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VICTIMS BY DEFINITION

I. INTRODUCTION

This Note attempts to answer a deceptively simple question: Who is the victim of a crime? After decades of “neglect” in state and federal criminal law,¹ during the last thirty years victims have come to play an increasingly central role in American criminal justice. Our current system of criminal law is not simply a matter of defendants, prosecutors, and judges; in the federal system, the victim of a crime has a right to restitution,² to confer with prosecutors handling the case,³ to speak at the offender’s sentencing,⁴ and to receive notice of the offender’s parole.⁵ Moreover, under the United States Sentencing Guidelines (hereinafter “the Sentencing Guidelines” or “Guidelines”), an offender’s sentence may also be influenced by whether a federal judge identifies victims of the offender’s crime.⁶

Yet victimhood is a slippery concept.⁷ As a matter of law, whether someone is a victim of a crime may depend, among other things, on the type and extent of injury sustained,⁸ the tenuousness of the connection of injury to the offender’s conduct,⁹ and whether the victim was at fault in the criminal transaction.¹⁰ Further, the term “victim” is inconsistently applied in the various arenas of federal criminal law. While the definitions of “victim” found in the federal restitution¹¹ and victims’ rights¹² statutes are functionally identical, the Federal Rules of Criminal Procedure define “victim” differently.¹³ Most remarkably of all, however, the Sentencing

1. See *infra* Part II.B.

2. 18 U.S.C. §§ 3663, 3663A (2000); see also 18 U.S.C. § 3771(a)(6) (Supp. 2007).

3. 18 U.S.C. § 3771(a)(5).

4. *Id.* § 3771(a)(4).

5. *Id.* § 3771(a)(2).

6. See *infra* Part III.A.

7. See *United States v. Terry*, 142 F.3d 702, 711 (4th Cir. 1998) (noting that the definitions of “victim” provided in *Black’s Law Dictionary* and *Webster’s Ninth New Collegiate Dictionary* vary in scope and that “the term ‘victim’ standing alone is ambiguous”).

8. See *infra* Part III.B.1.

9. See *infra* Part III.B.2.

10. See *infra* Part III.B.4.

11. 18 U.S.C. § 3663A(a)(2) (2000) (defining “victim” as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”).

12. 18 U.S.C. § 3771(e) (Supp. 2007) (“[T]he term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.”).

13. FED. R. CRIM. P. 32(a)(2) (defining “victim” as “an individual against whom the defendant committed an offense for which the court will impose sentence”). “[A]mazingly, the current [R]ules

“Guidelines do not define the term [victim], leaving the federal courts to sketch out the contours of its meaning.”¹⁴ In short, despite the widespread appearance of victims in federal criminal law, victimhood has yet to obtain a fixed, salient legal meaning.

This Note explores the meaning of victimhood within the Sentencing Guidelines and other areas of federal criminal law and proposes a victim definition for the Guidelines grounded in five core concepts: adequacy of victim injury, proximate cause, and victims who are imaginary, culpable, or consenting. Part II sketches the gradual appearance of victims in federal criminal law throughout the last three decades, a development that reached a new pinnacle in 2004 with the passage of the Crime Victims Rights Act (CVRA).¹⁵ Part III considers the role of victims in the Sentencing Guidelines, describes federal courts’ attempts to create standards for identifying victims in the Guidelines in the absence of a victim definition, and identifies the conceptual contours of victimhood. Drawing on the analysis in Part III, Part IV proposes a victim definition for the Guidelines and explains how it should be applied in an interlocking manner with other victim-related provisions of federal criminal law. Part V provides the Note’s conclusions.

Through its exploration of victimhood, this Note makes three principal contributions. First, this Note argues that the absence of a victim definition in the Sentencing Guidelines is both a major conceptual flaw as well as an impediment to the fair and consistent administration of justice. It is illogical to base sentencing calculations on undefined terminology. Furthermore, the absence of a victim definition leaves sentencing judges without proper guidance, producing judicial frustration and inconsistency. This Note also argues that the absence of a victim definition in the Guidelines reflects the fact that, until the introduction of federal victims’ rights laws and federal victim-based sentencing provisions in the 1980s, “victim” was simply a vague term used to denote a party injured by crime rather than a salient legal concept.

[of Federal Procedure] substantively use the word ‘victim’ only a single time.” Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYU L. REV. 835, 839.

14. Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 119 (2006). See also U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007) (failing to include a definition of “victim” among definitions for terms used throughout the Sentencing Guidelines); *United States v. Terry*, 142 F.3d 702, 710 (4th Cir. 1998) (noting that, “[r]egrettably,” the Guidelines do not define the word “victim”).

15. 108 Pub. L. No. 405, 118 Stat. 2260 (2004) (codified at 18 U.S.C. § 3771 (Supp. 2006)). The CVRA was included in the Justice for All Act of 2004; the legislative history reflects both names.

Second, this Note argues that victim-related provisions of federal criminal law should be viewed within a single field. Although victims' rights statutes confer benefits on crime victims while a victim-focused sentencing regime imposes penalties based on victims' injuries, both arenas involve the same critical inquiry of determining who, as a matter of law, is the victim of a crime. Viewing these two fields—victims' rights and victim-focused sentencing—together produces a more rigorous and comprehensive understanding of the role victims play in federal criminal justice. Moreover, since the argument in favor of victims' rights is often predicated on the moral right of victims to participate in the criminal justice system,¹⁶ this Note argues that there is a corresponding moral responsibility to carefully define victimhood when offenders' sentences are affected by determinations of who qualifies as a victim.

Third, this Note proposes a victim definition for the Guidelines that provides not only a basis for consistent adjudications of victim-based sentencing provisions, but also a starting point for a larger project of clarifying the meaning of victimhood in federal criminal law. The proposed definition incorporates two critical concepts, adequacy of victim injury and proximate cause, while categorically excluding putative victims who are imaginary, culpable, or consenting.

II. THE RISE OF THE VICTIM

A. *Origins of Victimhood*

The word “victim” arises from the Latin *victima*,¹⁷ the term used to describe animals sacrificed in religious ceremonies.¹⁸ By the late seventeenth century, the English Language had incorporated the word “victim,” apparently under the influence of Rhemish translators of the Bible.¹⁹ The religious (and specifically sacrificial) etymology of the word may explain why many early references to “victims” concern spiritual matters rather than parties injured by crime.²⁰ In the absence of victim-

16. *See infra* Part II.D.

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2550 (Merriam-Webster, eds. 1968).

18. OXFORD LATIN DICTIONARY 2057 (1982) (defining “*victima*” as “[a]n animal offered in sacrifice”).

19. “Victim,” OXFORD ENGLISH DICTIONARY Vol. XIX, 607 (2d ed. 1991).

20. *Id.* (noting that among the earliest uses of “victim” in English include: DRYDEN, *Virg. Georg.* IV. 784 (1697) (“Select four Brawny Bulls for Sacrifice, . . . From the slain Victims pour the Streaming Blood”); CHAMBERS, *Cycl.*, s.v. *Sacrifice* (1728) (“The Priest . . . then took Wine in a Vessel . . . and . . . poured it between the Horns of the Victim”); PRIESTLEY, *Inst. Relig.* (1782) I. 202 (“The Mexicans

focused provisions of criminal law, early nineteenth-century American courts do not appear to have used the term precisely. Rather, early American courts' usages of the term "victim" appear limited to factual descriptions of crimes²¹ and, on occasion, to a more general idea of a morally wronged party.²²

An 1860 opinion of the California Supreme Court may provide the first detailed discussion of the meaning of the word "victim" by an American court.²³ In that case, the Court considered whether the use of the term "victim" in jury instructions unduly prejudiced a defendant, as the word might convey to the jury the impression that the party suffering the injuries allegedly inflicted by the defendant was morally unblameworthy. Although the Court reversed the defendant's conviction on other grounds, in dicta the Court counseled against use of the word "victim" in future jury instructions:

The word *victim*, in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing When the deceased is referred to as "a victim," the impression is naturally created that some unlawful power or dominion had been exerted over his person.²⁴

Interestingly, appellate decisions addressing the use of the term "victim" in jury instructions provide some of the only judicial discussions of the meaning of the word before the introduction of federal restitution statutes and the Sentencing Guidelines in the 1980s. In 1964, for instance, the Maryland Supreme Court rejected a defendant's challenge to jury instructions making use of the word after evaluating competing definitions:

used human victims.")). The Dictionary does not include any reference to the use of the term "victim" as denoting someone injured by everyday crime.

21. *Turney v. State*, 16 Miss. 104, 118 (Miss. Err. & App. 1847) (Sharkey, C.J., concurring) (stating how circumstances suggested that an allegedly raped woman was a "willing victim to the perfidy of a seducer, rather than a resisting subject of a brutal outrage").

22. *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) ("Can those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?").

23. *People v. Williams*, 17 Cal. 142 (1860).

24. *Id.* at 147.

The appellant gives the definition of “victim” from the Oxford English dictionary (1933) as “a living creature killed and offered as a sacrifice to some deity or supernatural power,” or “a person who is put to death or subjected to torture by another; one who suffers severely in body or property through cruel or oppressive treatment.” . . . On the other hand, the State relies on the definition of “victim” in Webster’s New International Dictionary (2nd Ed.), as “a person or living creature injured, destroyed or sacrificed, in pursuit of an object, in the gratification of a passion, at the hands of another person, from disease, accident or the like.”²⁵

Although the court reversed the defendant’s conviction on other grounds, it held that the appearance of the word “victim” in the jury instructions was not prejudicial.²⁶ Other twentieth-century courts likewise rejected defendants’ efforts to overturn convictions based on judges’ stray references to “victims” during trials.²⁷ However, there appear to be only a handful of cases before 1980 involving litigation over the application of the term “victim” to a particular person, precedents which offer little guidance for developing a rigorous definition of the term in federal criminal law.²⁸

25. *Barger v. State*, 202 A.2d 344, 348 (Md. 1964) (conviction reversed on other grounds).

26. *Id.*

27. *Bradham v. State*, 250 S.E.2d 801, 806 (Ga. Ct. App. 1978) (“Webster’s defines ‘victim’ as ‘one that is injured, destroyed, or sacrificed under any of various conditions.’ No criminal connotation appears under any definition in Webster’s and we decline to impute such a meaning to the use of the term ‘victim.’”), *rev’d*, 256 S.E.2d 331 (Ga. 1979) (improper jury selection); *Walden v. State*, 542 S.W.2d 635, 637–38 (Tenn. Crim. App. 1976) (no reversible error when “the Court was using the word ‘victim’ in context with the general definition of the crime of rape and he was not instructing the jury that the female was in fact raped”); *Hogan v. State*, 496 S.W.2d 594, 599 (Tex. Crim. App. 1973) (judge’s use of word “victim” was not reversible error because “[i]f, as appellant claimed, [the] deceased was killed as the result of an act of an insane man, he would still be a ‘victim’ just as much as if he had been killed by the deliberate act of one who was sane”). The court in *Hogan* noted that Webster’s New International Dictionary, 2d ed., defines “victim” as “[a] person or living creature injured, destroyed, or sacrificed, in the pursuit of an object, in the gratification of a passion, at the hands of another person, from disease, accident or the like.” *See also* *Merch. Distrib., Inc. v. Hutchinson*, 193 S.E.2d 436, 441 (N.C. Ct. App. 1972) (rejecting defendant’s challenge to court’s reference to “victim” in a tort suit when “in the context in which the word ‘victim’ was used, it was obvious both to counsel for the plaintiffs and to the jury that the court was referring solely to the fact that Mark S. Hutchinson was the only person who was killed in the collision”), *overruled by* *Burcl v. N.C. Baptist Hosp., Inc.*, 293 S.E.2d 85 (N.C. 1982) (recognizing abrogation by statute on other grounds).

28. *See, e.g.,* *People v. Miller*, 558 P.2d 552 (Cal. 1977) (rejecting defendant’s contention that injured security guard was not a victim of a robbery but was merely an employee of a jewelry store robbed by the defendant), *overruled in part by* *People v. King*, 851 P.2d 27 (Cal. 1993) (on other grounds); *In re Application of Lohr*, 31 Ill. Ct. Cl. 671, 673–74 (Ct. Cl. 1975) (holding claimant does not meet definition of “victim” in state Crime Victims Compensation Act because her economic loss

As this brief history reflects, while there have always been victims, American criminal law has not employed “victim” as a salient legal concept for more than a few decades. Thus, in the last thirty years, as victims have won formal recognition in federal criminal law²⁹ their role in the criminal process has not been predetermined by common law notions of victimhood. This might help to explain why the “victim” appeared in the Sentencing Guidelines without her identity being subject to formal definition.

B. Statutory Recognition

Speaking in 1974, Senator John Little McClellan could credibly lament that “[f]or too long, the victims of crime have been a forgotten people.”³⁰ Although many commentators have shared Senator McClellan’s sentiment over the years,³¹ it has lost much of its force over time, notwithstanding occasional statements by politicians,³² judges,³³ and academics³⁴ that

claim stems solely from “her self-imposed absence from work, [which] was based solely on her fear of future assaults”).

29. See *infra* Part II.B–C.

30. S. REP. NO. 92-34, at 345 (1974) (Statement of Senator John Little McClellan).

31. Mike Maguire, *The Needs and Rights of Victims of Crime*, 14 CRIME & JUST. 363, 367 (1991) (arguing that the victims’ rights movement was “an inevitable (and overdue) correction in a long-term historical trend” that had marginalized the victim’s role in the criminal justice process); Sen. Mike Mansfield, *Justice for the Victims of Crime*, 9 HOUS. L. REV. 75, 76 (1971) (“Focusing more attention on the criminal and less on his victim is an inequity of modern society.”); Leslie Sebba, *The Victim’s Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 229 (1982) (“The failure of the victim to play an active role in the penal process is an illogical deviation from the principles of justice on which the American criminal trial is based . . .”).

32. See H.R. REP. NO. 104-16, at 4 (1995) (“There has been significant progress over the last 15 years in addressing the needs of crime victims. Their voices are no longer missing from the national debate concerning criminal justice. In spite of this progress, however, additional reforms are needed. Under existing law, crime victims’ rights are still too often overlooked. Even though the law provides the means to address the rights of victims, the law does not, however, provide for a means to make victims whole.”); Press Release, President George W. Bush, President Calls for Crime Victims’ Rights Amendment (Apr. 16, 2002), available at <http://www.whitehouse.gov/news/releases/2002/04/20020416-1.html> (“[I]n the year 2000, Americans were victims of millions of crimes. Behind each of these numbers is a terrible trauma, a story of suffering and a story of lost security. Yet the needs of victims are often an afterthought in our criminal justice system. It’s not just, it’s not fair, and it must change. Victims of violent crime have important rights that deserve protection in our Constitution.”).

33. District Court Judge Paul J. Cassell has argued that the Sentencing Commission should revise sentencing procedure to grant victims standing to litigate sentence enhancements. *Statement of Paul G. Cassell, United States District Court Judge for the District of Utah and Professor of Law at the S.J. Quinney College of Law at the University of Utah before the United States Sentencing Commission Concerning the Effect of United States v. Booker on the Federal Sentencing Guidelines*, at 40 (Feb. 15, 2005), available at: http://www.ussc.gov/hearings/02_15_05/cassell_testimony.pdf.

Following Judge Cassell’s statements to the Sentencing Commission, a group of practitioners wrote a letter to the Commission objecting to the expansion of victims’ rights in the Sentencing Guidelines. The practitioners’ letter argued that Judge Cassell’s proposal would result in

victims remain neglected parties in the federal criminal justice system. During the last three decades, Congress has restructured federal criminal law to recognize numerous rights and roles for crime victims. Today all fifty states and the federal government have victims' rights statutes³⁵ and at least thirty-two states also have state constitutional provisions protecting victims' rights.³⁶ As one scholarly commentator recently observed, "[t]he figure of the victim looms large in criminal law and procedure."³⁷

The victims' rights movement in the United States arose in the 1960s and 1970s.³⁸ Reacting against a time when crime victims lacked any right

interference with the prosecutor's duty to vindicate the public interest, the danger of private prosecutions, the harm that victims unwittingly can do to their own interests, the astronomical expense of a triangular litigation model, the potential for inaccuracy where victims are emotionally involved and not subject to ethical rules requiring candor to the court, the infringement of defendants' constitutional rights, and hazards to the privacy and safety of other witnesses and of the defendant.

Letter from the Practitioners' Advisory Group to the Honorable Ricardo H. Hinojosa, United States Sentencing Commission (Feb. 28, 2005), at 3, available at <http://fpdfls2.home.netcom.com/ussecpag/Letter22805.doc>.

34. See Jayne W. Barnard, *Allocution for Victims of Economic Crime*, 77 NOTRE DAME L. REV. 39, 85 (1993) (arguing that the federal rules of criminal procedure should be amended to grant victims of economic crime a right to speak at their offenders' sentencing hearings). The text of Barnard's proposed amendment states: "Questions as to whether a person is a 'victim' in any particular case shall be resolved by the sentencing judge and shall not be reviewable." See also Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 345-50 (arguing in favor of a constitutional amendment to grant crime victims standing in federal court and rights of appellate review); The Honorable Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005) (arguing that the victims' rights movement has thus far "had only mixed success in securing enforceable rights for crime victims"); Letter from Lawrence H. Tribe, Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard University Law School, to Senator Dianne Feinstein & Representative Jon Kyl (Apr. 8, 2003), reprinted in 9 LEWIS & CLARK L. REV. 667 (2005) (praising Members of Congress for doing "a splendid job at distilling the prior versions of the Victims' Rights Amendment into a form that would be worthy of a constitutional amendment").

35. See 18 U.S.C. § 3771 (Supp. 2007) (codification of Crime Victim Rights Act); see also Victoria Schwartz, *The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 526 & n.13 (2005) (collecting citations).

36. Schwartz, *supra* note 35, at 526-27 & n.14 (collecting citations).

37. Liu, *supra* note 14, at 115.

38. Cassell, *supra* note 13, at 841 ("The crime victims' rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system."); Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIME & CRIMINOLOGY 333, 333 (1994) (noting that the first crime victim compensation statute was passed in 1965 in California); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 944 (1985) (dating interest in victims' rights to the early- to mid-1960s); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 144 (1999) (early 1970s); Maguire, *supra* note 31, at 367 (early 1970s); Comment, *Compensation for Victims of Crime*, 33 U. CHI. L. REV. 531, 531 (1966) (noting the "late arrival[]" of victim-related policy proposals).

to confer with prosecutors³⁹ or influence sentencing decisions,⁴⁰ many victims' rights initiatives have focused on enhancing victims' participation in criminal adjudications and improving social services for victims.⁴¹ Moreover, in its early years, the victims' rights movement was associated with liberal or feminist politics.⁴² When advocating on behalf of victims' rights legislation in the early 1970s, Democratic Senator Mike Mansfield analogized victims' rights laws to worker's compensation statutes. Both types of state-guaranteed protections, Mansfield argued, "manifest society's abandonment of laissez-faire attitudes when facing matters of collective community need."⁴³

By the 1980s, "the plight of the victim, the 'forgotten person,'" had "come to the forefront of the public's consciousness."⁴⁴ In 1982, Congress passed the Victim and Witness Protection Act (VWPA),⁴⁵ a statute that affords victims of federal crimes a statutory right to restitution for their injuries.⁴⁶ The political context of victims' rights also began to change.

39. Maguire, *supra* note 31, at 364 ("Most writers have focused on one of two broad themes, victims' rights and services to victims."); Sebba, *supra* note 31, at 217 ("The impetus for reform has concentrated primarily on improving the material situation of the victim by means of schemes for compensation or restitution, and reducing his psychic trauma . . .").

40. See generally Henderson, *supra* note 38, at 938–42.

41. Stacy Caplow, *What if There is no Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 19 (1998) ("Most victims' rights reform proposals focus on efforts to secure more inclusion, consultation, and communication, and, in some, the right to be heard in court at various proceedings. None go so far as to give victims the right to approve or veto a disposition or sentence.") (footnote omitted).

42. Cassell, *supra* note 13, at 841 ("The crime victims' rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system. Led by feminist and civil rights activists, victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of crime victims' legitimate interests. These advocates urged reforms to give more attention to victims' concerns, including protecting the victim's right to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.") (footnote omitted); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 852–53 (1997) ("Although the exact origins of the victims' rights movement are still obscure, numerous commentators have suggested that the 'women's rights' efforts to protect rape victims were central to the beginning of the movement.") (footnote omitted).

43. Mansfield, *supra* note 31, at 78 (1971). Cf. Comment, *Compensation for Victims of Crime*, *supra* note 38, at 537 (arguing that "the notion that the state has an obligation to insulate its citizens from the consequences of crime has failed to win legal acceptance").

44. Lorraine Slavin & David J. Sorin, *Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 FORDHAM L. REV. 507, 507 (1984).

45. Pub. L. No. 97-291, 96 Stat. 1248 (1982).

46. Under current law, the primary federal restitution statutes are 18 U.S.C. §§ 2259, 3663, & 3663A (2000). In *Hughey v. United States*, the Supreme Court held that the VWPA only authorizes compensation to victims for "losses caused by the conduct underlying the offense of conviction." 495 U.S. 411, 416 (1990). Under *Hughey's* interpretation of the VWPA, restitution could not be ordered based on criminal charges dropped pursuant to a plea agreement. *Id.* at 420–21.

Although the logic of victims' rights is neither inherently conservative nor liberal,⁴⁷ the victims' rights movement in the United States became increasingly associated with conservative politics.⁴⁸

After decades of incremental accomplishments, the central victory of the victims' rights movement to date arrived in 2004, when Congress passed the CVRA.⁴⁹ Before 2004, the rights of victims were somewhat unclear under federal law;⁵⁰ in response, the CVRA explicitly conferred eight rights on crime victims.⁵¹ Although the CVRA rights have not yet

Shortly after the Court's decision in *Hughey*, Congress amended the VWPA to allow for restitution to victims of crime even when the underlying criminal charges were dropped pursuant to a plea agreement. Crime Control Act of 1990, 101 P.L. 647, 104 Stat. 4789 (1990) (codified at 18 U.S.C. § 3663(a)(3)). In 1996, Congress passed an additional restitution statute, the Mandatory Victim Restitution Act (MVRA), contained within the Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132, 110 Stat. 1214 (1996) (codified at 18 U.S.C. § 3663A (2000)), which incorporates a functionally identical victim standard to that found in the VWPA. As explained by the Eighth Circuit:

Consistent with *Hughey*, the Senate Judiciary Committee Report [for the MVRA] explained that, unless a plea agreement provides otherwise, the "mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted." S. REP. NO. 104-179, at 19 (1996), *reprinted in* 1996-4 U.S.C.C.A.N. 924, 932. Congress also amended the VWPA so that the two statutes would contain identical definitions of the term "victim" and substantively identical plea agreement provisions.

United States v. Chalupnik, 514 F.3d 748, 752–53 (8th Cir. 2008).

47. David Miers, *The Responsibilities and the Rights of Victims of Crime*, 55 MOD. L. REV. 482, 496 (1992) ("As espoused by the left, the victim movement is in the tradition of the radical politics of the 1960s; as espoused by the right, it advocates a return to an earlier set of values in which crime control is central, and victims' rights . . . trump those of the defendant.") (footnote omitted). *See also* Vanessa Barker, *The Politics of Pain: A Political Institutional Analysis of Crime Victims' Moral Protests*, 41 LAW & SOC'Y REV. 619, 620 (2007) (contrasting the political contexts of victims' rights initiatives in California and Washington, finding that "in a populist political context with a high degree of democratization but intensive social polarization, crime victims [are] likely to be part of a retributive movement, leading to restrictive penal policies cast in the name of victim rights," whereas "in a more deliberative political context with a high degree of democratization but well-developed social trust and norms of reciprocity, crime victims [are] part of a pragmatic resolution that sought to punish criminal offenders but also provide for the welfare of crime victims").

48. Henderson, *supra* note 38, at 951 ("[C]urrently, the victim's rights 'movement' has a decidedly conservative bent."). *See also* S. REP. NO. 108-191, at 47 (reporting that all Republican members of the Senate Judiciary Committee voted in favor of the proposed victims' rights constitutional amendment, while all but one Democratic Senator opposed its passage).

49. Crime Victims' Rights Act of 2004, 108 Pub. L. No. 405, 118 Stat. 2260 (2004) (codified at 18 U.S.C. § 3771 (Supp. 2007)).

50. Abraham S. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 LAW & CONTEMP. PROBS. 225, 232 (1984) (observing that "[i]t is not at all clear" how a court or a prosecutor should respond to victim statements).

51. The text of the CVRA states:

A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

been extensively tested in federal courts, at least one appellate court has granted a writ of mandamus in response to a challenge brought by victims who alleged denial of their rights under the Act.⁵²

The major legislative accomplishments of the victims' rights movement—the VWPA of 1982 and the CVRA of 2004—secured the increasingly visible and central roles of victims in the federal criminal justice system. Simultaneously, the creation of the Sentencing Guidelines, in 1987, established a new field of law that imposed penalties on offenders based in part on judges' identification of "victims" of offenders' crimes.⁵³ To understand fully the role of victims in the federal criminal justice system, the role of victims in the Sentencing Guidelines must be viewed in tandem with federal victims' rights statutes.

C. Constitutional Amendment Debate

The progress of victims' rights and the elusive meaning of "victim" were both powerfully demonstrated in 2003 when the Senate Judiciary Committee considered a proposed constitutional amendment to protect victims' rights.⁵⁴ The amendment's sponsors, Senators Jon Kyl of Arizona

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a).

52. *Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 435 F.3d 1011, 1018 (9th Cir. 2006).

53. *See supra* Part III.A.

54. Senator Kyl introduced Senate Joint Resolution 1 on January 7, 2003. At the time of its introduction, the text of the proposed amendment read:

SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.

SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted

and Dianne Feinstein of California, introduced the proposed amendment as part of an effort to balance the constitutional rights of defendants with constitutional protections for victims of crime.⁵⁵ Despite the fact that the amendment's sponsors ultimately pulled the amendment from the Senate floor without a vote, the fact that the Judiciary Committee passed the proposed amendment out of committee demonstrates the movement's political clout.

The views of the dissenting members of the Judiciary Committee are particularly relevant to the present discussion because of one objection they leveled against the proposed amendment: the term "victim" was left undefined.⁵⁶ As the Judiciary Committee dissenters noted, "[t]he most basic point about any constitutional right is, whose right is it?"⁵⁷ One problem with the proposed amendment, the dissenters argued, was that it was unclear who was entitled to receive its protections:

Consider the most obvious violent crime—murder. Ordinarily, we would think of the victim of this crime as the dead person, but that answer . . . will not do here. Maybe no one gets the benefit of the proposed constitutional rights in a murder case. Maybe the [victim] . . . in a murder case [is] the executor or co-executors of the victim's estate. . . . Or maybe the amendment's supporters are banking on

except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

SECTION 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

S.J. Res. 1, 108th Cong., 149 CONG. REC. 162–63 (2003). The 2003 version of this amendment was significantly longer than the first proposed victims' rights amendment, which was introduced in 1996 in the 104th Congress by Representative Henry Hyde. H.R.J. Res. 174, 104th Cong. (1996).

55. Language about "balancing" defendants' and victims' rights frequently appears in discussions of the CVRA and the proposed constitutional amendment. *See, e.g.*, Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 24 (1997) (arguing that the recent trend towards recognition of victims' rights "is simply a move toward reestablishing a proper balance between the rights of the accused and the rights of the crime victim").

56. S. REP. NO. 108-191, at 95 (2003) (dissenting views).

57. *Id.*

so-called “activist judges” to add words to the amendment that are not there and extend the new rights to members of the murder victim’s family. This would raise other questions, like which family members would be covered.⁵⁸

Notwithstanding the Judiciary Committee majority’s views to the contrary,⁵⁹ the amendment’s opponents argued that it would be unwise to constitutionalize the rights of an undefined party.⁶⁰

Two points about the debate over the proposed constitutional amendment are of particular importance to this Note’s discussion. First, the debate within the Judiciary Committee provides another example of the confusion over the term “victim.” As the dissenting views in the Committee report indicate, the use of a critically important, but undefined, term would leave the development of a workable standard up to the federal judiciary, which is precisely the problem that plagues the use of victim in the Guidelines.

The second point concerns where a dialogue over the appropriate victim standard can and should emerge. Although litigation over victim status under the CVRA does occur,⁶¹ such litigation is relatively rare,

58. *Id.* at 95–96 (footnote omitted).

59. The Committee stated:

Nothing removes from the States their plenary authority to enact definitional laws for purposes of their own criminal justice systems. . . . In determining how to structure a ‘victim’ definition, ample precedents are available. To cite but one example, Congress has previously defined a ‘victim’ of a crime for sentencing purposes as ‘any individual against whom an offense has been committed for which a sentence is to be imposed.’ Fed. R. Crim. Pro. 32(f). The Committee anticipates that courts, in interpreting the amendment, will use a similar definition focusing on the criminal charges that have been filed in court.

Id. at 30.

60. “In August 1997, the ABA House of Delegates resolved that any measure to recognize victims’ rights in the criminal justice system should, among other things, define the class of protected ‘victims.’ More than six years later, the proposed constitutional amendment still fails to adhere to this basic principle.” *Id.* at 95 (dissenting views).

Notably, dissenting members of the Senate Judiciary Committee voiced the exact same criticism three years earlier when rejecting a proposed victims’ rights amendment that failed to define “victim.” *See* S. REP. NO. 106-254, at 83–84 (2000) (dissenting views).

61. *See, e.g.,* *United States v. Sharp*, 463 F. Supp. 2d 556, 566 (E.D. Va. 2006) (“Nowicki is not a ‘victim’ as that term is used in the CVRA because she is not a person ‘directly and proximately harmed’ by the federal crime committed by the Defendant Nowicki is no doubt an alleged victim of her boyfriend’s violent ways. But Nowicki cannot demonstrate the nexus between the Defendant’s act of selling drugs and her former boyfriend’s subsequent act of abusing her.”); *see also* *United States v. Robertson*, 493 F.3d 1322, 1334–36 (11th Cir. 2007) (reversing district court’s identification of victim under federal restitution statute); *United States v. Bengis*, No. 03 Cr. 308 (LAK), 2007 U.S. Dist. LEXIS 35902 (S.D.N.Y. May 17, 2007), at *17, *21–23 (acknowledging that a foreign government can be a victim under the federal restitution statute but denying restitution to South Africa because defendants’ conspiracy to illegally import lobster into the United States did not directly harm South Africa).

given that defendants have relatively little incentive to dispute a putative victim's procedural rights when the defendant is faced with the more daunting prospect of federal criminal liability. In contrast, because a defendant has every incentive to dispute the application of victim-based sentence enhancements that could lead to a longer term of imprisonment, litigation over victim status under the Guidelines provides a sharper, more fully developed field of case law in which to consider the essential meaning of victimhood.⁶²

D. Rights and Penalties

As commonly understood, the victims' rights movement has not expressly focused on victim control over sentencing decisions.⁶³ Rather, the movement has encompassed advocates of greater victim services, and, with increasing prominence, advocates of greater legal rights for victims of crime.⁶⁴ Some victims' rights advocates have also argued for harsher sentences for offenders,⁶⁵ but this branch of the movement argues generally against rehabilitation models of criminal justice in favor of more punitive approaches,⁶⁶ such as enhancing penalties for specific crimes like drunk driving.⁶⁷

Although there are credible arguments for allowing victim participation in sentencing decisions,⁶⁸ there are sound public policy reasons for

62. See *infra* Part III.B.

63. Caplow, *supra* note 41; Sebba, *supra* note 31, at 224 ("Modern practice does not give the victim direct input in the matter of the sentence to be imposed upon the offender.").

64. See Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 458 (2006) (arguing in favor of "incorporating recovery approaches from both the science of victimology and theories of restoration in the justice process"); see also *supra* Part II.B (discussing statutory rights for victims of crime).

65. Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1054 (1998) (identifying three groups within the broader victims' rights movement: those who seek participatory rights, those who seek harsher sentences for defendants, and those who seek greater material support from the government for victims of crime).

66. Barker, *supra* note 47, at 624 (branches of the victims' rights movement have challenged correctionalism, which "tended to view criminal offenders as the victims of failed socialization and social deprivation, or as Foucault (1977) explains it, as raw material that could be trained, resocialized, and normalized into conformity") (citing MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (New York, Pantheon 1977)).

67. See Maguire, *supra* note 31, at 372 (commenting on the role of Mothers Against Drunk Driving in securing heavier penalties for drunk driving in various jurisdictions).

68. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90-92 ("Victims of crimes should be offered the opportunity to participate in guilty hearings so that they can offer additional information about the offense and express their viewpoints regarding appropriate sentences The vengeful instincts of victims will be channeled in a socially constructive manner The victim . . . is not a regular participant in the

denying victims too much control over sentencing outcomes. Victims generally “lack knowledge of the range of options, normal sentencing levels, penal history and the problems of penal policy.”⁶⁹ Sentencing policy is “not for the victim but for the State acting in the public interest.”⁷⁰ The victim, after all, does not have an identifiable legal stake in sentencing; “the victim suffers no deprivation at the hands of the government during the sentencing process.”⁷¹

As a practical matter, however, the exercise of victims’ rights, as currently recognized under federal law, influences offenders’ sentences. Most importantly in this regard, the CVRA creates a statutory right for victims to be “reasonably heard” at sentencing hearings.⁷² However, the role of the victim in federal criminal proceedings is rarely discussed in its totality, which would encompass both the legal rights of victims as well as victim-based sentencing liability for offenders. Instead, the ideology of victims’ rights encompasses its own discursive field,⁷³ with victim-based sentencing policy questions left largely, though not entirely,⁷⁴ to the domain of sentencing law.

It is this artificial divide of victims’ rights from victim-based sentencing, this Note argues, that helps to explain the fact that the categories of law involving victims’ rights—the CVRA, restitution statutes, the Federal Rules of Criminal Procedure—already incorporate victim definitions,⁷⁵ while the Sentencing Guidelines lack a definition. The different roles of victims in the rights-based and sentencing arenas of federal criminal law are troubling, for three reasons.

criminal justice system, and his presence would encourage the participants [the judge and lawyers] to fulfill their obligations in a responsible manner.”).

69. Andrew Ashworth, *Punishment and Compensation: Victims, Offenders and the State*, 6 OXFORD J. LEGAL STUDIES 86, 119 (1986).

70. *Id.* at 120.

71. Henderson, *supra* note 38, at 1004. *See generally* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (an alleged victim of crime lacks standing to challenge state non-prosecution).

72. The CVRA protects a victim’s right “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” 18 U.S.C. § 3771(a)(4) (Supp. 2007).

73. By way of example, see the website of the National Center for Victims of Crime, which contains a wide range of information on victims’ services and rights, but no discussion of sentencing policy. The National Center for Victims of Crime, <http://www.ncvc.org/ncvc/Main.aspx> (last visited Mar. 16, 2008).

74. Sentencing Guidelines for United States Courts, 71 Fed. Reg. 56,578 (Sept. 27, 2006) (stating the U.S. Sentencing Commission’s intention to revise the Guidelines Manual in light of recently enacted victims’ rights laws); Mosteller, *supra* note 65, at 1059 (criticizing a proposed victims’ rights constitutional amendment and observing that “rather than taking power or resources from government and giving it to victims, the taking is from defendants”).

75. *See supra* notes 11–13.

First, there are obvious parallels between the concepts of victim in the two fields. In most though not all instances, victim standards should be consistent between the rights-based and sentencing arenas. This is logical, since in most cases victim status is an uncontroversial issue. A burglarized homeowner, for instance, clearly qualifies as a victim under the CVRA, has a legal right to restitution, qualifies as a victim under the Federal Rules of Criminal Procedure, and qualifies as a victim under the relevant section of the Guidelines. However, a more rigorous, inclusive interpretation of the role of victims in federal criminal law would consciously cross-reference these standards in every criminal case involving victims, recognizing that even if discrepancies exist in victim standards among these arenas of law, they should all be viewed with reference to each other.

Second, it is troubling that an offender's liberty interest receives such casual treatment under the Guidelines. While the Guidelines do not require exact, beyond-a-reasonable-doubt determinations,⁷⁶ it is disconcerting to realize that the length of an offender's sentence could be influenced by a court's interpretation of a term that is not defined. Especially in light of the development of victim definitions in other areas of federal criminal law and the debate over the meaning of "victim" in the proposed constitutional amendment, the absence of a victim definition in the Guidelines is anomalous. After all, standing alone, the term "victim" provides little guidance as to whom it should apply.⁷⁷

Third, the underlying rationales supporting victims' rights and victim-based sentencing overlap to a significant extent. Although the victims' rights movement encompasses groups with competing agendas and visions,⁷⁸ the logic of incorporating victims into federal criminal law rests in large measure on claims regarding the moral significance of victimhood.⁷⁹ As Professor Vanessa Barker explains, "crime victim movements were part of broad cultural struggles to redefine the character of social order in the late twentieth century. Motivated by pain and outrage about criminal victimization, they were engaged in highly charged moral

76. See, e.g., *United States v. Snyder*, 291 F.3d 1291, 1295–96 (11th Cir. 2002) (stating that victim loss calculations under the Guidelines need only rest on reasonably reliable estimates).

77. Goldstein, *supra* note 50, at 227 ("[T]he word 'victim' refers to a wide variety of crimes and fact situations—with the victim more often identifiable in state criminal law than in federal law.").

78. Mosteller, *supra* note 65, at 1053–54.

79. Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 *BUFF. L. REV.* 433, 435–36 (2004) ("[T]he narrative of victims' rights serves as a rhetorical tool to justify and moralize the seemingly vengeful retributivist trend in criminal law.").

protests over the rights and duties of state government.”⁸⁰ Further, “[t]o crime victim advocates, the contrast between the pampered, needy offender and the forgotten injured victim seemed morally insupportable.”⁸¹ Ultimately, the reason that federal criminal law takes victims into account in any arena—procedural rights, restitution, or sentencing—is because policymakers recognize a moral obligation to include victims in the criminal process. Federal criminal law should better reflect this close moral connection between victims’ rights and victim-based sentencing.

III. THE VICTIMS OF THE GUIDELINES

A. *The Role of Victims in the Guidelines*

The United States Sentencing Guidelines, which became effective on November 1, 1987, aspire to provide a framework for consistent sentencing of federal offenders in the eighty-two federal districts in the country.⁸² In January 2005, the operation of the Sentencing Guidelines changed dramatically when, in *United States v. Booker*, the Supreme Court ruled that mandatory application of the Guidelines violates a defendant’s Sixth Amendment rights.⁸³ However, the remedial section of the Court’s opinion in *Booker* held that courts could still apply the Guidelines in an advisory manner when calculating a defendant’s sentence.⁸⁴ Although the exact effect of the Guidelines continues to be the subject of litigation and Supreme Court decision-making,⁸⁵ the Guidelines remain the essential

80. Barker, *supra* note 47, at 624.

81. *Id.* at 625.

82. The legislative history of the Sentencing Reform Act, the statute that authorized the creation of the Guidelines, reflects Congress’s concern with inconsistent sentencing. See H.R. REP. NO. 98-1017, at 31 (1984) (“Current practices result in a wide disparity among sentences imposed on defendants convicted of similar crimes.”). See also Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 321 (2006) (“Prior to the development of the Guidelines, the common law of corporate criminal liability gave judges broad discretion in determining sentencing, creating inconsistencies in the application of criminal laws and penalties and making it difficult for corporations to accurately assess potential liability for violations.”) (footnotes omitted). For an explanation of the underlying philosophy of the Guidelines, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

83. *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

84. *Id.* at 245–46 (opinion of Breyer, J.).

85. The Supreme Court’s most recent opinion addressing the Guidelines, *Kimbrough v. United States*, held that a district court judge may consider an “array of factors warranting consideration” and may depart from the Guidelines’ prescribed sentencing when in a “particular case, a within-Guidelines sentence is ‘greater than necessary’ to serve the objectives of sentencing.” No. 06-6330, slip op. at 2 (U.S. Dec. 10, 2007), available at <http://www.supremecourtus.gov/opinions/07pdf/06-6330.pdf>.

starting point for calculating an offender's sentence, and "the term 'victim' is used throughout the Guidelines."⁸⁶

The Guidelines take into consideration the victim of the crime in two ways. First, Part 3A of the Guidelines imposes three types of victim-related adjustments: those for vulnerable victims,⁸⁷ official victims,⁸⁸ and victim restraint.⁸⁹ The Part 3A adjustments apply, respectively, when the court finds that the offender selected his victim because of the victim's vulnerability (e.g., a very young child),⁹⁰ or because the victim was harmed while performing official duties on behalf of the government (e.g., a police officer injured in the line of duty by the defendant),⁹¹ or because the offender restrained the victim in the course of committing his crime.⁹² Although there is no uniform victim definition in the Guidelines, the vulnerable victim⁹³ and official victim⁹⁴ enhancements contain some explanatory language on how to identify proper victims, while the restraint-of-victim enhancement does not.⁹⁵ Extensive appellate litigation has helped to refine the discrete meanings of each of the three victim-related Part 3A adjustments,⁹⁶ although there is still occasional uncertainty in practice.⁹⁷

86. *United States v. Terry*, 142 F.3d 702, 711 (4th Cir. 1998) (citing inter alia U.S.S.G. §§ 3A1.1, 3A1.2, 3A1.3, 3D1.2, 5K2.3).

87. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2007).

88. *Id.* § 3A1.2.

89. *Id.* § 3A1.3.

90. *See, e.g., United States v. Boise*, 916 F.2d 497, 506 (9th Cir. 1990) (application of U.S.S.G. § 3A1.1 appropriate when the victim was a six-week-old baby).

91. *See, e.g., United States v. Garcia*, 34 F.3d 6, 13 (1st Cir. 1994) (application of U.S.S.G. § 3A1.2 appropriate when defendant assaulted officer who had yelled "police").

92. *See, e.g., United States v. Johnson*, 187 F.3d 1129, 1133 (9th Cir. 1999) (application of U.S.S.G. § 3A1.3 appropriate when defendant physically restrained his wife in his car).

93. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 cmt. n.2 (2007) ("'[V]ulnerable victim' means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.").

94. *Id.* § 3A1.2(a)(1) (official victim enhancement applies if "the victim was (A) a government officer or employee; (B) a former government officer or employee; or (C) a member of the immediate family of a person described in subdivision (A) or (B)").

95. *See id.* § 3A1.3.

96. *See, e.g., United States v. Wilson*, 913 F.2d 136, 137–38 (4th Cir. 1990) (residents of city affected by tornado are not "vulnerable victims" for purposes of U.S.S.G. § 3A1.1).

97. *See, e.g., United States v. Bolden*, 325 F.3d 471, 500–01 (4th Cir. 2003) (holding that district court erred in applying U.S.S.G. § 3A1.1 enhancement based on defendant's targeting of nursing home residents because defendant did not target residents because of their vulnerability); *United States v. Crispo*, 306 F.3d 71, 82 (2d Cir. 2002) (holding that district court incorrectly applied U.S.S.G. § 3A1.2 enhancement based on defendant's threats to private bankruptcy trustee); *United States v. Salemi*, 26 F.3d 1084, 1087–88 (11th Cir. 1994) (holding that district court erred in failing to apply U.S.S.G. § 3A1.1 enhancement to defendant who kidnapped a six-month-old baby).

Second, the Guidelines impose heavier penalties in a wide range of situations in which specific criminal activities harm victims. For instance, the fraud/embezzlement Guidelines enhancement, U.S.S.G. § 2B1.1, recommends heavier sentences when larger numbers of victims suffer a pecuniary loss as a result of the offender's criminal conduct.⁹⁸ Thus while the base offense level⁹⁹ in the Guidelines for fraud or embezzlement is seven,¹⁰⁰ a court calculating a recommended Guidelines sentence must increase the offense level by two if the offender's crime harmed more than ten victims,¹⁰¹ by four if the crime harmed more than fifty victims,¹⁰² and by six if the crime harmed more than 250 victims.¹⁰³ Thus, a hypothetical fraudster who stole \$60,000 but harmed less than ten victims should receive a recommended Guidelines sentence of between twelve and eighteen months.¹⁰⁴ Yet if the same fraudster harmed more than 250 victims, he would face a recommended sentence of between thirty and thirty-seven months.¹⁰⁵ This sliding scale of enhanced punitive liability is one of the "key compromises" of the Guidelines, under which an offender's recommended sentence increases with the magnitude of the crime but not in direct proportion to it.¹⁰⁶

The Guidelines' system of victim-based enhancements furthers both retributive and utilitarian goals. From a retributive perspective, the offender's punishment is directly linked to the victim's injuries; from a utilitarian perspective, victim-based sentencing provides incremental deterrence against crimes that harm identifiable individuals.¹⁰⁷ More generally, as noted earlier, calibrating offenders' sentences in light of the exact harm caused to actual people furthers the victims' rights movement's

98. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2) (2007).

99. Recommended sentences under the Guidelines are determined pursuant to a table that cross-applies the "offense level" of the offender's criminal liability with the offender's criminal history. *See id.* § 5A.

100. *Id.* § 2B1.1(a)(1).

101. *Id.* § 2B1.1(b)(2)(A).

102. *Id.* § 2B1.1(b)(2)(B).

103. *Id.* § 2B1.1(b)(2)(C).

104. A fraud offender's offense level would be thirteen if he stole \$60,000 but harmed less than ten victims. *See id.* §§ 2B1.1(b)(1)(D), 2B1.1(b)(2), 5A.

105. A fraud offender's offense level would be nineteen if he stole \$60,000 and harmed more than 250 victims. *See id.* §§ 2B1.1(b)(1)(D), 2B1.1(b)(2)(C), 5A.

106. Breyer, *supra* note 82, at 25–28 (explaining that the Guidelines' architects specifically rejected a system of penalties that increased directly in proportion to the magnitude of the crime).

107. Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1304 (1988).

goal of reshaping the federal criminal justice system to be morally responsive to victims.¹⁰⁸

Although the introductory commentary to the Guidelines defines terms used throughout the Sentencing Manual, it does not define the term “victim.”¹⁰⁹ Nonetheless, some (but not all) of the specific Guidelines enhancements provide a local definition of the term. Thus, a victim under the fraud/embezzlement Guidelines’ enhancement is a person who has suffered an “actual loss,”¹¹⁰ while the Guidelines’ enhancement for extreme psychological injury does not define the term.¹¹¹ While the local victim standards provide a patchwork of definitions for some sections of the Guidelines, they do not cover all appearances of “victim” in the Guidelines, nor are they grounded in a consistent theory of victimhood.¹¹² Moreover, while authors have addressed the first category of victim-related adjustments found in Part 3A,¹¹³ there has been relatively little effort to explore the meaning of “victim” in other sections of the Guidelines.¹¹⁴ This is regrettable, for three reasons.

First, while the conceptions of victimhood found within and outside of Part 3A are obviously related, academic and judicial analyses of Part 3A victims typically consider whether the putative victim’s status or personal characteristics qualify that person as a victim. Thus, for instance, litigation surrounding official victim adjustments typically turns on whether the alleged victim was acting in an official capacity,¹¹⁵ while vulnerable victim litigation usually focuses on whether the injured party was sufficiently vulnerable.¹¹⁶ In contrast, victim-related litigation based in

108. See *supra* Part II.D.

109. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007).

110. See *id.* § 2B1.1 cmt. n.1.

111. See *id.* § 5K2.3.

112. See *infra* Part III.B.1–4.

113. Jay Dyckman, Note, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960 (1998); John Garry, Note, “Why Me?”: *Application and Misapplication of 3A1.1, the “Vulnerable Victim” Enhancement of the Federal Sentencing Guidelines*, 79 CORNELL L. REV. 143 (1993); Madeline Yanford, Note, *Targeting the Criminally Depraved Mind: The Inherent Meaning of a “Vulnerable Victim” Under Federal Sentencing Guideline § 3A1.1*, 9 SUFFOLK J. TRIAL & APP. ADV. 103 (2004).

114. The one notable exception is Liu, *supra* note 14. See *infra* Part III.B for a discussion of Liu’s proposed Guidelines definition of “victim.”

115. See, e.g., *United States v. Denny*, 147 F. App’x 692, 693 (9th Cir. 2005) (affirming application of official victim enhancement when “victim was assaulted while wearing a police uniform”); *United States v. Gillyard*, 261 F.3d 506, 510 (5th Cir. 2001) (official victim enhancement appropriate when “high-speed chase endangered both police officers and others”).

116. See, e.g., *United States v. Dupre*, 462 F.3d 131, 145–46 (2d Cir. 2006) (vulnerable victim enhancement cannot be based merely on victims’ gullibility); *United States v. Medina-Argueta*, 454 F.3d 479, 482 (5th Cir. 2006) (status as illegal alien does not by itself provide basis for application of

sections of the Guidelines outside of Part 3A typically involves different questions: whether the alleged victim has suffered a sufficient injury, or whether that injury is so logically related to the offender's crime as to warrant the imposition of a harsher recommended sentence.¹¹⁷ Thus, while there is a broad similarity between the conceptions of victimhood found within and outside of Part 3A, litigation based on non-3A victim classifications typically raises more fundamental questions on the basic nature of victimhood in the Guidelines.

Second, the unwillingness of scholars and courts to explore the contours of victimhood in the Guidelines produces a conceptual hole in the larger field of victimhood that prevents a unified theory of victimhood from emerging in federal criminal law. While this shortcoming may have been little more than a conceptual flaw at the time of the Guidelines' adoption in 1987, the increasingly prominent role of victims in federal criminal law makes the need for consistent principles of victim identification a more urgent priority.¹¹⁸

Third, the absence of a unified theory of victimhood in the Guidelines produces practical problems. Courts split over the meaning of victimhood in the Guidelines, leading to inconsistent adjudications of similar fact patterns.¹¹⁹ Courts also occasionally vent their frustration with the illogic of victim standards in specific Guidelines provisions.¹²⁰

vulnerable victim enhancement); *United States v. Snow*, 184 F. App'x 618, 619 (9th Cir. 2006) (fact that victim was asleep at time of crime can demonstrate vulnerability sufficient to justify imposition of vulnerable victim enhancement).

117. *See infra* Part III.B.1–4.

118. *See generally* Cassell, *supra* note 13 (arguing that the Federal Rules of Criminal Procedure should be revised to take into account the recognition of victims' rights).

119. *See supra* Part III.B.

120. *See, e.g.*, *United States v. Schuster*, 467 F.3d 614, 619 (7th Cir. 2006) (agreeing with defendant-appellant's argument that victim loss calculation instructions in the Guidelines "appear to conflict with one another"); *United States v. Lee*, 427 F.3d 881, 894 (11th Cir. 2005) (noting that "[n]one of the definitions provided by the Guidelines speak to" the disputed victim issue in question); *United States v. Chriswell*, 401 F.3d 459, 464 (6th Cir. 2005) ("Even a cursory review of the above-quoted language of the Guidelines and the commentary reveals that the directives found within the Sentencing Guidelines [concerning victims] conflict."); *United States v. Yagar*, 404 F.3d 967, 970 (6th Cir. 2005) (stating that Guidelines' application notes concerning victim standard "do not offer much clarity"); *United States v. Terry*, 142 F.3d 702, 710 (4th Cir. 1998) ("Regrettably, neither [U.S.S.G.] § 5K2.3, p.s. nor § 1B1.1 defines 'victim.'"); *United States v. Mohammed*, 315 F. Supp. 2d 354, 362 (S.D.N.Y. 2003) (noting Guidelines' illogical victim classifications). Judicial critiques of other provisions of the Guidelines are not uncommon. *See, e.g.*, *United States v. Hendrickson*, 26 F.3d 321, 335 (2d Cir. 1994) (the "language and structure" of a Guidelines application note concerning conspiracy "confuses" the relevant legal issue); *United States v. Hidalgo*, 932 F.2d 805, 807 (9th Cir. 1991) (criticizing the criminal history Guidelines commentary as "unnecessarily confus[ing]" and "somewhat internally contradictory").

B. Defining the Victim

This Section discusses and analyzes five issues that have arisen in federal courts' efforts to identify victims when applying the Sentencing Guidelines: adequacy of victim injury, proximate cause, imaginary victims, culpable victims, and consenting victims. This Note argues that the first two categories, adequacy of injury and proximate cause, are critical concepts that should be incorporated into a Guidelines victim definition. The final three categories—victims that are imaginary, culpable, or consenting—concern problematic applications of the concept of victimhood that should be expressly excluded from the Guidelines definition.

The cases discussed in this Section are not, in and of themselves, seminal cases that establish important principles of federal sentencing law. Rather, the cases selected for discussion in this Section are used merely to illustrate the confusion that arises when courts attempt to identify victims in the absence of a Guidelines victim definition.

1. Adequacy of Injury

One of the most difficult issues in establishing appropriate victim standards is determining the correct injury threshold. Crimes have varying effects. A homeowner who has suffered a burglary has clearly been injured by crime, but has the homeowner's neighbor suffered an injury if she now cannot sleep at night out of fear of neighborhood burglaries? In a general sense, the neighbor may be a "victim" in so far as her life has been affected negatively by the crime. However, she is clearly not a legal victim, in so far as the crime did not cause her a legally cognizable injury. But oftentimes there arise situations where it is difficult to say whether the injured party has been injured in the "right way" and thus qualifies as a victim under the Sentencing Guidelines.

Take, for example, the case of financial crime. The application notes to the fraud/embezzlement Guideline, U.S.S.G. § 2B1.1, state that a person is the victim of a crime if he or she suffers "actual loss,"¹²¹ which is in turn defined as "pecuniary loss."¹²² But what constitutes adequate "pecuniary loss" is often unclear.

Consider a situation in which an offender illicitly accesses the accounts of multiple bank depositors and steals funds from them, following which

121. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.1 (2007).

122. *Id.* § 2B1.1 cmt. n.3(a)(i).

the bank discovers the fraud and reimburses the account holders.¹²³ The account holders certainly suffered pecuniary losses, at least for a specified, if limited, period of time. But does a reimbursed loss constitute an adequate “pecuniary loss” for purposes of victim identification? To put the question differently, is such a loss an adequate injury for the creation of legal victimhood?

The Sixth and Eleventh Circuits took different views of this question in cases decided in 2005. In *United States v. Yagar*, the Sixth Circuit reasoned that “[a] proper resolution of this issue largely depends on the scope of the word ‘victim’ as it is used in section 2B1.1 of the Guidelines. Unfortunately, the Application Notes to the 2002 version of the Guidelines do not offer much clarity.”¹²⁴ While the court held that the banks in question were victims because they suffered pecuniary losses at the end of the day, it found that the account holders who temporarily lost funds were not victims. Because they were reimbursed for their losses, “the account holders here suffered no adverse effect as a practical matter from Yagar’s conduct.”¹²⁵ In enigmatic dicta, however, the court noted that, “there may be situations in which a person could be considered a ‘victim’ under the Guidelines even though he or she is ultimately reimbursed”¹²⁶

Soon after the Sixth Circuit’s decision in *Yagar*, the Eleventh Circuit reached the opposite conclusion about the meaning of “pecuniary loss” in U.S.S.G. § 2B1.1. *United States v. Lee*¹²⁷ involved two defendants, Kathy Lee and Joseph Wyman, who wrote checks totaling approximately \$1,000,000 drawn on closed bank accounts. The government won convictions against Wyman and Lee on three counts of mail fraud.¹²⁸ The district court applied a two-level sentence enhancement under U.S.S.G. § 2B1.1 after determining that the number of victims exceeded ten but was less than fifty.¹²⁹ On appeal, the Eleventh Circuit rejected the defendants’ challenge to the district court’s calculation of the number of victims but remanded Lee’s case for re-sentencing on other grounds.¹³⁰

123. Unlike in the case of third-party reimbursement, the Guidelines credit a defendant’s voluntary reimbursement of funds to victims when performing victim loss calculations. See *Kharana v. Gonzales*, 487 F.3d 1280, 1284 (9th Cir. 2007) (citing U.S.S.G. § 2B1.1 cmt. n.3(E)(i)).

124. *Yagar*, 404 F.3d at 970.

125. *Id.* at 971.

126. *Id.*

127. 427 F.3d 881, 884 (11th Cir. 2005).

128. The defendants were found guilty for violations of 18 U.S.C. §§ 1341, 1342 (2000). *Lee*, 427 F.3d at 883–84.

129. *Id.* at 894–95.

130. *Id.* at 897.

Like the Sixth Circuit in *Yagar*, the Eleventh Circuit noted that “[n]one of the definitions provided by the Guidelines speak to the specific challenge posed by Wyman and Lee: whether a victim who is reimbursed for his loss qualifies as a victim for the purposes of § 2B1.1(b)(2)(A).”¹³¹ Still, the Eleventh Circuit concluded that the Sixth Circuit misread the Guidelines’ application notes in *Yagar*. “When considering the impact of recovered collateral, or the return of money, property, or services, to the victim, the Guidelines treat those so recovering as having suffered a loss,” the Eleventh Circuit noted.¹³²

Two points can be made about the different outcomes of *Yagar* and *Lee*. The first is that, even though the courts differed over a relatively narrow legal issue—the effect of reimbursement on a party’s status as a victim—the courts reached conclusions that reflect very different conceptions of what a victim is. The Sixth Circuit’s interpretation is based on the premise that a party has suffered an injury, and thus qualifies as a victim, if there is a quantifiable, dollars-and-cents impact at the time of sentencing. In contrast, the Eleventh Circuit’s approach reflects a crime scene conception of victimhood: a party has suffered an injury, and thus qualifies as a victim, if an injury was identifiable at the moment when the crime occurred, notwithstanding later remedial developments.

The second point, which is closely related to the first, is that the Guidelines provide no overarching standard for settling this interpretative difference. Faced with the ambiguity inherent in the U.S.S.G. § 2B1.1 application notes, how should courts decide cases like *Yagar* and *Lee*? Nuances over conceptions of loss matter—an offender’s punishment may be directly affected as a result. But they also matter because they show that courts lack a vocabulary for describing the line that separates an unlucky bystander from an actual victim.

Judicial frustration with the adequacy-of-victim injury applicable in one section of the Guidelines was evident in *United States v. Mohammed*, a fraud case from the Southern District of New York.¹³³ In *Mohammed*, the court faced the challenge of sentencing an offender who had illicitly obtained hundreds of peoples’ credit reports but had only been able to make harmful use of a handful of them before the FBI interrupted his fraudulent scheme. The court noted that the Sentencing Guidelines “[g]ive no reason for counting as victims only those who suffered actual financial

131. *Id.* at 894.

132. *Id.* at 895. In dicta, the Eleventh Circuit also noted that the defendants would still be accountable for ten to fifty victims even under the *Yagar* standard. *Id.* at 894.

133. 315 F. Supp. 2d 354 (S.D.N.Y. 2003).

loss, and excluding schemes that unsuccessfully targeted multiple victims or imposed non-economic harm on numerous persons.”¹³⁴ Forced to apply the victim definition provided in the application notes, the *Mohammed* court noted in dicta that “[t]his case provides a good example of a situation in which the number of victims who suffered actual loss inadequately measures the scope of the crime.”¹³⁵

Although this discussion has focused on financial crime cases,¹³⁶ adequacy-of-injury issues lurk in almost every corner of the Guidelines.¹³⁷ In 2001, for instance, Second Circuit Judge Guido Calabresi wrote a federal appellate panel’s decision in a case concerning the “important question . . . [of] whether and to what extent the enhancement for ‘permanent or life-threatening bodily injury’ applies to crimes in which the victim has suffered only emotional injury.”¹³⁸ After rejecting the view that “this sentencing enhancement applies only in cases of corporeally manifest physical injury,” Judge Calabresi’s opinion held that “the ‘impairment of a . . . mental faculty’ category is capacious enough to encompass lasting emotional and psychological harm, at least when that harm is aggravated by circumstances that prolong its detrimental impact on the victim.”¹³⁹ Judge Calabresi’s opinion may have reached a sensible result—post-traumatic stress disorder, as he noted, can have long-lasting effects comparable to physical injuries¹⁴⁰—but it also left open the question of how to determine the appropriate standard of what constitutes prolonged detrimental impact, an issue which is, more broadly, simply an adequacy-of-injury inquiry.

In some cases, courts identify as victims of crimes those who have suffered no direct injury from the crime. For instance, in considering an official victim-based sentence enhancement¹⁴¹ the Eighth Circuit observed

134. *Id.* at 362.

135. *Id.*

136. As might be expected, a related (and more common) sentencing issue in financial crime cases is not whether the victim has suffered a loss, but rather the extent of that loss. Unfortunately, courts often find the Guidelines’ principles no less difficult to apply when deciding this question than when identifying victims in the first place. *See, e.g.,* *United States v. Schuster*, 467 F.3d 614, 619 (7th Cir. 2006) (agreeing with the defendant’s argument that “the imperatives contained in application note 3(A)(v)(III) and commentary note 3(D)(ii) to U.S.S.G. § 2B1.1 appear to conflict with one another”).

137. *See, e.g.,* *United States v. Lin Guang*, 511 F.3d 110, 125 (2d Cir. 2007) (reversing district court’s application of a victim-based sentence enhancement and noting that “[w]here substantial impairment is not obvious, something more than the generalized and subjective impression of the victim is required in the way of proof”).

138. *United States v. Spinelli*, 352 F.3d 48, 58 (2d Cir. 2003).

139. *Id.* at 58–59.

140. *Id.* at 59.

141. U.S. SENTENCING GUIDELINES MANUAL § 3A1.2 (2007). Courts regularly find that

in *United States v. Drapeau* that, “an individual need not be harmed, or even knowledgeable of the crime, to be a victim.”¹⁴² In *Drapeau* the defendants constructed an illegal “firebomb” with the intention of harming a tribal police officer.¹⁴³ Even though the defendants’ scheme was uncovered before the weapon could be used against its intended victim, the court still found the officer to be a victim under the Sentencing Guidelines.¹⁴⁴ The court reached this conclusion by reasoning that “[w]ithout Officer Sauze as the target for the firebombs, the bombs would never have been constructed; there would have been no section 5861(f) offense.”¹⁴⁵

Notwithstanding the many factual differences among the cases, *Yagar*, *Lee*, *Spinelli*, and *Drapeau* can be viewed as markers recognizing different thresholds for the adequacy of victim injury under the Guidelines. Under *Yagar*, the injury must clearly fall within the defined field of injury and continue up to the time of sentencing. *Lee*, on the other hand, takes a slightly looser view, holding that the injury is adequate provided that it falls within the defined field and occurred when the crime occurred. In contrast to *Lee*, *Spinelli* construes the content of relevant injury more expansively, recognizing emotional harm as adequate, but finding that it must continue for a prolonged period of time, certainly at least until the sentencing hearing. Lastly, *Drapeau* takes the most extreme view, dispensing with the requirement that victim status must be determined with reference to victim injury at all; instead, victim status can be determined solely with reference to the defendant’s substantive offense.

On a case-by-case basis, each of these outcomes may seem reasonable under their specific facts, but the point is that they are inconsistent with each other. A consistent approach would begin with a basic inquiry: what is the minimum adequate injury necessary to find victim status and how should that standard be determined? Such an approach has many advantages: it would lead to more consistent sentencing; it would help to avoid imposition of sentences based on arbitrarily inclusive or exclusive notions of victimhood; and, by engaging in the process of thinking through the appropriate injury thresholds for the wide range of crimes found in the

application of the official victim enhancement does not require that the official victim actually suffer an injury. See, e.g., *United States v. Bier*, 238 F. App’x 228, 230–31 (9th Cir. 2007) (application of official victim enhancement appropriate when defendant planned, but did not carry out, presidential assassination plot).

142. 188 F.3d at 987, 991 (8th Cir. 1999).

143. *Id.*

144. *Id.* at 992.

145. *Id.* at 991.

Guidelines, legislators, judges, and policymakers would produce a more rigorous conception of what a victim actually is. In sum, the first key to consistent victim identification is to develop a victim definition that includes an express adequacy-of-injury requirement.

2. *Proximate Cause*

Beyond the adequacy-of-injury issue, a distinct victim identification problem arises when a party has suffered a legally adequate injury connected to the defendant's criminal conduct but the defendant's crime was not the proximate cause of the injury. Consider, by way of example, a case in which the police finally track down a criminal who has eluded capture for many years, during which time police and prosecutors arrested and convicted innocent parties for the criminal's crimes. In the absence of any evidence that the criminal intentionally led the police to suspect the innocent parties, is it sensible to view the wrongfully convicted parties as victims of the offender under the Guidelines?

In *United States v. Morehouse*, the District Court for the District of Maine answered this question in the affirmative.¹⁴⁶ The defendant in *Morehouse* had carried out a check-kiting scheme for many years along the Atlantic seaboard, during which time courts tried and convicted two innocent parties for some of the defendant's crimes.¹⁴⁷ Notwithstanding the defendant's argument that "any causation between his criminal acts and the later wrongful convictions is either too attenuated or broken by independent causes, namely improper police investigations and prosecutions,"¹⁴⁸ the court still found that the innocent parties were Morehouse's "victims" for sentencing purposes.¹⁴⁹ Significantly, however,

146. 345 F. Supp. 2d 3 (D. Me. 2004).

147. Somewhat confusingly, the court's opinion first states that "Mr. Morehouse has admitted committing" the crimes for which the two innocent parties were convicted, *id.* at 4–5, following which it states that "Mr. Morehouse . . . has never admitted to the facts surrounding the criminal convictions" of the innocent parties. *Id.* at 6.

The two victims identified by the court were Daniel Smith and Donald Miller. *Id.* at 5. New Hampshire police accused Mr. Smith, a construction worker from Kansas who was on a short-term assignment in New England, of one of Morehouse's crimes. *Id.* Despite multiple alibi witnesses, Smith was arrested in Kansas, extradited to New Hampshire, spent four months in jail awaiting trial, and was eventually convicted. *Id.* Before Morehouse's sentencing, Smith sued the police department responsible for his arrest and ultimately recovered more than \$200,000 in a settlement. *Id.* The other victim, Mr. Miller, was a New York resident with a prior criminal record; he was convicted and sentenced to a three-year prison term. *Id.* The District Attorney's Office refused to admit its error in prosecuting Miller. *Id.*

148. *Id.* at 5–6.

149. *Id.* at 8–9.

the court reached this conclusion only after finding that “there is a sufficient factual basis for concluding proximate causation has been established between Mr. Morehouse’s crimes and these wrongful convictions.”¹⁵⁰

While the *Morehouse* court sought and found a proximate cause link between the defendant’s crimes and alleged victim’s injuries, not all sentencing courts have required that the offender’s crimes be the proximate cause of the alleged victims’ injuries when identifying victims under the Guidelines. In *United States v. Mitchell*, the Fifth Circuit expressly rejected the defendant’s argument that the court must find that the defendant proximately caused his victim’s injuries in order to impose a victim-based sentence enhancement.¹⁵¹ Finding that the Guidelines “[c]ontain no requirement that the injury be reasonably foreseeable or that the defendant be culpable for the injury beyond committing the base offense,”¹⁵² the court imposed a sentence enhancement predicated on injuries related to a stroke suffered by a bank customer during the robbery.¹⁵³

In a 1998 case, *United States v. Terry*, the Fourth Circuit provided what may be the most extensive discussion by a federal court of the applicability of the concept of proximate cause to victim identification under the Sentencing Guidelines.¹⁵⁴ *Terry* involved a road rage incident that led to the deaths of several motorists. The relevant disputed sentencing issue was whether the family members of the dead motorists could be considered victims under the Guidelines.¹⁵⁵ The court began its analysis by noting that, “regrettably,” the term “victim” is defined neither in U.S.S.G. § 1B1.1, which defines terms used throughout the Guidelines, nor in U.S.S.G. § 5K2.3, the specific Guidelines section at issue in the case.¹⁵⁶ Lacking clear guidance from the Guidelines, the court then noted the ambiguity inherent in the term “victim”:

Black’s defines “victim” as “[t]he person who is the object of a crime or tort, as the victim of a robbery is the person robbed.” Under this definition, the victim of a homicide is the person killed, not a family member . . . Not all dictionaries, however, define

150. *Id.* at 8.

151. *United States v. Mitchell*, 366 F.3d 376, 379 (5th Cir. 2004).

152. *Id.*

153. *Id.* at 378.

154. *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998).

155. *Id.* at 704–05.

156. *Id.* at 710.

“victim” so narrowly. *Webster’s* defines “victim” as “one that is . . . adversely affected by a force or agent.” Under this sweeping definition, anyone adversely affected by a homicide is a victim. Although very different in scope, both definitions are consistent with how the term “victim” is commonly employed.¹⁵⁷

After reviewing appearances of the term “victim” in numerous other Guidelines sections, the court concluded that, at least in the context of U.S.S.G. § 5K2.3, the term “victim” could include both direct and indirect victims of the offense, but that “an indirect victim must have some nexus or proximity to the offense.”¹⁵⁸ The court then applied this standard to the case and found that family members of the dead motorist, although indirect victims, were not proximately connected to the defendant’s actions, and thus were not victims under the Guidelines since they had no “relationship to the offense beyond their relationship to the direct victims.”¹⁵⁹

In a recent article reviewing cases raising similar issues to those in *Morehouse*, *Mitchell*, and *Terry*, Assistant U.S. Attorney Jessie Liu proposed a two-pronged Guidelines victim definition.¹⁶⁰ In Liu’s formulation,

the term “victim” of a particular crime and defendant should be defined as any individual (1) whom the defendant intended to affect as a result or in the course of the crime; or (2) whose harm suffered at the defendant’s hand was an integral part of the manner in which the crime was committed.¹⁶¹

Liu’s definition abandons the “proximately caused” language found in the restitution and CVRA definitions of victim.¹⁶² Recognizing that requiring courts to find proximate cause does not itself resolve the issue of how closely connected the victim’s injury must be to the offender’s crime,¹⁶³ Liu rejects a conception of victimhood in which the putative victim’s injuries must only be “foreseeable” to the offender. Instead, Liu

157. *Id.* at 710–11 (alteration in original) (citations omitted).

158. *Id.* at 712.

159. *Id.*

160. Liu, *supra* note 14.

161. *Id.* at 164.

162. See 18 U.S.C. §§ 3663(a)(2) (2000), 18 U.S.C. § 3771(e) (Supp. 2007) (defining “victim” as one “directly and proximately harmed”).

163. Liu, *supra* note 14, at 124 (“To say that a defendant ‘caused’ something where his actions were the but-for cause is a very low bar; while saying the defendant ‘caused’ something only if his actions were the proximate cause is conclusory.”).

would require that the putative victim's injuries be either intended consequences of the crime or closely related to the factual nexus of the crime:

There are significant differences between the foreseeability test and the necessary knowledge test suggested above. The most important difference, perhaps, is that under the latter, the family members of injured or killed persons would be victims, since it is unquestionably foreseeable that the target of a criminal attack would have associates who would be affected by the crime. Under the necessary knowledge test, however, family members are not victims unless the defendant deliberately intended to inflict harm upon them or harm to them was a means of committing the crime. The foreseeability test sweeps too broadly. The criminal law focuses on intent, whereas the tort concept of foreseeability rests on a presumption that simple negligence is sufficient to support a finding of liability. Under the substantive criminal law, however, simple negligence is not enough for liability. Similarly, a victim of a crime must be an individual who suffered as a result of more than mere negligence.¹⁶⁴

Liu's analysis demonstrates that the value of a proximate cause standard—or an alternative model, such as her necessary knowledge test—is that it helps to limit the boundaries of the universe of victimhood.¹⁶⁵ However, three criticisms can be raised concerning her proposed definition.

The first criticism is analytical. As this Note explains, the question is not simply whether the connection between the offender's crime and the putative victim's injury is sufficiently close to support a finding of victimhood. Rather, victimhood involves two dynamic concepts, adequacy of injury and crime-injury connectedness; problems arising under one of these two elements could be resolved by refining the other. To borrow Liu's example from above, if we wish not to count upset family members of a murdered person as victims under the Guidelines, there are two ways of accomplishing this result. We could find that a purely emotional injury is an inadequate injury. Alternatively, we could find that, while an emotional injury is an adequate injury, the connectedness of the putative victims' emotional injuries to the offender's crime is too tenuous to

164. *Id.* at 164–65.

165. *Id.* at 122.

support a finding of victimhood. While Liu's article discusses theories of victim harm,¹⁶⁶ her proposed definition fails to incorporate the interplay of these two elements.

The second criticism is substantive. While Liu is correct that not everyone loosely connected to a crime should receive victim status, the "necessary knowledge" test is not necessarily an improvement over the existing proximate cause requirement applied by some courts. Indeed, as noted above, the Fourth Circuit in *Terry* applied a proximate cause standard and found that a decedent's emotionally traumatized family members were not victims under the Guidelines because their injuries were not proximately caused by the offender's crime.¹⁶⁷ As a practical matter, the restitution and CVRA victim definitions simply avoid the foreseeability problem raised by Liu by requiring that the victim be "*directly and proximately*" harmed by the offender.¹⁶⁸ Thus, even if proximate cause or foreseeability are, on their own, too open-ended conceptually, the directness requirement can effectively narrow the universe of victims.

The third criticism is policy based. Courts already apply victim definitions incorporating a proximate cause standard when they apply the federal restitution and CVRA statutes. Notwithstanding the conceptual problems with the restitution/CVRA definition identified in this Note, there is a strong argument for borrowing a portion of this definition, which federal courts have been applying for nearly three decades. As U.S. District Court Judge Paul G. Cassell noted recently, "the CVRA uses a definition of 'victim' that is 22-years-old and has not produced major administrative or definitional problems."¹⁶⁹

Notwithstanding these criticisms of Liu's proposed definition, she is absolutely correct that a Guidelines victim definition should exclude from the universe of victimhood parties whose injuries are too tenuously connected to the offender's crime. There is neither retributive nor utilitarian logic to holding a defendant liable for all injuries, including unforeseeable ones, that may be suffered by any person connected to a crime scene. The defendant is not morally blameworthy for such unforeseeable injuries, nor does imposition of a harsher sentence based

166. *Id.* at 123–36.

167. *See supra* note 159 and accompanying text.

168. 18 U.S.C. §§ 3663(a)(2), 3771(e) (2000 & Supp. 2007) (emphasis added).

169. Letter from the Honorable Paul G. Cassell, United States District Court Judge, to Tim McGrath, Staff Director, United States Sentencing Commission (Oct. 26, 2006), at 3, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/cassell_victim_letter.rtf.

upon such injuries effectively deter future crime if the defendant could not have reasonably foreseen that the injuries would occur.

Further, as the next two subsections demonstrate, there remain other victim riddles beyond adequacy of injury and proximate cause that require a more rigorous and comprehensive conception of victimhood. A Guidelines definition should deal directly with these problems.

3. *Imaginary Victims*

United States v. Drapeau, described above, involved the imposition of a victim-based sentence enhancement when the defendant intended to harm but ultimately failed to injure a police officer.¹⁷⁰ Moving beyond *Drapeau*, could a court ever impose a victim-based sentence enhancement for an injury that was never sustained by a party that never existed?

Perhaps surprisingly, the Guidelines specifically allow for the imposition of victim-based sentence enhancements predicated on fictive harms to imaginary victims. Imaginary victims arise in sentencing hearings when law enforcement officials have used fictitious identities to catch offenders, such as by creating online underage personae to trap child sex predators.

In *United States v. Sims*,¹⁷¹ for instance, the court convicted the defendant for soliciting sex over the Internet from two fictitious minors, “Sue” and “Kate,” who, in reality, were Internet personae maintained by an FBI agent.¹⁷² On appeal, the Tenth Circuit affirmed the district court’s refusal to group all of the defendant’s counts, which would have been appropriate if there had been only one victim of the offense.¹⁷³ The Tenth Circuit held that “Sue” and “Kate” each independently qualified as victims since, had they actually existed, “they, rather than society in general, would have been harmed.”¹⁷⁴ The Tenth Circuit reached this conclusion by following the victim definition provided in the application note to U.S.S.G. § 2G1.1, which addresses sexual crimes against minors. The

170. See *supra* note 142 and accompanying text.

171. 428 F.3d 945 (10th Cir. 2005).

172. In *Sims* the two Internet personae were originally created “as a gag” by an adult man in Missouri named Michael Walker. After the defendant e-mailed sexually explicit pictures of himself and solicited sex from “the girls,” Walker contacted the National Center for Missing and Exploited Children. Eventually the local police and the FBI became involved and an FBI agent posed as “Sue” and “Kate” in Internet-facilitated interactions with the defendant. The defendant was arrested when he traveled to Missouri to meet “Sue” and “Kate” at a roller-skating rink at which he thought he had scheduled a rendezvous. *Id.* at 950.

173. See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2007).

174. *Sims*, 428 F.3d at 962 (quoting *United States v. Butler*, 92 F.3d 960, 963–64 (9th Cir. 1996)).

relevant application note specifically states that an “undercover law enforcement officer” qualifies as a victim.¹⁷⁵

In *United States v. Iles*,¹⁷⁶ a district court reached the opposite conclusion of the *Sims* court on similar facts. In *Iles*, the defendant pled guilty to knowingly transporting child pornography in interstate commerce by computer.¹⁷⁷ The defendant had sent sexually explicit photos of children via e-mail to “Pam,” an Internet persona maintained by an FBI agent posing as an underage female. At the sentencing hearing, the government argued that the defendant should receive a five-level sentence enhancement under U.S.S.G. § 2G2.2 for distributing pornography to a minor.¹⁷⁸ The defendant disputed the enhancement, arguing that “Pam” was not a minor since “Pam” did not actually exist. The court noted that while the Guidelines had been revised to include undercover agents within the definition of “victim,” at the time of the offense neither the statute nor the Guidelines clarified whether the definition of minor included an undercover agent, and thus the court would consider the issue independently of the revised commentary.¹⁷⁹

The *Iles* court rejected the government’s position and held that a sentence enhancement could not be based on alleged harm suffered by an undercover agent posing as a child on the Internet.¹⁸⁰ The court noted that the government’s position made the sentence enhancement redundant, since the same facts required to prove a violation of the substantive offense would almost always involve harm to a minor if the definition of “minor” included undercover agents. “In this case, the victim for which the enhancement was created is an adult . . . the Court is not inclined to impose a Guidelines enhancement that expands a definition beyond its statutory confines.”¹⁸¹ In a partial dissent in a 2002 Eleventh Circuit case, Judge Cornelia G. Kennedy made a similar point when arguing against application of a sentence enhancement for “unduly influencing” an

175. “‘Victim’ means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, ‘victim’ may include an undercover law enforcement officer.” U.S. SENTENCING GUIDELINES MANUAL § 2G1.1 cmt. n.1 (2007).

176. 384 F. Supp. 2d 901 (E.D. Va. 2005).

177. The *Iles* defendant was convicted under 18 U.S.C. § 2252A(a)(1) (2006). *Iles*, 384 F. Supp. 2d at 903.

178. *Id.* at 905.

179. *Id.*

180. *Id.* at 906.

181. *Id.*

imaginary victim to participate in a sexual act.¹⁸² As Judge Kennedy noted, a nonexistent person cannot be unduly influenced; the majority “has had to substitute for the factual finding called for the in commentary [with] whether it thinks [the] defendant’s conduct would have unduly influenced a thirteen-year old hypothetical victim.”¹⁸³

Recognition of imaginary victims in the Guidelines raises difficult challenges for a unified conception of victimhood. If the purpose of victim-based enhancements is, for both retributive and utilitarian reasons, to impose harsher penalties on offenders whose crimes harm protected classes of people, then the underlying logic of such enhancements fails to support recognition of imaginary victims because no one has been harmed and future offenders are not deterred from harming real people (as opposed to harming fictive personae). It is difficult to reconcile an adequacy-of-injury inquiry with recognition of imaginary victims, since it is impossible to develop an appropriate standard to measure the injuries of nonexistent people. Further, it is unclear how an interpretation of proximate cause would apply to imaginary victims. Lacking an injury, it would appear logically impossible to determine whether the nonexistent person’s nonexistent injury was proximately connected to the actions of the defendant.

There are, however, two possible ways of reconciling imaginary victims with an overarching conception of victimhood that incorporates an adequacy-of-injury element and a proximate cause inquiry. The first is to view the imaginary victim as a proxy for the investigatory officer, at least in cases involving manipulation of fictional personae by law enforcement agents. The problem with this approach is that an FBI agent is not vulnerable in the same way that a child is,¹⁸⁴ nor does an FBI agent suffer an adequate injury—unless the injury itself is defined as mere exposure to the defendant’s conduct, in which case there is no reason to recognize a special penalty for targeting children. The second approach is to view the imaginary victim as a proxy for a special societal interest that is threatened merely by the defendant’s attempt to injure a nonexistent party. This approach might be supported by the Guidelines’ treatment of stolen mail

182. *United States v. Root*, 296 F.3d 1222, 1236–37 (11th Cir. 2002) (Kennedy, J., concurring in part, dissenting in part). Kennedy, a judge on the Sixth Circuit, was sitting by designation. *Id.* at 1223.

183. *Id.* at 1237.

184. *United States v. Chriswell*, 401 F.3d 459, 470 (6th Cir. 2005) (“Because the government official presenting himself to the defendant will have full control over all aspects of the characteristics of the fictitious victim, the victim will always appear as an unwilling and inexperienced victim whose will is easily overcome. The defendant, faced with such a victim, will find it virtually impossible to show that the victim’s will was not overcome.”).

cartons, which leads to automatic recognition of fifty victims.¹⁸⁵ The problem with this approach, however, is that it imposes an additional penalty on the defendant merely for his violation of the substantive law, rather than for the impact of that violation on society.

The best approach would be to recognize that imaginary victims cannot be logically reconciled with a theory of victimhood premised on adequacy-of-injury and proximate cause. The inclusion of imaginary victims in the Guidelines merely imposes an additional penalty on the defendant for his commission of the original substantive offense. The inquiry into victimhood is rendered moot because a victim will always be found if the defendant committed the substantive crime. Moreover, recognition of imaginary victims undermines the moral significance of the “victim” label. As noted in Part II, victims have come to play an increasingly central role in the federal system of criminal justice based in part on their claims to the moral wrongfulness of excluding them from the federal criminal justice system.¹⁸⁶ The moral stature of victimhood should not be weakened through extension of the label to nonexistent parties. A more straightforward approach to such cases would involve imposing heavier penalties for violations of the substantive offense, rather than tacking on additional penalties through the use of logically dubious sentence enhancements.

This Note is not arguing that the offenders sentenced pursuant to the enhancements discussed in this subsection received unduly harsh sentences. Rather, the point is simply that these same sentences could be reached more logically by imposing heavier penalties for violations of the substantive offense rather than by resorting to imaginary victim-based sentence enhancements.

4. *Culpable or Consenting Victims*

Another wrinkle in the development of a theory of victimhood concerns culpable victims. If a partially culpable plaintiff succeeds in a tort suit, her recovery will likely be reduced under principles of comparative negligence.¹⁸⁷ Even if the defendant is clearly at fault, the

185. *See* United States v. Akinsuroju, 166 F. App'x 748, 750 (5th Cir. 2006) (“Because of the unique problems of proof, the difficult-to-quantify non-monetary losses, and the importance of maintaining the integrity of the United States mail, the Guideline [U.S.S.G. § 2B1.1] includes a special provision for cases involving the taking of undelivered United States mail from a United States Postal Service delivery vehicle.”).

186. *See supra* Part II.D.

187. DAN B. DOBBS, THE LAW OF TORTS § 201 (2000) (“Modern comparative negligence law

defendant's liability will be reduced in recognition of the plaintiff's error. The Guidelines incorporate this principle by encouraging judges to impose lighter sentences on defendants if "the victim's wrongful conduct contributed significantly to provoking the offense behavior."¹⁸⁸ As the Guidelines note after a 2003 amendment, however, "this provision usually would not be relevant in the context of non-violent offenses."¹⁸⁹

Although sentencing cases involving culpable victims are rare, at least one court has imposed a victim-based sentence enhancement for a nonviolent offense, even when the identified victim was convicted for his role in the crime. In *United States v. Geeslin*,¹⁹⁰ the defendant, a chief of police, established a program through which police officers could earn extra income by serving warrants when off-duty. Geeslin initially served warrants with a subordinate officer, Gary Cooper, but Geeslin later asked Cooper to serve warrants on his own and to submit reimbursement forms under both of their names.¹⁹¹ When sentencing Geeslin for conspiracy to commit fraud, the district court counted Cooper as a victim, since Geeslin's fraudulent scheme had deprived Cooper of earned income.¹⁹²

The Fifth Circuit affirmed the sentence enhancement. It held that "under the rare circumstances presented here" a crime participant could qualify as a victim under U.S.S.G. § 2B1.1.¹⁹³ The Fifth Circuit emphasized the fact that Geeslin was Cooper's superior and that while Cooper was not completely helpless, his participation in Geeslin's scheme looked "like an assent to extortion."¹⁹⁴ Since the victim definition in the application notes to U.S.S.G. § 2B1.1 turns on pecuniary loss, Cooper qualified as a victim, notwithstanding the fact that he pled guilty to criminal charges in state court for his role in the crime.¹⁹⁵

Geeslin is clearly an outlier case, but it highlights an important issue in developing a theory of victimhood under the Guidelines. As the above-quoted Guidelines' policy statement notes, it is usually inappropriate to impose a victim-based sentence enhancement for injuries sustained by a

works differently [than contributory negligence], reducing the plaintiff's recovery in proportion to the plaintiff's fault.").

188. U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (2007).

189. Sentencing Guidelines for United States Courts, 68 Fed. Reg. 60,154, 60,158 (Oct. 21, 2003).

190. 447 F.3d 408 (5th Cir. 2006).

191. *Id.* at 409. The scheme lasted for approximately four years, between 1997 and 2001. Geeslin also illicitly earned money by pressuring a city administrative official to doctor the pay sheets submitted by Cooper to reflect a larger number of hours worked by Geeslin. *Id.*

192. *Id.* at 410.

193. *Id.* at 408.

194. *Id.* at 411.

195. *Id.* at 410 & n.5.

victim who was also a co-conspirator to the crime.¹⁹⁶ However, it is important to note how the existing approach to culpable victims operates. First, the court decides whether culpable parties such as Cooper are victims. Second, the court decides whether to impose a sentencing penalty based on the culpable victim's injuries, a question which turns on the circumstances of the case.

A better approach would be to develop a Guidelines theory of victimhood that, by definition, categorically excludes culpable victims. Such an approach would reduce the risk of arbitrary decision making under the "circumstances" of a particular case. It would also reinforce the moral significance of victim identification: the defendant's length of imprisonment is affected, if it is affected at all, based only on injuries sustained by parties who were not also criminally liable for the defendant's offense. Finally, even while there may be circumstances in which an injured party would qualify as a victim under the Sentencing Guidelines but fail to qualify for victim status under the CVRA, federal restitution statutes, or the Federal Rules of Criminal Procedure, such discrepancies among victim standards should be minimized to the extent possible.¹⁹⁷ Exclusion of culpable victims from the Guidelines reinforces the imperatives contained elsewhere in federal criminal law to bestow victim status only on deserving parties.

Closely related to the issue of culpable victims is the issue of victims who knowingly and willfully consent to suffer injuries inflicted by the defendant in the course of his criminal action.¹⁹⁸ These two situations, however, raise distinct issues. In tort law, the operation of comparative negligence merely diminishes a culpable plaintiff's recovery.¹⁹⁹ In contrast, knowingly and willfully consenting to receive the injuries inflicted by the defendant generally precludes all recovery for a tort

196. *Supra* note 188 and accompanying text.

197. *United States v. Pearson*, No. CR-05-83-B-W, 2007 U.S. Dist. LEXIS 84625, at *14 (D. Me. Nov. 14, 2007) ("Although it is not inconceivable that a person could be a victim of a crime under the Sentencing Guidelines, but not under the restitution provisions of the statute, this result is counterintuitive and its policy obscure.").

198. There is an obvious overlap in theory and practice between situations involving culpable and consenting victims. In fact, the two principal cases discussed in this section, *Geeslin* and *Angeles-Mendoza*, could both be viewed as involving either culpable or consenting victims. I have examined the issue of victim culpability and consent as discrete problems. However, even while in practice the distinction between the situations may often be irrelevant, in theory a culpable victim is more directly implicated in the defendant's crime than a victim who merely consents to become involved. For further discussion of *Angeles-Mendoza*, see *infra* note 207.

199. DOBBS, *supra* note 187.

plaintiff.²⁰⁰ A theory of victimhood in the Guidelines must also account for the problem of consenting victims.

As with the case of culpable victims, the problem of consenting victims is relatively rare, although it does arise occasionally.²⁰¹ Barring cases involving victims who cannot legally consent to participate in a crime,²⁰² this problem could arise, for instance, when an illegal immigrant consents to participation in a human trafficking scheme and then suffers unexpected injuries in the course of his or her detention by the traffickers.

The Fifth Circuit considered such a case in 2005 in *United States v. Angeles-Mendoza*.²⁰³ Since the defendants were only convicted of charges related to illegal alien smuggling, the court had to consider whether consent to human trafficking precluded victimization, or if instead victim status could arise from uncharged criminal conduct stemming from the execution of the crime.²⁰⁴ The court held that the aliens qualified as victims under the Guidelines.²⁰⁵ In reaching its holding the Fifth Circuit side-stepped its earlier decision in *United States v. Velasquez-Mercado*,²⁰⁶ which held that illegal aliens could not qualify as victims of crimes associated with human trafficking schemes because they were better understood as “customers.”²⁰⁷

200. DOBBS, *supra* note 187, § 97 (“The consensus seems to be that a subjective or ‘real’ consent is a bar to recovery even though the defendant was unaware of such consent.”).

201. One manifestation of this issue involves the precise meaning of consent in the context of forcible sex crime sentence enhancements. *See* *United States v. Romero-Hernandez*, 505 F.3d 1082, 1087 (10th Cir. 2007) (analyzing whether putative victims who are “legally or medically unable to consent” have suffered “forcible” sex crimes and observing that “other circuits appear to be split on the issue”). *Compare* *United States v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir. 2007), and *United States v. Gomez-Gomez*, 493 F.3d 562 (5th Cir. 2007) (both holding that actual physical force must be involved), *with* *United States v. Remoi*, 404 F.3d 789 (3d Cir. 2005) (holding that “a sex offense against a victim who is ‘physically helpless, mentally defective or mentally incapacitated’ is categorically a ‘forcible sex offense’”).

202. Statutory rape cases are an obvious example of situations involving victims whose manifestations of consent are irrelevant for purposes of determining victim status under the Guidelines. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A3.1 (2007) (stating that issue of consent is irrelevant when the victim is below the age of twelve).

203. 407 F.3d 742 (5th Cir. 2005).

204. The three *Angeles-Mendoza* defendants smuggled twenty-nine illegal aliens from Mexico into Texas and then held them at gunpoint in an Austin “stash house.” The defendants pled guilty to two counts of conspiracy to smuggle, transport, and harbor illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A), and one count of possession of a firearm by an illegal alien in violation of 18 U.S.C. § 922(g)(5). *Id.* at 745–46.

205. *Id.* at 747.

206. *United States v. Velasquez-Mercado*, 872 F.2d 632, 636 (5th Cir. 1989).

207. The court in *Angeles-Mendoza* noted that the Guidelines’ application notes had changed since its decision in *Velasquez-Mercado*; the application notes now indicated that a defendant should be sentenced in light of all relevant conduct associated with his crime, as determined by U.S.S.G. § 1B1.3. Even though the *Angeles-Mendoza* aliens were not victims of human trafficking, they were

Notably, a year after the Fifth Circuit's decision in *Angeles-Mendoza*, the Sentencing Commission approved an amendment to the Guidelines that effectively overturned the court's holding in the case. In May of 2006, the Commission published a notice stating that a court could not apply the restraint-of-victim sentence enhancement, U.S.S.G. § 3A1.3, in cases involving illegal immigrants restrained against their wills in the course of human trafficking. "[A]n illegal alien, as a participant in the offense, may not be considered a 'victim' for purposes of that adjustment," the Commission stated in its notice.²⁰⁸ In the very same amendment, however, the Commission created a new basis for imposing the equivalent of victim enhancements without invoking the word "victim":

[T]he amendment adds a two-level enhancement and a minimum offense level of 18 in a case in which an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, after the alien was smuggled into the United States, or while the alien was transported or harbored in the United States.²⁰⁹

The Commission's resolution of this particular manifestation of the consenting victim problem represents a sensible resolution of the issue and one that can be reconciled with a larger theory of victimhood premised on the idea of moral wrong. A person who knowingly and willfully consents to participate in a criminal activity may have suffered an adequate injury that was proximately caused by the defendant's criminal actions, but by consenting to participation, such a person has effectively excused the defendant from heavier penalties premised on such injury. A conception of victim grounded in a moral notion of victimhood requires no less.

IV. IN SEARCH OF VICTIMS

A. Proposed Definition

Part III's discussion and analysis of federal litigation addressing victim status under the Guidelines demonstrates why the simple adoption of a proximate cause standard of victimhood in the Guidelines would fail to solve the many victim-related issues that arise in sentencing law. A

victims of forcible detention at gunpoint after arriving in the United States. Their victimization as hostages thus served as a basis for application of a victim-based sentence enhancement. *Angeles-Mendoza*, 407 F.3d at 474.

208. Sentencing Guidelines for United States Courts, 71 Fed. Reg. 28,063, 28,072 (May 15, 2006).

209. *Id.*

proximate cause standard alone cannot clarify the adequacy-of-injury question for specific Guidelines provisions, nor would it provide any guidance for determining the appropriateness of basing sentencing calculations on injuries sustained by imaginary, culpable, or consenting victims.

The existing standards found in other arenas of federal criminal law are likewise inadequate. The definition found in the Federal Rules of Criminal Procedure²¹⁰ is unsatisfactory because it does not include a proximate cause limitation, much less a minimum injury threshold. The restitution/CVRA definition,²¹¹ while an improvement over the Federal Rules' definition because of its incorporation of a proximate cause requirement, also lacks an adequacy-of-injury element or standards for determining the status of imaginary, culpable, and consenting victims.

In the absence of a satisfactory victim standard drawn from other sections of federal criminal law, this Note offers a proposed definition that addresses the concerns raised in Part III:

A victim is a person, capable of suffering injury, who has suffered an adequate injury that was directly and proximately caused by the defendant's criminal conduct, and whose injury was not a consequence of the person's own criminal conduct nor a consequence of the person's consent to participate in the defendant's criminal conduct.

Although this proposed definition is (hopefully) self-explanatory, a few points of clarification are in order. The second clause of the proposed definition, "capable of suffering injury," is included in the definition in order to exclude imaginary victims. The final clause of the proposed definition addresses the problems posed by culpable and consenting victims. The "directly and proximately" harmed language borrows a portion of the restitution/CVRA victim definition and limits the universe of potential victims through a focus on the connectedness of the putative victim's injuries to the offender's crime.

The "adequate injury" language is included for two reasons. First, the language makes express the requirement that identification of the relevant injury is antecedent to identification of the victim. There are innumerable types of injuries—physical, financial, emotional, psychological—but not

210. *See supra* note 13 (defining "victim" as "an individual against whom the defendant committed an offense for which the court will impose sentence").

211. *See supra* notes 11–12 (defining "victim" as "a person directly and proximately harmed as a result of the commission of" the offense in question).

every type of injury is relevant for victim-based sentence enhancements. By design, the “adequate injury” language does not determine in advance whether particular types of injuries are or are not adequate in specific Guidelines sections. Rather, the Sentencing Commission should consider what type of injury would be adequate for each appearance of “victim” in the Guidelines and establish specific injury thresholds in application notes. Victimhood would thus gain a consistent conceptual foundation in the Guidelines while retaining the flexibility necessary for application to a wide range of criminal transactions.

Second, the “adequate injury” language suggests an approach to victim identification that could contribute to the development of victim theory in criminal law more generally. As noted in Part II, victims have secured a wide range of rights under federal criminal law in recent years. Even though scholars have long noted the importance of victim definitions in several contexts, including restitution²¹² and academic studies of crime,²¹³ these approaches to victim identification have always rested on somewhat vague notions of harm or injury. Developing exact standards of victim identification has proven less important in these areas than in sentencing policy, since victim services and, to a lesser extent, restitution, are often viewed as discretionary policies.²¹⁴ Indeed, some state compensation schemes have provided restitution to crime victims irrespective of whether the alleged offender was convicted or even apprehended.²¹⁵

But the full-fledged arrival of victims in criminal law requires a more rigorous understanding of who is entitled to perform this role. Just as there is a relevant type of injury for establishing victim status in sentencing policy, so are there relevant injuries for establishing victimhood in the context of the CVRA’s rights and restitution. The development of this

212. James Brooks, *Compensating Victims of Crime: The Recommendations of Program Administrators*, 7 L. & SOC’Y REV. 445, 460 (1973) (“For compensation purposes the terms ‘victim’ and ‘crime’ must be given definitions.”); Slavin & Sorin, *supra* note 44, at 523–33 (commenting on the possible confusion inherent in the federal restitution statute’s victim standard); Comment, *Compensation for Victims of Crime*, *supra* note 38, at 546–47 (commenting on the “considerable uncertainty” surrounding what criteria should be used to appraise victim conduct when deciding whether or not restitution is justified).

213. Anne L. Schneider, *Methodological Problems in Victim Surveys and Their Implications for Research in Victimology*, 72 J. CRIM. L. & CRIMINOLOGY 818, 821 (1981) (“Of all the methodological problems confronted by the field of victimology, none is more critical than a proper determination of who has been a victim of crime.”).

214. Greer, *supra* note 38, at 337 (“Generally, compensation provisions give the Board discretion to compensate victims of crime.”).

215. Comment, *Compensation for Victims of Crime*, *supra* note 38, at 545–46 (“The British, New Zealand, and federal plans properly allow a victim to receive compensation whether or not the offender has been apprehended, convicted, or even acquitted.”).

inquiry in sentencing law may help to provoke a wider discussion of the injuries antecedent to victim identity throughout criminal law.

B. Need for Interlocking Standards

The recognition of victims' rights under federal law, combined with the focus on victims in federal sentencing policy, provides victims with an ongoing role in the criminal process, beginning with the right to confer with the prosecutor in advance of trial and continuing through the sentencing and parole stages.²¹⁶ In its current organization, however, victim-related provisions in federal criminal law are a scattershot of rights (for victims) and liabilities (for offenders).

One of the central arguments of this Note is that the field of victimhood should be viewed holistically to include both victims' rights and victim-based sentencing. Although this Note's proposed victim definition²¹⁷ differs from the existing definitions found in other areas of federal criminal law,²¹⁸ all of these victim references attempt to determine the appropriate standard for taking account of persons harmed by crime.

The need for interlocking standards in discussions of victimhood arises in two contexts. First, the discursive field of victimhood—activist literature, policy papers, scholarly debates—should consciously associate discussions of victims' rights with victim-based sentencing. A narrow focus on victims' rights artificially divides the debate into two halves that are inextricably connected to each other.

The second context concerns the need to develop practical legal connections between victims' rights and victim-based sentencing policy. The CVRA helpfully grouped victims' pre-existing restitution right with the Act's newly created guarantees.²¹⁹ The next step is to develop effective

216. See 18 U.S.C. § 3771(a)(4)–(5) (Supp. 2007). Although the CVRA clearly establishes a crime victim's right to confer with prosecutors in advance of trial, courts have disagreed over whether the statute creates any rights during the investigatory stage before charges are filed. Compare *United States v. BP Prods. N. Am. Inc.*, No. H-07-434, 2008 U.S. Dist. LEXIS 12893, at *40 n.7 (S.D. Tex. Feb. 21, 2008) (holding that some CVRA rights “apply during investigation, before any charging instrument is filed”), with *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005) (“[A] court has no independent means of identifying the victim of uncharged conduct, and must rely on the government, or the victims of such alleged conduct themselves, to bring their status to the court's attention. Moreover, unlike conduct placed at issue in an indictment or complaint, allegations of uncharged conduct will not have been tested even against the relatively low standard of probable cause, thereby exacerbating the due process problem inherent in designating a person as the defendant's ‘victim.’”).

217. See *supra* Part IV.A.

218. Compare *supra* notes 11–13.

219. 18 U.S.C. § 3771(a) (Supp. 2007).

cross-references, either in Title 18 of the U.S. Code or in the Guidelines, that direct sentencing courts to consider step-by-step all victim rights and victim-based liabilities when conducting criminal trials and sentencing hearings.

V. CONCLUSION

This Note has argued that victimhood in its various forms in criminal law should be viewed within a single frame of reference and that the failure of the U.S. Sentencing Guidelines to define the term “victim” is a conceptual flaw that produces operational problems. In developing its proposed victim definition for the Guidelines, this Note has identified the conceptual contours of victimhood in federal sentencing law and proposed a victim definition that incorporates adequacy of injury and proximate cause while categorically excluding imaginary, culpable, and consenting victims. Even though this proposed definition is intended for application solely in the Guidelines, its analytical structure is capable of provoking a wider debate about the meaning of victimhood in federal criminal law.

In closing, a larger point can be made about the trajectory of victimhood over the past forty years. Advocates arguing for the recognition of victims in federal criminal law have often expressed moral outrage over the state’s systematic exclusion of and disregard for victims of crime.²²⁰ Victims, in this narrative, have been badly treated and have a moral claim to greater participation in and influence over the criminal process. In large measure, policymakers have found these moral claims persuasive, restructuring state and federal criminal law to focus on the needs and rights of victims.²²¹

Yet the moral foundations of victimhood cut both ways. If a victim has a moral basis for demanding a greater role in criminal law, the state has a moral obligation to define that role appropriately. Ultimately, criminal law is primarily about convicting and sentencing guilty parties. While the victim may have a legal right to participate, the victim does not have a right to unilaterally control the defendant’s proceedings. Victimhood must be kept within boundaries, and this Note’s argument about the need for clarifying those boundaries applies more generally to all victim-related

220. *See supra* Part II.B–D; *see also* H.R. REP. NO. 98-1017, at 77 (1984) (“The Federal criminal justice system, like the criminal justice system of the States, is based on the assumption that when a criminal act has been committed, the principal aggrieved party is the State, and not the person harmed by the act The victim is not a party, and is at best a prosecution witness.”).

221. *See supra* Part II.

provisions of criminal law. Once marginal and neglected, the victim has matured to the point where her centrality in criminal law requires the development of more rigorous standards.

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