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## Victimhood & Agency: How Taking Charge Takes Its Toll

Pam A. Mueller

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# Victimhood & Agency: How Taking Charge Takes Its Toll

Pam A. Mueller\*

## *Abstract*

*This Article addresses an unexplored tension in the civil justice system regarding victims. The goal of the civil system is to make victims whole. We can, as is most common, attempt to do this financially, or we can consider psychological research that suggests there may be other ways of restoring victims' statuses. One of the most common nonfinancial solutions is to increase victim participation in the justice process. This is a solution that appeals to many victims and may benefit them psychologically. However, by increasing their participation, they may unknowingly trade off some of the benefits of victimhood. For instance, they may be awarded less financial compensation and may even be blamed more for their own victimization. Part II of this Article discusses financial and nonfinancial strategies for making victims whole in the civil justice system. Part III addresses the paradoxical nature of victimhood in this system, and Part IV suggests that the psychological construct of agency may shed light on the issues victims face. Part V presents three empirical studies suggesting there are unanticipated consequences for victims who play an active role in the justice process, which may have serious ramifications for their recovery. The Article concludes with a discussion of the policy implications of these results, the limitations of the current studies, and future directions for this line of research.*

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	693
II.	MAKING VICTIMS WHOLE.....	693
	<i>A. Damages and Other Financial Compensation</i> .....	695
	<i>B. Nonfinancial Strategies</i> .....	697
III.	THE VICTIMHOOD PARADOX.....	699
IV.	AGENCY AND VICTIMHOOD .....	701
	<i>A. Psychological Research on Perceptions of Agency</i> .....	702
	<i>B. Victim Agency in Criminal and Civil Justice</i> .....	703
	<i>C. Are Victim–Plaintiffs Agents or Patients?</i> .....	705
	<i>D. Agency and Making Victims Whole</i> .....	707
V.	OVERVIEW OF EXPERIMENTS .....	709
	<i>A. Study 1: Moral Character and Agency</i> .....	712
	1. Method .....	712
	2. Results .....	713
	<i>a. Agency</i> .....	713
	<i>b. Blame</i> .....	714
	<i>c. Damages</i> .....	715
	<i>B. Study 2: Shared Fault and Agency</i> .....	716
	1. Method .....	717
	2. Results .....	718
	<i>a. Agency, Patency, and Sympathy</i> .....	718
	<i>b. Blame</i> .....	719
	<i>c. Damages</i> .....	720
	<i>C. Study 3: Other Instantiations of Agency</i> .....	721
	1. Method .....	721
	2. Results .....	722
	<i>a. Agency, Patency, and Sympathy</i> .....	722
	<i>b. Blame</i> .....	723
	<i>c. Damages</i> .....	724
VI.	LIMITATIONS, CONCLUSIONS, AND FUTURE DIRECTIONS .....	725

## I. INTRODUCTION

This Article addresses an unexplored tension in the civil justice system in regard to victims.<sup>1</sup> The goal of the civil system is to make victims whole.<sup>2</sup> We can, as is most common, attempt to do this financially, or we can consider psychological research that suggests there may be other ways of restoring victims' statuses.<sup>3</sup> One of the most common nonfinancial solutions is to increase victim participation in the justice process.<sup>4</sup> This solution appeals to many victims and may benefit them psychologically.<sup>5</sup> However, by increasing their participation, they may unknowingly trade off some of the benefits of victimhood.<sup>6</sup> For instance, they may be awarded less financial compensation and may even be blamed more for their own victimization.<sup>7</sup> Part II of this Article discusses financial and nonfinancial strategies for making victims whole in the civil justice system.<sup>8</sup> Part III addresses the paradoxical nature of victimhood in this system, and Part IV suggests that the psychological construct of agency may shed light on the issues victims face.<sup>9</sup> Part V presents three empirical studies suggesting there are unanticipated consequences for victims who play an active role in the justice process, which may have serious ramifications for their recovery.<sup>10</sup> The Article concludes with a discussion of the policy implications of these results, the limitations of the current studies, and future directions for this line of research.<sup>11</sup>

## II. MAKING VICTIMS WHOLE

The civil justice process begins with damage to a victim.<sup>12</sup> Indeed, as Judge Cardozo's classic opinion in *Palsgraf* makes clear, without a damaged

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1. See *infra* Parts II–IV.
  2. See *infra* Part II.
  3. See *infra* Section II.A.
  4. See *infra* Section II.B.
  5. See *infra* notes 37–41 and accompanying text.
  6. See *infra* notes 71–76 and accompanying text.
  7. See *infra* note 121 and accompanying text.
  8. See *infra* Part II.
  9. See *infra* Parts III–IV.
  10. See *infra* Part V.
  11. See *infra* Part VI.
  12. *Palsgraf v. United States*, 162 N.E. 99, 100 (N.Y. 1928).



victim, there is generally no civil cause of action: “What the plaintiff must show is ‘a wrong’ to herself; [i.e.], a violation of her own right and not merely a wrong to someone else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.”<sup>13</sup> Thus, a longstanding, important goal of the civil justice system—particularly within tort law but also in contract disputes—is to make this victim whole.<sup>14</sup> Most scholars—regardless of the underlying theory of tort they support—agree that making the victim whole is a fundamental goal of tort law.<sup>15</sup> This “make-whole” language is common across federal and state courts and across many types of tort cases.<sup>16</sup>

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13. *Id.*

14. OLIVER W. HOLMES, *THE COMMON LAW* 41 (1881); W. PAGE KEETON ET AL., *PROSSER & KEETON ON TORTS* 672–76 (5th ed. 1984). *But see* Joseph M. Dodge, *Murphy and the Sixteenth Amendment in Relation to the Taxation of Non-Excludable Personal Injury Awards*, 8 FLA. TAX. REV. 369, 417–18 (2007) (“[A] norm of making tort victims whole is nowhere expressed in the federal Constitution, much less the 16th Amendment. The notion of making victims whole is a ‘policy,’ but there are competing policies in tort law, namely, the deterrence of wrongdoing and the internalization of social costs, and these policies might conflict with each other and with the policy of making victims whole.”).

15. *E.g.*, Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 749 (2003) (“Our tort system clearly puts great emphasis on damages, and particularly on compensatory damages. In so doing, it obviously makes use of the concept of making whole, and of a principle that the plaintiff is entitled to be made whole.”); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 45 (1994); Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1578 (1997); Kathleen A. Zink, *Should Neither Wind nor Rain nor Hurricane Keep Victims from Recovery? Examining the Tort and Insurance Systems’ Ability to Compensate Hurricane Victims*, 83 FORDHAM L. REV. 1621, 1628 (2014). *But see* Elaine W. Shoben, *Let the Damages Fit the Wrong: An Immodest Proposal for Reforming Personal Injury Damages*, 39 AKRON L. REV. 1069, 1070 (2006) (“Compensatory damages should abandon the make-whole premise and be measured by three factors: the degree of the wrongfulness of the tort, the severity of the harm, and the extent to which the risky conduct was directed at the plaintiff . . .”).

16. *See, e.g.*, *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 178 (3d Cir. 1977) (“[T]he goal in assessing compensatory tort damages is to make the plaintiff whole for losses he has actually suffered . . . .”); *see also* *Salsbury Lab., Inc. v. Merieux Lab., Inc.*, 735 F. Supp. 1555, 1578 (M.D. Ga. 1989) (misappropriation of trade secrets); *Hall v. Schulte*, 836 P.2d 989, 994 (Ariz. Ct. App. 1991) (negligence regarding psychologist’s behavior); *Northern Ill. Gas Co. v. Vincent DiVito Constr.*, 573 N.E.2d 243, 251 (Ill. App. Ct. 1991) (trespass and property damage); *Exxon Corp. v. Yarema*, 516 A.2d 990, 997 (Md. Ct. Spec. App. 1986) (interference with property rights); *Caldwell v. Haynes*, 643 A.2d 564, 570 (N.J. 1994) (car accident); *Sorrell v. Thevenir*, 633 N.E.2d 504, 510 (Ohio 1994) (battery); *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 828 P.2d 610, 613 (Wash. Ct. App. 1992) (property damage).

Even a criminal statute is said to “function[] much like a tort statute” when its function is “to make a victim whole for losses caused by the responsible party.” *United States v. Monzel*, 641 F.3d 528, 536 (D.C. Cir. 2011); *see also* *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (“Functionally, the Mandatory Victims Restitution Act is a tort statute . . .”).

“Making the victim whole” has generally been interpreted as returning victims to the position they were in before the harm occurred<sup>17</sup> or had the victim not been injured.<sup>18</sup>

#### A. Damages and Other Financial Compensation

How does the civil justice system go about making victims whole? Generally, making a victim whole means compensating him *financially* to the extent necessary to return him to his previous position<sup>19</sup> or as near as possible.<sup>20</sup> Jury instructions tend to include specific provisions that “making the victim whole” or “restoring the victim to his original position” is the objective of tort damages.<sup>21</sup>

This amount is meant to compensate for both economic losses and nonmonetary factors as appropriate—e.g., pain and suffering.<sup>22</sup> For

17. See, e.g., *Big Rock Mountain Corp. v. Stearns–Roger Corp.*, 388 F.2d 165, 169 (8th Cir. 1968); *Harris v. Peters*, 653 N.E.2d 1274, 1275 (Ill. App. Ct. 1995); *Cerretti v. Flint Hills Rural Elec. Coop. Ass’n*, 837 P.2d 330, 341 (Kan. 1992); *Moulton v. Groveton Papers Co.*, 323 A.2d 906, 909 (N.H. 1974); see also RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (AM LAW INST. 1977) (“[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”); 25 C.J.S. Damages § 3 (2012) (stating that compensation should “put the injured party in the position in which he or she was before he or she was injured”).

18. See, e.g., *Roberts v. Sears, Roebuck & Co.*, 471 F. Supp. 372, 381 (N.D. Ill. 1979); *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1249 (3d Cir. 1971) (compensation is for losses the victim would not have suffered “had he not been injured”); *Gowdy v. United States*, 271 F. Supp. 733, 748 (W.D. Mich. 1967) (compensation “puts the plaintiff in as good a condition as he would have been if the injuries had not occurred”); *Mazza v. Huffaker*, 300 S.E.2d 833, 844 (N.C. Ct. App. 1983) (compensation puts the victim in the position she would have been in if the injury had not occurred); *Reaugh v. McCollum Exploration Co.*, 163 S.W.2d 620, 621 (Tex. 1942) (the fundamental purpose of damages is to place the victim “in the position that he would have occupied but for the injury in question”).

19. E.g., Steven Shavell, *Economic Analysis of Accident Law* (Nat’l Bureau of Econ. Research, Working Paper No. 9694, 2003); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (7th ed. 2007).

20. E.g., *Porter v. City of Manchester*, 849 A.2d 103, 118–19 (N.H. 2004).

21. E.g., RONALD W. EADS, *JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS* 3 (1990, supp. 1995) (“The object of an award of damages is to place the plaintiff, as far as money can do it, in the situation he/she would have occupied if the wrong had not been committed.”); see also U.S. COURT OF APPEALS 11TH CIRCUIT, *PATTERN JURY INSTRUCTIONS—CIVIL CASES INSTRUCTION 164* (11th Cir. 1990) (describing compensatory damages as an attempt “to make [the victim] whole or as he was immediately prior to his injuries”).

22. E.g., Valerie Harrant, *The Price of Impending Death: Evidence from Compensation Awarded to Victims Contaminated by AIDS in France*, 12 J. LEGAL ECON., 53, 57 (2002); U.S. COURT OF

instance, the original intent of Title VII was to include monetary damages as part of the remedy for victims of discrimination, stating that “[m]onetary damages . . . are also necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”<sup>23</sup>

Some research suggests that even if victims engage in restorative-justice activities—e.g., telling the harmdoer about the impact of his actions or receiving an apology from the harmdoer—they still want *some* financial reparations, even if they are minimal.<sup>24</sup> This aligns with the psychological research suggesting that damages awarded by a judge or jury can serve as a signal of a plaintiff’s social worth as well as a societal quantification of the magnitude of a plaintiff’s suffering.<sup>25</sup> A victim may enjoy the best of both worlds when he can act against his harmdoer via a state-sanctioned procedure; this affirms both his self-worth—he was able to take action—and his worth in the eyes of the community—the state’s procedure supported him.<sup>26</sup>

Courts do recognize that it may not be possible to restore a “plaintiff to a condition as good as he was prior to the accident . . . no amount of money

APPEALS 7TH CIRCUIT, 7TH CIRCUIT PATTERN JURY INSTRUCTIONS 7.23 (2005) (“Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.”).

23. H.R. Rep No. 102-40(I), at 63–65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602–03; *see also* Bryan Barnet Miller, *A Model of Victims’ Reparations in the International Criminal Court*, 33 U. LA VERNE L. REV. 255, 265 (2012) (arguing that financial reparations in ICC cases allow victims “to obtain respect, compensation, rehabilitation, restitution and restoration of self-dignity, and a sense of closure”).

24. *See* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (2003). *But see* Feldman, *supra* note 15, at 1598–99 (arguing that “[t]he plaintiff’s desire for a certain sum or for particular goods and services carries little or no normative force. . . . Were it otherwise, courts would have to instruct juries to award tort victims whatever the jurors conclude the victim wants or perhaps whatever economists would consider it rational for tort victims to want.”).

25. Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 429 (2013); *see generally* MARTHA CHAMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW* (2010).

26. *See, e.g.*, Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1111 (2007); Emily Sherwin, *Comments on Stephen Smith’s Duties, Liabilities, and Damages*, 125 HARV. L. REV. F. 164, 169 (2012) (“[A] wrong can be viewed as a denigration of the victim’s moral worth . . . providing the victim with a retaliatory remedy is a way to recognize, and allow the victim to reassert, moral equality.”); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1795 (2009).

could accomplish this purpose,”<sup>27</sup> but compensatory damages still remain the most common and important remedy in tort law.<sup>28</sup> As Martha Chamallas puts it, “the only thing worse than having one’s pain reduced to money is having one’s pain reduced to very little money.”<sup>29</sup>

### B. Nonfinancial Strategies

More recently, empirical research in psychology has suggested that financial compensation may not be the best way to make victims whole.<sup>30</sup> While victims may think money will ease their suffering, people are generally poor judges of what will make them happy in the future.<sup>31</sup> Specifically, the hedonic adaptation literature suggests that an injury may not be as debilitating to a person’s well-being as one would predict it to be.<sup>32</sup> According to this work, while it may provide a temporary boost, money in particular does not influence a person’s long-term happiness as much as the person believes it will.<sup>33</sup>

Additionally, the justice process is in many ways skewed in favor of compensating physical injury.<sup>34</sup> While financial compensation can ease the burden of medical bills and other expenses related to physical injury, it is much less likely to lead to long-term psychological or emotional wholeness. Even in the realm of physical injury, scholars suggest that people see it as inappropriate, or even taboo, to place a monetary value on certain types of

27. *Murphy v. Eaton, Yale, & Towne, Inc.*, 444 F.2d 317, 328 (6th Cir. 1971).

28. Zipursky, *supra* note 15, at 752.

29. Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 *LOY. L.A. L. REV.* 1435, 1438 (2005).

30. *See, e.g.*, Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 917 (1978) (finding that lottery winners were not measurably happier than nonwinner control groups and take less pleasure in mundane events).

31. *See* Brickman, *supra* note 30, at 923.

32. *See, e.g.*, Brickman, *supra* note 30, at 923; Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 *J. PERSONALITY & SOC. PSYCHOL.* 617, 618 (1998).

33. *See generally* George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 85 (1999); Shane Frederick & George Loewenstein, *Hedonic Adaptation*, in *WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY* 302 (1999).

34. *See, e.g.*, H. Beau Baez III, *Law's Failure to Keep Pace with Empirical Science: An Examination of Personality and Emotional Intelligence Testing in the Workplace*, 41 *OHIO N.U. L. REV.* 1, 4–5 (2014).

injuries, so having other methods of compensation may be critical to restoring victims in both ways.<sup>35</sup>

Several lines of research suggest that one nonmonetary way to help make victims whole is to encourage greater participation in the justice process.<sup>36</sup> Procedural justice scholars investigate the consequences of fair and unfair processes in legal proceedings;<sup>37</sup> they find that victims are more satisfied with legal outcomes if they are able to have a voice in the process.<sup>38</sup> In fact, their research suggests that victims may even care more about having this type of input than about the ultimate outcome of their case.<sup>39</sup> Restorative justice scholars who seek to repair the harm caused by an offender specifically focus on the relationships between victims and offenders.<sup>40</sup> Their work suggests that playing an active role in the justice process may help victims' long-term psychological well-being.<sup>41</sup> Finally, civil recourse theorists argue that the efficacy of the tort system depends entirely on victims' action.<sup>42</sup> They believe that tort law empowers victims

35. E.g., Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 854 (2000). See generally CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 127–28 (2002) (discussing taboo tradeoffs and tradeoff aversion).

36. See Deborah Kelly, *Victim Participation in the Criminal Justice System*, in 25 VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS 174–75 (Arthur J. Lurigio et al., eds., 1990).

37. See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 2005 ANN. REV. OF L. & SOC. SCI. 171, 176 (2005); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 10–12 (1988).

38. E.g., Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 132 (1988). Note that having a voice in the process is not necessarily equivalent to having agency. See *infra* Part IV; see also Kieran McEvoy, *Victims and Transitional Justice: Voice, Agency, and Blame*, 22 SOC. & LEG. STUD. 489, 492 (2013).

39. See, e.g., Jonathan D. Casper, Tom R. Tyler, & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 483, 486–87 (1988); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007).

40. E.g., Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 L. & SOC. REV. 1, 19–20 (2009); Dena M. Gromet et al., *A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments*, 36 L. & HUM. BEHAV. 375, 377–80 (2012).

41. E.g., John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999); see also Kelly, *supra* note 36, at 174; Richard P. Wiebe, *The Mental Health Implications of Crime Victims' Rights*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 213, 225 (1996).

42. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 3–4 (1998).

and gives them a sense of control, in that they are the ones authorized to bring suit and obtain recourse, either in the form of financial compensation or injunctive relief.<sup>43</sup>

### III. THE VICTIMHOOD PARADOX

Victimhood in the civil justice system is a complicated, even paradoxical, status.<sup>44</sup> To be a victim in this system, one must assert one's rights but also maintain and even perhaps internalize the narrative of victimhood.<sup>45</sup> This paradox may be quite damaging, because people may perceive plaintiffs in civil cases as hypocritical by both claiming the status of "victimhood" and confidently standing up in a court of law.<sup>46</sup> Many negative judgments, including guilt and punishment in the criminal and civil justice systems, are exacerbated by hypocrisy.<sup>47</sup>

Jurors may see a victim who files suit as aggressive and demanding, and view this aggressive stance as a result of "negative traits (hostility toward the defendant or greed) rather than to the demands of role (suing is how you get things done in the legal system)."<sup>48</sup> This may be particularly problematic

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43. *Id.* at 1; Benjamin C. Zipursky & John C. P. Goldberg, *Accidents of the Great Society*, 64 MD. L. REV. 364, 402 (2005); John C.P. Goldberg, *Wrongs Without Recourse: A Comment on Jason Solomon's Judging Plaintiffs*, 61 VAND. L. REV. EN BANC 9, 13 (2008); cf. Edna Erez & Ewa Bienkowska, *Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland*, 21 J. CRIM. JUST. 47, 48 (1993); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 447–48 (David B. Wexler & Bruce J. Winick, eds., Carolina Academic Press 1996) (arguing that participating in a civil suit helps victims by allowing them to "enlist the coercive power of the judicial system to reshape the power imbalance" between themselves and those who harmed them).

44. Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 433 (1985).

45. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 99 (1988); see also Bumiller, *supra* note 44, at 433 (describing this tension as a "psychological contest to reconcile a positive self-image with the image of the victim as powerless and defeated").

46. See, e.g., Sean M Laurent, *Punishing Hypocrisy: The Roles of Hypocrisy and Moral Emotions in Deciding Culpability and Punishment of Criminal and Civil Moral Transgressors*, 28 COGNITION & EMOTION 59, 60–62 (2014) (finding that criminal defendants perceived as hypocritical were viewed as more culpable and punished more severely).

47. *Id.*

48. Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 136 (1995); see also Michael Lupfer et al., *An Attributional Analysis of Jurors' Judgments in Civil Cases*, 125 J. SOC. PSYCHOL. 743, 743–45 (1985) (finding actor's behavior more often attributed to hostile intentions and

for victims in rape cases who choose to bring civil suit.<sup>49</sup> In some instances, even judges have suggested that plaintiffs in rape suits may be selfish or greedy, while accusers in *criminal* rape prosecutions are altruists acting in the public interest.<sup>50</sup>

In a RAND Corporation study of people who suffered a disabling injury, RAND found that 87% of victims in its large sample never took any action against the injurer or his insurer (indeed, only 19% even considered taking action).<sup>51</sup> Some have theorized that this low filing rate may be partially a result of the stigma victims may face by asserting their rights in the civil justice system.<sup>52</sup>

While case law strongly rejects the appropriateness of this inclination, courts continue to recognize that people may have the tendency to condemn resilient victims.<sup>53</sup> Even researchers who champion the empowerment of victims through tort law recognize that it can be problematic.<sup>54</sup> People have a schema for what a “victim” looks like, and a script for how a victim behaves.<sup>55</sup> Successful courtroom narratives reflect these scripts: if the plaintiff does not conform to these norms, her damages may be unseen or uncompensated by jurors.<sup>56</sup> Attorneys know that they may have to

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influenced by participants’ negative stereotypes when actor was plaintiff than when actor was defendant in a civil case).

49. See generally Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1563 (2008). See also Lior Jacob Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239, 1247 (2010) (arguing that pseudonymous litigation is not appropriate, because “involvement in litigation often signals something negative about the litigants, and pseudonymity might obscure this signal”).

50. See, e.g., *Wooten v. State*, 464 So. 2d 640, 642 (Fla. Dist. Ct. App. 1985); *Doe v. Shakur*, 164 F.R.D. 359, 361 (S.D.N.Y. 1996); *State v. Doughty*, 399 A.2d 1319, 1324 (Me. 1979).

51. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 120 (1991), <http://www.rand.org/pubs/reports/2006/R3999.pdf>.

52. E.g., Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1189 (1992).

53. E.g., *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 31 (D.D.C. 1998) (“Individuals can react very differently even under similar circumstances; while some sink into clinical depression and bitterness, others attempt to salvage something constructive from their personal tragedy. Such constructive behavior should not be considered as mitigating solatium, but rather as an equally compensable reaction . . . .”); *Connell v. Steel Haulers, Inc.*, 455 F.2d 668, 691 (8th Cir. 1972) (“[W]e are not convinced that mental anguish necessarily manifests itself objectively to the world, nor do grief stricken [sic] parents need to offer evidence of physical symptoms such as sleeplessness, weight loss, nervousness, personality changes, and the like.”).

54. See generally Ronen Perry, *Empowerment and Tort Law*, 76 TENN L. REV. 959 (2009).

55. See, e.g., Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432–33 (1993) (“Victimhood is a cramped identity . . . a limited slice of the individual becomes the focal point.”).

56. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001

strategically revictimize their clients, because a “victim who presents an image of strength and resilience to the court could be awarded less damages.”<sup>57</sup>

Thus, claiming victimhood, along with its concomitant helplessness, may be the only way for an injured person to obtain compensation or sympathy.<sup>58</sup> However, disempowering victims in an attempt to obtain increased compensation is problematic for both the victim and the public.<sup>59</sup> While on the positive side, apparent helplessness draws sympathy and compassion, on the negative side, it can lead to pity and condescension.<sup>60</sup> When a plaintiff is repeatedly categorized as a victim, she may internalize this classification and understand her condition as perhaps more negative and more permanent than she may otherwise have believed.<sup>61</sup> She may find it difficult to shed the identity of “victimhood” even when the litigation ends.<sup>62</sup> A person who truly embraces the “victim” identity is likely to suffer more in the long run.<sup>63</sup> For the public, categorizing and characterizing injured individuals as vulnerable victims may also lead to viewing disabled people in general as less agentic and more tragic.<sup>64</sup>

#### IV. AGENCY AND VICTIMHOOD

Why is it so problematic for people to accept the victimization of a person who then plays an active role in his own justice process? Some of

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UTAH L. REV. 247, 287 (2001) (“If a plaintiff’s story cannot or does not fit into the ‘set pattern’ of victimhood, her pain may go unseen, and ultimately unremedied.”); Minow, *supra* note 55, at 1432 (“The victim is helpless, decimated, pathetic, weak, and ignorant. Departing from this script may mean losing whatever entitlements and compassion victim status may afford.”).

57. See Perry, *supra* note 54, at 984.

58. See, e.g., *id.*

59. *Id.* at 964.

60. Rovner, *supra* note 56, at 290.

61. Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 736 (2011).

62. Rovner, *supra* note 56, at 253.

63. E.g., Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff’s Lawyer*, 55 DEPAUL L. REV. 563, 596 (2006) (talking about a traumatic event over a long period of time may exacerbate suffering); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 797 (2007).

64. Bloom & Miller, *supra* note 61, at 736; see also Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 195 (2005).



the answers may lie in the psychological concept of agency.<sup>65</sup> This is unrelated to “agency” as the area of law governing situations in which one party is authorized to act on behalf of another.<sup>66</sup> Rather, “agency” here refers to the capacity to do or intend to do something.<sup>67</sup> This capacity is generally seen as necessary for an individual or entity to be morally responsible and to merit punishment.<sup>68</sup>

#### A. Psychological Research on Perceptions of Agency

The psychological literature suggests that people have a tendency to view someone as *either* an agent (one who acts) or a patient (one who is acted upon; i.e., a victim), but not both.<sup>69</sup> Once a plaintiff is perceived as either agentic or patientic, jurors are likely to interpret other information they receive at trial through that lens and are more likely to remember information that supports their initial perception.<sup>70</sup>

It is generally suggested that victims are seen as patientic and tend to escape blame.<sup>71</sup> However, as this Article will show, it may be the case that when a victim proceeds to act more agentially (e.g., filing a civil lawsuit), he is then blamed more.<sup>72</sup> While not directly addressing the issue, the current literature gives insight into the difficult fine line a victim must walk.<sup>73</sup> Research suggests that in some situations, particularly those that call

65. See *infra* Section IV.A.

66. See, e.g., *Burlington Indus. V. Ellerth*, 524 U.S. 742, 751 (1998).

67. Kurt Gray & Daniel M. Wegner, *Morality Takes Two: Dyadic Morality and Mind Perception*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* 109 (2012).

68. *Id.* at 109.

69. E.g., Kurt Gray & Daniel M. Wegner, *Moral Typecasting: Divergent Perceptions of Moral Agents and Moral Patients*, 96 *J. PERSONALITY & SOC. PSYCHOL.* 505, 506–07 (2009).

70. E.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1208 (1995) (“[O]nce a target individual has been perceived as a member of a particular category, people are more likely to remember the target as exhibiting attributes and behaviors commonly associated with that category.”).

71. Kurt Gray & Daniel M. Wegner, *To Escape Blame, Don’t Be a Hero—Be a Victim*, 47 *J. EXP. SOC. PSYCHOL.* 516, 518 (2011); see *infra* Part III.

72. See *infra* Part III.

73. See Kurt Gray et al., *More Than a Body: Mind Perception and the Nature of Objectification*, 101 *J. PERSONALITY & SOC. PSYCHOL.* 1207, 1208–09 (2011) (“[A]lthough the dimensions of agency and experience are normally orthogonal, these dimensions may become inversely related . . . often an explicit or implicit comparison . . . helps to induce this compensatory relation.”); see also

for comparing two entities—as is implicitly the case in a trial—people see agency (thinking) and experience (feeling) as hydraulic rather than orthogonal.<sup>74</sup> Thus, an agentic victim may be perceived to have suffered less harm than a more passive victim. Additionally, someone who has more of a rational “mind,” as can be demonstrated through the filing of a lawsuit, is viewed as more agentic, and is subsequently perceived to be more blameworthy and less likely to have suffered harm.<sup>75</sup> Finally, people tend to attribute high status and competence—factors correlated with agency—to individuals who respond to a given harm with anger rather than sadness.<sup>76</sup> The act of filing a lawsuit is more akin to anger or retaliation, creating further tension between the initial perception of a high-status, competent actor and his attempt to be viewed as a victim.<sup>77</sup>

#### B. *Victim Agency in Criminal and Civil Justice*

Victim agency is likely to be perceived differently in the criminal and civil justice systems, because there is a key difference in focus between the two systems.<sup>78</sup> Throughout the *criminal* process, the focus is on the offender.<sup>79</sup> Police often search for a harmdoer’s motive when deciding whether to charge the suspect; juries are asked to assess the harmdoer’s state of mind when acting (e.g., negligent, reckless, or intentional); and sentencing can be affected by a harmdoer’s past actions and personal characteristics (aggravating or mitigating).<sup>80</sup> Nothing in these decisions

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Gray & Wegner, *supra* note 67, at 505; Charles M. Judd et al., *Fundamental Dimensions of Social Judgment: Understanding the Relations Between Judgments of Competence and Warmth*, 89 J. PERSONALITY & SOC. PSYCHOL. 899, 901 (2005); Nico Kervyn et al., *A Question of Compensation: The Social Life of the Fundamental Dimensions of Social Perception*, 96 J. PERSONALITY & SOC. PSYCHOL. 828, 828–29 (2009).

74. Gray et al., *supra* note 73, at 1215.

75. *Id.*

76. Larissa Z. Tiedens et al., *Stereotypes about Sentiments and Status: Emotional Expectations for High- and Low-Status Members*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 560, 561 (2000); see also Olof Wrede & Karl Ask, *More Than a Feeling: Public Expectations About Emotional Responses to Criminal Victimization*, 30 VIOLENCE & VICTIMS 902, 910 (2015).

77. Tiedens et al., *supra* note 76, at 562.

78. Compare Cecilia M. Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 969 (2010), with Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort’s Soul*, 48 U. LOUISVILLE L. REV. 1, 27 (2009).

79. Klingele et al., *supra* note 78, at 953.

80. *Id.* at 994.

takes the victim's interests into account.<sup>81</sup>

Indeed, victims are "widely recognized" as the neglected party in the criminal justice process.<sup>82</sup> Within the criminal justice system, victims generally cannot act autonomously if their desires conflict with the state's punitive goals.<sup>83</sup> Victims' rights are also generally not directly enforceable by the victim in the criminal system.<sup>84</sup> Though some reforms have been introduced as a result of victims' rights advocates, criminal trials generally continue to fail to acknowledge victims' agency.<sup>85</sup> For instance, while the Supreme Court's decision in *Payne v. Tennessee*<sup>86</sup> gave victims a voice in criminal sentencing hearings, the content of victims' statements is often circumscribed.<sup>87</sup> Victim impact statements also do not allow victims to fully realize their agency, scholars have argued, because their status in court is so contentious.<sup>88</sup> Even in their attempts to benefit victims, the victims' rights movement has created essentialist narratives about prototypical harmdoers and victims, treating victims as pure patients and harmdoers as pure agents,

81. *Id.* at 993 ("The power of the criminal law is triggered, after all, not by places or victims but by the conduct of individual offenders who engaged in proscribed conduct.").

82. *E.g.*, LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 38–39 (1996).

83. Aya Gruber, *The Feminist War on Crime*, 92 *IOWA L. REV.* 741, 778 (2007).

84. Doug E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2 *B.Y.U. L. REV.* 255, 260 (2005); Meg Garvin, *Harmony or Discord between Victim Agency and the Criminal Justice System: A Comment on DePrince, Belknap, Labus, Buckingham, and Gover*, 18 *VIOLENCE AGAINST WOMEN* 889, 889 (2012).

85. Jason M. Solomon, *Civil Recourse as Social Equality*, 39 *FLA. ST. U. L. REV.* 243, 265 (2011) ("Criminal law, then, fails to acknowledge the individual's agency. Because the individual does not decide whether to bring the action, she is still in that place of vulnerability or dependency. To be sure, recent efforts to give victims a more active role in criminal justice proceedings may change this assessment a bit. But for now, one could argue that by being dependent on the state for recourse, the state affirms her position of dependency.").

86. *Payne v. Tennessee*, 501 U.S. 808, 864 (1991).

87. *E.g.*, Eliza Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 *S. CAL. INTERDISC. L.J.* 17, 26 (2000) ("Despite the aim of individualizing the victim . . . , victim impact statements tend to arrange themselves around a particular imagined construction of 'victim.'"); Megan A. Mullett, *Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in Capital Cases*, 86 *IND. L.J.* 1617, 1637–40 (detailing problems that occur when victims and prosecutors do not share the same vision for sentencing). *But see* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims' Rights Act*, 26 *YALE L. & POL'Y REV.* 431, 444 (2008) (suggesting that these statements provide "personal empowerment" for victims).

88. *E.g.*, Tyrone Kirchengast, *Victim Lawyers, Victim Advocates, and the Adversarial Criminal Trial*, 16 *NEW CRIM. L. REV.* 568, 576 (2013).

again reducing victim agency.<sup>89</sup>

Conversely, in tort law, as described above, the victim takes a more central role. Some scholars have noted that this is, in fact, a direct exercise of agency on the part of the victim.<sup>90</sup> The design of the civil system explicitly allows for this active role for victims, “plac[ing] value on the agency of wronged victims, greater agency than is allowed by the impersonal, third-party apparatus of the criminal law.”<sup>91</sup> The rest of this Article will focus on victims’ actions in the civil justice system.<sup>92</sup>

### C. *Are Victim–Plaintiffs Agents or Patients?*

As described in Part III, victimhood can be a paradoxical status.<sup>93</sup> This puzzle continues when one considers the victim–plaintiffs’ status in relation to agency.<sup>94</sup> Agency and victimhood are often perceived as two incompatible states.<sup>95</sup> One view holds that “[v]ictims are powerless and incapacitated. Society deems them to lack the requisite agency to act on their own behalf.”<sup>96</sup> Other scholars maintain that the plaintiff in a civil case employs “a kind of vigorous agency, as someone who responds, vindicates,

89. Gruber, *supra* note 83, at 775 (“According to the victims’ rights movement, victims are perpetual objects of their victimhood: they are weak, innocent, and helpless. By contrast, defendants are autonomous, irredeemable, powerful, and evil.”).

90. *E.g.*, Krauss & Kidd, *supra* note 78, at 27 (“[B]ecause it is the exercise of purposive agency that creates the imbalance [after a wrong has occurred], it must also be an exercise of purposive agency that corrects that imbalance.”); *see also* Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107 (2001).

91. Nathan B. Oman, *A Theory of Civil Liability*, 21 GEO. MASON L. REV. 381, 402 (2014) [hereinafter Oman, *Civil Liability*].

92. *See infra* Part V.

93. *See supra* Part III.

94. *See* Gray & Wegner, *supra* note 67, at 506 (comparing agency with patiency, stating that “[a]n adult human has greater moral agency than a child, for example, and so will more often be held responsible for harm or help. A child, in contrast, will often be seen as having greater moral patiency than an adult, in that the child is more vulnerable and sensitive to harm.”).

95. *E.g.*, Justine A. Dunlap, *Sometimes I Feel like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 576 (2004); Gray & Wegner, *supra* note 67, at 505 (2009) (“[A] person or entity perceived as a moral agent is less likely to be perceived as a moral patient, and in turn, one perceived as a moral patient is less likely to be seen as a moral agent.”). For a critique of this view, *see* Martha C. Nussbaum, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 406 (2001) (“[O]nly the capacity for agency makes victimhood tragic.”).

96. Dunlap, *supra* note 95, at 576.

retaliates.”<sup>97</sup> Yet other scholars argue that while civil plaintiffs do act agentically, it is the case that those who suffer a civil wrong “are not usually portrayed as powerful agents but are more often cast as victims of misfortune and misconduct.”<sup>98</sup>

Is there any consistency to be found here? Historically, victim agency may have been more accepted and even required, but modern discussion “tends to suppress the strengths and capacities of people who are victims.”<sup>99</sup> This seems true across several theoretical camps; for one, corrective-justice theorists likely see victims primarily as patients.<sup>100</sup> In *The Idea of Private Law*, Ernest Weinrib discusses at length the agent–patient relationship inherent in tort, where the defendant is the “doer” or the agent and the plaintiff is the “sufferer” or the patient.<sup>101</sup> Civil-recourse theorists also suggest that tort law conceives of the plaintiff as a patient rather than an agent: “The notion of the plaintiff as one who is acted upon plays a central role in the system of civil recourse, for it is being *acted upon* that triggers the right to redress one’s injuries.”<sup>102</sup> However, despite their claims about victims being “acted upon,” both corrective-justice and civil-recourse theorists understand that victim *action* is key in the civil justice system.<sup>103</sup>

This Article argues that the tort system requires victims to reclaim their agency at the outset, because suing in tort is an inherently “aggressive” and a literally “empowering” act<sup>104</sup> that gives victims standing to seek accountability and recompense for harm caused to them.<sup>105</sup> It is this “power-

97. Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 530 (2013).

98. *Id.*

99. Minow, *supra* note 55, at 1429. *But see* Sandra Lee Bartky, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 15 (Linda J. Nichollson, ed., 1990).

100. *See infra* notes 101–02 and accompanying text.

101. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (Harvard Univ. Press 1995); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1684 (2002).

102. Goldberg & Zipursky, *supra* note 101, at 1684.

103. *E.g.*, Michael L. Rustad, *Twenty-First-Century Tort Theories: The Internalist/Externalist Debate*, 88 IND. L.J. 419, 434 (2013) (“In Goldberg’s view, tort law is not a system of compensation but fundamentally about victim empowerment. . . . Goldberg and Zipursky argue . . . that torts are good for empowering victims to seek civil recourse for recognized civil wrongs through a venue supplied by the state.”); Chamallas, *supra* note 97, at 530 (“For civil recourse theory, this central character or image is the empowered tort victim.”).

104. Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 63 (2011) [hereinafter Oman, *Private Law*].

105. *E.g.*, John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right*

conferring” aspect of tort law that makes it unique.<sup>106</sup> Tort law allows for the defendant to be made “vulnerable to the plaintiff’s agency in a way he was not previously,” essentially flipping the agent–patient relationship between harmdoer and victim.<sup>107</sup> While this Article is not the first one to note the importance of this turning of the tables,<sup>108</sup> it is the first to present empirical studies using the psychological concept of agency to investigate the effects of it.<sup>109</sup>

#### D. Agency and Making Victims Whole

As described in Section II.B, several legal theories suggest that victims feel psychologically better when they are able to play an active role in their own justice process.<sup>110</sup> The restoration of agency via active participation may therefore be an important factor in making victims whole.<sup>111</sup>

The mere act of filing a lawsuit may help to restore a victim.<sup>112</sup> It allows a victim the “wherewithal to demand that her agency and her

to a Law for the Redress of Wrongs, 115 YALE L.J. 524, 607 (2005); see also Lininger, *supra* note 49, at 1574 (“One important distinction is that the victim controls the civil proceeding, but the government controls the criminal proceeding.”).

106. Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1778 (2009) (quoting H.L.A. HART, *THE CONCEPT OF LAW* 26–33 (2d ed. 1997)); Oman, *Civil Liability*, *supra* note 91, at 408 (arguing that the plaintiff’s agency plays a primary role in tort and other civil law); see also Stephen Darwall, *Law and the Second-Person Standpoint*, 40 LOY. L.A. L. REV. 891, 893–94 (2007).

107. Oman, *Civil Liability*, *supra* note 91, at 382, 408 (“Civil liability . . . consists of rendering a defendant vulnerable to a plaintiff and then placing tools at the disposal of the plaintiff to take or restrict the defendant’s property and liberty.”); see also Oman, *Private Law*, *supra* note 104, at 63 (the civil system “provides a means by which agency can be exercised in the assertion and defense of one’s honor”).

108. *E.g.*, Perry, *supra* note 54, at 983 (“In court, as opposed to the original occurrence, the victim is in control of the interaction.”).

109. See *infra* Part V.

110. See *supra* Section II.B.

111. See, e.g., Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 222 (2006) (“Efforts to redress past harms can actually be counter-productive, cruel, or insulting when they are not accompanied by actions that attend to both the needs and agency of the injured group.”).

112. Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1150 (2013) (“[E]mpowering victims by giving them the agency to act against their wrongdoers is itself a primary value of private law.”).

presence among us as a human being be taken seriously.”<sup>113</sup> In many instances, particularly in cases of personal injury, bringing a civil suit helps victims resist the objectification process.<sup>114</sup> For instance, rape victims who reject “stereotypical victim roles” and file suit reclaim their right to self-determination and tend to recover “faster” and “more fully.”<sup>115</sup> Another study found that if a battered woman files charges in a jurisdiction that permits her to choose whether to proceed or drop the case, and she does not drop the charges, she is at lower risk of subsequent abuse than if she had been in a jurisdiction that made that decision for her through a mandatory prosecution policy.<sup>116</sup>

While past research does not address agency directly, the empirical literature in procedural justice finds that self-efficacy—a related concept that results from having a voice in legal proceedings—is a key factor in litigant satisfaction.<sup>117</sup> Other relevant data comes from recent empirical studies by Kenworthy Bilz & Andrew Gold, who found that when plaintiffs are able to take action themselves within the confines of the civil justice system, they feel more personal pride than when the state acts on their behalf—as in a criminal case.<sup>118</sup> Given the benefits of greater victim involvement, it has been argued that we should embrace this type of empowerment as an unintended consequence of the structure of the tort system, and consider it a legitimate addition to the other, more traditional objectives of tort law—e.g., compensation.<sup>119</sup>

However, past studies addressed at assessing victims’ satisfaction and

113. Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 202 (2012).

114. Swan, *supra* note 25, at 426.

115. Nora West, Note, *Rape in the Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis*, 50 U. TORONTO FAC. L. REV. 96, 114 (1992).

116. David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 127, 151–57 (N. Zoe Hilton ed., 1993); *see also* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

117. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW. & SOC’Y REV. 953, 955 (1990); *see also, e.g.*, Solomon, *supra* note 106, at 1794 (suggesting that civil recourse allows a person to “affirm [her] moral worth, self-respect, and dignity” by taking action against a person who has wronged her).

118. Kenworthy Bilz & Andrew Gold, *An Empirical Test of Civil Recourse Theory*, poster presented at the Society for Personality and Social Psychology Conference, Austin, TX (2014) (photo on file with author) (participants also believed that the outcomes resulting from what they participated in were more just than those where the state acted unilaterally on their behalf).

119. *Id.*

emotional states hold the ultimate outcome of the litigation constant.<sup>120</sup> Unfortunately, it may be the case that while acting agentially within the justice process reduces a plaintiff's self-perception as a victim and comes closer to restoring the person to psychological "wholeness," these agentic actions may also reduce observers' perceptions of the plaintiff's victimhood and lead such a victim to actually receive *less* in financial compensation.<sup>121</sup>

In three studies, I find that victims who play an active role in the justice process are seen as "less good" victims because they do not fit prototypical models of victim behavior.<sup>122</sup> When victims transcend victimhood and reclaim their agency, my results suggest that these "active" victims will be blamed more and compensated less for the injuries they suffered.<sup>123</sup>

#### V. OVERVIEW OF EXPERIMENTS

In related research, I proposed that laypeople have internalized the difference in focus between criminal and civil cases, and developed different schemata for them.<sup>124</sup> I found that victim moral character influenced participants' judgments about responsibility and blame in civil cases, but not criminal cases.<sup>125</sup> Victims were also perceived as having acted more agentially in a civil case than in a criminal case.<sup>126</sup> Partially as a result of this agency, victims tended to be blamed more in civil cases than in criminal cases.<sup>127</sup> Given these findings and the fact that other research suggests that a schema for civil cases likely involves more attention to the victim, the

120. See *supra* Section IV.A.

121. See Chamallas, *supra* note 97, at 531. While she goes on to argue the disproportionate disempowerment of some groups within the tort law system, I will argue that apparent empowerment may be harming individual victims in ways they do not anticipate.

122. E.g., Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. 301, 301 (2000); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991).

123. See *infra* Sections V.A–C.

124. Pam A. Mueller & Susan T. Fiske, *Unanticipated Consequences of Institutional Choice* (2017) (unpublished manuscript) (on file with author); see also, e.g., Reid Hastie, *Schematic Principles in Human Memory*, 1 SOC. COGNITION: THE ONTARIO SYMP. 39, 59 (1981); see generally SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION: FROM BRAINS TO CULTURE* (2013).

125. Mueller & Fiske, *supra* note 124.

126. *Id.*

127. *Id.* This was especially true when the person who harmed them had good moral character.



studies here address only the civil justice system.<sup>128</sup>

In the three studies, I explore in more depth how victim agency may impact judgments in civil cases.<sup>129</sup> Based on the past research, I hypothesized that victim agency would most likely impact judgments when one or more of the following are true:

- (1) the harmdoer's moral character is neutral or positive—and ergo, the situation is one of less-than-intentional harm;<sup>130</sup>
- (2) the victim's moral character is negative;
- (3) the victim arguably shares fault in the situation.<sup>131</sup>

In the first two studies, I manipulate agency by changing who filed the lawsuit; either the victim himself or someone filing on behalf of the victim.<sup>132</sup> Situations in which someone else could legitimately file suit on behalf of the victim are few and far between, so in the third study, the victim always filed suit herself.<sup>133</sup> In this study, I manipulate agency by changing the amount of involvement the victim had in the suit.<sup>134</sup> In past studies, we had been surprised to find that agency was consistently not perceived as a unitary construct, but instead comprised two factors, one relevant to action,

128. Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1282–83 (2001).

129. See *infra* Sections V.A–C.

130. While many instances of intentional harm can result in civil as well as criminal cases, intentional harmdoers are rarely, if ever, seen to have a positive moral character. Information about intentional harmdoers tends to outweigh other information, as there is a strong interest in paying attention to individuals who: (1) have negative intentions and (2) are capable of acting on those intentions, which an intentional harmdoer has just accomplished. See, e.g., Susan T. Fiske et al., *Universal Dimensions of Cognition: Warmth and Competence*, 11 TRENDS IN COG. SCI. 77, 77–79 (2007); Bertram F. Malle & Jess Holbrook, *Is There a Likelihood of Social Inferences? The Likelihood and Speed of Inferring Intentionality, Mind, and Personality*, 102 J. PERSONALITY & SOC. PSYCHOL. 661, 663 (2012); Gray et al., *Dimensions of Mind Perception*, 315 SCI. 619, 619 (2007); Carey K. Morewedge, *Negativity Bias in Attribution of External Agency*, 138 J. EXP. PSYCH: GENERAL 535, 535 (2009); Evelyn Rosset, *It's No Accident: Our Bias for Intentional Explanations*, 108 COGNITION 771, 771–72 (2008); Bogdan Wojciszke et al., *Effects of Information Content and Evaluative Extremity on Positivity and Negativity Biases*, 64 J. PERSONALITY & SOC. PSYCHOL. 327, 372 (1993). Additionally, while intentional torts are a part of the civil justice system, the vast majority of civil cases involve accidental harms and claims of negligence. See CAROL J. DEFRANCES ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 2, 11 (U.S. D.O.J. 1992), <https://www.bjs.gov/content/pub/pdf/cjcavilc.pdf> (showing that out of 377,421 tort cases in their sample, 277,087 (73%) were car accident cases, and 65,372 (17%) were premises liability cases—e.g., slip-and-fall or other injuries caused by the dangerous condition of property).

131. Wojciszke et al., *supra* note 130, at 327; see also Morewedge, *supra* note 130, at 535.

132. See *infra* Sections V.A–B.

133. See *infra* Section V.C.

134. See *infra* Sections V.A–C.

and the other relevant to competence.<sup>135</sup> Analyses in these studies reflect these past findings.<sup>136</sup>

In addition to agency, I chose to manipulate moral character in two of the studies because information about moral character has been shown to affect important judgments regarding harmdoers, including those regarding blame, intent, and punishment.<sup>137</sup> In fact, even when a harmdoer's moral character is separate from the harmful act itself, it can impact judgments regarding responsibility, blame, and causality.<sup>138</sup>

A more restricted body of research focuses on the effects of information about the moral character of victims; many of these studies focus on the role of victims in criminal rape cases.<sup>139</sup> Research examining prosecutorial charging decisions consistently reflects the influence of the victim's reputation or moral character and risk-taking behavior.<sup>140</sup> In fact, a woman's allegedly questionable moral character (e.g., drinking, drug use, premarital sex) disadvantages her throughout the justice process.<sup>141</sup> Prosecutors are less

135. See *infra* Part VI.

136. See *infra* Part VI.

137. E.g., Mark Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 368 (1992); Adam L. Alter et al., *Transgression Wrongfulness Outweighs Its Harmfulness as a Determinant of Sentence Severity*, 31 L. & HUM. BEHAV. 319, 332 (2007); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1358–60 (2009); Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXP. PSYCH. 3, 3 (1999).

138. E.g., Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 556 (2000); Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 L. & CONTEMP. PROBS. 1, 1–2 (2012); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 256–58 (2011).

139. See *infra* notes 140–46 and accompanying text.

140. E.g., Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behaviors and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, 27 VIOLENCE & VICTIMS 3, 7 (2012); Jeffrey W. Spears & Cassia C. Spohn, *The Genuine Victim and Prosecutors' Charging Decisions in Sexual Assault Cases*, 20 AM. J. CRIM. JUST. 183, 184–85 (1996); Cassia Spohn & Jeffrey W. Spears, *The Effect of Offender and Victim Characteristics on Sexual Assault Case Processing Decisions*, 13 JUST. Q. 649, 653 (1996).

141. See, e.g., Martha R. Burt & Rochelle S. Albin, *Rape Myths, Rape Definitions, and Probability of Conviction*, 11 J. APPLIED SOC. PSYCHOL. 212, 213 (1981); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 812 (1986). *But see* Cathaleene Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 26 J. PERSONALITY & SOC. PSYCHOL. 415, 418 (1973) (finding that rapists of “respectable” women were punished more severely, but that these women, e.g., virgins, married women, were also blamed more than “less-respectable” women,

likely to file charges in the first place.<sup>142</sup> Convictions are less likely and sentences are shorter when a woman's sexual history is mentioned, even if her experience is relatively limited.<sup>143</sup> In one study, a woman's moral character influenced jurors even more than pieces of actual evidence, including eyewitnesses, use of a weapon, and injury to the victim.<sup>144</sup> Another set of studies examined civil sexual-assault cases, both naturalistically and experimentally, and found the victim's moral character influential there as well.<sup>145</sup> However, little work has explored the effects of victims' moral characters in other types of cases.<sup>146</sup>

#### A. Study 1: Moral Character and Agency

##### 1. Method

Participants ( $N = 225$ ) were recruited from Amazon Mechanical Turk.<sup>147</sup> They read a scenario in which a homeowner, Bill Prentiss, was involved in a lawsuit against a negligent contractor who caused the kitchen in Bill's condominium to explode.<sup>148</sup> I manipulated who filed the suit: in this case,

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e.g., divorcées).

142. CASSIA C. SPOHN ET AL., PROSECUTORS' CHARGING DECISIONS IN SEXUAL ASSAULT CASES: A MULTI-SITE STUDY 84 (NCJRS 2002).

143. K. L'Armand & A. Pepitone, *Judgments of Rape: A Study of Victim–Rapist Relationship and Victim Sexual History*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 134, 134–35 (1982).

144. Gary D. Lafree, Barbara F. Reskin, & Christy A. Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROB. 389, 399 (1985).

145. Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 9–10 (2011).

146. *But see* David Landy & Elliott Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141, 141–42 (1969) (finding a significant impact of defendants' moral characters, but *not* of victims' moral characters, on punishment decisions in criminal cases); Mueller & Fiske, *supra* note 124 (finding that victims' moral characters influenced blame judgments in civil, but not criminal, cases arising from a car accident).

147. Pam A. Mueller, *Victimhood and Agency*, OPEN SCI. FRAMEWORK (Mar. 9, 2016), <https://osf.io/b69uf/>; *see generally* Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, 44 BEHAV. RES. METHODS 1, 1 (2012) (explaining how to run an experiment using Mechanical Turk as a subject pool); Gabriele Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT DECISION MAKING 411, 411–13 (2010) (discussing the representativeness of the pool and replicating several standard psychological findings).

148. Mueller, *supra* note 147.

either the homeowner himself or his insurance company.<sup>149</sup> I also manipulated the victim's moral character.<sup>150</sup> He had either been keeping the condo as a *pied-à-terre* in the city for his wife and himself or keeping it as a place where it would be easy to continue an affair with his coworker.<sup>151</sup>

Participants were asked to judge Bill on factors related to both "active" and "competence" agency.<sup>152</sup> They also assessed fault for both the harmdoer (the contractor) and the victim (Bill), and they were asked what, if anything, they would award Bill in compensatory and punitive damages.<sup>153</sup>

## 2. Results

### a. Agency

Participants' perceptions of victim agency were affected both by the victim's moral character and by who filed the lawsuit.<sup>154</sup> A victim with a lower moral character was seen as more actively agentic,  $F(1, 216) = 5.31$ ,  $p = .02$ .<sup>155</sup> Unsurprisingly, a victim who filed suit himself was also seen as more actively agentic,  $F(1, 216) = 58.61$ ,  $p < .001$ .<sup>156</sup> A victim with a lower moral character was seen as less competently agentic,  $F(1, 216) = 25.85$ ,  $p < .001$ .<sup>157</sup> However, a victim who filed suit himself was seen as more competent than one who did not,  $F(1, 216) = 11.20$ ,  $p = .001$ .<sup>158</sup>

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149. *Id.*

150. *Id.*

151. For the full text of all scenarios in this paper, as well as data files, see the Open Science Framework page for this research at *id.*

152. *Id.* As in the past studies, factor analysis indicated that the agency items did form two distinct factors, and scale reliability for these two sets of items was relatively good, for active agency, Cronbach's  $\alpha = .82$ , and for competence agency,  $\alpha = .83$ . *Id.* The items were *assertive*, *competent*, *competitive*, *determined* (active), *dominant*, *effective*, and *intelligent* (competence). *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

*b. Blame*

The harmdoer—the negligent contractor—was blamed significantly less when the victim had low moral character  $F(1, 216) = 6.66, p = .01, d = .25$ .<sup>159</sup> Participants were also more likely to blame the victim when he had low moral character; more interestingly, this was qualified by a significant interaction between morality and who filed the lawsuit.<sup>160</sup> The victim's moral character impacted judgments significantly more when he filed the lawsuit himself than when the insurance company filed the suit,  $F(1, 216) = 4.74, p = .03, d = .21$ .<sup>161</sup>

Bootstrapped mediation analyses indicated that there were significant indirect effects via both active agency (indirect effect = .28, 95% C.I. {.06, .57}) and competence agency (indirect effect = -.31, 95% C.I. {-.54, -.12}).<sup>162</sup> The more actively agentic a victim was perceived to be, the more participants blamed him.<sup>163</sup> On the other hand, the more competent the victim appeared to be, the less he was blamed.<sup>164</sup>

When victim morality was included as a moderator, active agency continued to affect blame judgments for both low- and high-morality victims (indirect effects for low-morality victim = .27, 95% C.I. {.06, .54}; indirect effect for high-morality victim = .30, 95% C.I. {.07, .63}).<sup>165</sup> That is, both high- and low-morality victims were blamed more when they were more active.<sup>166</sup> Competence agency only significantly affected blame judgments for low-morality victims (indirect effect for low-morality victim = -.37, 95% C.I. {-.70, -.10}; indirect effect for high-morality victim = -.19, 95% C.I. {-.44, .02}); low-morality victims were blamed somewhat less when they were more competent.<sup>167</sup>

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159. *Id.*

160. *Id.*

161. *See infra* fig.1.

162. *See* Kristopher J. Preacher & Andrew F. Hayes, *SPSS and SAS Procedures for Estimating Indirect Effects in Simple Mediation Models*, 36 *BEHAV. RES. METHODS* 717, 718 (2004); Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 *BEHAV. RES. METHODS* 879, 879–80 (2008).

163. *See* Mueller, *supra* note 147.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Figure 1:

*Willingness to Blame the Victim as a Function of Victim Moral Character and Whether the Victim Filed Suit Himself.* Asterisks indicate significant differences between conditions, \*  $p < .05$ , \*\*  $p < .01$ . Error bars indicate standard errors of the mean.



*c. Damages*

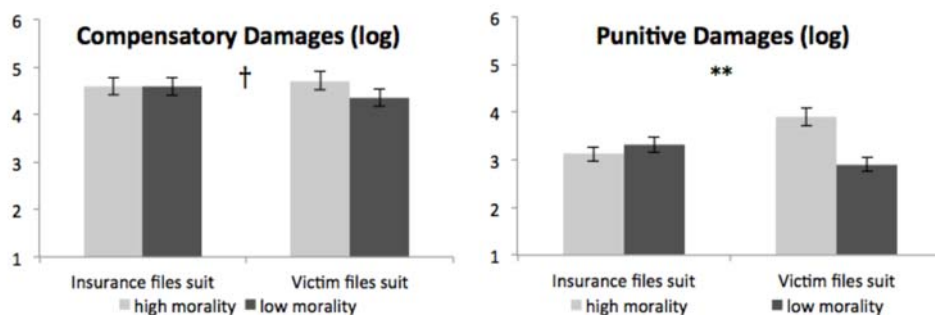
Results for damages were similar to those for blame.<sup>168</sup> Because damages data are bound at zero at one end and have no upper bound, the responses were log-transformed.<sup>169</sup> Victims with low moral character received marginally less in compensatory damage awards only when the victim filed suit himself,  $F(1, 215) = 2.51$ ,  $p = .10$ ,  $d = .16$ , and received significantly less in punitive damage awards, again only when the victim filed suit himself,  $F(1, 215) = 6.28$ ,  $p = .01$ ,  $d = .25$ .

168. See *infra* fig.2.

169. See Mueller, *supra* note 147.

Figure 2:

*Willingness to Assess Compensatory and Punitive Damages as a Function of Victim Moral Character and Whether the Victim Filed Suit Himself.* Asterisks indicate significant differences between conditions, †  $p < .10$ , \*  $p < .05$ , \*\*  $p < .01$ . Error bars indicate standard errors of the mean.



When victims appear more actively agentic—either as a result of their moral character, their decision to file suit, or both—they are more likely to be blamed and may receive less in damages.<sup>170</sup> These results suggest that when victims actively seek recourse through the justice system, they may be paying a penalty by appearing to be less “victimlike,” especially when their moral character is questionable.<sup>171</sup>

#### B. Study 2: Shared Fault and Agency

Many civil cases involve situations of shared fault. In most U.S. states, shared fault is assessed via comparative negligence.<sup>172</sup> In comparative negligence regimes, a plaintiff who is partially at fault will have his damages reduced by that amount (e.g., a plaintiff who is found to be 25% at fault will have his damages reduced by 25%).<sup>173</sup> A small minority of states follow the

170. See *infra* note 176 and accompanying text.

171. Kurt Gray et al., *supra* note 73, at 1215.

172. See *id.*

173. See *id.*

doctrine of contributory negligence, wherein a plaintiff who is at fault to any extent may be denied compensation entirely.<sup>174</sup>

I hypothesized that perceptions of plaintiff agency would be particularly important in situations where the plaintiff might be partially at fault.<sup>175</sup> When a person is seen as more agentic, she is more likely to be perceived as blameworthy, which changes the balance of fault in these situations.<sup>176</sup>

### 1. Method

Mechanical Turk workers (final  $N = 224$ ) were presented with a civil case in which a person, Steven, was injured at work.<sup>177</sup> He had been working offsite at a client's (Lattice Corporation's) offices—essentially on a secondment, though that language was not used in the study.<sup>178</sup> One day, he was unexpectedly called down to the processing floor.<sup>179</sup> He was wearing inappropriate shoes for entering the floor, but it had never been a problem before.<sup>180</sup> However, machine lubricant had spilled the prior day and had not yet been cleaned up.<sup>181</sup> He slipped and hurt his knee badly.<sup>182</sup> The client's insurance company denied part of his claim for benefits.<sup>183</sup> The key manipulation was whether the injured employee or his employer filed suit against the client's insurance company.<sup>184</sup>

Participants then responded to a five-item scale assessing sympathy for

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174. Alabama, Maryland, North Carolina, and Virginia, as well as the District of Columbia. *Comparative Negligence*, FINDLAW, <http://injury.findlaw.com/car-accidents/comparative-negligence.html> (last visited Mar. 28, 2016).

175. See *infra* Section V.B.2.b.

176. Kurt Gray et al., *supra* note 73, at 1215.

177. See Mueller, *supra* note 147.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* In addition to the critical manipulation of whether the victim or his employer filed the lawsuit, I also manipulated the level of emotion the victim displayed because prior research has shown that victims who display more emotion—as long as the emotion is appropriate to the injury—are viewed as better victims. See Mary R. Rose, Janice Nadler, & Jim Clark, *Appropriately Upset? Emotion Norms and Perceptions of Crime Victims*, 30 L. & HUM. BEHAV. 203, 217 (2006). This manipulation also resulted in the anticipated effects, but in an attempt to reduce the sheer quantity of data presented in this paper, I am omitting these analyses.



the victim,<sup>185</sup> items assessing classic patiency,<sup>186</sup> a seven-item scale assessing agency,<sup>187</sup> and five-item scales assessing blame for the victim and the corporation.<sup>188</sup> They were also asked to assess how much, if anything, Steven should receive in damages.<sup>189</sup>

## 2. Results

### a. Agency, Patiency, and Sympathy

Responses to the patiency items were not correlated with one another, so a valid scale could not be formed.<sup>190</sup> The factor analysis indicated that agency was again split into “hot” agency (*assertive, competitive, determined, dominant*) and “cool” agency (*competent, effective, intelligent*) and that these two factors were distinct from sympathy, willingness to blame Steven, and willingness to blame Lattice.<sup>191</sup> Reliabilities for each of these scales were high: sympathy,  $\alpha = .91$ ; blaming Steven,  $\alpha = .93$ ; blaming Lattice,  $\alpha = .90$ ; “active” agency,  $\alpha = .83$ ; “competence” agency,  $\alpha = .88$ .<sup>192</sup>

When Steven filed the lawsuit himself, participants saw him as more “actively” agentic,  $t(221) = -5.18, p < .001, d = .69$ , and less sympathetic,  $t(221) = 2.56, p = .01, d = .34$ .<sup>193</sup> Whether Steven or Steven’s boss filed the lawsuit did not significantly affect perceptions of competence agency.<sup>194</sup>

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185. Items were how much compassion, kindness, pity, sympathy, and understanding the participants had for Steven. See Mueller, *supra* note 147.

186. Items were how much pain did Steven experience and two scales rating Steven’s general sensitivity to pain and general sensitivity to pleasure. *Id.*

187. The same items as in the prior study were used: *assertive, competent, competitive, determined, dominant, effective, and intelligent*. *Id.*

188. Items were whether Steven or the Corporation *could have prevented the injury; is responsible for the injury; should have known better; should have been able to foresee; and the injury was their fault*. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

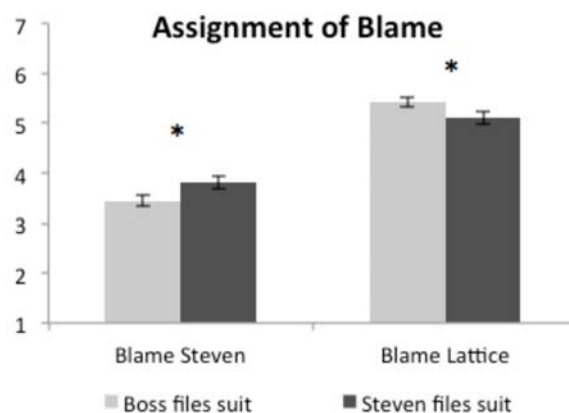
194. *Id.*

*b. Blame*

Participants blamed Steven significantly more for his injuries when Steven filed the lawsuit, as opposed to his employer,  $t(221) = -2.11$ ,  $p = .036$ ,  $d = .28$ . Similarly, they blamed Lattice significantly *more* when Steven's employer filed the suit,  $t(221) = 2.01$ ,  $p = .046$ ,  $d = .27$ .<sup>195</sup>

Figure 3:

*Willingness to Blame Steven and Lattice Based on Whether Steven Filed Suit Himself.* Asterisks indicate significant differences between conditions, \*  $p < .05$ . Error bars indicate standard errors of the mean.



Mediation analyses indicated that both “active” agency and sympathy were significant mediators.<sup>196</sup> When Steven (as opposed to his employer) filed the lawsuit, Steven was perceived as *more* agentic and *less* sympathetic.<sup>197</sup> Both increased agency and decreased sympathy predicted higher blame judgments: indirect effect via agency = .17, 95% C.I. {.05, .33}, indirect effect via sympathy = .15, 95% C.I. {.05, .31}.<sup>198</sup> The blame in this situation was viewed essentially as hydraulic because Steven’s

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195. See *infra* fig.3.

196. See Mueller, *supra* note 147.

197. *Id.*

198. *Id.*

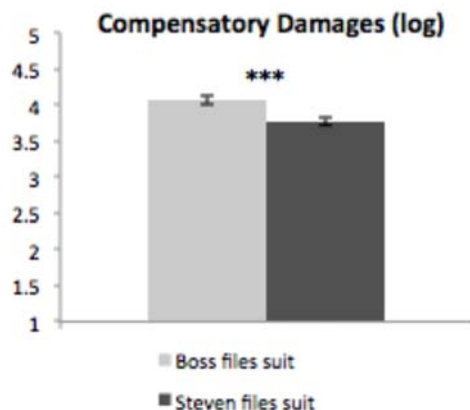
filing of the lawsuit caused Lattice to be viewed as less blameworthy with the same indirect effects, though in the opposite direction: indirect effect via agency =  $-.13$ , 95% C.I.  $\{-.30, -.01\}$ , indirect effect via sympathy =  $-.20$ , 95% C.I.  $\{-.29, -.05\}$ .<sup>199</sup> Indirect effects via Steven's perceived "competence" agency were not significant for either blaming Steven or blaming Lattice.<sup>200</sup>

*c. Damages*

Damages judgments were again log-transformed, and Steven was awarded significantly less when he filed suit himself,  $t(210) = 3.55$ ,  $p < .001$ ,  $d = .49$ .<sup>201</sup>

Figure 4:

*Willingness to Award Compensatory Damages as a Function on Whether Steven Filed Suit Himself.* Asterisks indicate significant differences between conditions, \*\*\*  $p < .001$ . Error bars indicate standard errors of the mean.



199. *Id.*

200. *Id.*

201. *See infra* fig.4.

*C. Study 3: Other Instantiations of Agency*

While the scenarios above provided a clean and simple manipulation of agency, in our current system, the instances in which a victim can have someone else file suit on his behalf are very limited.<sup>202</sup> In this final study, the victim filed the lawsuit herself in each of the conditions.<sup>203</sup>

Instead of using lawsuit-filing as the agency manipulation, the victim either (1) thought she had a potential claim and approached a lawyer herself, or (2) a lawyer initially told her that she might have a claim.<sup>204</sup> I also manipulated the moral character of the victim in an attempt to replicate the findings of Study 1; that is, the victim's moral character would influence blame and damages judgments more when the victim was seen as more agentic.<sup>205</sup>

## 1. Method

Participants (final  $N = 380$ ) read a slip-and-fall scenario involving a woman named Sara Davidson.<sup>206</sup> Sara was described either as a kind, healthy, and social person, or as a rather unpleasant, unhealthy, and antisocial person.<sup>207</sup> When she takes her dogs out for a walk, she often picks up coffee at a local café.<sup>208</sup> On this day, the café owner got distracted by a malfunctioning espresso machine, so he had not yet salted the sidewalk outside the café.<sup>209</sup> For her part, Sara had expected that the day would be warmer, so she was wearing old sneakers rather than shoes with better traction.<sup>210</sup> She slipped on the ice, broke her wrist, and sprained her back.<sup>211</sup>

Participants then continued reading about Sara's decision to sue and her

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202. See *supra* note 184 and accompanying text.

203. See Mueller, *supra* note 147.

204. *Id.*

205. This moral character manipulation was adapted from Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 27 CORNELL L. REV. 255, 285 (2012) (referring to Study 3).

206. See Mueller, *supra* note 147.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

behavior at trial.<sup>212</sup> As described above, she either did the research regarding her potential legal claims herself (high agency), or she was approached by a lawyer who suggested she might have a claim (low agency).<sup>213</sup>

Participants were asked to respond to the same set of questions as in Study 2 (agency items, patience items, and fault scales for both Sara and the café).<sup>214</sup> They were asked a single sympathy item for Sara, rather than a scale, and were also asked how likely they would be to help Sara if they had a chance.<sup>215</sup>

## 2. Results

### *a. Agency, Patience, and Sympathy*

As in the previous study, patience items did not form a reliable scale.<sup>216</sup> Factor analysis again showed that the agency items loaded on the two factors of “active” and “competence” agency.<sup>217</sup> The agency manipulation was successful.<sup>218</sup> Sara was seen as significantly more actively agentic when she decided to hire a lawyer and file a lawsuit based on her own research,  $F(1, 372) = 43.21, p < .001, d = .68$ .<sup>219</sup> In this case, contrary to the findings of Study 1, Sara was seen as more actively agentic when she had good character than when she had bad character,  $F(1, 372) = 20.923, p < .001, d = .47$ .<sup>220</sup> However, this may be due to the details of the character manipulation: “bad” Sara was described as overeating fast food and watching trashy TV, giving an overall impression of laziness and inactivity.<sup>221</sup>

Sara was also seen as more *competently* agentic when she had good character,  $F(1, 372) = 98.82, p < .001, d = 1.02$  and when she did the initial

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See supra* note 190 and accompanying text.

217. *See* Mueller, *supra* note 147.

218. *Id.*

219. *Id.*

220. *See supra* text accompanying notes 165–67.

221. *See* Mueller, *supra* note 147.

research about her claim,  $F(1, 372) = 8.90, p = .003, d = .3$ .<sup>222</sup> Unsurprisingly, participants were more sympathetic toward Sara when she had good character,  $F(1, 372) = 31.54, p < .001, d = .58$ .<sup>223</sup>

*b. Blame*

Sara was blamed more when she had a bad character,  $F(1, 372) = 8.65, p = .003, d = .43$ , but as in Study 1, this was qualified by a significant interaction.<sup>224</sup> Sara's moral character mattered significantly more when she acted agentially by initially having the idea to file suit,  $F(1, 372) = 6.70, p = .01, d = .38$ .<sup>225</sup> Martin, the café owner, was blamed significantly more when Sara's character was good,  $F(1, 372) = 5.89, p = .016, d = .35$ , but no other variables or interactions between them influenced judgments of his blame.<sup>226</sup>

Mediation analyses indicated that both "active" and "competence" agency were significant mediators and that sympathy for Sara was not a significant mediator.<sup>227</sup> When it was Sara's idea to file suit, she was seen as both more actively agentic and more competent.<sup>228</sup> Increased active agency *increased* blame judgments, while increased competence *decreased* blame judgments.<sup>229</sup> The indirect effect of active agency was larger than the indirect effect of competence agency: active = .22, 95% C.I. {.11, .37}, competence = -.12, 95% C.I. {-.26, -.04}.<sup>230</sup>

Additionally, despite the lack of main effect in assessing the blame of the café's owner, Martin, there were analogous and opposing *indirect* effects via perceptions of Sara's agency.<sup>231</sup> Sara's active agency decreased blaming of Martin: indirect effect = -.22, 95% C.I. {-.39, -.10}, and Sara's competence increased blaming of Martin: indirect effect = .12, 95% C.I. = {.03, .28}.<sup>232</sup>

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222. *Id.*

223. *Id.*

224. *See supra* text accompanying notes 159–61.

225. *See infra* fig.5.

226. *See* Mueller, *supra* note 147.

227. *Id.*

228. *Id.*

229. *Id.*

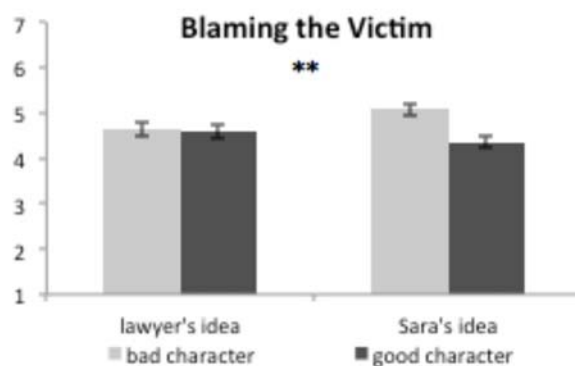
230. *Id.*

231. *Id.*

232. *Id.*

Figure 5:

*Willingness to Blame the Victim Based on Whether the Suit Was Originally Her Idea.* Asterisks indicate significant differences between conditions, \*\*  $p < .01$ . Error bars indicate standard errors of the mean.



### c. Damages

Damages were again log-transformed.<sup>233</sup> Participants awarded Sara marginally less in compensatory damages when she had a bad character,  $F(1, 372) = 3.49, p = .06, d = .19$ , but like in Study 1, this was qualified by a significant interaction.<sup>234</sup> Again, Sara's moral character mattered more to the damage award when she acted agentially,  $F(1, 372) = 4.82, p = .029, d = .23$ .<sup>235</sup> For punitive damages, there was a main effect of Sara's character,  $F(1, 111) = 4.50, p = .036, d = .39$ , in that "bad" Sara was awarded significantly less in punitive damages.<sup>236</sup> There was also a marginally significant main effect of whose idea it was initially to file the lawsuit,  $F(1, 111) = 2.72, p = .10, d = .31$ , in that Sara was awarded more when it was initially the attorney's idea.<sup>237</sup>

233. *Id.*

234. *See supra* text accompanying notes 159–61.

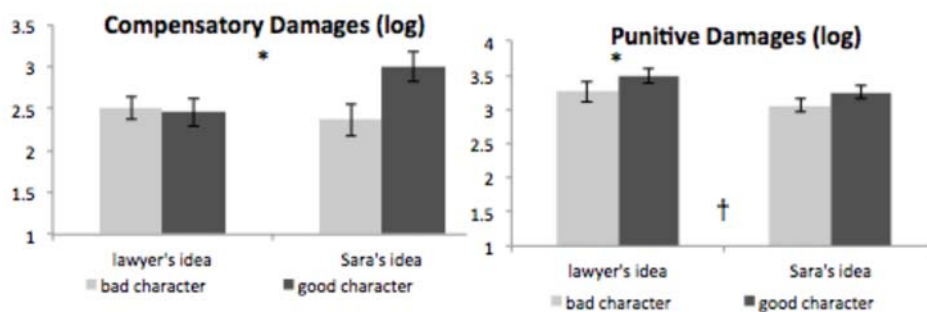
235. *See* Mueller, *supra* note 147.

236. *Id.*

237. *Id.* Less than one-third of participants believed that punitive damages should be awarded, so

Figure 6:

*Willingness to Award Damages to the Victim Based on Whether the Suit Was Originally Her Idea.* Asterisks indicate significant differences between conditions, \*  $p < .05$ , †  $p < .10$ . Error bars indicate standard errors of the mean.



## VI. LIMITATIONS, CONCLUSIONS, AND FUTURE DIRECTIONS

Across the three studies, I found that victims who played a more active role in their justice process were blamed more than less-active victims.<sup>238</sup> This was a result of these proactive victims being perceived as more “actively” agentic.<sup>239</sup> The studies extend the theory of dyadic morality. First, agency may not be a unitary construct; participants consistently rate “active” agentic adjectives in a different way than competence-related agency items.<sup>240</sup> Additionally, there was conflicting evidence on the effects of competence agency and sympathy for the victim on victim blame.<sup>241</sup> Further work exploring general agency and moral agency in relation to competence, activeness, and sympathy is needed.

More work also needs to clarify what concepts define the two contrasting conceptions of agency and confirm their consistency. The

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this result lacks statistical power and may not be reliable. *See infra* fig.6.

238. *See* Mueller, *supra* note 147.

239. *Id.*

240. *See supra* notes 73–76 and accompanying text.

241. *See supra* Section V.B.2.



findings presented here are limited by the studies run thus far, in that they are all cases of accident or negligence.<sup>242</sup> Further research is needed to ascertain whether the consequences agentic victims face extend to other legal situations. Additionally, these studies investigate an extremely limited set of factors that impact focus of attention and agency. Other factors and situations likely impact the attention to the victim as opposed to the harmdoer and the perception of each actor's agency. Manipulating these features can provide more clues as to how these biases in judgment occur and how we might counter them.

The key finding in these studies is that the underlying schema of an agentic harm-doer and a patientic victim is upended when the victim takes on an agentic role in a civil case. The data suggests that situations that focus on the victim also increase the likelihood that the victim will be seen as agentic and in turn, increase the likelihood that a victim's moral character will influence judgments. These findings support the expansion of shield statutes into other types of cases, particularly sexual harassment and other civil suits, to protect victims against the introduction of moral character information.<sup>243</sup> Additionally, because victims tend to be viewed as more agentic in civil cases than in criminal cases, and we pay more attention to the moral character of individuals acting agentially, the probative-prejudicial calculus under Federal Rule of Evidence 403 should be balanced differently depending on the forum in which the case is adjudicated.<sup>244</sup> Finally, this data also suggests that the move toward using more victim impact statements and allowing victims to play a more active role in criminal cases could have unfortunately ironic effects.<sup>245</sup>

In general, victims might have to choose between having a voice and an active role in their own justice process and being able to recover the full measure of damages. Because the goal of the civil justice system is to make victims whole, future studies will have to investigate the extent to which victims are "compensated" through the psychological advantages of taking on agency. Understanding whether this psychological boost is worth the

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242. See Mueller, *supra* note 147.

243. See *supra* Section V.A.2.b.

244. See *supra* Section IV.B; see also FED. R. EVID. 403.

245. E.g., Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Non-Specific Victim Liability Defense*, 52 BUFF. L. REV. 433, 436 (2004); Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 33 IDAHO L. REV. 157, 177-78 (1997).

financial tradeoff victims face if they act agentically is a critical issue to address to make the best policy recommendation for victims. It may be that victims may only be made financially *or* psychologically whole by the justice system—not both. If these studies find consistent effects, victims should be informed about the tradeoffs, and be able to choose themselves how to strike a balance between the two.<sup>246</sup> While the baseline of “accurate” compensation is still unclear, this research is the first to suggest that there may be a tradeoff at all, rather than considering having a voice to be an unmitigated good.

The best course for mitigating these tradeoffs is still unclear. Some scholars suggest that in instances where harm results in a criminal case as well as a civil case, police encouragement of victims to pursue civil remedies may lessen juror prejudice against civil litigation by victims.<sup>247</sup> The results of Study 3 support this: participants are less biased against the victim when they are told that the lawsuit was the attorney’s idea.<sup>248</sup> Others suggest that class actions and other collective-injury arrangements may lessen the problems overly agentic victims face.<sup>249</sup> These options for reducing bias against civil plaintiffs will also need to be explored in future works.

Finally, and perhaps most critically, future studies will need to systematically investigate how a victim’s race and gender interact with perceptions of victim agency, damages, and blame. Race and gender effects have been well explored in other areas of the psychological and legal literature and have been flagged as an issue in the enforcement of tort rights and remedies.<sup>250</sup> However, the interaction between race, gender, and agency

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246. It should be noted that these studies do not ascertain whether the “penalty” victims face for acting agentically is a true penalty. That is, if victims obtain psychological satisfaction from acting agentically, to be made whole, they need or deserve less financial compensation than those who do not play an active role. Thanks to J. Shahar Dillbary for raising the question of whether victims may be being under- or overcompensated.

247. Lininger, *supra* note 49, at 1637.

248. *See supra* Section V.C.2.

249. *See* Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims’ Rights Act, and the Victim’s Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 86 (2010) (stating that class actions and collective injuries may help remove some of the issues with regard to victim agency).

250. *E.g.*, Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2121 (2007); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464–65 (1998); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266

has not been fully explored in the context of legal victimhood.<sup>251</sup>

Victim race and gender already play an unfortunate role in many civil compensation cases; statistically, female and minority victims are likely to earn less over the course of a lifetime, so many courts use different earnings tables to calculate lost wages and other damages.<sup>252</sup> The tort system may also minimize women's injuries by classifying the types of injuries that are compensable.<sup>253</sup> Additionally, psychological research suggests that females are generally seen as less agentic but face greater consequences when they do act agentially.<sup>254</sup> For instance, women who express anger may be less credible, both as jurors and as victims.<sup>255</sup> The picture for minorities is more complicated. Some studies find black men to be less capable of agency than white men, while others find them to be perceived as overly agentic.<sup>256</sup>

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(2004); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37, 39–42 (2007); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900–1949*, 49 HOWARD L.J. 99, 101 (2005); Frank McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 762–63 (1996); Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905, 905–06 (2005).

251. See Giannini, *supra* note 249, at 86 (claiming that past work has “ignore[d] how race, class, gender, and power differentials impact tort rights and remedies” and suggesting that victim agency plays a critical role); see also Chamallas, *supra* note 97, at 527 (“[C]ivil recourse theory takes no account of the importance of group identity in tort law’s historical construction of wrongs and injuries and continues to miss the skewing of interests that characterizes the structure of mainstream U.S. tort doctrine.”).

252. See generally Chamallas, *supra* note 29, at 1435; see also TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997) (finding racial and gender differences in various aspects of procedural justice); Regina Graycar, *Telling Tales: Legal Stories About Violence Against Women*, 7 AUSTL. FEMINIST L.J. 79, 80 (1996) (reviewing the use of categories in the law and how these categories affect women’s experiences in the system).

253. E.g., Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 850–52 (1997); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 29–33 (1995).

254. Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle-Managers*, 77 J. PERSONALITY & SOC. PSYCHOL. 1004, 1004 (1999); Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 582 (2015).

255. See Olof Wrede & Karl Ask, *More than a Feeling: Public Expectations About Emotional Responses to Criminal Victimization*, 30 VIOLENCE & VICTIMS 902, 903 (2015) (examining the interaction of emotion and gender for victims); see also Salerno & Peter-Hagene, *supra* note 254, at 582–83 (finding that anger expressions are detrimental to perceptions and influence of female jurors).

256. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1585 (2004); Robert W. Livingston & Nicholas A. Pearce, *The Teddy-Bear Effect: Does Having a Baby Face Benefit Black*

Black women, on the other hand, are generally allowed to behave more agentically without a penalty.<sup>257</sup> However, there is some suggestion that minority victims, particularly females, suffer as a result of racial stereotyping because they “are seen as too powerful or too uncontrollable to be dominated by anyone. . . . [T]hey cannot be victims.”<sup>258</sup>

Victim race and gender may play a complex role in perceptions of victim agency and victim blame, thus it is important to understand how different victims may be viewed. This Article has shown that victimhood is a complex status, and we should not be lured into thinking that “a victim” is any more unitary a construct than victimhood itself.

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*Chief Executive Officers?*, 20 PSYCHOL. SCI. 1229, 1234 (2009).

257. Robert W. Livingston, Ashleigh S. Rosette, & Ella F. Washington, *Can an Agentic Black Woman Get Ahead? The Impact of Race and Interpersonal Dominance on Perceptions of Female Leaders*, 23 PSYCHOL. SCI. 354, 354 (2012).

258. Meghan Condon, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL’Y 487, 494 (2010); see also Jill E. Adams, *Unlocking Liberty: Is California Habeas Law the Key to Freeing Unjustly Imprisoned Battered Women?*, 19 BERKELEY WOMEN’S L.J. 217, 225 (2004) (“African American women . . . are stereotyped as strong, masculine, and angry—a discordant image that discourages judges and jurors from considering them ‘victims.’”).

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