty of a felony carrying a mandatory prison term, rather than a misdemeanor petty theft, and the deputy district attorney felt such a result was unjust. Moreover, court time would be taken up in a jury trial, and apparently the victim wasn't too upset about the loss of the food. The deputy finally persuaded his supervisor to allow him to reduce the charge to misdemeanor burglary, to which the defendant pled guilty. (Confidential communication.)

201. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 305 app., 651 P.2d 274, 319 app., 186 Cal. Rptr. 30, 75 app. (1982) (reprinting Proposition 8 ballot statements); Y.

California Victim's Bill of Rights which seeks to abolish plea bargaining in cases charging enumerated "serious felonies" and in felony driving-under-the-influence cases.[202] California law now prohibits plea bargaining in cases that charge these crimes unless the prosecution has "insufficient evidence," the testimony of a "material witness cannot be obtained," or "a reduction or dismissal would not result in a substantial change in sentence."[203] The California law forecloses any consideration of a victim's willingness or ability to testify at trial as a justification for plea bargaining, unless the language about "obtaining testimony" is read more broadly than are California's evidentiary provisions regarding unavailability of witnesses.[204]

One commentator supports laws like California's, asserting that because of plea bargaining, "victims may be deprived of their opportunity to have the cathartic experience of testifying against the defendant."[205] But is testifying against a defendant really "cathartic"? If the term is used loosely to mean the release of tension, testifying can be viewed as "cathartic."[206] In strict psychoanalytic terms, however, catharsis involves the retrieval of threatening or painful early life experiences and the process of bringing those emotions into consciousness to be expressed.[207]

KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 198, at 1224 n.m (quoting statement of New York Police Commissioner Patrick Murphy attacking plea bargaining and the court system and implying that plea bargaining as to felony gun possession leads to many murders); E. VAN DEN HAAG, *supra* note 53, at 157–63, 171–73 (attacking courts and liberals for making plea bargaining a tool for allowing even serious offenders to go unpunished, thereby raising the crime rate).

202. CAL. PENAL CODE § 1192.7 (West 1982).

203. *Id.*

204. For narrow interpretations of California's provisions regarding witness availability, see People v. Enriquez, 19 Cal. 3d 221, 233–37, 561 P.2d 261, 269– 71, 137 Cal. Rptr. 171, 178–81 (1977); People v. Williams, 93 Cal. App. 3d 40, 51–55, 155 Cal. Rptr. 414, 419–22 (Cal. Ct. App. 1979); People v. Gomez, 26 Cal. App. 3d 225, 230, 103 Cal. Rptr. 80, 83–84 (Cal. Ct. App. 1972).

205. Gifford, *supra* note 158, at 73. Needless to say, considerable controversy exists in the psychotherapeutic community as to whether catharsis is helpful or necessary to recovery from trauma. *See, e.g.*, A. BECK, COGNITIVE THERAPY AND EMOTIONAL DISORDERS (1979) (cognitive approach to helping relieve emotional distress); F. FROMM–REICHMAN, PRINCIPLES OF INTENSIVE PSYCHOTHERAPY (1960) ("catharsis" and insight overrated as therapeutic devices; process and relationship more likely to relieve emotional distress).

206. The lay witnesses and victims I have talked with certainly were *relieved* after they testified. Their relief was less related to the tension created by having to think about the crime than to the tension produced by the mere prospect of testifying, however.

207. As Yalom points out, Freud saw catharsis as the release of repressed effect

In this term of emotionally purging the experience of victimization, testifying is not necessarily cathartic. Catharsis encompasses articulation and expression of traumatic experiences in appropriate settings. The appropriateness of the setting is essential because the process of emotionally reliving a traumatic event can be extremely painful and frightening.[208] The victim is unlikely to feel that a courtroom is the right place for this kind of emotional experience. Catharsis is also dependent on a number of variables, including an individual's readiness and ability to face the emotions raised. Catharsis is not a phenomenon that can be forced; nor is it the end of the healing process.[209]

Moreover, abolition of plea bargaining does not actually address the psychological needs of the victim. Instead, it places a priority on obtaining convictions for the offenses charged, regardless of the victim's psychological state or preference.[210] To solve the problem of victim alienation associated with plea bargaining, prosecutors could simply provide more information to victims. Although the prosecutor represents the state, rather

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that produced psychiatric symptoms "symbolically provid[ing] an outlet for the tension." I. YALOM, *supra* note 90, at 304. Yalom observes "this formulation is so beautiful in its simplicity that it has persisted . . . . Certainly it is the popular view incarnated in innumerable Hollywood films." *Id.* The image of the hysteric rising from her sick bed—"Sigmund, I am cured!"—persists despite the fact that "psychotherapy is 'cyclotherapy'—a long, lumbering process." *Id.* at 307 (footnote omitted).

208. Moreover, simply reliving the experience is not enough—the experience then must be re-integrated into the person's consciousness in the form of "rewriting" history, if you will. J. COLEMAN, PSYCHOLOGY AND EFFECTIVE BEHAVIOR 405 (1969).

209. One indication that testifying is not cathartic in terms of resolving the experience of the criminal event is the failure of many victims to experience a strong emotional reaction when they tell police about the crime and when they testify. *See* note 150 *supra.* This separation of emotion and description is neither unusual nor necessarily harmful. In fact, "telling what happened" is all that the trial process requires of the witness. Description of the factual occurrences *may* be of aid to a victim by providing a way of organizing the cognitive aspect of a criminal event, but this is a highly speculative observation, because there simply is not enough available information about the experiences of victims who have testified.

210. As is discussed below, *see* text accompanying note 212 *infra*, one argument in favor of curtailing the defendant's right to examine the victim at trial is that such testimony is too traumatic for the victim-witness. Although I dispute the generalization, it is true that some crime victims indeed may be too psychologically traumatized by their victimization to be able to testify. The extreme nature of a violent criminal experience occasionally does produce a psychotic episode or a lasting breakdown of emotional functioning. *See, e.g.*, Burgess & Holstrom, *supra* note 89, at 985. Abolition of plea bargaining may thus cause the prosecution to lose a conviction of the defendant for *any* offense and allow the guilty to go free.

then the individual victim,[211] courtesy and common sense would seem to dictate that prosecutors treat victims with respect and explain the plea bargaining options to the extent possible. A victim who is not notified about a possible plea bargain, particularly in which the defendant pleads to a lesser charge, may view the bargain as an invalidation of his or her experience. Consultation with victims by prosecutors, and explanations of the problems of the case or the consequences of the plea bargain, would undoubtedly help clarify the situation for some victims and lead some to actively support the particular disposition. Other victims will remain unsatisfied no matter what the results.

Ironically, the Task Force's view of the value of testifying is contrary to the "catharsis" theory suggested in support of restrictions on plea bargaining. This contrary view asserts that testifying is "too traumatic" for the victim.[212] Victims are unlikely to consider testifying to be an enjoyable prospect. Victims who have had little or no experience with the courts or testifying cannot be expected to comprehend the process. They may be understandably frightened of seeing their assailants. They may experience a version of stage fright at the prospect of having to speak in public. They may view testifying at a public trial as yet another intrusion on their lives and privacy. Testifying need not be an unmitigated disaster, however. Some, if not all, of the anxieties associated with testifying can be alleviated by prosecutors when

211. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7–13 (1979) (duty is to seek justice, not merely to convict).

212. *See* TASK FORCE, *supra* note 71, at 7, 9–10 (composite model). The Task Force recommends that hearsay be admissible against defendants in preliminary hearings and grand jury proceedings and that the victim not be required to "relive his victimization . . . Within a few days of the crime, some victims are still hospitalized or have been so traumatized that they are unable to speak about their experience. Because the victim cannot attend the hearing, . . . the defendant is often free to terrorize others." *Id.* at 21. Ironically, the California victim's rights provision which sharply curtails plea bargaining, and therefore increases the number of trials in which victims must testify, apparently disregards the Task Force's claim that testifying produces undue trauma.

The Task Force seems untroubled by the fact that if a victim attends a preliminary hearing, she might realize that the police and prosecutor have charged the wrong defendant, or that some victims of allegedly horrible crimes are not telling the truth. The presumption of guilt, intrinsic to the crime control model, seems especially prominent here. Moreover, the Task Force seems unaware that an opportunity to testify once before trial, if there should be a trial, is likely to help the victim familiarize herself with the process. Finally, the confrontation clause of the sixth amendment might place some limit on the extent to which the victim's testimony can be introduced through hearsay evidence or statements not made under oath.

they prepare their victim-witnesses.[213] Such common sense lawyering does not require fundamental changes in the criminal law or process. It simply requires an awareness on the part of prosecuting attorneys that although they and their law enforcement witnesses understand the law, the courtroom procedure, and the mechanics of testifying, lay witnesses frequently are not familiar with the process.

Accordingly, an absolute restriction on the use of plea bargains eliminates consideration of the emotional needs of the individual victim altogether, and to restrict plea bargains because some victims are dissatisfied with the results seems ill-advised.

D. *Abolition of the Exclusionary Rule*

Perhaps the most cynical manipulation of victim's rights is the invocation of these "rights" by crime control advocates as a justification for abolition of the fourth amendment's exclusionary rule.[214] The California "Victim's Bill of Rights" attempted to circumvent the exclusionary rule in a section titled "Truth in Evidence,"[215] and the President's Task Force recommended abolishing the fourth amendment exclusionary rule altogether.[216]

The exclusionary rule as a mechanism for enforcing the fourth amendment's prohibition on unreasonable searches and seizures has been the subject of endless debate.[217] Liberals see

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213. Preparation of lay witnesses through a mock direct and cross-examination can help them understand the process. To the extent that we understand something, we are less likely to fear it and less likely to feel helpless about the outcome. When information about something can be obtained, anxiety will likely be reduced even if the experience itself cannot be fully grasped ahead of time. M. SELIGMAN, HELPLESSNESS 107-33 (1975). Explaining how the preliminary hearing, grand jury, or trial is conducted can give victims a better feeling of mastery and control. I have suggested to several rape victims that they watch part of another trial, civil or criminal, before they themselves testify in order to get a picture of what a courtroom proceeding is like. With this experience behind them, the prospect of testifying is not so intimidating. Those who have tried this have found it helpful. I have also advised victims to obtain a copy of the transcript of their testimony at any preliminary hearings to review before the trial, especially if there has been a long delay between the preliminary hearing and the trial. No reason exists for prosecutors not to do their best to prepare witnesses in a like manner. Although many deputy district attorneys have heavy caseloads, they should be able to take the time to acquaint their lay witnesses with the basics of the process.

214. *See* note 80 *supra.*

215. CAL. CONST. art. 1, § 28(d) (West 1983).

216. TASK FORCE, *supra* note 71, at 24–28.

217. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349 (1974) (containing major arguments for and against the exclusionary rule and an analysis of the historical reasons for the fourth amendment).

the exclusionary rule as a sometimes troubling, but necessary, means of preventing Gestapo-like police tactics.[218] Conservatives see it as a counterintuitive, counterproductive rule that allows "criminals" to go unpunished.[219] Liberals may overstate the case when they argue that the exclusionary rule is the only thing that stands between the populace and a police state and that any diminution of the rule is a step towards fascism. But the knock on the door at night is just as threatening to existence as the nighttime burglar.

Whether or not the exclusionary rule is the appropriate solution to the problem of individual security against the state, it has had a salutory effect on police practices and has promoted efficiency in investigations.[220] Nevertheless, the present Supreme Court has steadily moved toward abolishing the rule. Doctrinally, the Court has narrowed the rule from a general protection against governmental intrusions to a tool for specific deterrence of particular police misconduct.[221]

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218. *Id.* at 400. The German experience, as well as the more recent examples of Chile, *see, e.g.*, Chavez, *Church Says Civil Rights in Chile Are Eroding*, N.Y. Times, Nov. 1, 1984, at 13, col. 1, and Argentina, *see, e.g.*, J. TIMMERMAN, PRISONER WITHOUT A NAME: CELL WITHOUT A NUMBER (1981), should serve as a warning against giving authorities too much power as a result of fear or economic instability.

The tendency to consider a criminal as an "other" or "it," rather than as a human being, leads many conservatives to overlook the potential for tyranny. Denying the humanity of offenders is the easiest way to dismiss the problem of human actions that are evil, and it permits an us-them paradigm to dominate thought and action in response to crime. Accordingly, the right to freedom from unreasonable searches and seizures does not attach to offenders: Offenders are simply not included in "the people."

219. TASK FORCE, *supra* note 71, at 27–28. Chief Justice Burger has long opposed the exclusionary rule, *see* Bivens v. Six Unknown Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) ("Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals."); L. BAKER, *supra* note 32, at 56–58.

220. For a discussion of immediate reactions to the exclusionary rule, see Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L. & CRIMINOLOGY 171 (1962). After the California Supreme Court adopted an exclusionary remedy, then-Attorney General Edmund C. Brown stated that the police had done better investigatory work and that investigations "are more thorough and within American constitutional concepts . . . . I believe the overall effects of the . . . decision . . . have been excellent." *Id.* at 179. The U.S. Attorney for the District of Columbia also opined that the exclusionary rule improved police preparation of cases. *Id.*

221. *See* Allen, *supra* note 32, at 535–37; Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1, 5-12 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 373 (1981).

In United States v. Leon, 104 S. Ct. 3405, 3421–23 (1984), the majority opinion emphasized the question of specific deterrence of particular police officers who obtained

The exclusionary rule has a minimal effect in the vast majority of cases: The rule affects only a very small percentage of prosecutions.[222] But opponents of the rule perceive it as interfering with effective and efficient law enforcement. They have never abandoned their efforts to abolish it and now have recharacterized their opposition to the rule as an issue of "victim's rights." Their assertion that "victim's rights" compel the abolition of state and federal exclusionary rules seems post hoc, and the efforts to define a victim's "right" that outweighs the constitutional right to be protected from unreasonable searches and seizures are strained. For example, the President's Task Force asserts:

> It must be remembered that the exclusionary rule is a remedy only, and not a very good one. It thus rewards the criminal and punishes, not the police, but the innocent victim of the crime and society at large for conduct they may not condone and over which they have little or no control.[223]

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a search warrant from a superior court judge in concluding that the officers had relied on the warrant in good faith and that the evidence obtained should not have been suppressed, despite the fact that the affidavit submitted in support of the warrant failed to provide enough information to establish probable cause. *See also* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982) (arguing that the good faith exception will encourage police to engage in conduct otherwise impermissible under the fourth amendment).

222. The empirical studies available contradict the prevailing wisdom that countless guilty people go free as a result of the suppression of evidence. *See, e.g.*, Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 AM. B. FOUND. RESEARCH J. 611 (criticizing a National Institute of Justice study for concluding that the exclusionary rule had "major impact" on criminal prosecutions in California on the basis of data that indicates the opposite conclusion; only 2.4% of felony arrests in California are not pursued by the prosecution as a result of unlawful searches and seizures); U.S. COMPTROLLER GENERAL, REPORT ON IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979) (only 1.3% of all cases studied had evidence suppressed as a result of a successful suppression motion); Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment,* 1983 AM. B. FOUND. RESEARCH J. 585 (motions to suppress evidence were filed in less than 5% of all cases; of those motions filed to suppress physical evidence, only 17% were granted; thus only 0.7% of all cases included a successful motion to suppress physical evidence obtained through an illegal search or seizure; only 0.56% of all cases were "lost" because of a motion to suppress physical evidence); *see also* Carlsen, *California's Appeal Court Reversal Rate,* San Francisco Chron., Aug. 25, 1983, at 12, col. 1 (detailing study by California Judicial Council finding that only 75 of 604 criminal appeals in California resulted in reversal and that over one-fourth of these were the result of sentencing errors). *But see* NATIONAL INST. OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982) (concluding that 5% of all felony cases in California were rejected by prosecutors because of search and seizure problems and that from 1976 to 1979 30% of all felony drug cases were rejected because of the exclusionary rule).

223. TASK FORCE, *supra* note 71, at 25.

After enumerating all the perceived "costs" to the criminal process—"handcuffing police," suppression of "perfectly good" evidence, court delays, and the lack of any danger to the rights of "law abiding" citizens, the Task Force goes on to state:

> Victims are adversely affected by the rule's operation at every turn. When the police fail to solve the crime because of inaction, the victim suffers. When cases are not charged or are dismissed and the "criminal goes free because the constable blundered," *the victim is denied justice.* When the case is continued interminably or must be retried, the victim is hurt time and time again.[224]

The Task Force uses the symbols of both past and future victims as embodied by society's interest in crime prevention to justify abolition of the exclusionary rule in a confusing way; the Task Force decries the costs to society of allowing the guilty to go unpunished and emphasizes the rule's interference with efficiency in the process. Even the Task Force's claims that are more applicable to past victims are grossly exaggerated, reflecting a hostility to the rule itself, rather than any particular solicitude for past victims. For example, the statement that the exclusionary rule causes police inaction simply does not make sense.[225] The suggestion that the exclusionary rule is the major source of continuances, delays, and retrials is not supported by available statistical evidence.[226] In the vast majority of cases involving core crime, the exclusionary rule makes no difference to the result. Indeed, it has become almost a truism in defense circles that, while courts may grant suppression motions in drug cases, they invariably deny them in murder cases.[227] The strongest refutation of the Task Force position, however, is that reversals of convictions on fourth amendment grounds appear to constitute only

224. *Id.* at 28 (emphasis added).

225. Because so few cases are "lost" because of the exclusionary rule, *see* note 222 *supra,* it is very unlikely that police will be discouraged to the point of inaction. While I am aware of instances where the police have not asked the district attorney to issue a complaint because they are aware that the evidence seized during a search would probably be suppressed, those instances did not involve violent crimes, and they certainly did not involve "inaction."

226. *See* note 222 *supra.*

227. *See* Nardulli, *supra* note 222, at 602 & table 13 (of the cases that were "lost" because of suppression of physical evidence, less than 20% were "serious," involving unarmed robbery, arson, and burglary); Davies, *supra* note 222, at 667 ("while there are not truly comprehensive statistics on the number of arrests rejected or dismissed because of illegal searches, all the pieces of data we do have show the general effect of the rule to be quite low, and the effect in nondrug arrests and violent crime arrests to be quite low").

a tiny fraction of all reversals of criminal convictions by appellate courts.[228]

Undeniably, retrials of serious cases necessitated by an appellate court reversal may be difficult for past victims. But it seems unlikely that the degree of difficulty is necessarily related to the *reason* for the reversal and retrial, or that having to testify again because of a reversal resulting from fifth or sixth amendment violations or instructional errors is less "traumatic." The attitudes of the police or prosecutor towards the grounds for the reversal might, however, exacerbate the situation if the prosecutor emphasizes to the victim the "needlessness" of having to retry the case, or criticizes the appellate court's solicitude towards the guilty "criminal."

A second argument offered by the Task Force in opposition to the exclusionary rule is that it denies the victim justice. This argument appears to assume that a victim has a right to a conviction of the accused or, perhaps, a right to revenge.[229] But the history of the criminal process does not support a finding of such a right.[230] Whether victims have a right to a conviction should be examined in terms of whether they have a cognizable interest in participating in the sentencing of offenders and whether they have a "right" to recovery from the wrongdoer, the subjects of the next section.

V. Victim Participation in Sentencing

Ironically, the most politically visible activity in the victim's rights movement focuses on the end, rather than on the beginning, of the criminal process. Advocate groups such as MADD attend the sentencings of defendants;[231] formalized victim participation at sentencing frequently appears in victim's rights pro-

228. Of 75 criminal writs and appeals decided by the California courts of appeal in both published and unpublished opinions between January 1, 1981 and February 28, 1981, only 12.4% resulted in a reversal. Of the reversals, only nine cases, or 5.1% of the total appeals, involved errors in motions to suppress evidence, and a few of those were reversed for improper *suppression* of evidence; one of the nine cases involved a *Miranda* issue. Judicial Council of California, 1983 Annual Report 7–8 (1983); *see also* Carlsen, *supra* note 222.

229. *See* notes 262–373 *infra* and accompanying text.

230. *See* notes 13–23 *supra* and accompanying text.

231. *See* Rios & Yeochum, *Making Sure Drunk Drivers Pay,* San Jose Mercury News, Dec. 18, 1983, at 1A, col. 4 (reporting the effect of MADD monitoring on sentencing judges in Santa Clara County, California); *cf.* Magagnini, *Drunk Case Judges Mad at 'Monitors,'* San Francisco Chron., May 16, 1983, at 1, col. 2 (San Francisco County judges

posals;[232] and many states have recently adopted provisions allowing victims to participate in sentencing proceedings.[233] Leaving aside the question of restitution for the moment, the following discussion evaluates the desirability of such participation in terms of the justifications for imposing the criminal sanction and in terms of whether or not the justifications promote the interests of the victim.

A. *The Relevance of Victim Participation to the Justifications for the Criminal Sanction*

The classic justifications for the criminal sanction are deterrence, incapacitation, rehabilitation, and retribution. At different times, different justifications are in ascendancy, but one single justification never entirely determines the imposition of the criminal sanction. Since each justification is analytically different, however, this part discusses each justification separately to determine whether each supports victim participation in sentencing.

1. *Deterrence.*

The essentially utilitarian foundation of deterrence theory is the premise that punishment has the socially useful function of preventing crime.[234] Deterrence theory has two components: general deterrence, where the punishment meted out for a criminal act discourages others from engaging in the specific wrong-

found MADD monitoring inappropriate; MADD advocate quoted as saying, "There are judges . . . who failed to get re-elected because MADD is all over their tails.").

232. *See, e.g.*, TASK FORCE, *supra* note 71, at 76–78.

233. *See* ARIZ. REV. STAT. ANN. § 13–702(F) (1983); CAL. PENAL CODE § 1191.1 (West Supp. 1985); CONN. GEN. STAT. ANN. § 54–91c (West Supp. 1984); FLA. STAT. § 921.143 (Supp. 1985); ME. REV. STAT. ANN. tit. 17–A, § 1257 (Supp. 1983); MASS. ANN. LAWS ch. 258B, § 3(h), ch. 279, § 4B (Michie/Law. Co–op. 1985); N.H. REV. STAT. ANN. § 651:4–a (Supp. 1983); R.I. GEN. LAWS § 12–28–4 (Supp. 1984); TENN. CODE ANN. § 40–35–209 (Supp. 1984); W. VA. CODE § 61–11A–2 (1984).

234. Cesare Beccaria repeatedly emphasized deterrence as the justification for punishment of offenders in *An Essay on Crimes and Punishments,* published in 1819; the purpose was social betterment: "The degree of the punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent." C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 75 (1819 & photo. reprint 1953) (emphasis deleted). Jeremy Bentham is probably the most well-known spokesman for the utilitarian theory that punishment is an evil in and of itself and only is justifiable if it serves the greater social good of preventing "some greater evil." J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1876), *reprinted in* S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 60, at 189. *See generally* H. PACKER, *supra* note 47, at 39–45 (summary and critique).

doing,[235] and specific deterrence, where punishment of the individual wrongdoer dissuades him from engaging in further wrongdoing. General deterrence seeks to educate others; specific deterrence seeks to educate the individual offender.

General deterrence requires that the penalties for crimes be sufficiently severe—and certain—to prevent people from committing those crimes; it assumes that a rational person will "trade off" the benefits of engaging in criminal conduct for the benefits of escaping punishment.[236] But despite increased penalties for crime, the rising crime rates of the past few decades seem to contradict the assumption that general deterrence is effective.[237] Indeed, complete general deterrence appears to be an unmanageable ideal, and the theory has fallen out of popular favor as a justification for the criminal sanction.[238] Nonetheless, the educational function of the criminal sanction remains a consideration, if only *sub silentio*, in criminal sentencing literature and in practice.[239] For general deterrence purposes, the participation of the individual victim seems to be of negligible value in determining sentences because this theory concentrates on the moral beliefs and behaviors of the community. It holds that the imposition of the criminal sanction deters crime, regardless of who the victim is. The focus of general deterrence is public and

235. H. PACKER, *supra* note 47, at 39; E. VAN DEN HAAG, *supra* note 53, at 181–83.

236. Kelman characterizes this premise as a "variety of economic theories that correspond in the philosophical literature to arguments justifying punishment as necessary to deter crime" and notes that "[p]olitically, the central method of the economic view of crime has focused less on optimal criminality than on the observation that we can reduce crime by upping its price." Kelman, *supra* note 28, at 214, 216.

237. The rise in crime, including violent crime, might have been attributable more to an increase in the population of people at a crime-prone age than to anything else, but fear has caused a shift in thinking from deterrence to incapacitation and retribution. *See, e.g., An Eye for an Eye,* TIME, Jan. 24, 1983, at 28, 28–29 (discussing the influence of rising rate of violent crime on reemergence of capital punishment); Currie, *supra* note 29, at 32–33 (failure of deterrence has caused a shift in focus from deterrence theory to incapacitation theory).

238. This is true despite efforts of conservative criminologists to demonstrate that the threat of increased incarceration can affect the behavior of marginal individuals. *See* note 235 *supra*; Currie, *supra* note 29, at 32.

239. As Packer notes, "the symbolic richness of the criminal process is a powerful deterrent" that serves to reinforce societal values. H. PACKER, *supra* note 47, at 44. The stigmatization of guilt and social condemnation still exerts a powerful force on behavior. Consider, for example, the transformation in social attitudes about driving under the influence currently being undertaken by the media, MADD, and insurance companies. At one point, driving under the influence was not a crime taken seriously, and a conviction carried little stigma.

nonindividualized; victim participation is not necessary to educate the community.

Specific deterrence is aimed at preventing the individual offender from engaging in future criminal activity.[240] Achieving specific deterrence does not require victim participation at sentencing, rather it requires a calculation of the appropriate level of punishment to teach the offender to abstain from wrongdoing in the future.[241]

2. *Incapacitation.*

Proponents of the incapacitation approach believe that the best way to prevent a particular offender from committing future crimes is to remove him from society.[242] This belief is based on predictions or assumptions of future dangerousness or propensity to commit crimes that are not necessarily related to the actual crime for which the offender is sentenced.[243] In fact, the relationship between the actual offense and future dangerousness may be attenuated at best.[244] Although the *manner* in which the offender committed the crime might intuitively seem relevant to a determination of dangerousness, it may be of limited usefulness.[245] The factors examined in determining whether to incapacitate an offender are related to the characteristics of the

240. *See id.* at 39, 45–48.

241. *Id.* at 45. The common wisdom is that, by putting an offender in jail or prison, we demonstrate to him that his behavior will not be tolerated. He should consequently learn not to repeat that behavior. Recidivism rates would seem to deny the efficacy of special deterrence, however, *id.* at 46, but as Packer notes, "we are certainly not in a position now to say that the concept has no utility," *id.* at 47. Special deterrence, or "intimidation," may be very effective on some individuals, or on some types of crime, and its efficacy may depend in part on the level of brutality of the prison experience. *Id.*

242. *Id.* at 48. Incapacitation is enjoying renewed popularity. *See* note 237 *supra; see also* Wilson, *supra* note 183, at 52, 61 (selective incapacitation is the "most rational way to use the incapacitative powers of our prisons").

243. *See* Wilson, *supra* note 183, at 61–62. *But see* Cohen, *Selective Incapacitation: An Assessment,* 1984 U. ILL. L. REV. 253, 281 & n. 67 (data in a Washington, D.C., study indicated that 15.3% of auto thefts were committed by specialists, 19.8% of burglaries, and 28% of robberies).

244. *Cf.* Slobogin, *supra* note 183, at 119–23 (1984) (comparing usefulness of clinical assessments to predict future dangerousness that rely on nature of present offense and psychological variables with usefulness of predictions based on demographic variables that have been statistically demonstrated to correlate with violent behavior).

245. *See id.* at 119–23, 153–54 ("The fact that a homicide is committed in a particularly vile manner does not necessarily mean that its perpetrator is more likely to commit a second violent act than a more fastidious murderer . . . .").

offender, rather than to those of the victim.[246]

3. *Rehabilitation.*

The rehabilitative goal of the criminal sanction has not received widespread support. But unless we are to incapacitate all offenders for all time, rehabilitation cannot be dismissed entirely because of our longstanding interest in reforming offenders in order to prevent them from committing future crimes. Rehabilitation, like incapacitation, is "offender-oriented," rather than "offense-oriented." It concentrates on the offender, his nature, and what is needed to correct his undesirable behavior.[247] To the extent that the offender's past behavior offers a clue about what rehabilitative steps are necessary, the nature of the crime committed may be relevant to a sentencing decision. Yet unless the victim knows the offender, it is unlikely that he or she can supply the sentencer with helpful information about the crime or the offender that is not already available from other sources.

In a few instances, rehabilitation-oriented sentences may seem to depend upon, or benefit from, victim cooperation. For example, the successful rehabilitation of perpetrators of domestic violence or child abuse appears to necessitate therapeutic intervention that requires both victim and offender participation.[248] This is quite different, however, from giving the victim a role in determining *what* sentence to impose. Instead, it gives the victim a role in *implementing* the sentence.

4. *Retribution.*

One meaning of retribution is associated with a theory of moral blameworthiness that justifies punishment. Although what constitutes appropriate punishment is both morally and cultur-

246. Wilson, *supra* note 183, at 62–63, 65 (predictive factors for high-rate offenders include, among other things, a prior criminal record, a history of drug or alcohol abuse, and a documented inability to secure a job).

247. As Packer observes, however, "we do not know how to rehabilitate offenders, at least within the limit of the resources that are now or might reasonably be expected to be devoted to the task." H. PACKER, *supra* note 47, at 55. In a general sense, this is true, although knowledge about the relationship of substance abuse and criminal activity, for example, does provide some direction for "rehabilitative" efforts.

248. If an agency or organization is willing to work with a child abuser, it may be preferable to maintain the family unit and have all family members participate in therapy if they are willing, rather than to send the offender to jail. Parents United, for example, has been successful in counseling sexually abused children and the abusing parents.

ally determined,[249] the guiding notion is that defendants must pay a "debt" to society to make amends for their wrongs.[250] The other, perhaps more automatic meaning of retribution is simply that of revenge: Society has a right to retaliate against those who have hurt it or failed to follow its rules.

The moral blameworthiness, or "moral retributionist," view subdivides further into two general components: One view, associated with Kant, is that crime merits punishment simply because it is wrong;[251] the other view, identified by Herbert Morris, holds "that society's members implicitly agree to an allocation of benefits and burdens,"[252] and "punishment serves the purpose of restoring the equilibrium of benefits and burdens"[253] upset by the wrongdoer. Both of these approaches embody a proportionality principle—a correspondence between the wickedness of the act and the suffering to be inflicted upon the actor. The arguments for this side of the retributionist thesis gain strength by using an "innocent" victim to illustrate graphically the offender's blameworthiness. But importing the victim into the blameworthiness calculus logically requires courts to call into question the victim's relative blameworthiness—to measure the offender's actual

249. *See* Cohen, *Moral Aspects of the Criminal Law,* 49 YALE L.J. 987, 990–94 (1940). H.L.A. Hart argues, for example, that

> a person may be punished if, and only if, he has voluntarily done something morally wrong; . . . his punishment must in some way match, or be the equivalent of, the wickedness of his offence, and . . . the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good.

H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 231 (1982). Normative words and phrases haunt this formulation: What referents exist for determining "wickedness" or "moral evil voluntarily done"? A moral code in one culture may be vastly different from that in another. Similarly, the "wickedness" of a given act may be greater in one society than in another. Lloyd Weinreb has found the concepts of "deserts" and "moral responsibility" to have normative components; he is, however, unable to find other concepts to replace them. *See* Weinreb, *The Complete Idea of Justice,* 51 U. CHI. L. REV. 752 (1984).

250. Punishment of those who deserve it is, under classic retribution theory, self-justifying. *See, e.g.,* H.L.A. HART, *supra* note 249, at 231 ("suffering for moral evil voluntarily done, is itself just or morally good"). But the infliction of pain is not something that we can universally agree is "good," so we seek other justifications as well. Some have argued that punishment for wickedness is a means to "atone" for the wicked deed. *See, e.g.,* H. PACKER, *supra* note 47, at 38. Others see the punishment as a "payment" of a "debt." *See, e.g.,* H. MORRIS, ON GUILT AND INNOCENCE 34–36 (1976).

251. *See* I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99–102 (J. Ladd trans. 1965), *quoted in* S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 60, at 187–88.

252. Morris, *Persons and Punishment,* in PUNISHMENT 75 (J. Feinberg & H. Gross eds. 1975).

253. *Id.*

moral culpability requires examining whether the victim "deserved" what he got and whether "[t]he harm the criminal does to society by taking the law into his own hands could be insignificant in comparison to the benefaction . . . that would otherwise be left undone."[254] Although the substantive criminal law does occasionally shift blame to the victim, as illustrated by the justification of self-defense, it does so only in a very narrow sense.[255] Considering the victim's blameworthiness at sentencing, rather than at adjudication, may act to distort the substantive law governing the initial determination of guilt.

A related question is whether "victim precipitation" should be taken into account at sentencing. "Victim precipitation" refers to victim conduct that induces or provokes another to commit a crime and is a broader concept than that of victim culpability.[256] One commentator has argued that certain types of victim precipitation *should* be considered at the sentencing stage because they "make the crime more understandable and in many instances lessen the [offender's] moral culpability."[257] While this may follow logically from an attempt to calculate the extent of someone's moral blameworthiness, it does result in a difficult inquiry as to "relative badness."

A determination of "relative badness" at the sentencing phase closely resembles the concept of contributory or compara-

254. Commentary, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification,* 34 OKLA. L. REV. 567, 594 (1981). Criminal activity may be a self-help device to impose social control. *See* Black, *Crime as Social Control,* 48 AM. SOC. REV. 34, 36 (1983) ("Like the killings in traditional societies described by anthropologists. . . . most intentional homicide in modern society may be classified as social control, specifically as self-help, even if it is handled by legal officials as crime."). And there may be a tendency for legal officials to respond less harshly in the self-help situtation where the victim arguably "deserved" his or her victimization. *Id.* at 40, 42. One recent, and extreme, example of this form of social control/self-help involved the fatal shooting of a man who had bullied residents of a small town in Missouri. Investigation of the homicide was stymied by the refusal of any of the town's citizens to identify the killer or to admit that they had seen anybody fire at the victim. The case received a great deal of media attention and dramatically illustrates the use of self-help by a community that believed its existence to be threatened. While it may very well be that the person or persons who shot the victim would legally be guilty of murder, the behavior of the victim—carrying a gun and terrorizing the community—seems to be equally "blameworthy." *See Widow of Slain "Town Bully" Seeks $11 Million for Death,* San Jose Mercury News, July 11, 1984, at 9A, col. 1.

255. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 855–75 (1978) (discussing tensions in the law of self-defense created by theoretical and pragmatic concerns with choice, culpability, and rights).

256. Gobert, *Victim Precipitation,* 77 COLUM. L. REV. 511, 514 (1977).

257. *Id.* at 535.

tive negligence. These concepts may already explicitly or implicity influence sentencing determinations,[258] but *formal* recognition of the victim's presence can produce unpredictable results. In a recent case, the defendant, convicted of driving under the influence and of manslaughter, received a minimal sentence for killing two drunken pedestrians, despite the arguments by the next of kin at sentencing for a harsh penalty. The sentencing judge observed that the pedestrians were "more to blame" than the driver for their deaths.[259] Presumably, some explicit standards for measuring victim blameworthiness or victim precipitation could be devised to guide sentencing judges, but adopting such standards is ill-advised. No self-evident source for the development of these standards exists. An inquiry into comparative blameworthiness could increase the appearance of capriciousness in the criminal process. Such an inquiry could create a normative nightmare for both victims and society, because it necessarily would consider how the victims should have acted. The prototypical example of this problem is the crime of rape, where both law and society have traditionally "judged" the victim on the basis of who she was, where she was, how she was dressed, and whether or not she resisted.[260] Finally, despite its fall from grace,

258. *Id.* at 539-40. A 19-year-old man, who shot and killed his father, was found guilty of voluntary manslaughter following a court trial in California. Apparently the victim had beaten his wife and sexually abused his daughters; the morning the victim was shot, he beat his wife and threatened to kill his 19-year-old son. In sentencing the defendant to five years' probation, the judge commented that the victim was "the scum of the earth" and "a man the planet Earth can rotate without quite nicely." *Father-Killer Sentenced to 5 Years' Probation,* San Francisco Chron., Feb. 25, 1984, at 5, col. 4; *Judge Seeks Sentencing Ideas,* San Jose Mercury News, Jan. 29, 1984, at 12A, col. 1. On the other hand, Richard Jahnke, a 17-year-old who shot his abusive father and was convicted by a jury of manslaughter, was sentenced to serve five to fifteen years in prison by the trial court, which refused to take the victim's behavior into account in imposing sentence. The Governor of Wyoming subsequently commuted the sentence to three years in a juvenile detention facility, noting that "the court record characterized the father as a cruel, sadistic man." Jahnke was protrayed as a victim. *Father Killer's Sentence Reversed,* San Francisco Chron., June 15, 1984, at 30, col. 4.

259. *See* Cohn, *Oakes Gets 90 Days in Driving Deaths,* San Jose Mercury News, Aug. 13, 1983, at 1A, col. 5.

260. T. BENEKE, *supra* note 115, at 6–33 (language and cultural symbols influencing beliefs about rape); Berger, *supra* note 68, at 7–32 (1977) (summary of the history and rationale of the law of rape); Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia,* 117 U. PA. L. REV. 277 (1968) (reflecting the old common law assumption that rape is a charge easily made and hard to defend, and recommending that police consider time between occurrence and report, physical appearance of "complainant," medical evidence, the complainant's conduct prior to the offense, evidence of weapons or struggle, information derived from a record check on

general deterrence remains a goal of the criminal justice system. Taking the victim's blameworthiness into account weakens the educational value of the criminal sanction and thus lessens its general deterrent effect.[261]

Recent victim's rights proposals appear to be driven more by the retaliatory view of retribution than by the moral aspect of retribution. The victim who participates in sentencing might further the ends of the retribution-as-vengeance theory by providing specific and graphic information about the crime—information that will provoke outrage.

Despite its popularity among victim's rights proponents, retaliation has received relatively little support from philosophers or social scientists.[262] Vengeance is uncivilized,[263] and it certainly cannot be said to appeal to the "higher nature" of man, yet the "*romantic version* of the vindictive theory . . . holds that the justification of punishment is to be found in the emotions of hate and anger, these emotions being those allegedly felt by all nor-

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every complainant, the opinion of the complainant's husband or parents as to the truthfulness of her allegations, and the results of a polygraph examination of the complainant). *See generally* S. BROWNMILLER, *supra* note 43.

261. Although principles of comparative or contributory fault may justify the reduction of damages in intentional tort cases, *see* Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations,* 24 SANTA CLARA L. REV. 1, 26–32 (1984), we may not be willing to incorporate notions of comparative fault in determining criminal penalties. The notion of general deterrence in tort is slightly different from the general deterrence justification in criminal cases; the state may be unwilling to weaken the educative effect of punishment by explicitly making criminal sentences dependent on the behavior of the victim.

On the other hand, California has provided that certain types of victim precipitation may be considered by a judge in determining what sentence to impose under the determinate sentencing law. A sentence may be mitigated if "[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident," or if the defendant was reacting to "an unusual circumstance, such as great provocation . . . ." CAL. RULES OF COURT Rule 423(a)(2), (3) (1985).

262. Revenge or retaliation is enjoying a renaissance, however. For example, a recent book advocates the use of revenge as a legitimate justification for the criminal sanction. *See* S. JACOBY, WILD JUSTICE (1983). Conservative columnist George Will writes that "[t]he element of retribution—vengeance, if you will—does not make punishment cruel and unusual, it makes it intelligible." Will, *The Value of Punishment,* NEWSWEEK, May 24, 1982, at 92. Advocates of the retaliation model of retribution tend to advocate its use for utilitarian reasons, however. *See* notes 264–276 *infra* and accompanying text.

263. To the extent that vengeance is associated with vigilantism, barbarity, lynching, and other pejoratives, the tendency has been to reject it as a justification for punishment. Similarly, to the extent that it is associated with historical punishments such as drawing and quartering and other forms of torture, it seems reflective of a less enlightened state.

mal or right-thinking people."[264] The retaliatory view of retribution ultimately is a utilitarian view, because its justifications are that it prevents mob violence, channels society's outrage, and preserves the legitimacy of the criminal justice system by paying heed to the community's sense of justice.[265] But none of these rationales adequately support retaliation, even from a utilitarian perspective. First, except in unusual or highly publicized cases, the likelihood of *mob* violence is almost nonexistent. Second, most crime—even core crime—does not provoke strangers to retaliate directly against the criminal. Third, although it may be proper to be angered by evil acts, it is not at all self-evident that vengeance or retaliation is the only available or appropriate response for channeling society's outrage—another perfectly appropriate response to outrage would be to renew efforts to prevent violent crimes. Finally, some crimes transcend even outrage and *any* response may be futile in an instrumental sense.

Nor is it a simple task to determine what constitutes the community's sense of justice, and to ascertain whether that sense comports with the retaliatory view of retribution in most, if not all, instances. Whatever community feeling does exist could be reflected in ways other than vengeance—for example, through jury condemnation, police and prosecutorial discretion, and legislative determination of penalties. In general, only a very narrow category of crimes raises the issue of the community's sense of justice, and even in these cases the community may not agree on what is just. The controversy in New Bedford, Massachusetts during and after a rape trial indicates that sharp divisions in a community's sense of justice exist even in serious cases.[266]

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264. Feinberg, *Punishment,* in PUNISHMENT, *supra* note 252, at 8.

265. *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law,* 122 U. PA. L. REV. 1497, 1508–14 (1974).

266. The New Bedford case involved a sexual assault that polarized the largely Portuguese-American community. The issues included age-old beliefs about rape and ethnic prejudices. *See* Rangel, *Thousands March to Protest Bar Rape Convictions,* N.Y. Times, Mar. 24, 1984, at 7, col. 1; Friendly, *Naming of Victim in Rape Trial on TV and in Newspapers Prompts Debate,* N.Y. Times, Mar. 24, 1984, at 7, col. 5; Beck & Zabarsky, *Rape Trial: 'Justice Crucified'?,* NEWSWEEK, Apr. 2, 1984, at 39.

Another justification for retaliation is that it is necessary to ensure public respect for the law: The "law has an expressive function, expressing and thereby sustaining certain values." Will, *supra* note 262, at 92. By deferring to "a common sense of justice," retaliatory punishment maintains respect for the law. *See* Schulhofer, *supra* note 265, at 1513. This is really no more than a general deterrence argument in retributive clothing, however, and it is not altogether clear that public, ritualized retaliation serves the function of enforcing respect for the law: Recall the public executions of pickpockets in England,

The utilitarian justifications for the retaliatory view of retribution are inadequate. But what of the individual's desire for vengeance? Although few people would suggest a return to the blood feud, many would argue that the victim is entitled to his "pound of flesh." In this way, the victim may be entitled to tell the judge what he or she thinks should be done to the offender. The first and immediate criticism of this type of participation is that the victim's desire for vengeance conflicts with two principles that apply even to retributive sentencing: proportionality and equality. In an extreme example, while a victim may believe that an auto thief should be hanged and may muster a variety of moral arguments in support of his position, proportionality requires a rejection of the victim's position. Second, the equality principle requires similar treatment of similarly situated offenders in order to eliminate capriciousness in outcome.

The underlying assumption that anger and vengeance are different aspects of the same phenomenon and that vengeance is the necessary and appropriate response to the anger many victims experience also does not withstand close examination. A victim may direct anger at the offender, at the offense, at herself, or at a combination of these elements. Although anger is a justifiable response to crime, vengeance as a formalized manifestation of anger is of questionable psychological value to the victim. The anger experienced may therefore have little relevance to retaliation. Second, while anger is a normal and understandable response to all kinds of harms, anger does not inexorably lead to retaliation as an appropriate response to harm. Even if we can distinguish intentional harms from accidents, we still react with anger to hurt. We may even retaliate. But direct retaliation towards the perceived source of the harm is only one of many possible responses to the anger engendered. Finally, retaliation may be the victim's *first* impulse but not the last or the definitive one.[267] While the passage of time may not end a crime victim's

where the brethren of the condemned circulated in the crowds, picking pockets. *See also* M. FOUCAULT, DISCIPLINE AND PUNISH 58–65 (1979) (public executions used to solidify authority of sovereign more than to express "common" sense of justice).

267. The wife of a Stanford University mathematics professor who was murdered observed: " 'My own personal philosophy based on my spiritual beliefs and on my psychological beliefs is that there is no point in hanging on to hatred and fear . . . .' " Madison, *No Hatred for Killer, Widow Says,* Peninsula Times Tribune, Jan. 24, 1984, at B1, col. 1. George Wallace has stated that he has forgiven the man who tried to assassinate him. *Wallace: Bremer Is Forgiven,* San Jose Mercury News, May 15, 1984, at 3A, col. 4. Relatives of victims, on the other hand, frequently do become intensely involved in seek-

anger, it may diminish the retaliatory impulse. Thus, what people choose to alleviate their feelings of anger, particularly after the initial shock of the harm has passed, can vary enormously from physical retaliation to withdrawal, to efforts to prevent future harms, to forgiveness of the offender.[268]

Anger and its manifestation as blame certainly *are* normal responses to violent crime, but they are not necessarily tied to a desire, need, or justification for retaliation. Disaster victims often try to assign responsibility for an evil, many times in a way that relieves them of responsibility for the outcome. Thus, victims of crimes often blame the perpetrator, "the system," the police, the district attorney, the defense lawyer, or all of them for the victim's agonies.[269] But blame does not relieve a victim of responsibility for the criminal act, if any, and for what he or she chooses to do about it.[270] As discussed earlier, victims who assume a degree of responsibility for a crisis or disaster may suffer less stress and may reduce their sense of vulnerability and loss of control more successfully than those who do not.[271] Assigning responsibility to others may also help the victim to find an explanation for the victimization. The victim's question "why" may be

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ing vengeance. *See, e.g.*, Burress, *Angry Son Tries to Attack Mother's Killer in Court*, San Francisco Chron., Feb. 11, 1984, at 3, col. 1 (son of murder victim tried to attack defendant after judge overruled jury verdict to impose death penalty); Foley, *"Trailside" Trial to Begin in L.A.*, San Jose Mercury News, Oct. 9, 1983, at 1A, col. 4 (mothers of victims expressing rage at criminal justice system and supporting death penalty).

268. *Compare* Bilby, *Maximum Drunk-Driving Term Given*, Denver Post, June 6, 1984, at 9A, col. 1 (mother of victim of drunk driver "said her feelings for the man who killed her son have turned from hate to pity"), *with* Anderson, *Missing Children's Center Gets Funding*, San Jose Mercury News, Apr. 19, 1984, at 2A, col. 5 (John Walsh, father of murder victim, became "crusader on behalf of missing kids" and lobbied for legislation), *and* sources cited in note 267 *supra*.

269. A man who survived a murder attempt, but whose fiancee was killed during the attack, remains outraged at the criminal justice system. The outrage has generalized to anger at defense lawyers in general. *See* Mandel, *Crime Victim, Legal Victim, Turns Crusader*, San Francisco Chron., Jan. 16, 1983, at A2, col. 1.

270. *See* notes 129–136 *supra* and accompanying text. At the time of this writing, a considerable amount of controversy surrounds the shooting of four black teenagers on a New York subway by Bernhard Goetz, a man who had been mugged by three blacks several years before. Did Goetz shoot the four young men because of rage, an urge to retaliate, or fear produced by the prior incident? It would be foolish to speculate on the effect of his prior victimization at this time; the shooting of four people in a subway appears to be an extreme response, particularly if it is true that Goetz fired a second shot into an apparently disabled youth. Stengel, *A Troubled and Troubling Life*, TIME, Apr. 8, 1985, at 35.

271. *See* text accompanying notes 129–135 *supra; cf.* Miller & Porter, *supra* note 122 (acknowledging that their own behavior may have contributed to assault enabled victims to reassert control and autonomy).

answered by blaming the parole officer of an offender who committed the crime while on parole,[272] or by blaming a judge for releasing an offender on bail.[273] But such explanations ultimately do not provide a lasting or sufficient answer to the broader question of meaning.[274] Indeed, the opposite of vengeance—forgiveness—is more likely to enable the victim to recover. As Hanna Arendt observes:

> [F]orgiveness is the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequence of the first misdeed, everybody remains bound to the process . . . . In contrast to revenge . . . the act of forgiving can never be predicted; it is the only reaction that acts in an unexpected way and thus retains . . . something of the original character of action. Forgiving, in other words, is the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it and thereby freeing from its consequences both the one who forgives and the one who is forgiven.[275]

Forgiveness alone retains the uncontested authorship essential to responsibility and resolution. Forgiveness, rather than vengeance may, therefore, be the act that eventually frees the victim from the event, the means by which the victim may put the experience behind her.

Emphasizing individual vengeance and blame can undermine, rather than facilitate, recovery from a violent crime. This is not to say that victims can or should be indifferent to the sentence imposed; the rare disproportionately light sentence disaffirms the victim's experience and undoubtedly causes the victim more pain.[276] But even a harsh sentence does not end the matter for the victim. In a sense, sentencing does provide a recognizable

272. *See, e.g., Crime Victims' Agony, supra* note 155 (detailing testimony at Senate Judiciary Committee subcommittee hearing by victims and relatives of victims advocating abolition of parole).

273. The bail issue has also led to the adoption of preventive detention statutes. *See* notes 170–172 *supra.*

274. *See* notes 119–137 *supra* and accompanying text. The questions of good and evil are not easily answered; indeed, most explanations fall woefully short of providing any lasting understanding. Each individual is ultimately responsible for answering his or her own "why."

275. H. ARENDT, THE HUMAN CONDITION 240–41 (1958).

276. *Compare* Cohn, *supra* note 259 (daughter of a man killed by a drunk driver, who was "on the verge of tears" after apparently lenient sentencing, was quoted as stating, "He'll never, ever realize what he did"), *with* Bilby, *supra* note 268 (mother of the victim said the judge " 'did all he could do' ").

event and possible opportunity for completion of a phase of the recovery process. But to say to a victim that after sentencing he or she can now put the experience to rest denies that any remaining questions of meaning, fears of death, or feelings of helplessness exist.[277] While the sentencing may signal the end of public concern with the crime, it surely cannot be expected to signal the end of the victim's recovery process.

If the harm to the victim is determinative of a particular sentence, then victim participation in sentencing would appear to be of use to the criminal process. But none of the rationales that underlie the criminal sanction are necessarily furthered by considering the *individual* harm in imposing a sentence. Moreover, concentrating on the harm to a specific victim may increase, rather than decrease, capriciousness in sentencing.

B. *The Relevance of Harm*

The Federal Victim and Witness Protection Act provides 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."[278] Although the record of the hearings before the Criminal Law Subcommittee of the Senate Judiciary Committee indicates that a major reason for including this information was for purposes of determining restitution,[279] the appendix to the hearings emphasizes that statements concerning the actual harm caused are "useful tools in determining equitable penalties during the sentencing of a convicted offender."[280]

Often the substantive law defines the criminal offense and the sanction to be imposed by the actual harm that has resulted. The definition of an offense frequently depends on the result of the conduct—simple battery, aggravated assault, and murder all encompass particular results within their definitions. And legislatures provide for penalties that correspond in severity to the harm associated with the prohibited behavior.[281] This emphasis

277. *See* notes 146–148 *supra* and accompanying text.

278. Pub. L. No. 97–291, 96 Stat. 1248 (1982) (amending FED. R. CRIM. P. 32(c)(2)).

279. *Omnibus Victim's Protection Act: Hearing on S. 2420 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. 55 (1982) [hereinafter cited as *Senate Hearings*].

280. *Id.* at 171.

281. Within wide limits, the eighth amendment prohibition against cruel and unu-

on outcomes makes some sense, both intuitively and philosophically: The principle of proportionality requires us to punish murderers more severely than petty thieves, as does the principle of relative moral blameworthiness. Beyond these rather general formulations, however, the justifications for emphasizing the particular harm inflicted in determining the sanction to impose become more problematic.

One commentator has countered many of the arguments offered in support of taking the particular harm into account at sentencing by showing how this approach is inconsistent with the moral retributionist rationale for the criminal sanction,[282] how it does not necessarily further deterrence,[283] and how it does not influence the incidence of jury nullification or reduce the problems of discretion in the criminal justice system.[284] Moreover, the "frugality principle"—the notion that punishment "can be justified only by necessity and should be no greater than necessary to achieve its goal"[285]—cannot support reliance on the particular harm as the exclusive reason for imposing punishment.[286] Thus, the only rationale for the criminal sanction with which emphasizing the particular harm is consistent is that of retaliation.[287]

Focusing on the particular harm caused emphasizes retaliation. This appeal to personal vengeance may be necessary to elicit the victim's cooperation with the prosecution in some cases, but not all: Victims may cooperate because of feelings of social duty or altruism as well. And whether formalizing individual retaliation at the sentencing stage is beneficial either to victims or to society is questionable.[288] Explicit encouragement of a victim's urge to retaliate does not necessarily aid the victim's recovery and, as noted earlier, may foreclose the possibility of taking re-

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sual punishments may require legislatures to maintain the relationship between harm and punishment. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983) (life sentence without possibility of parole under habitual offender statute disproportionate when underlying offenses are not serious or violent); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty is grossly disproportionate punishment for rape).

282. Schulhofer, *supra* note 265, at 1515.

283. *Id.* at 1519–22.

284. *Id.* at 1522–62.

285. *Id.* at 1562 (citing J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 194 (1876)).

286. *Id.* at 1562–85.

287. *Id.* at 1508–10.

288. *See* notes 264–276 *supra* and accompanying text.

sponsibility for the experience. From society's perspective, the state attempts to mediate among individuals in order to prevent vigilantism and runaway vengeance, and a greater focus on individual retaliation may thwart this goal.

Thus, while retaliation is the only rationale for the criminal sanction with which victim participation at sentencing and an emphasis on the particular harm are consistent, this rationale is problematic for both the victim and society. And ironically, while victim's rights advocates have urged victim participation in sentencing for the purpose of apprising the sentencer of the specific harm caused, mandatory or determinate sentencing laws may render the information provided largely irrelevant.[289] Nonetheless, the victim may have an interest in being heard independent of the reasoning behind the criminal sanction.

C. *Other Possible Justifications for Victim Participation*

Although the individual contribution that a victim can or should make to the determination of the criminal sentence may be minimal at best, other justifications for victim participation may still exist. These justifications for a "right" to participate fall loosely into three categories: "fairness," "due process," and "recognition."

1. *Fairness.*

Victims of core crime are individuals, while the criminal justice process is an amalgam of public agencies and courts with their own agendas, bureaucracies, and rituals. Yet the criminal justice process appears to ignore the concerns, wants, and needs

289. Although judges may have a range of sentencing options, that range is becoming increasingly narrowed by the legislatures. The change in focus from rehabilitation to retribution as the primary justification for the criminal sanction has led to the end of indeterminate sentencing. *See* S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 60, at 205; O'Leary, *Criminal Sentencing: Trends and Tribulations,* 20 CRIM. L. BULL. 417 (1984); *see also* Casper, *supra* note 62, at 233–37. Legislatures now set minimum mandatory penalties, often with precise detail, to limit judicial discretion in imposing sentences. *See, e.g.,* CAL. PENAL CODE § 1170 (West Supp. 1985); ILL. REV. STAT. ch. 38, §§ 1005-5-3(2), 1005-8-1 (1982); N.Y. PENAL LAW §§ 60.05, 70.00, 70.02 (McKinney Supp. 1984); 42 PA. CONS. STAT. ANN. §§ 9712–17 (Purdon Supp. 1984); I. SCHWARTZ, NEW YORK SENTENCE CHARTS 6–7 (1985). *See generally* Casper, *supra* note 62.

Indeterminate sentencing and discretionary probation thus have been replaced by determinate sentences and mandatory prison provisions. As more and more statutes sharply circumscribe the judge's discretion, the issues of the specific harm to the victims and victim participation become increasingly irrelevant.

of victims while it simultaneously relies on victims to function.[290] Sacrificing individuals to society's goals seems "unfair" to many; the treatment of victims as a means to an end seems wrong.[291] Victim participation in sentencing ostensibly cures this inequality by giving the victim "equal time." But if fairness or equality are the goals served by participation, waiting until sentencing to recognize the victim does not seem to cure the perceived evil of using the victim as a means to an end. If the real reason for encouraging victims to speak at sentencing is the desire for harsher sentences, the process continues to use the victim for an instrumental purpose. The use of the victim can be more subtle, however, because in many cases the victim participates either to a limited extent, or not at all, after reporting the crime and agreeing to press charges.[292] At best, it may be several months before a sentencing proceeding occurs, assuming that there is a conviction.[293] Thus, the victim may continue to be "used" without fair treatment for an extended period, because sentencing occurs at the end of the criminal process.

Symbolically, the defendant does appear to have an advantage in the criminal process: He has a lawyer, while the victim does not; he enjoys the protection of specific constitutional provisions, while the victim does not; he frequently is the focus of attention and concern—even if that attention and concern are entirely negative in orientation—while attention paid to the victim is typically nonexistent or dependent upon the victim's usefulness to the prosecution. The perception that defendants are somehow advantaged is thus difficult to dispel. The reality, however, is that most defendants have little or no real advantage either substantively or procedurally. And the fact that the defendant has one person ostensibly supporting and advocating his interests—his

290. *See Senate Hearings, supra* note 279, at 83 (statement of Marlene A. Young, Executive Director of the National Organization for Victim Assistance); *id.* at 187–92 (statement of Deborah P. Kelly, Department of Government and Politics, University of Maryland).

291. *See, e.g.*, TASK FORCE, *supra* note 71, at 60, 64. The Task Force's *Final Report* recommends that victims be allowed to participate throughout the process. In its recommendations for prosecutors, the report emphasizes a victim-centered prosecutorial model. *Id.* at 63–71. *See also* Goldstein, *supra* note 72.

292. Although some have argued that the victim should have a greater role throughout the process, *see* note 291 *supra*, and some victims or relatives of victims have also wanted a more active role in prosecution, *see* Foley, *supra* note 267, it is not self-evident that all, or even most, victims want to be so involved.

293. This is a rough figure, as each state has different provisions for speedy trials, sentencings, and other criminal procedures.

lawyer—may be considered an advantage by some,[294] but viewed another way, representation is less an advantage than a necessity. Without counsel, the defendant is at a distinct disadvantage in the system; having counsel lessens, but does not obliterate, that disadvantage.[295]

Another possible argument that can be made in support of victim participation in sentencing is that such participation renders the sentencing process more democratic and thus will make the sentence imposed more reflective of the community's response to a crime. But the fact that democratic legislative bodies set sentences detracts from this argument. Nevertheless, the democratizing function may arguably be better served by allowing the victim and her friends and relatives to participate in sentencing in order to provide the judge with a sense of the community's norms and values in a particular case. The legislature is probably a better measure of those norms and values than is a judge, however, particularly when the judge is faced with a self-selected group of individuals who do not necessarily represent the norms of the community. In fact, if ensuring that community norms prevail is the goal, jury sentencing would be more representative than victim participation.[296]

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294. One victim is quoted as saying: "Why do criminals have more rights than victims? They get to choose counsel and have these continuances . . . . You are stuck with a lawyer they give you, you are left out of what's going on . . . ." *Senate Hearings, supra* note 279, at 189. In many instances, however, it is a total misperception that the "criminal" got to choose his or her own lawyer: An indigent defendant is assigned counsel by the court, and has little to say in the matter. Even though an accused has a right to counsel, the Supreme Court has made it clear that that right does not include the right to a "meaningful attorney-client relationship." Morris v. Slappy, 461 U.S. 1, 14 (1983). Indeed, I found that asking defendants if they had an attorney in a prior case usually produced the response, "No, I had a PD (public defender)."

295. The majority of defendants have no reason to perceive themselves as advantaged, especially if they remain in custody or are represented by public defenders—often referred to as "dump trucks" by clients who see their lawyers as only wanting to strike a quick deal. And when an indigent defendant does not meet his public defender until the day of his trial or has appointed counsel who does not know how to conduct a trial, "having a lawyer" is more illusory than real. *Cf.* Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel,* 34 STAN. L. REV. 1133, 1163–74 (1982) (discussing adversary model as undermined by failure of courts to assure effective representation for indigent defendants).

296. The jury trial is unique to Anglo-American criminal procedure. It is a way of presenting at least the appearance of democratic, rather than hierarchical, decisionmaking. *Cf.* Damaska, *Structures of Authority and Comparative Criminal Procedure,* 84 YALE L.J. 480, 492, 532–42 (1975) (comparing "liberal" English criminal procedures to hierarchical continental methods). While the use of the jury is not exclusively ideological—by

2. *Due process.*

The "due process" rationale focuses on the victim's natural law rights to "life, liberty and property" and suggests according some procedural due process protection to victims.[297] The argument proceeds as follows: When an individual becomes a victim of a violent crime, that person's right to life or liberty (defined as security from harm) has been invaded. Although the due process clause is a check on government power, the government uses victims as witnesses, and victims can therefore claim a private interest in the outcome of a criminal matter. In this view, the government and the courts should provide procedural due process for victims.[298]

If the victim does have some right cognizable under the due process clause—natural, fundamental or substantive—that entitles him to a hearing, the question remains what kind of hearing. The procedural side of the due process clause arises in cases involving government attempts to deprive an individual of a constitutionally protected or legislatively granted right, or to burden this right in some way.[299] Procedural protections are generally required as safeguards against erroneous decisionmaking.[300] But the victim suffers no deprivation at the hands of the government during the sentencing process. The sentence does not formally foreclose any civil action for damages caused by the crime unless the victim agrees,[301] the sentence has no bearing on whether the victim's property will be returned,[302] and the sentence does not

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now, it has become custom or habit in the United States—there is an overlay of belief that a jury better reflects community values than does a judge.

297. *Cf.* M. FLEMING, *supra* note 40 (arguing that the proper focus of criminal law is protection against crime, not protection of criminals).

298. *Id; see also* R. REIFF, *supra* note 25.

299. *See* P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 719–46 (1983).

300. *See In re* Winship, 397 U.S. 358, 371–72 (1971) (Harlan, J., concurring); Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1278 (1975).

301. A sentence might, however, practically preclude recovery. *See* notes 316–324 *infra* and accompanying text. A plea bargaining arrangement might ease recovery in some jurisdictions, however. California, for example, permits the use of a guilty plea or a "no contest" plea in a subsequent civil suit to prove that the defendant committed a felony. *See* CAL. EVID. CODE § 1300 (West Supp. 1985); CAL. PENAL CODE § 1016 (West Supp. 1985).

302. For example, the Santa Clara County, California, District Attorney's Office had a general policy of photographing the property of victims and returning the property to them whenever possible. By contrast, the San Mateo County, California, District Attorney's Office would retain property until after a conviction was affirmed on appeal.

determine whether the state will restrain the victim's physical liberty.[303] Only the restitution context involves the adjudication of some cognizable claim belonging to the victim.[304] Thus, inquiry into the protection of a victim's due process rights because of an erroneous determination by the sentencing judge is unnecessary simply because the victim has no rights or entitlements at stake at sentencing.[305] To seek a justification for the incorporation of procedural due process rights for victims, despite the lack of identifiable *governmental* interference with an individual right, far exceeds the scope of even the Supreme Court's most expansive procedural due process applications.[306] And cluttering up sentencing hearings with additional procedures is not really what advocates of the crime control position seek. The protraction of sentencing proceedings runs contrary to the desire for efficiency and swift and sure punishment.

3. *Recognition.*

"Recognition" is somewhat distinct from fairness or due process concerns. In one form, it may be defined as permitting the victim to speak in response to the appearance of unfairness of the present criminal process,[307] but it is largely a symbolic gesture. This type of recognition of the "individual dignity" of the victim, might have some merit in a utilitarian calculus. By giving victims

303. The President's Task Force seems to imply that a victim's physical safety and liberty may be affected by the release of an offender, at least in the context of parole. TASK FORCE, *supra* note 71, at 30, 84. Again, however, the *Final Report* vacillates confusingly among past victims who have a "deep and real" fear of retaliation and may want "to take precautions," and society's "responsibility for protecting the innocent." *Id.* at 84.

304. *See* notes 311–318 *infra* and accompanying text.

305. In a few instances, the release of an offender may pose a direct danger to the individual victim, but those instances will be rare. Even if we had criteria for determining general dangerousness—e.g., the likelihood that the interest in protecting future victims dictates that a given offender be incapacitated—general dangerousness is decidedly different from dangerousness to a specific individual. The difficulty of separating a victim's understandable fear of, and perception of threats from, the offender from actual threats to the individual would make rational sentencing very difficult, if not impossible, in the vast majority of cases. In cases involving domestic violence, where the offender has clearly directed his behavior toward a given individual or individuals, dangerousness may be more predictable.

306. Perhaps this is why the President's Task Force recommended amending the sixth amendment to the United States Constitution to provide explicitly for victim's rights. *See* TASK FORCE, *supra* note 71, at 114–15.

307. This basis for recognition could be characterized as an "individual dignity" argument. As Jerry Mashaw has observed:

State coercion must be legitimized, not only by acceptable substantive policies,

a voice, this type of recognition could increase the social welfare by encouraging victims to report and prosecute crimes. But whether or not victims are encouraged to help the police and the prosecution may depend more on whether victims have been treated with dignity earlier in the process, or throughout the process, than on whether they participate at sentencing. Moreover, although recognition of the individual's experience in a formalized setting is theoretically possible, great care must be taken to insure that any existing problems of victim alienation are not exacerbated by perfunctory treatment, or alternatively, by uninformed responses such as blaming victims for their predicaments or telling them that now they should "put it all behind them." Finally, because both practical and theoretical considerations may preclude the sentencer from implementing the victim's wishes, some victims may discover that their opinions are meaningless to the outcome and become more embittered.

Recognition also ensures some public validation of the victim's experience—the lending of a sympathetic official ear—but validation may not be a workable justification for victim participation, and it suffers from some of the same flaws as the symbolic gesture form of recognition. Moreover, public validation may not be very useful to many victims who are more interested in obtaining validation from a more specific reference group, such as their friends or family. Overall, there appears to be little justification for victim participation in the determination of the criminal sanction. However, victims may have a more limited role to play—that of helping the court to determine "restitution." Although determining the amount of restitution that an offender should pay may not necessarily mandate the victim's actual presence at sentencing, it certainly requires some victim involvement. The next section discusses victim participation in determining restitution, and observes that participation only serves to emphasize the problematic nature of "victim's rights."

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but also by political processes that respond to a democratic morality's demand for participation in decisions affecting individual and group interests.

. . . .

To accord an individual less [than a hearing] when his property or status is at stake requires justification . . . because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.

Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28, 49–50 (1976) (footnotes omitted).

D. *The Riddle of Restitution*

While many propositions advanced on the behalf of past victims may be of marginal concern to them, compensation for injuries can be of central importance. If crime victims have "rights," the right to recover from the wrongdoer is the most tenable individually based right. Restoration of the victim to the *status quo ante* is what the tort system is supposed to accomplish, and its failure to do so in instances of criminal harm has led many commentators and politicians to advocate grafting tort principles onto the criminal law, typically at the sentencing stage.[308] Both the California Victim's Bill of Rights,[309] and the Federal Victim and Witness Protection Act have made restitution an issue at the sentencing stage.[310]

1. *Restitution as paradox.*

Few would quarrel with the proposition that, in an ideal world, the person who does harm should compensate the victim. This premise is the basis of the tort system, which in theory provides victims of crimes with compensation for their injuries.[311] As a theoretical matter, the civil courts are the proper forum for victims to claim damages.[312] The current emphasis on restitution has blurred the theoretical separation between crime and tort, although restitution is not a complete substitute for a tort action. Usually defined in terms of actual damages and restoration of property,[313] restitution generally does not encompass broader tort concepts such as damages for pain and suffering.[314] Nor do victim's rights laws expand restitution to include these broader damages.[315]

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308. *See, e.g.,* CAL. CONST. art. I, § 28(b); 18 U.S.C. §§ 3579, 3580 (1982); ALA. CODE § 15–18–67 (1982); CAL. PENAL CODE §§ 1191.1, 1191.2 (West Supp. 1985); IOWA CODE ANN. §§ 910.2, 910.3 (West Supp. 1985). *See generally* Harland, *supra* note 72, at 69–75.

309. CAL. CONST. art. I, § 28(b).

310. 18 U.S.C. §§ 3579, 3580 (1982).

311. *See, e.g.,* note 26 *supra.*

312. Many advocates of mandatory restitution have asserted that requiring the victim to pursue a civil remedy is unnecessarily burdensome and duplicative, and have disputed the historical distinction between criminal and civil law. *See, e.g.,* S. SCHAFER *supra* note 36; Laster, *Criminal Restitution: A Survey of Its Past History,* in READINGS, *supra* note 36, at 19–28; Note, *Victim Restitution in the Criminal Process: A Procedural Analysis,* 97 HARV. L. REV. 931, 933–37 (1984).

313. Harland, *supra* note 72, at 60–64.

314. *Id.* at 86–89.

315. The federal restitution provision, enacted as part of the Victim and Witness

The Federal Victim and Witness Protection Act provides that the sentencing judge "may" order restitution and "shall" state his or her reasons "on the record" if he or she does not do so.[316] The California Victim's Bill of Rights goes further, stating that "[r]estitution shall be ordered . . . in every case, regardless of the sentence or disposition imposed . . . unless compelling and extraordinary reasons exist to the contrary."[317] The wording of both the federal and California provisions seems to suggest that the victim's right to restitution "trumps" the state's right to impose the criminal sanction.[318] But a fundamental tension exists between the imposition of the criminal sanction and access to monetary remedies for victims—frequently the use of one negates the use of the other. If restitution is to be more than a symbolic but empty promise to past victims and an assurance for future victims, either the private interest in recovery has to prevail, or an accommodation between public and private interests has to be created.

When serious crimes are involved, the public interest will almost inevitably foreclose either allowing private interests to prevail or accommodation. As the criminal law has evolved, its nature and function has become increasingly social and public, and the criminal process now serves the frequently interrelated public tasks of preventing crime and punishing offenders. The justifications for the criminal process and the characteristics that distinguish criminal law from all other law focus on these two tasks.[319] The increasingly public nature of the criminal law is

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Protection Act of 1982, provides for restitution of noncompensated costs, including damage or loss of property, payment of medical and psychiatric care, funeral expenses, and lost income. 18 U.S.C. § 3579(b), (e) (1982). *But see* ALA. CODE ANN. § 15–18–65, –66 (1982) (all perpetrators of criminal activity are to compensate for "pecuniary loss," damage, or injury; "pecuniary loss" is defined as "all special damages which a person shall recover against the defendant in a civil action"); ARIZ. REV. STAT. ANN. § 13–603(c) (Supp. 1984) (requiring restitution "in the full amount of economic loss as determined by the court and in the manner as determined by the court after consideration of the economic circumstances of the convicted person"); ME. REV. STAT. ANN. tit. 17–A, § 1322(6) (1983) ("restitution" defined as monetary or in-kind reimbursement for "economic loss").

316. 18 U.S.C. § 3579a(2) (1982).

317. CAL. CONST. art. I, § 28(b). It further provides that victims be heard at sentencing for the purpose of determining restitution. CAL. PENAL CODE § 1191.1 (West Supp. 1985).

318. *Cf.* Dworkin, *Liberalism,* in PUBLIC AND PRIVATE MORALITY 113, 136 (S. Hampshire ed. 1978) (preservation of a true liberal system requires that individual rights occasionally trump the economic market and political democracy).

319. Deterrence, rehabilitation, and incapacitation are all aimed at crime preven-

largely a result of our acknowledgement that many crimes have profound effects not only on individuals, but also on the community as a whole. While the distinction between public and private rights is not a particularly satisfactory one, in the instance of core crime, the distinction seems worth preserving.[320] The community has interests in its security and continued existence that are fundamentally affected by war, disasters, and violent crimes. If individual victims are permitted to dictate the choice of sanctions, the community will be virtually excluded from protecting itself from the disruptive impact of crime.

The criminal sanction is the community's response to crime. Because core crime transcends the interests of the harmed individual, the criminal event "belongs" to others as well. Accordingly, the larger community protects its interests by prohibiting private settlements of criminal cases,[321] encouraging community-wide participation in crime prevention,[322] and defining the ap-

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tion, a public function. Retribution also serves a public function, either as a utilitarian means of handling public outrage or as an irreducible, morally good public response to wickedness. *See* notes 251–253, 262–264 *supra* and accompanying texts.

320. In fact, the University of Pennsylvania found the subject vexing enough to publish an entire symposium on the public/private distinction. *The Public/Private Distinction,* 130 U. PA. L. REV. 1289 (1982). It *may* be of note that none of the participants in the symposium addressed the public/private distinction in the area of criminal law; on the other hand, Duncan Kennedy acknowledged two critiques of criminal law in his comment on Paul Brest's contribution. Kennedy, *The Stages of the Decline of the Public/Private Distinction,* 130 U. PA. L. REV. 1349, 1350 & n. 2 (1982). Perhaps we are all so acculturated into believing that criminal law is public that we don't really think of it automatically when we think of attempts to distinguish "private" from "public." Or at least I am so acculturated that I am convinced that criminal law is inescapably collectivity oriented rather than individually oriented. Nozick's argument that compensation to one person does not reassure others who are frightened and does little to stabilize the environment in which individuals live is a good one insofar as it recognizes the importance of the distinction. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA 57–87 (1974); *see also* H. ARENDT, EICHMANN IN JERUSALEM 260–61 (rev. ed. 1965) (crime is a wrong against the community whose law is violated).

321. Many criminal codes forbid such things as "misprision" or "obstruction of justice," often in broad terms. *See, e.g.,* 18 U.S.C. §§ 1503–1512, 1515 (1984); ARIZ. REV. STAT. § 13–2409 (Supp. 1984); MASS. ANN. LAWS ch. 264, § 4, ch. 268, § 13B (1970); *cf.* CAL. PENAL CODE § 153 (West Supp. 1985) (compounding or concealing a crime).

322. One frequent criticism of the Uniform Crime Index is that it fails to reflect the "true" rate of crime because of nonreporting, among other things. Linked to the problem of nonreporting is the belief, if not the certainty, that crimes that go unpunished lead to an increase in the crime rate. Thus, studies are conducted to determine how to increase citizen reporting, *see* W. SPELMAN & D. BROWN, *supra* note 174, and victim's compensation has been justified in part because of a posited incentive to increase re-

propriate sanctions or range of sanctions for particular crimes.[323] The community's protection of its right to exist, as manifested by its imposition of the criminal sanction, will therefore often negate the interest of the victim in recovering from the offender. This is the case, for example, when the community chooses to imprison someone on retributive or incapacitative grounds.

Any unspoken hesitancy to allow the victim's right to recover from the offender to dominate the sentencing determination may explain the attempts to define restitution concepts in terms of the traditional justifications for the criminal sanction in an effort to resolve the paradox created. Proposals for restitution or state compensation for injuries have existed for centuries and these proposals have drawn heavily on the traditional justifications for the criminal sanction. Bentham's utilitarian scheme, for example, called for "satisfaction," a combination of restitution and compensation: reparation for past injury and assurance to society, in order to promote a feeling of security, that suffering will not go unrecognized.[324] Garofalo argued that mandatory restitution would deter criminals by raising the crime tariff, save money, and lead to reformation of some criminals.[325] Thus Bentham and Garofalo suggest that even in the narrow sense of reparation, compensation to victims is not a good end in and of itself. It also must serve the public purposes of the criminal law, particularly those of deterrence and rehabilitation.

In spite of the critiques of rehabilitation, some liberal supporters of restitution have stressed its value as a rehabilitative tool. Some have argued that restitution personalizes the context

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porting of crimes and to increase victim cooperation, *see* R. ELIAS, *supra* note 72, at 254, 259 n.24.

A relatively recent development that encourages public participation in crime prevention is the "Neighborhood Watch" program, in which members of the community monitor suspicious activity. But neighborhood watch programs, citizen patrols, and other community-based, public responses to the crime rate do not appear to have substantially reduced crime, although they "can at the very least help pull a neighborhood together and improve its sense of security." Currie, *supra* note 29, at 23.

323. Thus, the Supreme Court has granted legislatures wide latitude in determining what sanctions to impose for what crimes. Rummel v. Estelle, 445 U.S. 263, 274–76 (1980) (reluctance to review legislatively mandated terms of imprisonment under eighth amendment). *But see* Solem v. Helm, 463 U.S. 277 (1983) (while courts should grant "substantial deference" to legislatures, no penalty is per se constitutional).

324. Bentham, *Political Remedies for the Evil of Offenses,* in READINGS, *supra* note 36, at 29.

325. Garofalo, *Enforced Reparation as a Substitute for Imprisonment,* in READINGS, *supra* note 36, at 43.

of a criminal sentence, keeping the offender in contact with the victim, so that he or she can see the consequences of the criminal acts. Restitution arguably personalizes the sentence and increases the offender's awareness of responsibility and remorse, thereby aiding his rehabilitation.[326] Whether restitution orders under the threat of imprisonment do serve a rehabilitative function is an open question. Other variables, such as availability of work and other sources of financial support for the offender undoubtedly influence the effectiveness of restitution as a rehabilitative device.

The deterrence argument for restitution is based on a "crime tariff" model that assumes that if the price of crime is high enough, potential offenders will refrain from committing crimes.[327] Perhaps offenders would be more deterred by the prospect of having to suffer financially rather than physically, but this hardly seems likely. Most offenders given the choice between making restitution and going to jail would probably opt for restitution.[328]

The retributionist impulse touched off by conservatives has taken the form of mandatory imprisonment for offenses, longer prison terms, and determinate sentencing. None of these enhance the likelihood of the offender making the restitution that conservatives also demand.[329] For example, although the Senate hearings on the issue of restitution reveal some recognition that the desire to punish offenders and the desire to compensate victims are frequently contradictory, the Senate ignored the contra-

326. *See, e.g.*, L. FORER, *supra* note 72, at 299 (1980). Forer also points to the debilitating effects of prison and the expense of imprisonment as further reasons to adopt restitution schemes. *Id.* at 136–38, 307.

327. Kelman, *supra* note 28, at 215–16.

328. Restitution has been used most frequently as a condition of probation. *See* Harland, *supra* note 72, at 57, 69–75. But it might also be used to escape criminal liability altogether under a so-called "civil compromise" statute. *See, e.g.*, CAL. PENAL CODE § 1378 (West 1982) (victims may "compromise" misdemeanors by acknowledging satisfaction for injury); *see also* Harland, *supra* note 72, at 65. Most offenders, given the choice between jail and probation, probably prefer probation and restitution. Although I found no empirical evidence on this subject, my own clients almost always chose restitution over jail.

329. At present, a person in prison has no opportunity to earn the money necessary to make restitution. Even where prisoners do work, the profits are used primarily to defray the expense of feeding and housing inmates, and prisoners' wages are minimal. Moreover, private industry and labor resent the competition of prison industries. "[N]obody wants to see prison shops opened in their market." *See* Schilling, *Prison Shops Have 'Edge,' Foes Say*, Rocky Mountain News, Dec. 25, 1983, at 97, col. 1.

diction in enacting the Federal Victim and Witness Protection Act.[330]

On the liberal side, some advocates of restitution have advocated using restitution as a fine-like punishment imposed instead of imprisonment, because restitution provides a direct method of reminding the criminal of the wrong and forcing an acknowledgement of moral responsibility.[331] At first blush, this seems ideally suited to moral retributionist goals, but in instances of serious crime, it is unworkable. As a society, we want the rapist, mugger, or robber imprisoned on proportionality and incapacitation grounds;[332] in many instances, the victim does also.[333] In cases in which we are indifferent about punishing offenders through imprisonment or fines, restitution through fines may make sense. But restitution is not so much a "punishment" as it is an amends for wrongdoing. Punishment, by definition, should be an unpleasant "extra" that serves no purpose other than to inflict pain or suffering.[334]

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330. A submission to the Subcommittee on Criminal Law of the Senate Judiciary Committee by Ronald A. Zweibel, Chairman of the New York State Crime Victims Board and President of the National Association of Crime Victim Compensation Boards, provides a good example of this tendency. The submission noted the problems of both civil and restitutive recovery but utterly failed to acknowledge that restitution is often no more than an unrealistic goal: "[T]he realities of recovering losses from a criminal offender, who may be judgement proof, incarcerated or indigent, are not particularly promising. . . . Although encumbered by some of the same practical problems as encountered with civil recoveries, restitution at least provides an alternative avenue for securing this basic right." *Senate Hearings, supra* note 279, at 172.

331. *See* L. FORER, *supra* note 72, at 303. *But see* Dittenhoffer & Ericson, *The Victim/Offender Reconciliation Program: A Message to Correctional Reformers,* 33 U. TORONTO L.J. 315, 346–47 (1983) (community program in which offender and victim meet and agree on restitution amount and terms is not a clearly better alternative to jail).

332. There are other problems with restitution as well. For one thing, many offenders lack legitimate means to pay restitution, and may resort to other methods of providing for the money to meet restitution payments rather than go to jail. Second, if an offender legitimately lacks the means to make restitution, it may not be possible to incarcerate him. *See* Bearden v. Georgia, 461 U.S. 660, 668–69 (1983) (state may not imprison probationer who has made "all reasonable efforts" to pay fine or make restitution as condition of probation "without considering whether adequate alternative methods" of punishment are available).

333. Given a choice between receiving restitution or seeing the offender punished or incapacitated, the victim of a core crime is likely to *want* both, but will settle for something less. Given the cultural association of crime with punishment, many victims will arguably prefer punishment; some victims may want the offender incapacitated for more "altruistic" reasons such as the protection of the community. Thus, even from a pure "victim" orientation, restitution may not be as important as is often assumed.

334. Although physical torture has largely been replaced by deprivation of rights and wealth, M. FOUCAULT, *supra* note 266, at 7–15, the deprivation is still punishment,

2. *California's attempt to resolve the paradox.*

The California legislature explicitly recognized the paradoxical nature of restitution in 1983 when it had to reconcile the Victim's Bill of Rights amendment to the state constitution requiring restitution in all cases with California's constitutional and statutory requirements of increased and mandatory prison terms.[335] Conservative Republicans insisted that individual offenders be required to make restitution regardless of imprisonment or ability to pay.[336] Where necessary, they were willing to require payment of restitution as a condition of parole, essentially taking the position that the offender, and *only* the offender, is responsible for providing the victim with a financial remedy.[337] Under the

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reaffirming power relationships and social control, and inflicting pain. It is a negative stimulus. As such, pain or suffering, however short, is a part of punishment.

335. The Victim's Bill of Rights made restitution mandatory, *see* CAL. CONST. art. I, § 28(b), and lengthened sentences in cases where an offender had a prior conviction for a felony, no matter how old the prior felony conviction, *see id.* at § 28(f); *cf.* CAL. PENAL CODE § 667 (West Supp. 1985) (requiring a five-year sentence for each prior "serious felony" conviction to run consecutively to sentence for new "serious felony" conviction); *see also* CALIFORNIA LEGISLATIVE ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, ANALYSIS OF PROPOSITION 8, at 28, 31–32, 42–43 (1982) (arguing that "[s]ignificantly [l]onger [s]entences" would result under Proposition 8). The California Determinate Sentencing Law, together with individual provisions requiring *mandatory* prison sentences for a number of offenses, already existed when Proposition 8 passed. *See* CAL. PENAL CODE § 1170 (1977).

336. Paul Gann, a co-author of the Victim's Bill of Rights, stated that "he favors just about any effort to get restitution money from convicted felons, including confiscating money or property," and went on to observe: " 'If they commit a heinous crime, like rape or murder, as far as I'm concerned they can get the money selling their blood if somebody will buy it.' " Norman, *Traffic Tickets May Help Pay the Bills for Victims of Crime,* Peninsula Times Tribune, June 4, 1983, at A1, col. 1, A8, col. 1. Republican legislators "introduced legislation that would require convicted adults and juveniles to repay their victims, either directly with money or goods, or indirectly through community service," Stanton, *A Proposal to Pay Victims of Crime,* Peninsula Times Tribune, Mar. 23, 1983, at A4, col. 1, but they ultimately agreed to Democrat-sponsored legislation, *see* notes 340–343 *infra* and accompanying text.

337. Senate Bill 593, introduced by Senator Dolittle and co-authored by Republican Assemblyman Nolan, would have provided that courts impose a mandatory "restitution penalty" of between $50 and $100,000. S. 593, 1983 Cal. Legis., Regular Session, at 5 (June 17, 1983) (amended in assembly, July 15, 1983). If the offender were sentenced to prison, the Director of Corrections would have been required to withhold 50% of the prisoner's income and transfer it to the State Board of Control to be placed in a restitution trust account. *Id.* at 8–9. The Board of Prison Terms, in considering parole, would have to determine a payment schedule for "remaining restitution penalty"; parole could be revoked if the restitution payments were not made, and parole terms could be extended up to 15 years in order to assure payments. *Id.* at 8. The majority leader of the Assembly referred to the Republican proposals as "unworkable" and "hoax-like," concluding that the Republican package "offers a false hope that everybody will get restitution for a crime." *Demos Would Make Criminals Pay 'Tax' for Restitution*

conservative plan, and in light of California's existing mandatory sentencing structure, a victim who suffered serious bodily injury as a result of a forcible rape in which the perpetrator used a deadly weapon would have to wait a *minimum* of approximately ten years, eight months, before the assailant would be eligible for parole[338] and, perhaps, be able to earn money to make restitution payments. Such a "resolution" of the restitution paradox is no resolution at all.

Liberal Democrats sought to increase the amount of funds available to victims under the California Victims of Violent Crime Compensation program[339] by recharacterizing it as a victim's restitution fund, financed by penalty assessments charged in addition to fines in all criminal cases.[340] The Democrats additionally proposed changes in the law involving tort suits for damages, including extending statutes of limitations, providing for punitive damages in wrongful death suits, and increasing the civil liability of parents whose children commit a crime.[341]

The "restitution fund" places a tax on all criminal activity: a mandatory payment to the restitution fund of $5 assessed for every $10 of criminal fines in misdemeanor cases, a mandatory assessment for felony convictions ranging from $100 to $10,000, and a $20 assessment imposed on those convicted of driving

Funds, San Francisco Examiner, Mar. 23, 1983, at B12, col. 1, 3; *accord Should a Restitution Penalty Be Assessed in Criminal and Juvenile Cases to Be Paid into a Separate Account for the Benefit of the Victim?*, Memorandum by Byron D. Sher, Chairman of the California Assembly Committee on Criminal Law and Public Safety (1983) (on file with author).

338. This is based on the maximum, "aggravated," eight-year term, *see* CAL. PENAL CODE § 264 (West Supp. 1985), for violation of the statute, *see id.* at § 261 (West Supp. 1985), a five-year consecutive enhancement for great bodily harm, *see id.* at § 12022.8 (West 1982), and a three-year enhancement for use of a deadly weapon, *see id.* at § 12022.3. The maximum sentence is thus 16 years. With one-third of the sentence reduced by good time/work-time credits, *id.* at §§ 2931, 2933 (West Supp. 1985), 10 years and 8 months would be the minimum sentence the offender would have to serve.

339. CAL. GOV'T CODE §§ 13960–13974 (West. Supp. 1985).

340. *See* CAL. GOV'T CODE §§ 13959, 13960.1, 13967 (West Supp. 1985); H.R. 1485, 1983–1984 Cal. Legis., Regular Sess., 56–68; Ashby, *Assembly Passes Bills on Restitution to Crime Victims*, L.A. Daily J., June 10, 1983, at 1, col. 2.

341. *See* Press Release by California Assemblyman Byron Sher (Sept. 12, 1983) (on file with author) [hereinafter cited as Sher]. In the press release, the sponsors of the "Crime Victim Restitution Program of 1983" stated: "The Restitution Fund would be financed by doubling current fine limits, ordering a restitution fine in every criminal case, and imposing heavy fines on drug offenders." Sher, *id.* at 1. California law now provides that restitution fines may be paid by withholding 20% of a prisoner's wages, a peculiar blend of the Republican's direct restitution idea and the Democrat's compensation fund model. CAL. PENAL CODE § 2085.5 (West Supp. 1985). *See also* Lynne, *Of Parking Violators and Victims of Violence*, Peninsula Times Tribune, Mar. 31, 1983, at A2, col. 1.

under the influence.[342] Although conservatives initially opposed the plan in which traffic violators "subsidized" rapists and murderers, the proposal eventually gained bipartisan support and became law. The program that emerged was thus more like California's preexisting victim's compensation program, with increased funds to be supplied essentially by a tax on well-to-do offenders,[343] rather than a program of restitution by offenders.

3. *Some unanswered questions.*

In those cases in which direct restitution by the offender to the victim is possible and is a sentencing issue, neither federal nor state provisions offer much guidance on the procedures for determining the appropriate amount of restitution. One commentator has recently argued that once a person is convicted, his or her rights "are merely conditional,"[344] and therefore no formal trial is necessary to determine the amount of restitution required.[345] The argument uncritically accepts that restitution is compatible with the justifications for the criminal sanction.[346] Because this article asserts that restitution is analytically different, the problem of procedure cannot be so lightly dismissed.[347]

The Federal Victim and Witness Protection Act recognizes due process questions associated with restitution by placing the burden of proving the amount in question by a preponderance of the evidence on the prosecution and the same burden of proof

342. *See* CAL. GOV'T CODE § 13967 (West Supp. 1985); CAL. PENAL CODE §§ 1463.18, 1464 (West Supp. 1985); CAL. WELF. & INST. CODE § 729.6 (West Supp. 1985).

343. One author has argued that this type of funding scheme furthers the goals of punishment and rehabilitation, *see* Friedsam, *Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act,* 11 FLA. ST. U.L. REV. 859, 872 (1984), presumably because it is a form of quasi-restitution. But the distinction between payment of a restitution "fine" and other "fines" seems nonexistent. Moreover, it is not clear that restitution functions either as a rehabilitative device or as a punishment. Nor does "taxing" well-to-do offenders, primarily white collar criminals or drug dealers, seem to add to general deterrence.

344. Note, *supra* note 312, at 944.

345. *Id.* at 944–46.

346. *Id.* at 937–41.

347. I take issue with this argument for two reasons. First, as I have argued, *see* notes 324–334 *supra* and accompanying text, restitution is *not* supported by any of the rationales for the criminal sanction. Second, this argument ignores the fact that if a convicted offender is sued in tort, he does not sacrifice the procedural and evidentiary benefits that other tort defendants have. To treat him differently in the criminal context undermines the purpose of the safeguards in the civil context.

on the defendant to show his or her inability to pay.[348] On the other hand, it leaves the burden of "demonstrating such other matters as the court deems appropriate upon the party designated by the court as justice requires."[349] The reference to "appropriate matters" in this latter provision creates virtually complete judicial discretion in restitution proceedings. Moreover, the Act applies to harms resulting from "the offense" without defining whether the offense means all the offenses with which the defendant was charged, or simply the offense for which he or she was convicted.[350] Thus, the defendant could have to pay restitution for crimes of which he or she is not guilty.[351]

The situation on the state level may be worse than it is on the federal level. A recent article surveying restitution provisions throughout the United States found that many state plans failed to provide for due process protections for criminal defendants comparable to those available in civil actions against the criminal offender.[352] The option of restitution, either instead of a jail sentence or at least with the promise of a lesser term, makes it difficult for offenders to object to the amount of restitution awarded, however unfounded.[353] Moreover, many states have shifted the burden of proving the amount of reasonable restitution from the person seeking restitution to the offender.[354] The lack of proce-

348. 18 U.S.C. § 3580(d) (1982). For an argument that the determination of restitution should take place in the adjudicatory phase of the criminal process in order to protect the rights of defendants, see Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability,* 93 YALE L.J. 505, 516–17 (1984). The courts have also been unwilling to dispense with due process protections in the restitution area, although they have disagreed on what process is due. *Compare* U.S. v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983) (restitution order under Federal Victim and Witness Protection Act violates due process clause, seventh amendment right to jury trial, and eighth amendment prohibition against cruel and unusual punishment, because it might result in imprisonment for debt), *with In re* D.G.W., 70 N.J. 488, 361 A.2d 513 (1976) (due process encompasses a right to be heard at the sentencing hearing), *and* State v. Pope, 107 Wis. 2d 726, 321 N.W.2d 359 (Wis. Ct. App. 1982) (due process requires notice, an opportunity to be heard, and a right of confrontation).

The procedures for determining restitution that have been developed by courts and legislatures are not as protective as are existing procedures for civil cases. *See* Harland, *supra* note 72, at 99–108.

349. 18 U.S.C. § 3580(d) (1982).

350. *See* Note, *supra* note 348, at 509–11.

351. *Id.* at 517.

352. Harland, *supra* note 72, at 99–108.

353. *Id.* at 73–74, 105.

354. *Id.* at 100–08. Similarly, California's Victim's Bill of Rights did not address any substantive or procedural questions, but simply left it up to the legislature to determine how the restitution provisions should be implemented. Although the legislature

dural protection is troubling because it is symptomatic of a general willingness to treat offenders as "others" and not as persons entitled to the same consideration the law provides other wrongdoers who cause harms.[355]

4. *A final note on victim's compensation programs.*

The California compromise led to increased funding for the already existing victim's compensation program.[356] Victim's compensation statutes exist in almost every state[357] and are largely the product of a liberal, social welfare ideology,[358]

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has created the Crime Victim's Restitution Fund, it has yet to provide a procedural framework for reaching a restitution decision at sentencing.

355. Harland's thesis is that the use of restitution is grounded more on convenience and practicality than on any particularly "profound reconsideration of the fundamental purposes of civil versus criminal courts or tort-crime differences." *Id.* at 120.

356. *See* CAL. GOV'T CODE §§ 13959–13974 (West 1980 & Supp. 1985).

357. *See, e.g.*, ALASKA STAT. § 18.67.010–.180 (1981 & Supp. 1984); FLA. STAT. ANN. § 960.01–.28 (West 1985); MASS. ANN. LAWS ch. 258A, §§ 1–9 (Michie/Law. Co-op. 1980 & Supp. 1985). In 1984, Congress established a federal victim compensation program. Victims of Crime Act of 1984, Pub. L. No. 98–473, 98 Stat. 2170 (1984). The federal law enacts a tax on offenders—$25 for individuals convicted of a misdemeanor, $50 for individuals convicted of a felony—similar to the "penalty assessment" scheme used in California. *Id.* at § 1405, 98 Stat. at 2174–75. The fines are to be distributed to state victim's compensation programs.

358. *See, e.g.*, Yarborough, *S.2155 of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act*, 50 MINN. L. REV. 255, 256–57 (1965). English penal reformer Margaret Fry argued, for example, that the state, having taken on the responsibility of controlling crime and adjudicating guilt, also had the responsibility to compensate those injured when the state failed to control crime. *See* Fry, *supra* note 36; *cf.* Mueller, *Compensation for Victims of Crime: Thought Before Action*, 50 MINN. L. REV. 213, 216–17 (1965) (characterizing victim's compensation as "compulsory government insurance, comparable to workmen's compensation, social security, or medicare"); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 249 (1965) (emphasizing the need for the state to fulfill "an important social welfare function" through victim's compensation). *But see* R. ELIAS, *supra* note 72, at 27–29 (victim's compensation is motivated by the desire to "buy off" civil unrest); Weeks, *The New Zealand Criminal Injuries Compensation Scheme*, 43 S. CAL. L. REV. 107, 107–09 (1970) (victim's compensation was a politically convenient way to offset objections to liberalization of penal system).

Although inspired by liberalism, several statutes did incorporate conservative values, such as requirements that the victim be "blameless" and cooperate with law enforcement officials. *See, e.g.*, CAL. GOV'T CODE § 13961 (West Supp. 1985) (State Board of Control empowered to promulgate eligibility rules); CAL. ADMIN. CODE tit. 2, Rr. 648.3, 649.9 (1985) (for claims arising before July 1, 1974, victims could be required to cooperate with law enforcement in the apprehension *and* conviction of the criminal in order to recover; for claims arising July 1, 1974 or thereafter, applicant has burden of proving by a preponderance of the evidence to Board's "satisfaction" that injuries or death arose "from a crime of violence which was promptly reported" to law enforcement agency, and that victim did not, "by his acts, contribute to his own injuries," among other things); MINN. STAT. ANN. § 611A.53(2) (West Supp. 1985) (reparation unavailable

although some have argued that compensation should be considered a right.[359] Still, no satisfactory explanation exists for treating victims of crime as *more* entitled to state-funded compensation than victims of other insolvent or governmental tortfeasors. Several compensation advocates have argued that because the state has taken responsibility for crime prevention, it has a duty to compensate individual victims when it fails to protect them.[360] This argument, however, does not explain why crime victims are "special." Under this analysis, the state is equally under a duty to compensate victims of uninsured motorists because it controls the licensing of drivers and "requires" insurance.[361] Moreover, according victims of crimes a special status in society above victims of governmentally inflicted harms— for example, civilians who are injured because of the dumping of toxic wastes by the government, or who get cancer as a result of government testing of nuclear weapons—seems to be insupportable.[362]

An argument that the state needs a victim's assistance to enforce the criminal law, and therefore should reward victims for their cooperation, is problematic under most existing statutes. Many victim's compensation programs provide only for victims

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if victim failed to report the crime to the police within five days, "failed or refused to cooperate fully" with law enforcement, or is related to the offender); WIS. STAT. ANN. § 949.08 (West 1982) (compensation unavailable if victim "engaged in conduct which substantially contributed to" injury or death, "has not cooperated with law enforcement," is related to the offender, or committed a crime himself or herself).

359. R. ELIAS, *supra* note 72, at 237, 252–53 (social welfare model may increase victim discontent); Elias, *The Symbolic Politics of Victims Compensation*, 8 VICTIMOLOGY 213, 217–20 (1983) (compensation should be based on a theory of rights).

360. *See, e.g.*, Fry, *supra* note 36; Wolfgang, *Social Responsibility for Violent Behavior*, 43 S. CAL. L. REV. 5, 6 (1970); Yarborough, *supra* note 358, at 256.

361. *See generally* Starrs, *A Modest Proposal to Insure Justice for Victims of Crime*, 50 MINN. L. REV. 285 (1965) (criticizing special treatment of crime victims inherent in state compensation schemes and advocating private insurance as a remedy). I am unaware of any proposals in which states compensate victims of uninsured motorists; the farthest that states seem willing to go in this direction is to require that drivers be insured. *See, e.g.*, CAL. VEH. CODE §§ 16020, 16021 (West Supp. 1985); FLA. STAT. ANN. §§ 324.011–.021, 627.733 (1984 & Supp. 1985). The sanctions imposed on uninsured drivers who are involved in accidents, *see* CAL. VEH. CODE § 16070 (West Supp. 1985); FLA. STAT. ANN. § 324.051(2) (West Supp. 1985), typically suspension or revocation of a driver's license or vehicle registration, do nothing to compensate victims.

362. For an excellent attempt to find a theoretical and practical justification for government compensation to victims of toxic waste dumping, see Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983).

of violent crimes,[363] and frequently require that the victims be "innocent"—excluding those who arguably precipitated the crime or are otherwise "blameworthy,"[364] or those who do not cooperate fully with law enforcement.[365] This substantially narrows the field of victims encouraged to aid the system and provides few incentives to aid law enforcement. Further, with normative language such as "innocence" in the statutes, those in charge of deciding which victims receive compensation have enormous discretion. Finally, one of the major complaints about victim's compensation programs has been that few victims know or are told of such programs.[366] As a practical matter, compensation falls woefully short as an incentive for many victims to help the state enforce laws.

Another less instrumental approach to victim's compensation programs might justify treating crime victims differently from other victims. The state has an expectation that crime victims will report crimes and assist in the prosecution of offenders, but this expectation does not extend to victims of many kinds of insolvent tortfeasors. Indeed, the state may *punish* a crime victim for noncooperation by holding him or her in contempt for refusing to testify, or the state conceivably could prosecute victims for the obstruction of justice.[367] Although crime victims can and do choose not to report crimes, once they report a crime, they must accept the intrusion of the larger community into their experience. Victim's compensation may provide a symbolic recognition of the victim's contribution to the general welfare of the community. Perhaps by demonstrating our collective opposition to violent crime by compensating victims, the system gains moral

363. *See, e.g.*, FLA. STAT. ANN. § 960.03(3),(7) (West 1985); OKLA. STAT. ANN. tit. 21, § 142.3(13) (West 1983); WIS. STAT. ANN. §§ 949.01, .03 (West 1982 & Supp. 1985).

364. *See* note 358 *supra*.

365. *See, e.g.*, CAL. ADMIN. CODE tit. 2, R. 648.3 (1985); MINN. STAT. ANN. § 611A.53(2)(b) (West Supp. 1985); OHIO REV. CODE ANN. § 2743.60(C) (Page Supp. 1984); OKLA. STAT. ANN. tit. 21 § 142.10(c) (West 1983); WIS. STAT. ANN. § 949.08(d) (West 1982); W. VA. CODE § 14–2A–14(d) (Supp. 1985).

366. *See* R. ELIAS, *supra* note 72, at 111–12, 180. Elias, *supra* note 359, at 218.

367. In 1982, the Santa Clara County courts held two minor victims in contempt for their refusal to testify in sexual abuse cases. Both victims were confined in juvenile hall. Despite the negative publicity, the District Attorney's office supported the imprisonment of the victims. *See* Letter from William Hoffman, Chief Assistant District Attorney for Santa Clara County, to Lynne Henderson (May 25, 1982) (on file with author); *see also* Nakao, *12-Year-Old-Girl Held in Solitary for Not Testifying Is Freed,* San Francisco Examiner, Jan. 8, 1984, at 1, col. 1 (molestation victim held in contempt for refusing to testify against stepfather).

credibility for its position against noninstrumental violence. But, to compensate such victims lacks coherence, and to characterize victim's compensation as symbolic of an opposition to noninstrumental crimes is to accept responsibility to contribute to the fund generally, rather than to tax offenders in order to compensate. The unwillingness of most advocates of compensation to abandon the premise that the wrongdoer should directly or indirectly pay the victim weakens the interpretation of victim's compensation as a community response.[368]

A final observation on restitution and compensation is appropriate before concluding. Neither compensation nor restitution provide for nonmonetary loss. The secondary costs of victimization—pain and suffering, emotional distress, loss of status and security—are not easily quantified. And, except perhaps for loss of status, these "costs" are not ultimately expunged by money, although as the common wisdom would have it, money certainly helps. But increased understanding of the meaning of the experience and willingness to overcome the ambivalence about victims might be of more value to them in the long run, particularly because of the reality of limited monetary resources.

VI. CONCLUSION

This article has briefly touched upon the complex issues raised by the victim's rights movement and the psychological phenomena resulting from victimization. It offers an outline of the current state of the law and does not discuss victim's rights proposals that do not relate directly to changes in the criminal law or process.[369] Rather, the concern of this article is to increase the understanding of the experience of victimization, and the manner in which the anguish of victims has been reformulated or mistranslated into support for a particular ideology. The cooptation of victim's concerns by crime control proponents has created a new mythology of victimization that fails to hear those concerns. The following exchange, taken from the Senate Subcommittee Hearings on the Omnibus Victim and Witness Protection Act, both exemplifies the inability of nonvictims to hear past vic-

368. *See* notes 137–147 *supra* and accompanying text.

369. For an article that discusses changes in the law of evidence as a result of the California Victim's Bill of Rights, see Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies,* 31 U.C.L.A. L. REV. 1003 (1984).

tims and demonstrates the resulting translation of the anguish of victimization into a condemnation of the offender:

> *Senator Heinz.* Do you have any thoughts on how prosecutors can be more sympathetic or more understanding, more humane in their treatment of people such as yourself?
> *Mrs. X.* I certainly do have a lot of opinions. When I talked to the police—I did a series of workshops in the Montgomery County Police Department—the first thing I emphasized was that whether a person is a prosecuting attorney, a judge, or the President of the United States, I would urge him to examine his own feelings about crime. In my particular case, about rape.
>
> What I feel is that most people are so afraid of being victims themselves that when they are dealing with a victim they treat us as anathema. *Our very existence* makes them uncomfortable. I imagine I look like someone you know. Maybe I look like someone you love? I might make you feel uncomfortable just by my existence. Rape happened to me. It wasn't nice. It wasn't midnight, and I wasn't alone or in a bar. I didn't ask for it.
>
> This makes people uncomfortable. I would ask prosecuting attorneys not to hide behind sarcasm here, nor employ the games of the law, not to be afraid of being somehow compassionate, not to confuse cold with professional.
> *Senator Heinz.* In other words, what you are really saying is that although the *criminal* may have every step of the way explained to him by his lawyer or, if he can't afford his own lawyer, by a court-appointed lawyer—paid for by the *taxpayer,* there was no one in your case who ever had the courtesy or the simple decency to explain the process and sit down with you and let you know, no matter how uncertain the process was, what it was comprised of.[370]

To whom, or to what, is he responding?

370. *Senate Hearings, supra* note 279, at 65–66 (emphasis added).