

# A THEORY OF CRIMINAL VICTIMIZATION

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*Criminal punishment is systematically harsher, given an otherwise fixed crime, where victims are vulnerable or innocent, and systematically less harsh where victims are powerful or culpable. We make a distinction between one gangster attacking another and a gangster attacking a bystander (though the assaults might be formally identical) or between selling drugs to an adult and selling them to a child (though the penal code might treat the two as the same). Yet this pattern in blame and punishment has been overlooked. Criminal scholarship and moral philosophy have offered no theory by which to explain it. And, lacking a theory, the pattern itself has been missed or misunderstood empirically.*

*This Article sets forth the concept of “victimization”—the idea that the moral status of a wrongful act turns in part on the degree to which the wrong’s victim is vulnerable or innocent and the wrongdoer preys upon that vulnerability or innocence. It shows the concept to be implicit in both the doctrine and practice of criminal law. And it argues normatively that victimization is at the same time essential to criminal justice and peculiarly prone to illiberal distortions, and should therefore be at once preserved and constrained.*

*A concluding section reflects methodologically on this Article’s approach to moral philosophy in law—an approach in which the law is not just a tool with which to implement the conclusions of an extralegal philosophical inquiry but an object of study with a certain immanent moral content already in place, which philosophy can help bring to light and expose to question.*

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#### INTRODUCTION: THE CONCEPT OF VICTIMIZATION IN CRIMINAL LAW

This Article is about a concept at work in moral culture and criminal law that has not yet been given a name, and so it helps to start with examples. There's a character in *The Wire* named Omar Little who is a sort of raider: he robs drug dealers and only drug dealers, and though an aggressive, shotgun-wielding professional criminal, he is nonetheless and however ambiguously a hero in the broken social landscape the show gives us. In a climactic exchange, denounced in the courtroom because of the violent nature of his work, Omar delivers his *apologia* (“not an apology in our sense of the term . . . but a defense”<sup>1</sup>). He says: “I ain’t never put my gun on no citizen.”<sup>2</sup> What I would like to understand in this Article is: why does that response make sense? And in particular, that strange yet somehow also obvious use of the word “citizen” for “noncriminal”—why do viewers understand what that term means without ever being told? The scene is effective; what is the moral logic of that effect?

Consider now a real case: in Ohio in 1997, Raymond Tibbetts killed his wife and the elderly, invalid man for whom she was a live-in nurse.<sup>3</sup> Both murders were unprovoked and unmitigated; both involved a ferocity of violence—stabbing and beating and the like—that cannot fail to shock and disturb; and both were submitted to the jury for the death penalty. But the jury sentenced

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1. Plato, *The Apology of Socrates*, in *THE TRIALS OF SOCRATES: SIX CLASSIC TEXTS* 26, 26 n.1 (C.D.C. Reeve ed. & trans., 2002) (editor's note).

2. *The Wire: All Prologue* (HBO television broadcast July 6, 2003). *The Wire* is not just a popular television show or a colorful example—to think that would be to lose a resource for criminal scholarship. *The Wire* is the latest of art's great contributions to the study of crime and punishment.

3. *State v. Tibbetts*, 749 N.E.2d 226, 237 (Ohio 2001).

Tibbets to death only for killing the old man, not his wife.<sup>4</sup> Why? The jury effectively declared that what he did to his wife was terrible, but what he did to the old man, still worse. That judgment made moral sense to the jury, and one can feel the pull of their view. But what is the view exactly? Why not think the opposite—that it is worse to harm those close to you than strangers? When judges used to give capital sentences, one would see the same pattern. In Arizona in 1986, Milo Stanley shot his wife three times in the head over a trifle, then placed the muzzle of the gun downwards against the top of the head of their five-year-old daughter and pulled the trigger.<sup>5</sup> The judge gave him a life sentence for killing his wife and death for killing his daughter.<sup>6</sup> Those accustomed to capital cases will not be surprised at these verdicts; they are familiar in type. But why do judges and juries feel this way?

Turning now to criminal theory, there is a prominent view under which, given an otherwise fixed actus reus and mens rea, the victim's characteristics should have no bearing on how wrong a crime is or what punishment it merits. A murder is a murder, whether the victim is the most vile predator or the most innocent child; the norm against killing having been violated, the punishment—the very same punishment—must follow. Our commitment to the equality of persons, the thought goes, requires upholding norms in this sort of formal, neutral way, in which the particularities of the agents on either side of the norm don't matter. And the thought is also that, since most crimes are defined by the offender's act and state of mind—his or her culpable transgression of a “Thou shalt not”—victims' characteristics are just irrelevant: if an intentional killing is a murder, it is so regardless of whether the victim is tall or short, male or female, black or white. Thus, as George Fletcher has remarked with respect to the theory of retributive justice: “You can read a first-rate book like Michael Moore's recent *Placing Blame* and not find a single reference to the relevance of victims in imposing liability and punishment.”<sup>7</sup> And thus Moore can respond: “I think victims should and must be ignored if you are claiming to be doing retributive theory.”<sup>8</sup> Of course, Moore added, victims are naturally taken up in the criminal norms themselves: there can't be a murder unless someone is killed.<sup>9</sup> But he saw no role for them beyond that. That is, he saw no role for them, given a fixed crime, in answering Henry Hart's famous question (which might be criminal theory's cardinal question): “what *are* the ingredients of

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4. *Id.* at 239.

5. *State v. Stanley*, 809 P.2d 944, 947, 953-54, 956 (Ariz. 1991).

6. *Id.* at 946.

7. George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 51 (1999) (footnote omitted).

8. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999). In fairness, Moore's subject is criminal procedure when he makes this remark. But his argument in substance sweeps more broadly.

9. *Id.* at 69-70.

moral blameworthiness which warrant a judgment of community condemnation?”<sup>10</sup>

Moore’s assumption—the assumption that victim characteristics don’t figure in the calculus of blame—is typical of the field: mainstream criminal thought has not traditionally looked upon the position of the victim as the sort of thing that needs a theory. What was distinctive about the Moore/Fletcher exchange was that Fletcher’s challenge brought Moore’s assumption, unmentioned throughout the eight hundred pages of his book, to the surface. Usually the assumption stays below the surface, implicit in a silence that extends from high theoretical work like Moore’s to the black-letter doctrine of leading casebooks<sup>11</sup> and treatises<sup>12</sup> to the Model Penal Code (MPC).<sup>13</sup> And while, in the wake of the victims’ rights movement, the silence has come increasingly to be noticed and remarked upon,<sup>14</sup> victims’ new prominence has been expressed mainly in the context of criminal procedure, as with victim impact statements. The proposition that most mainstream work has not addressed—and in fact, like Moore, has implicitly rejected—is that victims might be “integrate[d] . . . into the justification for punishment.”<sup>15</sup> That is “[t]he interesting challenge.”<sup>16</sup> As Cornelius Prittwitz has written, the fundamental idea of victimology and the theoretical center of the victims’ rights movement is that one cannot “look only

10. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 412 (1958).

11. See, e.g., JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (4th ed. 2007) (leaving the subject of criminal victims out of the table of contents and index, and featuring no sustained discussion of victim characteristics); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (8th ed. 2007) (same, apart from passing references).

12. See, e.g., WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW (2d ed. 2003) (leaving the subject of criminal victims out of the table of contents and index); 1 *id.* § 6.5(b)-(c) (highlighting the criminal law’s indifference to the victim’s “status as a criminal,” “guilt,” and “contributory negligence”); 3 *id.* § 19.7(i)(1)-(2) (highlighting the criminal law’s indifference to the victim’s “gullibility” and emphasizing “the broader principle that the victim’s badness is no defense to crimes committed against him”).

13. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 990 (2001) (“[T]he victim as person plays a subordinated role in the Model Code. . . . The Model Code goes a long way toward shifting the core of criminal law from interpersonal crime—of persons against persons—to apersonal offense—of threats against interests, communities, and ultimately the state . . . .”); George P. Fletcher, *From Rethinking to Internationalizing Criminal Law*, 39 TULSA L. REV. 979, 992 n.57 (2004) (“Model Penal Code § 1.02(1) [the Code’s statement of purposes] expresses a commitment to protect the accused against false convictions and says nothing about the interests of victims.”).

14. See, e.g., ELLEN S. PODGOR ET AL., MASTERING CRIMINAL LAW 20 (2008) (“In the analysis of the criminal law, victims are probably the least discussed group . . . .”); Fletcher, *supra* note 7, at 51 (“Remarkably, the theory of criminal law has developed without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment.”).

15. Fletcher, *supra* note 7, at 52.

16. *Id.*

at the offender . . . in order to understand criminal acts” but must instead view crime as “an interaction” between criminal and victim.<sup>17</sup> The dominant view in criminal law does not look at crime in that way, and indeed lacks the theoretical resources to look at crime in that way.

Yet surely the dominant view is partly true. A victim’s race shouldn’t matter if we are committed to equality, nor his social class, nor his religion. And some characteristics are indeed just irrelevant—whether a victim has blond hair or speaks with a stutter, or some such. But is the dominant view really *wholly* true, that is, true without exception? Is it really true that it shouldn’t matter whether the victim is a child? That seems mistaken. And what if a state’s criminal code *says* that a victim’s characteristics matter in some way—that murdering a child, for example, is an aggravating factor that shifts ordinary intentional murder to some more serious category (as some do<sup>18</sup>)? Are we then to think that no victim characteristic should matter, unless the code says it does, and then it should? That seems confused. In fact, most penal codes contain a variety of provisions—indeed, a vast array<sup>19</sup>—that build victim characteristics into either the definition of certain crimes (statutory rape, for example), their grading, or both. Those provisions would be incoherent if nothing about the victim could matter. Part of the office of criminal theory is to offer an account, a rationalization in the nonpejorative sense, of why our criminal law is the way it is. Criminal law *does* respond to victim characteristics in some instances. The dominant view seems incapable of explaining why.

Let’s turn now from law to ordinary moral thought—by which I mean nothing grand or mysterious, but just those everyday intuitions of right and wrong, good and bad, sometimes reflective, sometimes not, that most people make simply in virtue of being evaluative creatures in an evaluative culture. Victims indubitably have a place here. We make a moral distinction between one gangster attacking another and a gangster attacking a bystander, though the assaults might be formally identical, or between selling drugs to an adult and selling them to a child, though the penal code might treat the two as the same (as a matter of fact, some don’t<sup>20</sup>). We think there is something especially objectionable about financially defrauding the elderly.<sup>21</sup> We think there is some-

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17. Cornelius Prittwitz, *The Resurrection of the Victim in Penal Theory*, 3 BUFF. CRIM. L. REV. 109, 112 (1999).

18. *See, e.g.*, TEX. PENAL CODE ANN. § 19.03(a)(8) (West 2011) (counting the murder of a child under ten years old as an aggravating factor that can elevate ordinary murder to capital murder).

19. *See infra* Part II.A.2.

20. *See, e.g.*, 21 U.S.C. § 859 (2011) (increasing the minimum sentence, doubling or tripling the maximum sentence, and at least doubling or tripling any term of supervised release for any adult convicted of distributing narcotics to a person under twenty-one years of age).

21. *See, e.g.*, 18 U.S.C. § 2326 (stiffening sentences for those who target elderly victims in telemarketing fraud).

thing horrible, loathsome almost without peer, in raping young children.<sup>22</sup> These are comparative judgments: they in no way excuse or minimize the seriousness of ordinary assault, drug dealing, fraud, or certainly rape, but they find something still worse about those crimes where the victims are—like bystanders, the elderly, or children—particularly vulnerable or particularly innocent.

So, in short, the situation is this: there is a dominant theoretical model of criminal law that supposes the characteristics of a crime's victim to be irrelevant in determining how wrong the crime is or what punishment it merits, at least given two instances of an otherwise fixed criminal violation. But ordinary moral intuition does not concur, and it is not clear that actual criminal law can plausibly or even coherently be described along the lines the dominant theoretical view proposes. Something is out of joint here. Something—either criminal theory or ordinary moral intuition or criminal law itself—has to give.

This Article carves out a place in criminal theory for certain kinds of victim characteristics; it is a critique of the dominant theoretical view. The core of the argument is a concept I term “victimization”—the idea that the moral status of a wrongful act turns in part on the degree to which the wrong's victim is vulnerable or innocent, and the wrongdoer preys upon that vulnerability or innocence. (The concept extends, as we'll see, to victims on the opposite side of the spectrum as well: the nonvulnerable or noninnocent—the powerful or culpable.) My basic claim is that the concept of victimization is at work in both the doctrine and practice of criminal law; that is, the criminal system is drenched in concern for the vulnerability or innocence of victims. I also claim that, with important exceptions, this pattern in condemnation and punishment is a good thing. To the extent criminal theory has denied those claims, it has misdescribed the criminal law, or mistaken the moral situation, or both.

There are three parts to the argument. Part I clarifies the victimization concept itself—what it amounts to and what it is based on—by filling in the moral intuition with philosophical content. This is an exercise in descriptive moral philosophy; the interest is in “studying morality as a phenomenon or as a set of concepts, rather than in preaching.”<sup>23</sup> As Emile Durkheim (a model for the mode of thought at work throughout this Article) puts it: “Moral reality, like all reality, can be studied from two different points of view. One can set out to explore and understand it and one can set out to evaluate it. The first of these problems, which is theoretical, must necessarily precede the second . . . .”<sup>24</sup> Part I is about that anterior problem: the concept of victimization is not just a normative command but also a social fact with a socially given content. To describe that social fact philosophically is thus to clarify a feature of our cul-

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22. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008) (summarizing six state statutes extending the death penalty to the crime of child rape).

23. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 5 (1999).

24. EMILE DURKHEIM, *The Determination of Moral Facts* (1906), in *SOCIOLOGY AND PHILOSOPHY* 35, 35 (D.F. Pocock trans., 1953).

ture—this is moral philosophy as the study of moral culture—and the signal of a good description will be less that the claim comes to seem attractive or binding as that certain resonant cultural patterns light up as the concept on which they're based comes into view. (Examples from popular culture are thus evidence, not color.) Now, admittedly, there's no purely descriptive way of going about moral philosophy. Even simply identifying a moral idea's conceptual foundations is justificatory insofar as those foundations prove to be minimally rational. But the chief aim in Part I is to understand rather than to endorse or oppose.

It is one thing to identify a moral concept and another to show the moral concept to be at work in the law. Part II takes up that latter goal. The claim here is that the concept of victimization is *present in our law*—that is, the concept is at work, though almost always implicitly, in the legal doctrine and social practices that make up the criminal system. Victimization is part of the criminal system's unstated normative logic; it runs through the law like a red thread. Again, this is a descriptive rather than a normative claim; we are still engaged with the first of Durkheim's two points of view. The issue is not whether we should approve of victimization thinking in criminal law—only that it is there.

Part III turns finally to the second half of Durkheim's equation: the normative questions. Should we want this concept in our moral lives and criminal law? If equality before the law means anything, it means that the wrongness of killing one person and killing another is the same—right? But then, is it really mistaken to think there is something morally distinctive about, say, killing a child, or tricking someone with Alzheimer's, or assaulting a blind man? My view is this: victimization is at base a moral insight and properly a component of criminal justice, but it is also peculiarly susceptible to distortion, to being misapplied in operation in ways that offend the basic commitments of a liberal and democratic criminal order. It thus has to be understood and managed rather than simply supported or opposed. Consider, by way of analogy, the principle of loyalty: it too is a deeply rooted and rationally grounded element of ordinary moral thought that is nonetheless dangerous and often misplaced or carried to excess in practice, and it too is something one does not sensibly oppose or endorse wholesale but rather chaperones, aware of what is best and worst in it. I view the concept of victimization with the same kind of qualified affirmation. My aim, then, is not simply to defend the concept, but also to make us more self-aware with respect to it. Self-awareness serves justice.

One final note will help forestall confusion. I don't claim that victimization is the *only* determinant of a crime's wrongness (that would be ridiculous), or even the only victim-based determinant of a crime's wrongness. We have special punishments for killing the president; those aren't based on vulnerability or innocence. We also have special punishments for those who harm the agents of the criminal system (police, prosecutors, judges, witnesses, and jurors); those aren't vulnerability- or innocence-based either. Grading the seriousness of of-

fenses is a complicated and undertheorized business.<sup>25</sup> I take victimization to be *one* of the principles that give criminal justice its normative order, one among a number of moral and practical considerations that go toward answering Hart's great question. It comes into play whenever a crime puts vulnerability or innocence (or their opposites) particularly at stake.

The concept is thus quite specific, but it has, I submit, a general theoretical implication. When Prittwitz argues that we must learn to view crime as "an interaction" between criminal and victim,<sup>26</sup> he may be right, but he's not telling us how to do so. When Fletcher says that integrating victims "into the justification of punishment" is "the interesting challenge,"<sup>27</sup> he is pointing to a question but not answering it. I don't think there is at present a fully adequate answer in the literature. Coming to terms with the concept of victimization is a theoretical key that can unlock that door.

## I. THE CONCEPT ITSELF

### A. *Describing the Intuition*

The first step in explaining the *concept* of victimization is to bring the *intuition* of victimization more clearly into view—for though the intuition is a familiar part of moral experience, it has not to my knowledge come in for philosophical examination before.<sup>28</sup> And it displays some odd dynamics.

First—a simple point—the intuition really does seem to respond to the vulnerability or innocence of victims. It's spurred when we turn our thoughts to harms or wrongs inflicted upon children, the elderly, the mentally or physically handicapped, or animals, among others. It's spurred when we think of able-bodied adults attacked while in a position of helplessness, as in a beating, and *not* spurred (though we might yet disapprove of the wrong) when we think of such people suffering merely in the course of combat or other conflict, as in a fair fight. (When, after all, does a fight *become* a beating? Could we even make sense of that distinction without something like the concept of victimization?) One of the functions of literature is to teach us to see the contours of moral life

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25. See generally PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 157-99 (1995).

26. Prittwitz, *supra* note 17, at 12.

27. Fletcher, *supra* note 7, at 52.

28. In *The Theory of Moral Sentiments*, Adam Smith touches upon "[o]ur sympathy with the unavoidable distress of . . . innocent sufferers" and asks whether there could be any "greater barbarity . . . than to hurt an infant" as "[i]ts helplessness, its innocence, its amiableness, call forth the compassion, even of an enemy . . ." ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 92, 245 (Ryan Patrick Hanley ed., Penguin Books 2009) (1759). The concept of victimization is of a piece with Smith's subject in *Moral Sentiments*, and it isn't surprising to find hints of it there. But hints are all Smith gives us: he talks around the edges of the victimization concept but never brings it into view.



more clearly, and we've already witnessed the concept of victimization at work in *The Wire*.<sup>29</sup> In fact, victimization is a literary trope.

In a central scene in Victor Hugo's *Les Misérables*, Jean Valjean, after nineteen years in prison for a trifle, hardened and embittered until "[t]he beginning and the end of all his thought was hatred," has just encountered a saintly bishop, who does him a rare kindness and thus throws his soul into confusion.<sup>30</sup> He is in a state of bewildered distraction when "[a] boy of about ten . . . one of those gay and harmless child vagrants" comes upon him, tossing coins into the air and catching them on the back of his hand, "singing as he came."<sup>31</sup> The boy drops one of the coins, which rolls over to Jean Valjean, who sets his foot on it. "Monsieur," says the boy "with the childish trustfulness that is a mingling of innocence and ignorance, 'may I have my coin?'"<sup>32</sup> Valjean refuses. The boy pleads; Valjean ignores him. The boy starts to cry; Valjean reaches for his stick. The boy becomes angry; Valjean threatens him. Now the boy is frightened. He looks up at Valjean in "a moment of stupefaction" and then turns and runs away without a sound, until off in the distance, pausing for breath, the sounds of his sobbing drift back to Valjean's dazed, distracted ears.<sup>33</sup> It takes Valjean a few minutes to realize what he has done, but when he does, he calls after the boy, frantically searches for him, gives twenty times what he stole to a priest for the poor, tries to have himself arrested, and finally collapses, crying, calling out to the heavens, "Vile wretch that I am!"<sup>34</sup> And this is the experience that finally breaks his shell. He had, Hugo says, in robbing the boy finally committed an act he could not bear—"an act of which he was no longer capable."<sup>35</sup>

Now, this is an effective scene; it makes sense. But why? Why isn't the whole affair trivial? Valjean has done worse and had worse done to him. Indeed, the aesthetic energy of the scene turns exactly on a deed so minor implying a moral devastation so great. If one were to try to explain the moral devastation, surely that explanation would have to turn on the victim being a child; the scene would not work if he were a grown man (unless perhaps he were blind, or mentally retarded, and then it would—which itself is telling). And if one were then to explain what makes the victim's childhood important, surely that further explanation would turn on his innocence and vulnerability. Those are the terms in which Hugo sells the scene; he goes to great pains to emphasize the boy's innocent trust and harmless goodwill. And that "moment of stupefaction"—what is it *for*, as a literary matter, if not to signal a moment at

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29. See *supra* note 2 and accompanying text.

30. VICTOR HUGO, *LES MISÉRABLES* 101, 110-12 (Norman Denny trans., Penguin Books 2012) (1862).

31. *Id.* at 112.

32. *Id.* at 113.

33. *Id.*

34. *Id.* at 115 (internal quotation marks omitted).

35. *Id.* at 117.

which something significant has happened? Something significant did happen. That was the moment at which Valjean took the child's innocence away.

Second, vulnerability and innocence are disjunctive. Hugo's child vagrant was both vulnerable and innocent—children usually are—but to have both together is not necessary for the victimization intuition to take hold. The elderly and physically handicapped are typically just vulnerable, not innocent (although senility might change that). If two men get in a fight at a bar, one loses consciousness, and the other continues beating him, the victim is also just vulnerable, not innocent. By contrast, a fierce animal in an unarmed physical confrontation is innocent but not vulnerable. The same animal under the control of a person may be both vulnerable and innocent, though not necessarily to the same degree. (As Senator Robert Byrd said during the Michael Vick dog-fighting scandal: “The depravity of dogfighting . . . involves training innocent, innocent, vulnerable creatures to kill . . .”<sup>36</sup>) The two pieces of the intuition can be coupled or decoupled, and the intuition may still take hold.

Indeed, innocence is internally disjunctive: it has an interior complexity that vulnerability does not. We'll need some distinctions to puzzle through it. The first distinction is between *situational* and *general* innocence. Situational innocence is the state of being blameless with respect to the particular situation in which one is subjected to a wrong—the ordinary adult killed by a stranger while strolling down the street, as opposed to the bank robber killed by his accomplice for an extra share of the loot. We have a term in our culture for these situationally innocent victims: “innocent bystanders.” (Omar's term for them was—tellingly, wonderfully—“citizens,”<sup>37</sup> but the usual term has its own advantages, for it is a fixture in our language that would not even be intelligible without the concept of victimization.) General innocence, by contrast, is about moral purity, about being *an* innocent rather than innocent *of* something, as with animals and young children, who, lacking full agency, are free of both moral guilt and moral stain. (Logically, general innocence could include a mature, agential moral perfection as well, like a saint. The case rarely arises. But the crucifixion story is an account of a morally perfect victim.)

The second distinction internal to innocence is between innocence based on *culpability* and innocence based on *risk-taking*. Culpability innocence is a matter of wrongdoing: one has it in virtue of being upright and loses it in virtue of misdeeds. Risk-taking innocence is a matter of responsibility: one has it in virtue of prudence and loses it in virtue of recklessness or assumption of risk. It makes a difference to us, for example, whether the person killed in an accident was engaged in extreme sports or was merely unlucky in the course of ordinary

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36. Senator Robert C. Byrd, Remarks Following the Indictment of Michael Vick on Dog-Fighting Charges (July 19, 2007), *audio available at* [http://en.wikisource.org/wiki/Speech\\_of\\_Senator\\_Robert\\_Byrd\\_following\\_the\\_Indictment\\_of\\_Michael\\_Vick\\_on\\_Dog-fighting\\_Charges](http://en.wikisource.org/wiki/Speech_of_Senator_Robert_Byrd_following_the_Indictment_of_Michael_Vick_on_Dog-fighting_Charges); *see also* 153 CONG. REC. 19,708 (2007) (statement of Sen. Robert C. Byrd).

37. *See supra* note 2 and accompanying text.

life, and we care as well whether the person harmed in combat was a soldier who volunteered for the job or a conscript who didn't. The common thread in all these distinctions internal to innocence is blamelessness, but blame is a capacious concept in our moral culture, and it pulls different kinds of phenomena under the innocence heading. Thus innocence has internally disjunctive pieces that can take hold individually, be variously assembled together, or be variously coupled with vulnerability.<sup>38</sup>

Third, the victimization intuition is symmetrical—that is, it not only extends an extra measure of concern to wrongs visited upon the vulnerable or innocent, but also withdraws a measure of concern from wrongs visited upon the *nonvulnerable* or *noninnocent*—the powerful, risk-taking, or culpable.<sup>39</sup> We are less saddened to hear that a rapist was killed by his victim than to hear that his victim was killed by him. That is not to say we think it good, upon reflection, that the rapist was killed—rape is not a capital crime—but where the judgment is comparative, where there is a quantum of badness that must fall somewhere and the only question is on whom it will fall, we prefer that it fall on a wrongdoer. Again, literature has picked up on this pattern of thought: the figure of the culpable victim is a tremendous fund of dramatic tension. *Law & Order: Special Victims Unit*, for example, started its immensely successful run with an episode about two rape victims who kill their rapist; the show's energy comes from the officers' dilemma over whether to enforce the norm against killing even in that case (they sort of do and sort of don't).<sup>40</sup> It's a popular motif.

Fourth, the victimization intuition comes in degrees; it's a spectrum, more-or-less phenomenon, not an either/or. Attacking a child is an extreme case; attacking a physically handicapped bystander is a little less extreme; and attacking an ordinary bystander, a little less still. This makes good sense because the components of the victimization intuition—vulnerability or innocence on the

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38. There is at least one limit—one way in which the logical possibilities here are fewer than they might seem. Anyone who has general innocence also, necessarily, has situational innocence.

39. The sense in which vulnerability is symmetrical is complex. Logically, the "other" of vulnerability is invulnerability, but invulnerability doesn't humanly exist. One might substitute the concept of power for that of invulnerability, as I have, but then there is the further problem that every crime makes its victim powerless in some sense. Criminal victims are *necessarily* vulnerable to the extent of their victimhood, and however secure (rich, well connected, physically capable, etc.) they might have appeared before the crime, we know afterwards that appearances were deceiving. An invulnerable victim is an oxymoron, a powerful victim almost an oxymoron. So is vulnerability really symmetrical? I think, despite these difficulties, that it is. When the boat is sinking or the village attacked, the traditional call of our culture is to "save the women and children," because the assumption (however sexist) is that the men can fight or swim—that they are less vulnerable. A powerful victim is a less sympathetic one. Yet I acknowledge misgivings on this point. There is, in any case, no question that the concept of innocence is symmetrical.

40. *Law & Order: Special Victims Unit: Payback* (NBC television broadcast Sept. 20, 1999).

one hand, power or culpability on the other—vary by degree. Not all wrongdoing is like this. If a person is killed, his right to life either was invaded or it wasn't, and by and large, the killing either was criminal or wasn't; it typically doesn't make sense to say a murder victim's right to life was "a little" violated. Even for wrongs or crimes that can vary by degree in a sense—theft, say, where the property taken can be more or less valuable—they do not vary by degree in the same sense that victimization does. An act is equally theft whether the thing taken is a hundred-dollar bicycle or a thousand-dollar watch, but the act is not equally victimizing whether the victim is a gangster or a bystander or a child. I like to think of victimization as being like the volume knob on a stereo: in some wrongful acts the volume on the victimization knob is turned up to the max; in others it's turned down low.

Fifth, note how the last few points work in combination. Because the intuition is symmetrical, it can take hold in any case in which a victim is notably vulnerable or innocent on the one hand, or nonvulnerable or noninnocent on the other. Because the intuition is disjunctive, those two pairs represent at least four possibilities—the victim can be notably vulnerable, innocent, nonvulnerable, *or* noninnocent.<sup>41</sup> And because the intuition is analog, it can take hold to a small degree even in cases where "notably" doesn't mean very much, where the victim is only a little vulnerable or innocent or a little powerful, culpable, or risk-taking. These three points together expand vastly the range of cases to which the intuition applies. Previously it might have seemed that the intuition is reserved for extraordinary cases, like crimes upon children. But given the logic of the above, it should take hold also where the victim is just a little responsible for bringing the crime about (or the opposite), or a little more vulnerable than average (or the opposite). And indeed, the intuition does take hold in such cases. After the attack on the "Central Park Jogger," it was not uncommon to hear people point out that she was, after all, running through Central Park at night—pointing it out apologetically, perhaps, for fear of appearing to excuse the crime, but withdrawing a little sympathy for a little risk-taking (not even culpability!) nonetheless.<sup>42</sup> It was not uncommon in the last financial crisis to hear a

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41. In fact, there are many more than four possibilities here, since the four components of victimization can be variously combined, and since innocence and noninnocence come in multiple forms (situational or general, culpability-based or risk-based). But I think there is more to lose in clarity than to gain in exactness by delineating each of these possibilities separately.

42. Oprah, for example, interviewing the Central Park Jogger herself in 2002, said: "When I first heard about you, I thought, 'Why were you running alone in Central Park at night?'" *Oprah Talks to the Central Park Jogger*, OPRAH (Apr. 2002), <http://www.oprah.com/omagazine/Oprah-Interviews-the-Central-Park-Jogger>. The exchange that followed was bursting at the seams with the ambivalences of our moral culture to this sort of thing—the evils that befall the foolish or reckless—for a victim's foolishness or recklessness does not reduce a bad event's tragedy by much or an offender's blameworthiness at all, yet still seems to matter in the moral calculus somehow. "I'm not sitting here trying to justify it," Oprah continued, "But . . . [y]ou had to be the kind of person who either thought you were invincible or who was just nuts." And the victim, no less ambivalently, answered:

little extra sympathy going to those who were encouraged to make bad investments while lacking the financial education to understand the risks, and a little less sympathy to the big institutional players and wealthy individuals who were similarly misadvised or ripped off. In other words, the victimization intuition is not just reserved for extreme situations but is at work all the time, as if there were a hypothetical median victim to whom every other victim is compared and found to be either more or less vulnerable, innocent, powerful, risk-taking, or culpable. As I see it, the intuition is most interestingly and importantly at work where the situation is extreme—with child victims and gangster victims and so on—but it is not only at work in such cases. It is a general and basic feature of moral life, a regular part of the way in which we go about making judgments of blame and wrong.

As the examples of victimization multiply, one has the sense of the concept working itself through in the social world, opening up logical spaces like slots into which cultural content can flow. There is a slot for the child (vulnerability with general innocence) and another for the innocent bystander (vulnerability with situational innocence); there is a slot for the warrior or hero (situational assumption of risk without culpability or vulnerability) and another for the villain (general culpability and risk-taking without vulnerability); there is a slot for the daredevil (situational recklessness without culpability or vulnerability) and another for the fool (situational recklessness and vulnerability without culpability). For every conceptual possibility victimization carves out, the culture, to the extent it has need for it, generates an archetype. The concept is realized in social life.<sup>43</sup>

Two final caveats. First, this intuition, being essentially a feature of social life, won't resonate equally with every individual. Some people may not feel it; many won't feel it in all respects. But the chief issue is not whether it is present in our feelings but whether it is present in our culture. Second, the intuition, being merely an intuition, may have fuzzy edges not because of a failure to see it clearly but because, as an intuition, it lacks the propositional content to answer all reasonable questions that might be asked of it. That is as it should be. The hard questions have to await a *conceptualization* of the intuition. Indeed, the process of conceptualization is partly one of trying to find good answers to those questions.

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“You’re not the first person to say that. . . . It was not a smart thing to do. . . . I wouldn’t say I was nuts, but maybe I thought I was invincible.” *Id.* The victim later told reporters that she wished she had answered differently: “If that isn’t a blame-the-victim question, I don’t know what is. It’s like, ‘OK, so it’s my fault that I was out there?’” *A New Run on Oprah*, NEWSDAY, Nov. 16, 2007, at A52 (some internal quotation marks omitted). An exchange like this one is a window into the culture—and it is unintelligible without the concept of victimization.

43. See *infra* note 265.

B. *Some Familiar Explanations That Don't Work*

We turn now from bringing the intuition into view to explaining it—which is surprisingly difficult. It resists many familiar modes of moral explanation.

First, the concern for victimization cannot be explained on the basis of rights. What makes the concept such an astonishing feature of the moral universe is precisely that a person can, in two instances, invade the very same right with the very same intention and yet, in one of those instances, be worse or more blameworthy than in the other. In the language of criminal law, the same actus reus with the same mens rea can be wrong to different degrees based on a characteristic of the victim. That should impress us as a deep puzzle. On some views, a wrong just *is* the invasion of a right. Some forms of deontology, for example, in picturing human beings essentially as rightsholders, understand wrongdoing essentially as rights-invasion. Victimization on such a view is almost impossible to make sense of.

Could one fit victimization into a rights framework by postulating, say, a “right not to have one’s purity (general innocence) taken away,” or a “right not to be harmed where blameless (situationally innocent) in occasioning the harm,” or a “right not to have one’s vulnerabilities exploited,” or something else of that sort? The problem is that these postulated rights don’t *explain* victimization: they just recast the concept in other language. Furthermore, these claims of right are implausible on their own account: a young and vigorous adult has a right not to be beaten up just as surely as an old and frail one; whatever significance youth and vigor might have, they do not impair the right to physical security. And finally, even forced, implausible claims of right may not be able to capture the victimization concept in full—for what claim of right could explain *reducing* the protection afforded risk-takers and wrongdoers? In the end, if we accept that the concept of victimization is minimally rational, we must also accept that two equally purposeful invasions of the same right might not have the same moral status, or even be quite the same moral phenomenon. To steal from a blind person and from a sighted person is not the same thing, though in both cases the right invaded is the right of property. This is also to say, of course, that the framework of rights cannot give a complete picture of moral life.

Second, victimization cannot be explained on the basis of norm violation, at least insofar as norms are thought of (rather thinly) as commands or rules—another common deontological focal point and the main issue in retributivist accounts like Moore’s.<sup>44</sup> The problem is just what we saw a moment ago with respect to rights. If on the one hand we define norms in general terms that make no reference to victim characteristics—“intentionally taking another’s property is wrong,” for example—then victimization is impossible: two violations of the

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44. See Moore, *supra* note 8, at 69 (“Fletcher appears to attribute my theoretical indifference to victims to my preoccupation with norm violations by criminals . . .”).

same norm cannot imply two different degrees of wrongdoing if wrongdoing just is norm violation. If, on the other hand, we define norms so as to include reference to victim characteristics—“intentionally taking another’s property is wrong, and intentionally taking a blind person’s property is even more wrong,” for example—we simply beg the question of *why* victim characteristics matter, and thus explain nothing.

Third, victimization cannot adequately be explained by reference to harm or suffering—the focus of concern among many consequentialists and particularly utilitarians<sup>45</sup>—although the issues here are closer (hence the caveat). The blind person who has her wallet stolen does not necessarily or even probably suffer more, and is not necessarily or even probably harmed more, than the sighted person who has her wallet stolen. The child who is beaten up won’t feel more pain than the adult who is beaten up, and might heal better both physically and emotionally. The gangster killed in a gunfight suffers no less than the bystander killed in the crossfire. Indeed, there can be considerable suffering and harm with very little victimization (as when Omar assaults a drug dealer) and considerable victimization with very little suffering and harm (as with Jean Valjean and the vagrant boy). The two categories of victimization and harm (or suffering) can thus become almost totally detached from one another.

What makes the “adequately” caveat necessary is that the two categories do line up in some cases. A raped child is typically more harmed than a raped adult, harmed though the adult may be;<sup>46</sup> an elderly adult is predictably more harmed by an otherwise equal physical assault than an ordinary adult. Can we just use the familiar concept of harm in these cases, then, and do away with the foreign concept of victimization? The problem is, if one asks *why* a raped child is more harmed than a raped adult, it seems almost impossible to answer without reference of some kind to the premature invasion of the child’s sexuality—which just *is* a form of innocence. Likewise, if we try to explain why an elderly assault victim is more harmed than an ordinary adult assault victim, we’d have to say something about the physical brittleness of the elderly—that is, about a feature of their vulnerability. In other words, in the subset of victimization cases in which victimization and harm are correlated, vulnerability and innocence are actually doing the explanatory work; they are the independent variables and harm the dependent one. Or perhaps the way to think about it is that the greater

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45. See, e.g., JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”). I don’t mean to imply that no consequentialist theory could account for victimization; only that some cannot. I also don’t mean to imply that harm and suffering are identical—only that they are related enough to discuss together here.

46. See *Kennedy v. Louisiana*, 554 U.S. 407, 468 (2008) (Alito, J., dissenting) (discussing evidence of the long-term effect of rape on children, including the estimate that “as many as 40% of 7- to 13-year-old sexual assault victims are considered ‘seriously disturbed’” (quoting Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, FED. PROBATION, Sept. 1995, at 69, 70)).

harm does indeed account for the greater wrongfulness, but the greater vulnerability and innocence accounts for the greater harm—which is to say, we need to build vulnerability and innocence into our understanding of harm itself. In the messy way that moral concepts are lived, it isn't surprising—and it isn't a rebuttal—to find this sort of overlap.

Fourth, victimization cannot adequately be explained (again a caveat is necessary) on the basis of social cost or deterrence—also common modes of explanation among consequentialists and particularly utilitarians.<sup>47</sup> The problem with explaining victimization in terms of social cost is parallel to the problem of explaining it in terms of suffering or harm (that is, individual cost). First, social cost and victimization can move independently and even in opposing directions: the murder of an elderly person past her productive working years, for example, would ordinarily be thought to involve *less* social cost than the murder of a middle-aged person with many productive years left—so tort law views them—but the one involves a high degree of victimization and the other, all else equal, a lower one. And second, where social cost and victimization do move together, the explanation for that judgment turns on victimization's two components, vulnerability and innocence, not the other way around. If, for example, we regard the death of the rapist as less costly as a social matter than the death of his victim, the explanation turns on the diminishment of the rapist's social value on account of his wrong or, in other words, on his culpability.

Deterrence at first glance presents a greater challenge. It *can* explain concern for victims' vulnerability insofar as an extra measure of punishment may be necessary to deter wrongdoing against those who cannot deter it of their own power. And it can explain concern for victims' innocence insofar as a lesser measure of punishment for those who harm wrongdoers and risk-takers may discourage people from becoming wrongdoers and risk-takers in the first place. I'm not sure if the overlap here is partial or total, but even if total, I don't think it undermines the need to give an explanation of victimization in the terms in which it is experienced: noninstrumental terms of blame and wrong, desert and virtue. There's nothing new about moral instrumentalists and non-instrumentalists explaining the same phenomenon in different ways (and wrestling over whose explanation is better). In fact, the lesson of this overlap is not that the concept of victimization can be done away with, but that the concept has legs. It turns out that deterrence theorists and perhaps other criminal punishment instrumentalists, who have not to my knowledge taken an interest in victims' vulnerability or innocence before, have reason to do so. That the concept speaks to them as well as to those who think of criminal punishment in more natively moral terms (retributivists, virtue theorists, and expressivists, among others) is all to the good.

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47. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).



Finally, victimization cannot adequately be explained on the basis of sympathy or empathy, that is, on the basis of sentiment—the typical focal point in scholarly work that, lacking the concept of victimization, nonetheless brushes up against victimization thinking.<sup>48</sup> I say “adequately” because there is no question that predation upon the vulnerable or innocent elicits passionate feelings of sympathy and empathy for the victim and anger or hatred toward the wrongdoer. One could even imagine a good evolutionary case for why we would feel these passions, centering on our reproductive interest in the safety of children. But even if true, that sort of psychological explanation is not a substitute for philosophical or normative explanation of the kind this Article attempts. We want different things from psychological and normative explanation. The one is a matter of motivation; the other is a matter of testing whether our motivations are based on or linked to ideas that we can reflectively endorse. It is not enough to know that the invasion of the bodies of children, sexually or otherwise, fills us with horror and disgust, or even that it fills us with horror and disgust because we have an evolutionary interest in the well-being of children, because we want the rationale for that horror and disgust; we want to know whether and how it is justified. Furthermore, if the two forms of explanation are too independent for the one to take the other’s place, they are also too *interdependent*—for our emotions are themselves evaluative in character, subject to correction where those evaluations go awry.<sup>49</sup> We would not want a moral or criminal system that excused the beautiful and condemned the ugly. We want our normative systems to act on principle, and sympathy and empathy alone, taken purely as facts about our passions rather than as elements in moral reason, are too standardless to serve that purpose. Part of the point of philosophical inquiry into moral life is to fashion our passions into sound moral guides.

But if we do not chalk victimization up to passion and sentiment, what is left to explain it? We have just rejected many of the classic modes of moral explanation—explanation in terms of rights or norms or in terms of individual or social suffering, harm, or cost. It may be tempting at this point to think that the concern for victimization cannot be accounted for rationally, but I think that’s a mistake. Moral life is subtler than moral theory. When the two are out of joint, we should not be too quick to think it is moral life that has gone wrong.

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48. See, e.g., Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003); see also *infra* Part II.B.2.

49. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (defending an evaluative conception of emotion in criminal law).

### C. *A Moral Relationship*

There are different ways of thinking about wrongdoing—that is, not just different views as to what should count as wrong, but different views as to what wrongdoing itself is. I'd like to focus here on a contrast between thinking of wrongdoing as conduct that violates a norm and thinking of it as conduct that violates another person.<sup>50</sup> Eve's eating the forbidden fruit is a paradigm of the first, "norm violation" category: the reason her action was wrong was that it violated God's law (indeed, no other human person was in view). Cain killing Abel is a paradigm of the second, "violation of others" category: the reason Cain's wrong was wrong had to do with a claim arising out of Abel (out of Abel's personhood, one might say). The norm violation model is the default in criminal law,<sup>51</sup> but to make sense of victimization—and from victimization, to make sense of the interactive approach to crime in general—we must turn to the violation of others model.<sup>52</sup>

Various ideas arise in connection with this distinction. One thinks of the *malum in se/malum prohibitum* distinction in criminal law, or the literature on "victimless crimes" and John Stuart Mill's harm principle, or George Fletcher's distinction between "wrongfulness" and "wrongdoing" (where the former "highlights the conduct standing in violation of a rule of law" or "the logical dissonance between [the] behavior and the rules of criminal law," and the latter "derives not from the violation of a rule but from a characteristically dangerous . . . way of doing harm to others" and "[a]t the core . . . an invasion against the victim's interests").<sup>53</sup> To my mind, however, the best explication of the two categories is to be found in the philosopher Michael Thompson's remarkable paper, *What Is It to Wrong Someone?*<sup>54</sup> The question Thompson takes up in that paper is: how do we think about ourselves and our duties when we are committed to doing what is just? That is, what is the posture of mind of a person oriented to justice and trying to determine what in some particular situation justice requires of her?<sup>55</sup> The term "justice" here carries its traditional (indeed ancient) sense, naming "a virtue of individual humans like you and me," rather than its modern sense concerning "a feature of the larger social structures into

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50. The concept of "norms" can be variously defined, but for present purposes, I take it narrowly to mean commands or rules.

51. See *supra* notes 7-17 and accompanying text.

52. See *supra* notes 26-27 and accompanying text.

53. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 77-80 (1998). As much as I like the distinction in substance, I find the verbal contrast between "wrongdoing" and "wrongfulness" excessively fine. In this Article, "wrongdoing" just means "doing a wrong," and "wrongful" is just the adjective form of the same idea.

54. Michael Thompson, *What Is It to Wrong Someone? A Puzzle About Justice*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 333 (R. Jay Wallace et al. eds., 2004). Another significant work along these lines is STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006).

55. Thompson, *supra* note 54, at 333-35.

which we fall.”<sup>56</sup> The question is, how do we think about the moral universe when we are exhibiting the virtue of justice?

What Thompson picks out in answer is the relational—or as he puts it, “bipolar”—aspect of such thought:

The mark of this special virtue of human agents . . . is that it is ‘toward another’ . . . . It is characteristic of the individual bearer of justice . . . to view *herself* as related to others, and as other to others . . . .<sup>57</sup>

That is, whatever the particular *content* of our thoughts regarding justice, the *grammar* of the thought is that there is a me and a you linked together in a certain morally charged relationship. As Thompson puts it, there is in the mental posture of justice a “yoking of agent to agent”<sup>58</sup> in a “formally distinctive type of practical nexus.”<sup>59</sup> “[The two agents] are for me,” he says, “like the opposing poles of an electrical apparatus: in filling one of these forms with concrete content, I represent an arc of normative current as passing between the agent-poles, and as taking a certain path.”<sup>60</sup> The concrete content in that arresting image can be any particular claim of justice—that agent *A* owes agent *B* an apology, or that *B* owes *A* performance on a contract, or that *A* trespassed on *B*’s land or on his freedom or whatever else—but what absorbs Thompson’s focus are not those particularities but the structure in which they fall: the very fact of those two poles and the normative current passing between them. The posture of mind characteristic of justice is that one sees oneself as occupying one of those poles and all others with whom one comes into moral contact as occupying another. Justice, in short, is an other-regarding virtue. In that essential submission, Thompson joins Aristotle, Aquinas, and Kant, among others; it seems to me that this is a point on which much of the philosophical tradition concurs.

From this base, Thompson develops a more refined version of the initial contrast I offered between Eve’s wrong and Cain’s, between wrongdoing as a violation of norms and wrongdoing as a violation of others. In Thompson’s terms, this is a contrast between “bipolar normativity” and “merely monadic normativity,” between a form of moral life in which we say “*X* wronged *Y* by doing *A*” and one in which we say only that “*X* did wrong in doing *A*”—*Y* having dropped out of the picture.<sup>61</sup> The former is a three-part relation between agent, victim, and norm, in which the relationship between the agent and victim has somehow become corrupted and the norm serves to describe or account for the way in which it has become corrupted. The latter is a two-part relation be-

56. *Id.* at 337.

57. *Id.* That last phrase, “as other to others,” has a certain mystery about it, but it simply means that the just person not only has regard for others but also understands that others must view her in the same way. She apprehends herself as part of a normative order in which all alike should be other-regarding, and in which she is one among all.

58. *Id.* at 345 n.19.

59. *Id.* at 335.

60. *Id.*

61. *Id.* at 335, 338 (capitalization altered).

tween agent and norm, in which the person wronged is incidental to the statement of the moral issue (though potentially necessary, depending on how the norm is defined, for the norm to have been violated at all).

One could wonder what this difference really amounts to. It seems possible to redescribe most or perhaps all bipolar moral claims as merely monadic ones (“Cain did wrong in committing murder” rather than “Cain wronged Abel by murdering him”) and perhaps it would be possible to go the other direction too, redescribing merely monadic claims as bipolar ones (“Eve wronged God by violating his trust” rather than “Eve did wrong in violating God’s law”—though that recasting of the issue seems somehow more strained). One could imagine a partisan of one of these two modes of moral thought trying to colonize the field. So is the difference a real one? Thompson tells us that “tradition and intuition alike assign [the merely monadic claims] a place very different from that occupied by our bipolar forms,”<sup>62</sup> and that may be, but is there some more definite reason for the distinction than mere fidelity to tradition and intuition?

I think there are five such reasons. First and most important, our social practices fall into monadic or bipolar forms already and thus become inaccessible or unintelligible if we don’t have recourse separately to each of these two options. Apology and forgiveness, for example, are bipolar: I cannot forgive a wrong done to you.<sup>63</sup> Private law is bipolar: the claim for breach belongs to the promisee, for tort to the injured. These practices are part of the architecture of social life, yet a merely monadic view of morality would be baffled by them. Second (and relatedly), whether we take a monadic or bipolar view of some type of wrongdoing will affect our redressive scheme because the distinction bears on whether the claim for redress belongs to the community or to the victim. A monadic understanding of promise breaking, for example, would suggest that anyone might take action to rectify the breach—the issue being that *A* broke a promise, rather than that *A* broke a promise to *B*—whereas a bipolar understanding would suggest that the demand for redress belongs to the promisee alone. This question of redressive form is of course a major issue in the law. Third, the possibility of redescribing bipolar claims as monadic ones and vice versa does not undermine the distinctiveness of the two forms. What makes them distinct is not just how the claim is described or expressed, but whether, in *accounting* for, say, Cain’s wrong, we would need finally to say something about Abel (about his dignity, for example, or his value), or in accounting for Eve’s wrong, we would need finally to say something about God (about his divinity, for example, or his authority as moral lawgiver). The issue is what object of moral consideration is explanatorily basic. Fourth, monadic

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62. *Id.* at 338.

63. See Nicholas Wolterstorff, *Does Forgiveness Undermine Justice*, in *GOD AND THE ETHICS OF BELIEF: NEW ESSAYS IN PHILOSOPHY OF RELIGION* 219, 221 (Andrew Dole & Andrew Chignell eds., 2005) (“[O]ne cannot dispense forgiveness hither and yon indiscriminately. Specifically, I can forgive you only if you have wronged me, and only for the wrong you have done me.”).

and bipolar modes of thought are importantly different in emphasis, in what they make salient. That kind of textural change is easy to disregard, but it matters: our moral ideas are part of the material from which we constitute our personalities and our cultures, and the difference between thinking of them as the product of our interlinking with other people and thinking of them as the instantiation of our duties to the abstract law changes who *we* are.<sup>64</sup> Finally, as Thompson argues, the verdict of monadic and bipolar moral judgment may diverge even in one and the same instance—a most striking claim. “If, for example, you are making an unjustly intrusive enquiry, and I tell you a lie in response,” Thompson writes, “it certainly doesn’t seem that *I* wrong *you*. But a lie would cover me with shame nevertheless.”<sup>65</sup> I like to fill this example in with the thought of a Nazi soldier asking a Jew to identify his religion or ethnicity, intending to cart him off to the camps if the answer is “Jewish.” A lie does not wrong the Nazi. But one might be ashamed of it nonetheless.

Something important for victimization purposes happens in Thompson’s explanation of this example. If you mount an unjust inquiry and I lie in response, Thompson says, the account of this moral event would of course have to include you in some sense—you’re part of the story. But you would be, as Thompson memorably puts it, “the occasion, not the victim, of my fall.”<sup>66</sup> This is the first use of the word “victim” in Thompson’s study of wrongdoing, and it is no coincidence that it should be found here, in his explanation of what is missing in a monadic and present in a bipolar normativity. In a monadic normativity, the victim is *always* in some sense incidental—always, at most, just the occasion of one’s fall. Sometimes a monadic wrong may have no victim or no clear victim at all (think again of Eve and the apple). But even where there is a victim, a monadic way of thinking makes that victim incidental to *understanding* the wrong—incidental, that is, to understanding why the wrong was wrong. Consider again the story of Cain and Abel: if the essential thing is that Cain violated a norm against murder, Abel is relevant only in the sense that he was the site at which the norm was violated—he was, like the Nazi lied to, only the occasion of Cain’s fall. But on a bipolar understanding, the essential issue is the violation *of* Abel (of his rights or dignity or personhood, perhaps); the two of them are in a moral relationship (“like the opposing poles of an electrical apparatus”<sup>67</sup>) and the very nature of the wrong has to do with the way in which Cain’s violence trod upon that relationship. In a word, bipolar wrongdoing is *victim-creating*. That is what makes it the substrate of the concept of victimiza-

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64. This understanding of morality as self-constituting comes from CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* (2009).

65. Thompson, *supra* note 54, at 339.

66. *Id.* at 340. The wronged as merely “occasion . . . of my fall” is strongly reminiscent of Moore’s effort to treat victims as mere preconditions for certain kinds of norm violations. See *supra* notes 8-10 and accompanying text; see also *infra* notes 69-72 and accompanying text.

67. Thompson, *supra* note 54, at 335.

tion. And that is why understanding victimization is a theoretical key that can open up the entirety of the interactive approach to crime. To understand victimization is to understand bipolar wrongdoing. And to meet Fletcher's "interesting challenge" of integrating victims into the justification for punishment, to work out any version of Prittwitz's view of crime as an "interaction" between criminal and victim, we need the idea of bipolar wrongdoing; it is the foundation on which the entire edifice, not just the particular concept of victimization, must rest.<sup>68</sup>

Now, there is a great deal of thought about how law works swirling around this monadic/bipolar contrast. Thompson takes the expression "bipolar" from the legal theorist Ernest Weinrib, for whom bipolarity is the molten core of private law.<sup>69</sup> Monadic normativity, meanwhile, is characteristic of public law. In the one case, the claim belongs to the wronged and the architecture of the suit is offender versus victim, with the victim seeking recompense; in the other, the law issues in a "Thou shalt not," and the architecture of the suit is offender against community, with the community insisting that its norm be upheld. Indeed, for Thompson, the very model of "merely monadic normativity" is criminal law. A subsection of his paper is entitled: "Positive Law Encodes our Opposition in the Distinction between Private Law and Criminal Law."<sup>70</sup> He writes: "The verdict of the jury, 'Guilty!', expresses a property of one agent, not a relation of agents. If another agent comes into the matter—if there is, as we say, a 'victim'—it is, so to speak, as raw material in respect of which one might do wrong."<sup>71</sup> Indeed, Thompson goes further, suggesting not only that criminal law *reflects* a monadic form of thought but that criminal law is "the implicit model" for monadic thought—all monadic thought.<sup>72</sup> Criminal law actually becomes, for him, the ground of monadism rather than monadism the ground of criminal law.

And this is where I dissent. Thompson has arrived here at what I earlier called the "dominant view" of criminal justice and associated with Michael Moore.<sup>73</sup> Criminal law on this view is understood as a system committed by its very architecture to monadism—a system in which the victim serves only as the occasion for a norm violation, and in which the essential thing is to uphold and defend the community's norms rather than to vindicate the violations of victims. There are deep structural grounds for this view. And formally it is so. *But*

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68. *See supra* notes 15-17, 26-27, and accompanying text.

69. Thompson, *supra* note 54, at 344 n.18 (citing ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995)).

70. *Id.* at 343.

71. *Id.* at 344.

72. *Id.* at 345. He also argues that a merely monadic normativity is at the heart of deontology (indeed, proposing that his bipolar alternative be considered an alternative to deontology). *Id.* at 338. It follows that criminal law is the implicit model for all deontology.

73. *See supra* notes 7-17 and accompanying text.

*operationally it is not so*, at least not consistently and not in full. Consider, by way of contrast with Thompson's picture, this one from George Fletcher:

As the criminal law has matured in the last few centuries, . . . the movement has been away from paradigms of wrongdoing toward rules laying down the definition of offenses. In all the jurisdictions of the Western world, the legislature has gained the upper hand over the courts. And with legislative dominance has come the method of law-making in which legislatures specialize: formulating rules that define offenses. The violation of state-supported rules has displaced the violation of the victim's interests as the rationale for punishment. . . .

Yet the ancient idea of crime as wrongdoing, as a paradigmatic wrong against a victim, continues to shape the rhetoric of prosecutors and the passions of the public. . . . In modern systems of criminal law we must live with an uneasy accommodation of wrongdoing<sup>74</sup> (the violation of victims'[] interests) and wrongfulness (the violation of rules).

If Thompson, the philosopher, has the better account of bipolar and monadic moral thought, Fletcher, the criminal lawyer, has the better account of the law. For Fletcher, the monadism in criminal law is a historical and institutional phenomenon, not an essential one—and there are chinks in the armor. I agree with that. What I mean to add is that the bipolar aspects of criminal law can sometimes be found in specific and identifiable places, and victimization is one of them.

We are thus now in a position to state this Article's thesis more technically and precisely than was possible at the outset. What I oppose is a merely monadic conception of criminal law. Criminal law is structurally monadic, but it is operationally bipolar in some ways: criminal law in action is drenched in bipolar normativity. Indeed, one way of thinking about my point is that the gap between criminal law and tort law—cousins both conceptually and historically—is not as wide as it is generally taken to be. The private and public systems of redressing wrongdoing do not occupy wholly different universes; victims' place in the normative order of criminal law is too great for that.

#### D. *Vulnerability and Beneficence, Innocence and Justice*

There is one last piece to the philosophical puzzle: bipolar normativity, with its understanding of wrongdoing as fundamentally one person's violation of another, brings the victim back into moral picture, making his or her situation a part of our moral understanding. We can thus start to see why a victim's individual characteristics might matter. But we have so far said nothing about vulnerability or innocence. Bipolar normativity is like the big circle in a Venn diagram, victimization the little circle within it. Within the big circle are other varieties of bipolar normativity, other victim-oriented normative logics, that

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74. FLETCHER, *supra* note 53, at 80.

don't particularly put vulnerability or innocence at stake.<sup>75</sup> I earlier mentioned the special penalties in criminal law for harming political officials (which would seem to turn on concerns for preserving stable government) or the agents of the criminal system (a condition for having a functioning criminal law at all). Some cultures with Confucian moral traditions specially protect parents and ancestors;<sup>76</sup> ancient Greek society specially protected what for them was a near-sacred relationship between guest and host.<sup>77</sup> Bipolar normativity is the philosophical substrate of it all, but we came to that broad moral category in an effort to understand something more specific—namely, the particular form or manifestation of bipolar normativity involved when we respond in a morally distinctive way to predation upon the vulnerable or innocent. Victimization is *one* way in which normative relationships can become distorted or infected—a way with which our moral culture, perhaps due to its Judeo-Christian roots,<sup>78</sup> is markedly concerned. It is this particularity that remains to be explained.

The value driving our concern for innocence, I submit, is our higher-order commitment to just deserts. When one gangster kills another in a turf war, the reason we view the killing as less bad than that gangster killing an innocent bystander is that the murdered bystander is less deserving of his fate than the murdered gangster. That is not to say the murdered gangster deserved to be killed, but it is to say that, comparatively, he was more deserving of it than the bystander. (Perhaps it would be better to say he was less undeserving.) Desert here is a looser concept than it is in academic criminal theory. It is not limited to state punishment for a morally culpable deed in strict proportion to culpability. More basic and more ancient than that refined, academic's conception of desert is the simple insistence that fault be conjoined with a bad fate. And furthermore, "fault" for this substructural desert is a broad enough concept to encompass risk-taking as well as wrongdoing and general deservedness as well as situational deservedness. As compared to the innocent bystander, the murdered

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75. Here again we can see how victimization might open up larger theoretical vistas. See *supra* notes 26-27 and accompanying text.

76. See Damien P. Horgan, *Observations on the South Korean Penal Code*, 3 J. KOR. L., no. 2, 2003, at 139, 155-56 ("Some parts of the [South Korean] Penal Code have retained what can be best described as a latter-day Confucian tone. . . . Among the various forms of homicide there is a special provision for killing one's lineal ascendant or the lineal ascendant of one's spouse. A somewhat similar provision can be found for battery. Likewise, abandonment of a lineal ascendant along with cruelty to or intimidation of a lineal ascendant are crimes." (footnotes omitted)).

77. See BLOOM'S GUIDES: HOMER'S THE ODYSSEY 17-18 (Harold Bloom ed., 2007) ("A second central Dark Age institution [in ancient Greece] is denoted by the Greek word *xenia*, which means 'guest-friendship' or hospitality. . . . It is the closest thing in the world of Homer to an absolute moral mandate. . . . Much of the *Odyssey* concentrates on the fulfillment and perversion of the demands of *xenia*.").

78. *Matthew* 5:5 (King James) ("Blessed are the meek . . ."); FRIEDRICH NIETZSCHE, *On the Genealogy of Morals: A Polemic* (1887), in BASIC WRITINGS OF NIETZSCHE 449, 469-71 (Walter Kaufmann ed. & trans., 2000) (arguing that Judaism and Christianity valorize weakness).



gangster is responsible for his fate because he assumed the risk of violence when he became a gangster and engaged in a turf war. And as compared to the innocent bystander, the murdered gangster earned his fate because being a gangster and engaging in a turf war is wrong. His death is thus, though wrongfully excessive, a quasi-punishment; it shares the most essential feature of punishment, which is not state action (that is a lawyer's fetish), but, in the final analysis, merely the infliction of harm for wrong.<sup>79</sup> Thus the reason predation upon the innocent offends us more than identical predation upon the culpable has to do with the ideal of retributive justice, operating in criminal law as it always does.

There is in this a solution to the puzzle of how the very same act can, depending on the characteristics of the victim, be more or less bad or wrong. The ideal of just deserts is not just a principle of punishment but finally a psychological and even spiritual longing for a world in which happiness is proportioned to virtue.<sup>80</sup> It is the yield of our yearning for a world that is morally under control—a world that, if you only behave properly, won't do you ill. We have a stake, socially, in building such a world. Predation upon the innocent offends that ideal and that goal in a way that the same deed, done against someone who has himself transgressed, does not. Thus the very same act can, depending on the characteristics of the victim, be more or less bad or wrong. It is more or less bad or wrong because the innocence of the victim changes the position of the act with respect to justice.

As to vulnerability, I submit that the value driving our intuitions is what might be called *beneficence*. The key idea is that a vulnerable person's limited capacity to care for himself imposes on others a greater responsibility to care for him—for we have a stake not only in a just universe, but also in a humane one. Any two connected people are put into some sort of a moral relationship from the standpoint of bipolar normativity; a person habituated to justice always takes herself to be “related to others, and as other to others.”<sup>81</sup> But to think all such relationships are exactly the same is a mistake, a failure to take the concreteness of the other into account. It is different, morally, to walk down the street and notice a lost-looking adult and to walk down the street and notice a lost-looking toddler; a different sort of normative current passes between the agents and links them together. Vulnerability thus changes the character of the relationship between two linked persons. It adds a layer to that relationship. To

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79. At its foundations, what separates punishment from merely inflicting harm is not the role of the state but just *what the offender did*. The opposition that matters most is *innocent* versus *guilty*, not *private* versus *state*. No one would prefer a system of state-sponsored criminal law that consistently punished the innocent to a system of private vengeance that consistently punished the guilty.

80. This is the Kantian notion of “the highest good.” IMMANUEL KANT, *Dialectic of Pure Practical Reason* (1788), in PRACTICAL PHILOSOPHY 226-46 (Mary J. Gregor ed. & trans., 1996).

81. Thompson, *supra* note 54, at 337.

walk away from the lost toddler manifests a degree of human indifference that walking away from the lost adult does not.

We can therefore again explain the puzzle of how the same act can be, depending on the characteristics of the victim, more or less bad or wrong. It is more or less bad or wrong because the vulnerability of the victim changes the character of the relationship between victim and victimizer in such a way that the act—the very same act—registers differently with respect to beneficence. And we have a stake, socially, in building a society committed to beneficence.

Just deserts and beneficence are, I think, the two major values at work in the concept of victimization, but there are a few miscellaneous others worth noting. In situations involving general blamelessness or purity—that is, in situations involving *an* innocent—there is something at work analogous to the vulnerable person's need imposing on others a special responsibility to be caring: the innocent's trust puts others under a special responsibility to be trustworthy. The financial advisor who rips off a child has done something morally different, though formally identical, from the financial advisor who rips off a professional investor. The latter merely defrauds; the former both defrauds and exploits. In addition—and old-fashioned an idea as it might be—I think it is still true that we place special value on childlike innocence, that we think of purity as a good just as we think of beauty or knowledge as a good, and as such, innocence calls on us to act in such a way as to protect and preserve it. Thus there is something worse about a deed that shatters innocence as compared to the very same deed where it does not. To rape an adult is to violate a person's sexual self-determination; to rape a child is both to violate a person's sexual self-determination and to take his or her innocence. There is an extra wrong done.

One closing point is in order. I've been applying the concept of victimization chiefly to *acts*; the focus has been on how the same act can be better or worse depending on characteristics of the victim. But it is crucial that the concept applies also to *actors*.<sup>82</sup> Virtue theory is a natural home for the concept of victimization: the person who directs his wrongs against the vulnerable or innocent has a worse character than the one who does not; predation upon the vulnerable or innocent reflects back upon the disposition of the wrongdoer in a particularly vivid and revealing way. And now, having noticed the relationship between innocence and justice, vulnerability and beneficence, we're equipped to see why. One's treatment of the innocent is a measure of one's commitment to the project of building a society based upon justice. Someone who preys upon the innocent has, as it were, launched himself out of that project. Likewise, one's treatment of the vulnerable is a measure of one's commitment to the project of building a society based upon beneficence; to prey upon them is to reject

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82. There's no reason a normative concept shouldn't apply both to acts and to persons. There's no line in the sand between virtue theory and everything else. The concept of being "irrational," for example, can apply to both an act and a person.

that project, to display a soul indifferent to human need. It is to some degree this issue of the offender's character that makes victimization properly *one* concept—a unity—despite the disjunctiveness of its two component parts. (After all, if those two parts were altogether disjunctive, victimization might just be two things.) The unity is not just that the qualities of vulnerability and innocence are often conjoined in the same victim; it is even more that the mind of the person who would prey upon the vulnerable is also the mind of the person who would prey upon the innocent. Perhaps victimization is thus what we mean in criminal law when we speak of “depravity.”<sup>83</sup> It is a mind heedless of all moral limits.

By contrast, think again of Omar, committing acts of robbery for a living, inviting and sometimes involved in violence, yet still a heroic character in the story in which he plays a part. How is that possible? It is possible because, having “never put [his] gun on no citizen,”<sup>84</sup> Omar never turned his back upon the projects of justice or beneficence. We still might not approve. But we do not condemn to the same extent.

## II. THE CONCEPT AT WORK

I take it that the *concept* of victimization is now reasonably clear: it is a moral intuition with a certain internal structure and logic and a prominent place in ordinary moral life. But it is one thing to define a concept philosophically and another thing to show that the concept actually has some life in the law. We transition now to that legal and legal-sociological analysis. The goal is to demonstrate that, as a descriptive matter, American criminal justice is systematically concerned with the phenomenon of victimization. The inquiry is in two halves: the first centered on legal doctrine and the second on social practice.

### A. *Legal Doctrine*

A methodological remark is necessary before we get started. My doctrinal aim is to engage interpretively with penal codes in such a way as to render one of their implicit normative commitments explicit. It is necessary to engage with them interpretively because the codes, though filled to the brim with moral ideas, consist not in direct statements of principle but in definitions of crimes and defenses, requirements of liability, prescriptions of punishment, and the like. There is always a gap between legal command and moral idea, which interpretation fills. So the challenge here is to work backwards from command to idea in a process of normative statutory interpretation—which invites a question: how are we to detect the concept of victimization in a criminal code? How are we to find it?

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83. See *supra* and *infra* notes 5, 6, 36, 92, 115, and accompanying text.

84. See *supra* note 2 and accompanying text.

There are different ways to answer that question, but the one I'll be using is this: imagine you were a legislator inclined to put the concept of victimization to work in a criminal code. What options would be available to you? There are three obvious ones. First, you could break ranks and name the concept explicitly, establishing as law that, given two otherwise identical crimes, the punishment is to be more severe as the "volume" on the victimization knob goes up or less severe as it goes down. But if you don't do that, you'd need a more subtle approach. So, second, you could identify, expressly or by implication, a class of victims who are characteristically vulnerable or innocent and stiffen up penalties for crimes committed against that class. And third, you could identify a class of victims who are characteristically powerful, risk-taking, or culpable and reduce penalties for crimes against them (this you would almost certainly do by implication). The argument below is organized according to these three options. It is an argument of jabs rather than knockout blows, but the overall picture strongly indicates that the concept of victimization is present in criminal doctrine.

### 1. *Naming the concept in doctrine*

That there is anything in this category of "naming the concept in doctrine" should come as a surprise. It's of course possible for a legislature concerned with victimization to just write the concept into the criminal code and pass it into law, but to actually do so is unusually, almost jarringly self-aware and morally transparent. Yet we have in the "Vulnerable Victim" provision of the Federal Sentencing Guidelines an exception to the norm.<sup>85</sup> Perhaps we have it because it was originally the product, not of a legislature directly, but of the Federal Sentencing Commission, and criminal sentencing commissions are supposed to be self-aware and morally transparent, or at least to make something that is so. In any case, the provision appeared with the first edition of the Guidelines in 1987;<sup>86</sup> was clarified and broadened on Congress's express instruction in 1995<sup>87</sup> and again in 1998;<sup>88</sup> and is now a fixture of federal criminal law.

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85. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2012).

86. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (1987).

87. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250003(a), 108 Stat. 1796, 2085 (directing the Sentencing Commission "to review and, if necessary, amend the sentencing guidelines to ensure that victim related adjustments for fraud offenses against older victims" are adequate); U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) cmt. n.2 (1995) (revising the commentary to the Vulnerable Victims provision to effectively broaden the provision's application); U.S. SENTENCING COMM'N, REPORT TO CONGRESS: ADEQUACY OF PENALTIES FOR FRAUD OFFENSES INVOLVING ELDERLY VICTIMS (1995) (reporting to Congress as to the directive).

88. *See* Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, § 6(b)(1), (c)(3), 112 Stat. 520, 521 (directing the Sentencing Commission to provide for "substantially increased penalties" for defrauding the elderly in telemarketing scams and "an additional

In its 2012 form, the Vulnerable Victim enhancement directs sentencing judges to increase an offender's sentence by two levels in any case in which he "knew or should have known that a victim of the offense was a vulnerable victim"—meaning someone who is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."<sup>89</sup> The commentary explains that a handicapped robbery victim or someone sold a fake cancer cure would qualify an offender for the enhancement, while a bank teller, whose exposure to crime was "solely by virtue of the teller's position in a bank," would not.<sup>90</sup> The commentary also instructs that the enhancement is not to be applied where "the factor that makes the person a vulnerable victim" is already incorporated into an offense's specific guideline provision, as when the guideline already enhances the penalty for the very old or very young.<sup>91</sup>

That is a strikingly penetrating rendition of the vulnerability prong of the victimization concept (innocence is missing). The commentary in particular leaves no doubt (not that the main text left much) that vulnerability in the sense we have been using the term is the provision's concern. Courts have caught the flavor of the idea and, in applying the provision, have given voice in the Federal Reporter to aspects of the victimization intuition.<sup>92</sup> The addition of a mens rea term ("knew or should have known") is interesting; it suggests that greater blameworthiness and not merely greater wrongfulness is the enhancement's concern, that the focus should be on the offender and not merely his deed. (I'll pick up on the mens rea suggestion in Part III.C-D.) Also interesting is the exception for sentences that already take into account "the factor that makes the person a vulnerable victim"; this constitutes recognition of the fact that an implicit concern for vulnerability runs throughout Title 18 and the Sentencing Guidelines already, in their many preexisting provisions concerning victim age

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appropriate sentencing enhancement" for defrauding a large number of vulnerable victims of any type and in any context); U.S. SENTENCING GUIDELINES MANUAL § 3A.1.1(b)(2) & cmt. background (stating that the redrafted provision "implements, in a broader form," Congress's directive).

89. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) & cmt. n.2 (italics omitted) (2012).

90. *Id.* § 3A1.1 cmt. n.2.

91. *Id.*

92. *See, e.g.,* United States v. Castellanos, 81 F.3d 108, 111 (9th Cir. 1996) ("[T]he victims to whom § 3A1.1 applies are those who are in need of greater societal protection. They are the persons who, when targeted by a defendant, render the defendant's conduct more criminally depraved." (citation omitted)); United States v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990) (recognizing "the extra measure of criminal depravity which § 3A1.1 intends to more severely punish"). Judge Posner, meanwhile, has explained the enhancement in economic terms:

The "vulnerable victim" sentencing enhancement is intended to reflect the fact that some potential crime victims have a lower than average ability to protect themselves from the criminal. Because criminals incur reduced risks and costs in victimizing such people, a higher than average punishment is necessary to deter the crimes against them.

United States v. Grimes, 173 F.3d 634, 637 (7th Cir. 1999).

and disability and the like. But these are details. The remarkable thing here is that the first Commission, tasked with uncovering the proper principles of offense grading, saw its way to one part of the concept of victimization and simply made that part of the concept into law.

I like this example because it shows that there is at least something to the idea that criminal law exhibits concern for victimization. It remains to show that victimization is systematically part of American law (including with respect to innocence and in state law), but the claim that victimization is present in our law is, given the enhancement, at least not false.

## 2. *Children, the elderly, and the disabled*

### a. *In general*

I argued before that one option available to a legislature with victimization on its mind is to expressly identify certain classes of characteristically innocent or vulnerable victims and prescribe special penalties for crimes committed against members of those classes. I'd like to begin here with a simple point: criminal codes are absolutely chock-full of special provisions for crimes committed against children, the elderly, and the disabled.

What astonishes is the array of examples. We've already seen a few from federal law: penalties go up for dealing drugs to a person under twenty-one,<sup>93</sup> for committing telemarketing fraud against the elderly,<sup>94</sup> or for knowingly committing any crime against "vulnerable victims" (specifically including children, the elderly, and the disabled).<sup>95</sup> Federal law also treats crimes in which a disabled victim was selected because of her disability as hate crimes,<sup>96</sup> as do California, New York, and Texas<sup>97</sup>—the three largest states in the country, and the three I'll focus on here.<sup>98</sup> But these are one-off examples; more striking is

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93. See 21 U.S.C. § 859 (2011).

94. See 18 U.S.C. § 2326.

95. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b).

96. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, div. E, § 4707, 123 Stat. 2190, 2835, 2838-41 (2009) (codified at 18 U.S.C. § 249).

97. CAL. PENAL CODE § 422.55(a)(1) (West 2012); N.Y. PENAL LAW § 485.05(1)(a) (McKinney 2013); TEX. PENAL CODE ANN. § 12.47(a) (West 2011). Texas's section 12.47 must be read against section 22.04 of the Texas Penal Code, lest section 12.47 appear to except assaults against the disabled from the hate crimes enhancement. In fact, section 22.04 independently provides for enhanced punishments against those who assault the disabled—the enhancement is essentially built into it—and section 12.47 (in conjunction with TEX. CODE CRIM. PROC. ANN. art. 42.014) extends the enhancement to other crimes against the disabled as well.

98. In trying to generalize about American criminal law, one challenge is to manage the fact that we have at least fifty-two jurisdictions making law. There are those who say that one cannot speak of *American* criminal law at all under these circumstances, that there is no such thing. See, e.g., David Garland, *The Peculiar Forms of American Capital Punishment*,

to work systematically through a state's crimes against the person looking for special reference to one or all of our three victim groups.

In Texas, for example, a murder becomes death penalty eligible if the victim is under age ten.<sup>99</sup> Unlawful restraint becomes a felony if the victim is under age seventeen.<sup>100</sup> Assaults that are otherwise Class C misdemeanors become Class A misdemeanors where the victim is elderly or disabled.<sup>101</sup> In fact, Texas has a special type of assault—delineated by its own independent subdivision, making it formally its own crime—precisely for offenders who cause injury to “a child, elderly individual, or disabled individual,” and no other group; intentional assaults against these victims count as first-, second-, or third-degree felonies.<sup>102</sup> Abandonment of children or leaving them in vehicles is specially criminalized.<sup>103</sup> Of course there is the array of sex crimes involving children, including sexually based human trafficking (which becomes a felony of the first degree if the victim is under age eighteen, equivalent to human trafficking of adults that results in death);<sup>104</sup> continuous sexual abuse of a child (which in especially serious cases receives a harsher penalty than virtually any other crime except capital murder);<sup>105</sup> indecency with a child;<sup>106</sup> improper relationship between educator and student;<sup>107</sup> and sexual assault upon a child,<sup>108</sup> which becomes aggravated sexual assault if the child is younger than fourteen (and which also carries some of the harshest penalties in the code).<sup>109</sup> The special provisions governing sex have a good deal to say about the elderly and disabled as well. It is, for example, sexual assault to have sex with someone with a serious mental disability,<sup>110</sup> and not only does sexual assault become aggravated

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74 SOC. RES. 435, 437 (2007) (“America is not a single place for penological purposes, any more than is ‘Europe’ or ‘the West.’”). I think that view is too strong, but it's true that too big a sample of jurisdictions is burdensome and too small a sample unreliable. My approach here is simply to survey the law of the three largest American states, which also happen to be a nice mix of regional cultures, political histories, and penal codes (California's being more or less common law based, and New York's and Texas's more or less MPC based).

99. TEX. PENAL CODE ANN. § 19.03(a)(8), (b).

100. *Id.* § 20.02(c)(1).

101. *Id.* § 22.01(c)(1).

102. *Id.* § 22.04.

103. *Id.* §§ 22.041, 22.10.

104. *Id.* § 20A.02.

105. *Id.* § 21.02 (making continuous sexual abuse of a child a first-degree felony punishable by a minimum term of twenty-five years). In contrast, murder is a first-degree felony punishable by a minimum term of five years. *Id.* §§ 12.32, 19.02.

106. *Id.* § 21.11.

107. *Id.* § 21.12.

108. *Id.* § 22.011(a)(2).

109. *Id.* § 22.021(a)(1)(B), (a)(2)(B), (e)-(f) (making all aggravated sexual assaults first-degree felonies—typically punishable by a minimum term of five years—and certain aggravated sexual assaults upon children punishable by a minimum term of twenty-five years, as when the child is under six years of age or a child under fourteen years of age is subjected to violence).

110. *Id.* § 22.011(b)(4).

ed where the victim is a child, but also where the victim is disabled or (perhaps surprisingly) elderly.<sup>111</sup>

There aren't that many offenses against the person; the list just given is comprehensive. There is in Texas no category of offense against the person without special provisions for one or more of our three victim groups. Furthermore, the pattern seems to hold if one looks past the category of crimes against the person (fraud, for example, is specially criminalized where the victim is a "child, elderly individual, or disabled individual"<sup>112</sup>) and past Texas. It might, in fact, be even more pronounced in California.<sup>113</sup>

What we are seeing here is a systematic assertion by our criminal law that it is worse to commit a crime against children, the elderly, or the disabled than it is to do precisely the same thing with precisely the same kind of intent to an ordinarily situated adult. The assertion is so pronounced as to be counted among the features of American criminal law properly considered basic. And it should be seen as a puzzling feature of the law. Some might regard it as obvious that there is something worse about assaulting or kidnapping or killing a child than committing that same crime against an able-bodied adult, but that is a mistake; just because something is intuitive does not make it obvious. *Why* should committing the same prohibited act with the same prohibited mental state count differently in the moral scales because the victim is very young, or very old, or in a wheelchair? Two people are raped; one is an adult, the other a child. We feel there is a difference. According to our law, there is a difference. But what is the ground of the difference? There is no extant conceptualization of the pattern, and lacking that conceptualization, even the bare fact of the pattern seems to have been overlooked. The world is hard to see until we have the concepts we need to see it. Perhaps the most basic contention of this Article is simply that a phenomenon this pronounced calls for explanation.

The concept of victimization has explanatory power here. An adequate explanation for the differential treatment afforded children, the elderly, and the disabled in criminal law, especially where it affords special treatment to them as a set, should track some feature these three groups share in common. What could that common feature be if not a victim characteristic of some sort, and what characteristic do these victims share if not their vulnerability and, with respect to the mentally immature, diminished, or disabled, their innocence? The victimization concept also has intuitive power here. If we imagine crimes in which children, for example, are beaten, raped, or exploited, and hold up to introspective view the type of outrage we feel in response—an exercise legisla-

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111. *Id.* § 22.021(a)(2)(c).

112. *Id.* § 32.53.

113. *See, e.g.*, CAL. PENAL CODE § 208(b) (raising the penalties for kidnapping where the victim is a child); *id.* § 236.1(c) (expanding the definition of human trafficking where the victim is a child and raising the penalties where the victim is a child and force or fraud is employed); *id.* § 237(b) (raising the penalties for false imprisonment where the victim is elderly); *id.* § 243.25 (raising the penalties for battery where the victim is elderly).



tors must engage in when they establish criminal law—an instinct for vulnerability and innocence is, I submit, what we’ll find. Really, when the law goes so far as to name three classes of victims like these three and establishes a series of exceptional penalties for harming them, the concept of victimization is a very natural explanation. Perhaps the case is not as clear as the “vulnerable victim” enhancement, but the interpretive gap here between legal command and moral idea is not a large one.

b. *Child sex*

Let’s zero in on one aspect of the legislative scheme more closely. Within the variety of special criminal protections for our three victim groups, a large proportion has to do with sexual crimes involving children. And within that body of law, the central place goes to the crime of having sex with a minor—statutory rape as it is often called for older children and child rape for younger ones (though the terms are variously used). Statutory or child rape is the paradigmatic victimization crime, the first, most obvious, and most powerful example when we think of criminal law extending special protection to the vulnerable or innocent. It was for engaging in sex with young children that six state legislatures sought to extend the death penalty to nonhomicide crimes despite unfavorable Supreme Court precedent,<sup>114</sup> and when the Supreme Court struck down those statutes as cruel and unusual, the controversy centered on innocence and vulnerability to a considerable degree.<sup>115</sup> So let’s examine more closely the statutes governing this form of wrongful sex.

There is a conventional story about why sex with children is criminal that does not give special weight to children’s innocence or vulnerability. The conventional story holds that the ordinary logic of rape is that it is sex without consent; children can’t consent; therefore sex with children constitutes rape.<sup>116</sup>

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114. See *Kennedy v. Louisiana*, 554 U.S. 407, 422-23 (2008).

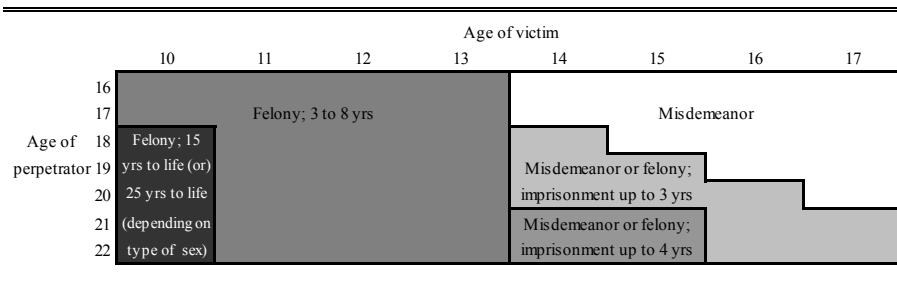
115. The dissenters, for example, argued that “in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.” *Id.* at 467 (Alito, J., dissenting). They also quoted the claim (from an article tellingly titled *Murdering Innocence*) that “[t]he immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.” *Id.* at 468 (emphasis added) (quoting Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 208-09 (2003)) (internal quotation marks omitted).

116. See, e.g., 2 LAFAVE, *supra* note 12, § 17.4, at 638-39 (“[S]ometimes nonconsent is conclusively presumed because of the victim’s age, as with what is commonly called ‘statutory rape.’”); SAMUEL H. PILLSBURY, *HOW CRIMINAL LAW WORKS: A CONCEPTUAL AND PRACTICAL GUIDE* 258 (2009) (“In all jurisdictions, age sets one important limit on sexual consent. Any person under the jurisdiction’s legal age of consent is legally incapable of consenting to certain sexual acts . . . .”); PODGOR ET AL., *supra* note 14, at 164-65 (“The rationale for the crime is that those under a specified age are incapable of making a reasoned decision to have sexual relations.”).

What is distinctive about children on this account, what leads to their special legislative treatment, isn't their innocence or vulnerability, but their reduced agency. Yet this story, however reasonable in principle, does not hold up when one actually looks at the penal codes. Consent alone cannot be driving the doctrine.

The California Penal Code, for example, defines rape as sex without consent, where the lack of consent is due to force, threats, unconsciousness, etc., and the punishment is three to eight years.<sup>117</sup> Now, if the usual theory of statutory and child rape were right, it would be easy to imagine the statute. It would simply include minority among the other factors that vitiate consent and prescribe the usual punishment: three to eight years. But that is not how the statutory scheme works. Statutory and child rape in California is generally either not as bad as adult rape or much worse (see Figure 1, below). The same is true in New York (see Figure 2) and Texas (see Figure 3).

FIGURE 1  
California<sup>118</sup>



117. CAL. PENAL CODE §§ 261, 264(a).

118. *Id.* §§ 261.5(a)-(d), 288(a), 288.7(a)-(b). This chart contains some simplifying assumptions, as California's statutory scheme governing child sex is exceedingly complicated. First, I elide California's distinctions between different kinds of sexual contact; the chart takes up all forms of sexual contact together. Second, I do not indicate instances of statutory overlap that allow prosecutors to select from among different charges. Third, I focus only on crimes for which minority *makes* the sex criminal, turning what would otherwise be consensual, legal sex (if it were to take place between adults) into criminal sex because it takes place with a child. That, after all, is the issue here: explaining *why* minority makes otherwise legal sex criminal. But for clarity's sake, it's worth noting that minority plays a second role in California's sex crimes provisions, functioning as an aggravator where the sex in question would be criminal in any case. Thus the three- to eight-year sentence for adult victims of forcible rape becomes seven to eleven years where the victim is a midrange teenager (fourteen to seventeen years old); nine to thirteen years where the victim is a young child (thirteen years old or less); and fifteen years to life where the victim is a young child (thirteen years old or less) and the offender is at least seven years older than the victim. *Id.* §§ 264(a), (c)(1)-(2), 269(a)-(b); *see also* § 289(a)(1)(A)-(C). Effectively, these provisions reproduce in a second context the same pattern of moral concern displayed in the chart—distinguishing between children of different ages and attending to the age gap between offender and victim.

FIGURE 2  
New York<sup>119</sup>

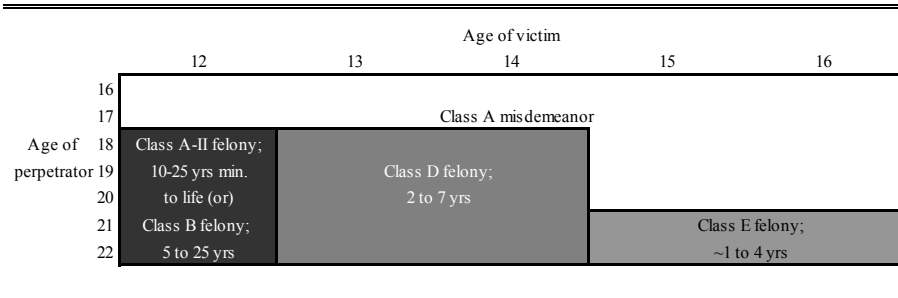
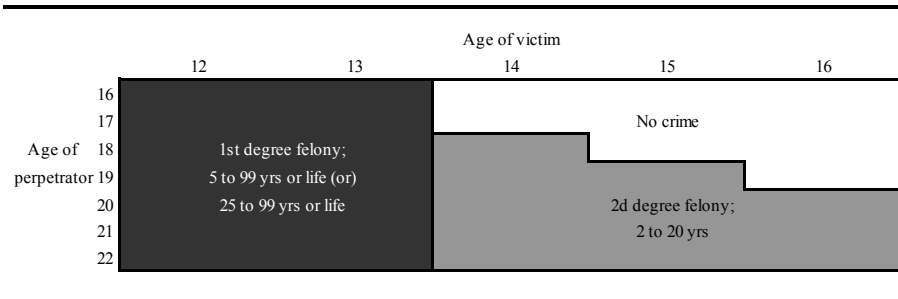


FIGURE 3  
Texas<sup>120</sup>



Three features of these statutory schemes stand out. First, nonforcible sex with a young child (twelve or thirteen or younger) is typically subject to harsher penalties than adult forcible rape. Second, nonforcible sex with a midrange teenager (thirteen or fourteen to seventeen or eighteen) is typically subject to milder penalties than adult forcible rape. Third, the gap between the age of the offender and the age of the victim typically matters.<sup>121</sup> It is these three facts that the conventional story, focusing exclusively on consent, cannot explain.

119. N.Y. PENAL LAW §§ 70.00-.02, 130.05(3)(a), 130.20-.50, 130.96 (McKinney 2013); *see also id.* § 70.07. Adult forcible rape, by contrast, is a Class B felony carrying a five- to twenty-five-year sentence. *Id.* §§ 70.00-.02, 130.35, 130.50.

120. TEX. PENAL CODE ANN. §§ 12.32-.33, 22.011(a)(2), (c)(1), (e)-(f), 22.021(a)(1)(B), (a)(2)(B), (b)(1), (e)-(f) (West 2011). The alternative minimum of twenty-five years applies where the victim is either extremely young (under six years of age) or where the victim is very young (under fourteen years of age) and injured, threatened, etc. *See id.* § 22.021(a)(2)(A), (f). Adult forcible rape, by contrast, is a second degree felony carrying a two- to twenty-year sentence. *Id.* §§ 12.33, 22.011(a)(1), (b)(1).

121. Some jurisdictions don't have an age gap requirement ("Romeo and Juliet laws," as they're called). Two children of the same age who have sex can both potentially be prosecuted for rape.

To start with, if consent were the only issue, and if a fifteen- or sixteen-year-old cannot consent, why should sex with them be treated more mildly than other nonconsenting sex—than adult forcible rape? Perhaps consent theorists might try to stand their ground in these cases by proposing some notion of partial or impaired consent. But then, second, why should sex with very young children be treated more severely than ordinary rape? It's true that young children cannot consent to sex, but it's not as though they consent *even less* than the adult who is dragged kicking and screaming from a parking lot. Both the adult and the young child *do not consent at all*—yet the penalties are different. And finally, if consent were the only issue, why should it matter whether the offender is forty years old or just eighteen himself? Why should age gaps matter? If a sixteen-year-old is incapable of consent, he or she is equally incapable of consent either way.

The concept of victimization can explain here what the concept of consent cannot. Begin with the very fact of drawing lines between victims of different ages where all of them are below the putative “age of consent.” That there are degrees of wrongfulness in this doctrinal area makes perfect sense on a victimization model because, as discussed above, victimization is an analog concept: a person can be *more or less* vulnerable or innocent, and consequently *more or less* victimized. And of course, children are more innocent and vulnerable when they are younger.

Next, consider the sharp line all three jurisdictions draw around age thirteen. There's a jump there in the doctrine; we see sudden, not stepwise, variation in the severity of wrongdoing and punishment. But of course, there's a jump there in terms of human development, too. The line that the law is drawing is the line demarcating adolescence. On one side of that line is genuine childhood, and on the other, the liminal space between childhood and adulthood; with the first, we have a stage of development that is at least relatively presexual, and with the second, a stage of development that we expect to be one of sexual awakening. With adolescents, we want the passage into adult sexuality to be a healthy one, and we worry that it might be distorted by some bad experience, some manipulation by an older person. With young children, we don't want that passage to occur yet at all, and we react to its occurrence as if something has been not just distorted but lost or destroyed. This difference also affects how we look at the offender. A forty-year-old man who is attracted to sixteen-year-old girls or boys had better watch himself, but he is not deviant in the sense of feeling sexual attraction to a kind of person that is not supposed to have a sexual presence. A forty-year-old man who is attracted to eight-year-old girls or boys *is* deviant in that sense, precisely because he feels sexual attraction to a kind of person that is not supposed to arouse sexual feelings.<sup>122</sup> The issues

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122. Psychiatrists and psychologists distinguish *pedophilia* (sexual attraction to young children) and *ephebophilia* (sexual attraction to teenagers). Only the first is categorized as a

here are connected to both vulnerability and innocence, but I think pride of place in this case goes to innocence: youth and sexuality, and in particular the concept of virginity, are bound up in our culture with the idea of innocence.

Finally, what about the law's insistence on an age gap between offender and victim? Here, the key is victimization's relational character, its yoking together of wronged and wrongdoer in a moral relationship "like the opposing poles of an electrical apparatus: . . . an arc of normative current . . . passing between."<sup>123</sup> Where there is victimization, there must not only be one person in a position of vulnerability or innocence, but also another in a position of relative power and worldliness; there must be a *preying upon*. And there is no preying upon without an age gap. If two seven-year-olds have sex, we might think something has gone wrong socially, but we wouldn't ordinarily think of the problem as one of predation (or the logic would be that each preyed upon the other!). But if a forty-year-old has sex with a seven-year-old, there is predation. The difference in the two cases turns neither on the age of the victim alone nor on the age of the offender alone, but on the relationship between those two ages. Age gap requirements are necessarily relational, insisting on certain *relative* positions between wrongdoer and wronged—just as the logic of victimization would suggest.

Thus I suggest a new understanding of the wrong at issue in child sex. I do not claim that consent is irrelevant, but I do claim that it is secondary. The core of the wrong is not chiefly *nonconsensual* sex but *predatory* sex; it is preying sexually upon vulnerability or innocence. For what we see in this area of doctrine is a complex arrangement of both relational and absolute age requirements that cannot be explained on the basis of consent alone. Victims must be below some ceiling—eighteen in California, seventeen in Texas and New York—to be subject to predation on account of their innocence or vulnerability; this is the so-called "age of consent," and it turns on the victim alone. Offenders must of course be above some floor to be criminally responsible at all; this concerns familiar norms regarding child offenders (rather than child victims) and it turns on the offender alone. But provided those absolute requirements are satisfied, we begin a complex bipolar dance where criminality shifts as certain relational and threshold ages on both sides are passed. The numbers in all three jurisdictions are constantly in motion, and the logic of it will elude any analysis in terms of offender or victim alone. But the patterns are perfectly logical: the numbers are moving in tandem, tracing out the concept of victimization with such clarity of focus that it is startling to see. I have not cast this analysis in terms of legislative intent; the interest has been in the normative logic of the law, not the psychological motivations of the lawmakers. But in this case, the victimization concept is written into the law so precisely that I find it hard not

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disorder. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.2 (4th ed., text rev. 2000).

123. See Thompson, *supra* note 54, at 335.

to believe that the legislatures had the concept in mind—consciously, unconsciously, or semiconsciously.<sup>124</sup> The normative logic of the law seems too strong to be explained in any other way.

### 3. *Combatants and adulterers*

The concept of victimization not only extends concern to the vulnerable or innocent but also, as discussed above, withdraws it from the culpable.<sup>125</sup> We've been examining the first part of that equation. Let's turn now to the second: reduced penalties for those whose victims have themselves transgressed.

This is an uncomfortable business for legislatures. Without running directly afoul of our sense of equality, they can safely and explicitly protect certain victim classes, but it would be awkward indeed for a legislature to declare in a penal code that, say, robbery or rape are to be downgraded to misdemeanors when the victims are drug dealers or prostitutes. That sort of downgrading tends to show up in the practice of criminal law rather than the doctrine,<sup>126</sup> and to the extent there are legislative exceptions, they tend to be subtle and ambiguous.<sup>127</sup> But there is one major exception: the doctrine of provocation in homicide—that is, voluntary manslaughter.

Voluntary manslaughter in American law today is a moving target, caught between the competing rationales and doctrinal formulations of the common law and the Model Penal Code.<sup>128</sup> The common law version still makes up the core of the doctrine in the vast majority of states<sup>129</sup>: “The traditional common law formulation . . . defines voluntary manslaughter as a killing that is commit-

124. Others have focused on the historical motivations of legislatures in criminalizing child sex, and have come to conclusions supportive of mine. *See, e.g.*, Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 *BUFF. CRIM. L. REV.* 691, 778-79 (2003) (describing the nineteenth-century effort to raise the age of consent for young women as having “little to do with violation of their sexual autonomy” but rather “the ‘ruination’ of their character, the loss of chastity itself” at the hands of “that omnipresent figure . . . , the lustful man, . . . ready to prey on the vulnerability of the morally unformed and latently lustful girl”).

125. *See supra* notes 39-40 and accompanying text.

126. *See infra* Part II.B.

127. For example, when California declares that it is a crime to entice an “unmarried female, of previous chaste character, under the age of 18 years,” for “the purpose of prostitution” or “illicit carnal connection,” it is not clear whether to interpret the provision as extending special concern to a class of putative innocents (the “chaste”) or as removing it from another class of putative non-innocents (the “unchaste”). *See CAL. PENAL CODE* § 266 (West 2012).

128. *See Kahan & Nussbaum, supra* note 49, at 305-23; *see also* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331 (1997).

129. Depending on how one counts, roughly ten states currently make use of the Model Penal Code's version of the doctrine, in whole or in part. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 418 (7th ed. 2001).

ted in the ‘heat of passion’ produced by an ‘adequate provocation,’ and that occurs without sufficient ‘cooling time.’”<sup>130</sup> Essential to the common law conception is that the provocation is legally adequate only where it falls into certain categories—chiefly the “nineteenth century four” of “adultery, mutual combat, false arrest, and a violent assault.”<sup>131</sup> Also essential, the victim must be the source of the provocation; the defendant cannot benefit from the doctrine if she lashes out at some third party.<sup>132</sup> And most important of all, the claim is not a complete defense. It mitigates the charge and penalty, but unlike, say, a successful claim of self-defense, it does not exculpate. Part of the puzzle in this area of law is explaining why a provoked killing should be *less* wrongful than an unprovoked one without thereby becoming *non*wrongful.<sup>133</sup>

The elements of this doctrine make sense on a victimization model. To begin with, each of the categories of adequate provocation, of the “nineteenth century four,” turns on some transgression on the part of the victim.<sup>134</sup> The two great images in this body of law—the cheating spouse and the barroom brawl—are images of culpability and aggression, the one a betrayal and the other combat. Furthermore, if it is the *victim’s* transgression that mitigates the wrongfulness of the killing, as a victimization model would hold, it makes sense that the doctrine is only available for killing the victim-transgressor and not a third party—for the third party is not culpable, however understandably enraged the defendant may be. And finally, the partial, merely mitigating (rather than exculpating) character of the defense also fits, since victimization is itself a more-or-less phenomenon, one that typically increases or reduces wrongfulness rather than creating or eliminating it.

More difficult to explain via the concept of victimization are the related requirements that the defendant actually have been in the grip of passion at the moment of his crime and that a reasonable person would not have cooled off in the time between provocation and response. Now, in its earliest history, voluntary manslaughter did not (or did not clearly) require passionate action: provocation was mitigation, full stop.<sup>135</sup> But that changed fairly early in the doctrine’s development, and, while a requirement of understandable, overpowering passion is not inconsistent with the concept of victimization, it is not suggested by it either. (On a victimization model, crimes against culpable victims are of

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130. Kahan & Nussbaum, *supra* note 49, at 305.

131. Nourse, *supra* note 128, at 1341 (internal quotation marks omitted).

132. Kahan & Nussbaum, *supra* note 49, at 306.

133. *See id.* at 312-13.

134. *See* JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 25 (1992) (arguing that what links the four categories together is the victim-provoker’s transgression upon the defendant’s honor); A.J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 293-94 (1976) (arguing that the link is the “unlawfulness” of the victim-provoker’s conduct). *But see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 4.2, at 245 (2000) (“[T]he fact that it is the victim who typically strikes the accused before he is killed can mislead one to think that the rationale for provocation is the victim’s contribution to his own death.”).

135. *See* HORDER, *supra* note 134, at 23-24.

reduced wrongfulness even if dispassionately committed—as when Omar robs drug dealers. Passion is an orthogonal issue.) My view here is simply that voluntary manslaughter under the common law is a hybrid: on the one hand, there must be victim culpability, and on the other, there must be a sudden, passionate response. The first is the concept of victimization at work; the second is something else—perhaps mercy for a reasonable loss of self-control (as Hart would have it<sup>136</sup>) or an evaluatively laden judgment of virtuous emotion (as Kahan and Nussbaum argue<sup>137</sup>). There is a major scholarly and practical dispute over how best to understand the passionate elements of voluntary manslaughter, but I am not invested in that dispute so long as the element of passion does not push aside the element of victim transgression. The concept of victimization is a necessary part of explaining the common law doctrine of voluntary manslaughter; it does not have to be a sufficient explanation for the doctrine as well.

The Model Penal Code reformulation of the doctrine, however, largely does away with the victim transgression element of that hybrid, reducing what would otherwise be murder to manslaughter whenever “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse,” where reasonableness is to be judged “from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”<sup>138</sup> This is a psychologization of the doctrine, focusing on the capacity of extraordinary situations to deprive ordinary people of self-control,<sup>139</sup> and it allows the defendant to get the benefit of the charge reduction even where she was not provoked by a wrong, or did not confine her response to the wrongdoer, or both.<sup>140</sup> Insofar as the doctrine takes this path, it becomes wholly a defense of excuse rather than justification, and the concept of victimization is not an important part of its explanation.

Yet what is most notable about the MPC version of voluntary manslaughter is how few states have taken its path. Of the roughly fourteen to try it, four “returned to common law formulations after a brief experience with the Model Penal Code.”<sup>141</sup> As Kahan and Nussbaum remark: “The career of the Model Penal Code formulation has not been a particularly happy one. . . . Consumers of legal doctrine, at least, clearly prefer the evaluative position of the common law.”<sup>142</sup> Furthermore, even in the states that have gone the MPC route, an empirical examination of the voluntary manslaughter claims that reach juries show

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136. See H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY 28, 33 (2d ed. 2008) (suggesting “that men are capable of self-control when confronted with an open till but not when confronted with a wife in adultery”).

137. See Kahan & Nussbaum, *supra* note 49, at 314-18.

138. MODEL PENAL CODE § 210.3(1)(b) (1980).

139. *Id.* § 210.3 cmt. 5(a).

140. *Id.*

141. KADISH & SCHULHOFER, *supra* note 129, at 418.

142. Kahan & Nussbaum, *supra* note 49, at 323.



that victim wrongdoing has resurfaced in practice.<sup>143</sup> Extreme emotional disturbance under the MPC must be at least subjectively reasonable. On that basis, judges have barred claims from reaching juries where grounded in mere insults from friends or employers and permitted claims to reach juries where (as always) grounded in situations of combat or intimate betrayal.<sup>144</sup> Nourse speaks to the intimate side of that equation: “In the end, our judgments about ‘passion’ turn on the equities of intimacy and loyalty. Defendants regularly portray their partners as the wrongdoers in the relationship, as the cheaters who heartlessly left.”<sup>145</sup> That is not to say that the MPC changes nothing. In those states that have taken the MPC approach, a broader, less evaluatively constrained set of claims makes it to juries than once did under the common law. But the victimization elements of the doctrine have not been wholly eliminated even in the relatively few states that have gone in the MPC’s direction.

In fact, the most striking evidence of victimization’s power in this body of law is its stickiness in those states that have gone *partly* down the MPC’s path. In Texas, for example, the legislature recently struck its voluntary manslaughter provision altogether, while adding a clause to its murder statute allowing a defendant to argue, at the punishment stage of trial, that “he caused the death under the immediate influence of sudden passion arising from an adequate cause.”<sup>146</sup> But if one then checks the definition of “sudden passion,” one sees that it must be passion “arising out of *provocation by the individual killed*”<sup>147</sup>—the old victim transgression requirement, here in a slick new MPC context. California’s voluntary manslaughter statute requires only “unlawful killing . . . upon a sudden quarrel or heat of passion.”<sup>148</sup> That too has an MPC ring to it, and California is ordinarily classified as a “mixed” MPC/common law state on this issue.<sup>149</sup> But California courts have required provocation nonetheless, and required it specifically from the victim.<sup>150</sup> Voluntary manslaughter in America, despite the MPC, overwhelmingly still follows the logic of victimization.

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143. See Nourse, *supra* note 128, at 1345-51 (examining a dataset of all “intimate homicide” provocation cases in all MPC jurisdictions over a fifteen-year period and comparing it to equivalent datasets from common law and “mixed” jurisdictions).

144. *Id.* at 1367-68, 1375-76.

145. *Id.* at 1379.

146. TEX. PENAL CODE ANN. § 19.02(d) (West 2011); see also 1993 Tex. Gen. Laws 3614 (amending TEX. PENAL CODE ANN. § 19.04).

147. TEX. PENAL CODE ANN. § 19.02(a)(2) (emphasis added). The statute adds that the provocation can also come from an individual “acting with the person killed,” but as the “acting with” language makes clear, this too is a form of the victim transgression requirement. *Id.*

148. CAL. PENAL CODE § 192(a) (West 2012).

149. See, e.g., Nourse, *supra* note 128, app. A at 1413-14.

150. See, e.g., *People v. Steele*, 47 P.3d 225, 239-40 (Cal. 2002).

## B. *Social Practice*

We turn now from legal doctrine to social practice. The goal here is to treat the victimization concept as a hypothesis and test it empirically, and again a methodological note is necessary at the outset. Legislatures and judges leave behind a body of written material that lawyers are trained to interpret. But to study the output of police and capital juries—the institutional focal points here—we need the quantitative and qualitative techniques of social science; we need empirical studies of whether police and juries respond to the vulnerability or innocence of victims. And therein lies a problem. It is not that victims' vulnerability and innocence are unmeasurable; one could, for example, investigate whether police and juries respond differently to crimes based on *victims'* (not offenders') criminal histories, victims' activities immediately before being killed, or even victims' physical positions when killed (e.g., kneeling, tied up, or lying prone, as in a coup de grace). And the problem is not a shortage of empirical studies as to how police and juries do their jobs; the literature on those matters is considerable. The problem is that, victimization being a novel conceptual proposal, few if any of the existing empirical studies measure what a victimization theorist would take to be the relevant factors.

There is a deep empirical issue here. If our quantitative studies are going to teach us the right lessons about the world, we have to know what to count, and knowing what to count is a conceptual matter. Thus the extant studies of police and juries typically overlook what for a victimization theorist would be the crucial matters in favor of a small set of factors that are both easily counted and conventionally relevant (e.g., various offender characteristics and, if anything for victims, most often race). Even in the rare cases in which the right factors are measured, they are often measured under the wrong conceptual heading (such as victims' "social status"<sup>151</sup>), and thus the studies typically don't include the right controls or make optimal distinctions. (A wealthy, middle-aged professional might be high social status but low victimization, for example.)<sup>152</sup> There is, in sum, a shortage of direct, on-point empirical studies that could put the victimization hypothesis to the test.

In light of these difficulties, my approach will be to synthesize some of the existing empirical work under a victimization heading. There are various second-best proxies for victimization that can nonetheless tell us something about what moves police and juries, such as whether victims were very young or very old, whether they were involved with drugs or alcohol, whether they were members of gangs or otherwise criminally involved—and also whether they were men or women. Gender is an extremely complex and normatively problematic part of the victimization story.<sup>153</sup> On the one hand, there is an ingrained

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151. *See infra* notes 193-194 and accompanying text.

152. *See id.*

153. I take up these issues at length in Part III.C, below.

stereotype, encoded in ideas of masculinity and femininity that continue to play a prominent role in society's practices (especially its unexamined practices), that regards women as characteristically more vulnerable and innocent than men. This would suggest that gender, like age, could serve as a crude proxy for victimization in interpreting empirical findings. On the other hand, there are gender currents pulling in the opposite direction: women in abusive relationships or other intimate contexts, "fast" women, and prostitutes are often stereotyped as noninnocents.<sup>154</sup> Gender is therefore an ambiguous proxy for victimization in the empirical literature, important to explore but, absent appropriate controls, unclear in its yield.

The results of this synthesis, though unavoidably tentative, will provide suggestive evidence of the victimization thesis. And there's a silver lining in these empirical difficulties: if the concept of victimization has any plausibility at all, there's new social science to be done. Do prosecutors respond to victimization? Do judges? The public, the press, or criminals themselves? Can the material on police and capital juries discussed below be improved upon? Kant is said to have remarked, "Concepts without experience are empty, experience without concepts is blind."<sup>155</sup> The empirical world will slip through our fingers to the extent we lack the concepts with which to interpret it, no matter how many studies we do. And if that is true, it in turn suggests that philosophers and social scientists have good work to do together, for philosophy is uniquely occupied with clarifying, defining, and proposing concepts, and social science is uniquely equipped to test whether those concepts describe events in the social world.<sup>156</sup>

### 1. *Police*

My argument regarding police is simply this: scarcity of resources means that police cannot give unlimited attention to every case and therefore cannot but rank crimes. They prioritize. Homicides outrank petty theft, bank robberies outrank ordinary robberies, assaults that cause serious injury outrank assaults that cause minor injury, and so on. The principles at work in these judgments

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154. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986) ("I learned, much later, that I had 'really' been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are 'asking for it,' and get what they deserve.").

155. The aphorism seems to be, if not exactly apocryphal, an imprecise but accessible (and not substantively misleading) translation of what Kant actually said, which, better translated, would be: "Thoughts without content are empty, intuitions without concepts are blind." IMMANUEL KANT, *CRITIQUE OF PURE REASON* 193-94 (Paul Guyer and Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1781).

156. See Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. ONLINE 293, 306 (2011), <http://www.yalelawjournal.org/images/pdfs/1029.pdf> ("It is not unusual for the office of philosophy to be teeing up the right empirical question. This is one of those times.").

are sometimes established by policy and sometimes intuitive and implicit; a general understanding of the importance of the right violated, the magnitude of the violation, the social cost of the type of crime in question, and other considerations are all in play. My claim here is that one important prioritization principle, especially within a fixed category of crime, is victimization. I'll make both a qualitative and a quantitative argument for this claim, focusing on within-category prioritizations of homicide.

a. *Qualitative evidence*

Not all homicides are created equal. As David Simon's journalistic study of a year in the life of the Baltimore homicide unit (which Peter Manning has called "arguably the finest available treatise on detectives"<sup>157</sup>) shows, a homicide detective

labor[s] in anonymity over some bludgeoned prostitute or shot-to-shit narcotics trafficker until one day the phone bleats twice and the body on the ground is that of an eleven-year-old girl, an all-city athlete, a retired priest, or some out-of-state tourist who wandered into the projects with a Nikon around his neck.

Red balls. Murders that matter.<sup>158</sup>

The point can't be made much more forcefully than that. The six hundred pages of near-daily, diary-like narration in Simon's book would become unintelligible without these distinctions of priority, and indeed the very term "red ball" demonstrates that such distinctions are so much a part of Baltimore's ordinary police culture as to have found a place in that culture's language. Simon also shows that what it means functionally for a case to be a red ball is that the police devote disproportionate resources to it, putting in (and paying for) "twenty-hour days," "constant reports to the entire chain of command," and sometimes even "a special detail, with detectives pulled out of the regular rotation and other cases put on indefinite hold."<sup>159</sup> The policy in such cases is all hands on deck: "by definition, a red ball requires every warm body."<sup>160</sup>

So what makes a homicide a red ball? Simon is not one to venture a definition—theorizing is not his style—but his examples fall into three categories: politically sensitive murders (i.e., murders that catch political or press attention, typically because they embarrass the city or threaten tourism),<sup>161</sup> killings of or by police,<sup>162</sup> and the murder of children.<sup>163</sup> The first two categories likely turn

157. Peter K. Manning, *Politics and Metaphors in Police Studies*, 9 SOC. F. 673, 673 (1994) (book review).

158. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 20 (Holt Paperbacks 2006) (1991).

159. *Id.* at 21.

160. *Id.* at 391.

161. *Id.* at 20-21, 103-04, 193.

162. *Id.* at 135-36, 391.

on considerations of self-interest and legitimacy (again, I don't claim that victimization is the only prioritization principle at work), but that last category—child murders—is a victimization category. Indeed, the “classic red ball,” the case that becomes the structural spine of Simon's book, is the molestation and murder of an eleven-year-old African American girl assaulted on her way home from the library—Latonya Wallace.<sup>164</sup> The case commanded “the attention of the entire department,”<sup>165</sup> arousing a kind of passion and energy totally unseen in a typical case. “You can tell a little girl got killed today,” says one detective, “because it's eight P.M. and the entire police department doesn't want to go home.”<sup>166</sup> The case spurred that kind of reaction not only within the police department but also within the girl's neighborhood and, interestingly, that neighborhood's criminal community as well: “For one February evening the code of the street is abandoned and the dealers and dopers readily offer up to the police whatever information they have . . . .”<sup>167</sup> That is to say, even in a crime-ravaged, inner-city neighborhood accustomed to much more than its share of death and violence, something about the murder of a child was different, and everyone appreciated that difference.

Different from what, exactly? The routine of homicide work that Simon chronicles is one in which the average victim is “indistinguishable from his killer”<sup>168</sup>—or is at least in a dispute with the killer, criminally involved, or reckless:

[T]here is the thirty-nine-year-old Highlandtown native who goes with a friend to buy PCP in a blighted section of Southeast Washington, where he is instead robbed and shot in the head by a street dealer. . . .

There is the argument at a West Baltimore bar that begins with words, then escalates to fists and baseball bats until a thirty-eight-year-old man is lingering in a hospital bed, where three weeks later he rolls the Big Seven. . . .

. . . [T]he Westport mother who shoots her boyfriend . . . . [T]he young drug dealer from the Lafayette Courts projects who is abducted and shot by a competitor . . . . [T]he twenty-five-year-old East Baltimore entrepreneur who is shot in the back of the head as he weighs and dilutes heroin at a kitchen table. And the is-this-a-great-city-or-what homicide that Fred Ceruti handles in a Cathedral Street apartment, where one prostitute plunges a knife into the chest of another for a \$10 cap of heroin . . . .<sup>169</sup>

The routine is a “catalogue of sin and vice” in which detectives try with mixed success to hold at bay a “who-really-gives-a-shit attitude” because again and again they find themselves “punching a victim's name into the admin office terminal and pulling out five or six computer pages of misbehavior, a criminal

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163. *Id.* at 69-70, 435, 460.

164. *Id.* at 69.

165. *Id.*

166. *Id.* at 70 (internal quotation marks omitted).

167. *Id.*

168. *Id.* at 185.

169. *Id.* at 170-71.

history that reaches from eye level to the office floor.”<sup>170</sup> Detectives get burned out chasing down those victims’ killers, and burned out detectives “give up on” cases a little sooner than they probably should; to pretend otherwise is just an official “fiction.”<sup>171</sup>

But every once in a while a case comes around with one of those “rare victims for whom death is not the inevitable consequence of a long-running domestic feud or a stunted pharmaceutical career.”<sup>172</sup> Those cases are not the cause of burnout; “more often than not” they are “the cure for burnout.”<sup>173</sup> Simon roams into the language of victimization when he talks about these exceptional victims, especially children. He refers to them repeatedly as “true victims,” “rare victims,” or “genuine victims.”<sup>174</sup> He often uses the word “evil” in connection with their deaths.<sup>175</sup> And he speaks of their innocence: “From the moment of discovery,” he writes, “Latonya Wallace is never regarded as anything less than a *true victim, innocent* as few of those murdered in this city ever are.”<sup>176</sup>

Interestingly, it is innocence—really the more forbidding of victimization’s two components—that is doing the heavy lifting here. It is not vulnerability except to the extent conjoined with innocence. And strikingly, it is not race, class, or gender; those three powerful influences seem to fade into the background where the victim is a child. Simon emphatically does not whitewash the white detectives’ racial biases or the city’s racial tensions,<sup>177</sup> but childhood just proves to be a more powerful force than race. Latonya Wallace was a poor, black girl. Simon describes another red ball in which the victim was a young boy.<sup>178</sup> And when a second poor, black girl is murdered and not given the full red-ball treatment, the explanation is not race but exhaustion and demoralization after Latonya’s case went unsolved.<sup>179</sup>

This victimization logic in police priority decisions is not unique to Baltimore or homicide, and Simon is not the only one to notice it. In Southern California, police slang in the early 1990s for the murder of drug dealers, gangsters, prostitutes, and other lawbreakers was the vivid and extremely disturbing term, “NHI (no humans involved) Homicide.”<sup>180</sup> Rape victims report that police respond differently to victims depending on whether they seem like “nice”

170. *Id.* at 71, 185.

171. *See id.* at 185.

172. *Id.* at 171-72.

173. *See id.* at 185.

174. *Id.* at 60, 171, 185, 456, 462, 477.

175. *Id.* at 60, 459, 478, 522.

176. *Id.* at 60 (emphasis added).

177. *See, e.g., id.* at 241-42.

178. *Id.* at 435.

179. *Id.* at 460, 463, 466-68.

180. David A. Klingler, *Negotiating Order in Patrol Work: An Ecological Theory of Police Response to Deviance*, 35 CRIMINOLOGY 277, 291 n.7 (1997).

girls.<sup>181</sup> Social scientists report that police sort victims into categories based on “[t]wo fundamental criminological truths”: that “[v]ictims often bring crimes upon themselves by engaging in deviant conduct” and that “[m]any crime victims are themselves criminals.”<sup>182</sup> They then accord “less vigorous action” to the “undeserving victims” and more vigorous action to the “deserving” victims.<sup>183</sup> And at least two other crime journalists who have taken sabbaticals to spend time with big-city homicide squads (in New York and Chicago) offer accounts broadly consistent with Simon’s, distinguishing “murders that matter” from those that don’t (apparently “red balls” are called “heaters” in Chicago) and noting that victim characteristics often determine the difference.<sup>184</sup>

b. *Quantitative evidence*

Now for the quantitative case. Central to Simon’s description, and a premise of my victimization-as-prioritization-principle argument, is that only rare homicide victims have perfectly clean hands—that most are criminally involved or undertook a wrong or risk that led to their death. The empirical literature unambiguously supports that claim. Most homicide victims have a criminal record and often so substantial a record that it is a match for their killer’s. Furthermore, the vast majority of homicide victims are killed in contexts in which they voluntarily or culpably participated or are regarded as having voluntarily or culpably participated—contexts involving, for example, drugs, gangs, fights, arguments, or domestic disputes.

The average homicide victim in Stockton, California, for example, has 10.6 arrests on his record; the average homicide offender has 7.3.<sup>185</sup> (That victims were typically older than offenders seems to account for the difference.) Among youth homicide victims and offenders in Boston, 75% of victims had been arraigned for at least one offense, 44% had ten or more arraignments, and the average number of arraignments was 9.5, while 77% of their killers had at least one arraignment, 41% had ten or more, and the average number was

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181. See, e.g., Estrich, *supra* note 154, at 1087-88 (“When we got [to the police station], I borrowed a dime to call my father. They [the police] all liked that. By the time we went to the hospital, they were really on my team.”).

182. Klinger, *supra* note 180, at 290-91, 294.

183. *Id.* at 294.

184. See ROBERT BLAU, *THE COP SHOP: TRUE CRIME ON THE STREETS OF CHICAGO* 43, 165 (1993) (“Stories bigger than box scores paid homage to the innocent . . .”); MITCH GELMAN, *CRIME SCENE: ON THE STREETS WITH A ROOKIE POLICE REPORTER* 70 (1992). Both books, however, focus more on what motivates media interest in a case than what motivates police effort in it.

185. ANTHONY A. BRAGA, *PREVENTING VIOLENT STREET CRIME IN STOCKTON, CALIFORNIA: A REPORT TO THE STOCKTON POLICE DEPARTMENT* 10-11, 46 (2006), available at [http://www.stocktonpoa.com/Braga\\_Report.pdf](http://www.stocktonpoa.com/Braga_Report.pdf).

9.7.<sup>186</sup> (Adult rates would presumably be even more extreme, since youth—defined in the study as twenty-one and under<sup>187</sup>—would limit the extent of criminal histories.) Regarding context, the most common motive for homicide according to one study is an argument with the victim (43%), followed by drugs (for instance, “failure to pay a drug debt, robbery during a drug deal, and conflict over drug territory”) (26%), retaliation (23%), taking of property (18%), conflict over money (16%), self-defense (12%), and death while committing a crime (11%).<sup>188</sup> (The numbers add up to more than 100% because a homicide can have more than one motive.) Only one of those, “taking of property,” is likely to involve an “innocent” victim in the sense we’ve been using the term. To find other motives involving “innocent” victims, one must go to the single-digit categories: “bystander[s] . . . killed inadvertently” (8%), children killed by parents and guardians (5%), and “victim[s] randomly selected from a particular social group” (4%).<sup>189</sup> So consistent are these sorts of findings that they have spurred a theoretical/empirical literature on the similarities between criminal offenders and victims (“lifestyle/routine activities theory,” “culture-of-violence theory,” “self-control theory,” and the like).<sup>190</sup> One of that

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186. David M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U. L. REV. 449, 452 (1997); see also Lisa M. Broidy et al., *Exploring Demographic, Structural, and Behavioral Overlap Among Homicide Offenders and Victims*, 10 HOMICIDE STUD. 155, 165 tbl.1 (2006) (finding that 49.5% of homicide victims in Bernalillo County, New Mexico, have an arrest history, as against 57% of offenders); David M. Kennedy & Anthony A. Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263, 276 (1998) (finding that 43% of victims in Minneapolis have an arrest record, with an average of 7.5 arrests for those who do, as against 72% of suspects and an average of 7.4); Adrienne Frank, *Homicide: 33 Years on Baltimore’s Streets*, AMERICAN, Summer 2009, at 22, 26, available at <http://www.american.edu/americanmagazine/upload/10-001-American-summer-2009.pdf> (stating, albeit without clear attribution, that the average homicide offender in Baltimore has been arrested eleven times and the average homicide victim ten times).

187. See Kennedy, *supra* note 186, at 452.

188. CHARLES WELLFORD & JAMES CRONIN, JUSTICE RESEARCH & STATISTICS ASS’N, AN ANALYSIS OF VARIABLES AFFECTING THE CLEARANCE OF HOMICIDES: A MULTISTATE STUDY 10-11 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/181356.pdf> (analyzing data from California, Maryland, Michigan, and Wisconsin). Note that I have rounded the percentages. A problem with this study is that it does not break out domestic disputes or gang activity. A Washington, D.C., study fills that gap, finding that the six most frequent motives for homicide are, in order: argument (52%), drugs (35%), retaliation (25%), robbery (20%), gangs (13%), and domestic violence (6%). ELIZABETH GROFF & TOM MCEWEN, INST. FOR LAW & JUSTICE, EXPLORING THE SPATIAL CONFIGURATION OF PLACES RELATED TO HOMICIDE EVENTS 37-38 (2006), available at [http://www.ilj.org/publications/docs/Spatial\\_Configuration\\_Places.pdf](http://www.ilj.org/publications/docs/Spatial_Configuration_Places.pdf). Again, I have rounded the percentages.

189. WELLFORD & CRONIN, *supra* note 188, at 10-11.

190. See Broidy et al., *supra* note 186, at 156-59 (summarizing literature); see also Adam Dobrin, *The Risk of Offending on Homicide Victimization: A Case Control Study*, 38 J. RES. CRIME & DELINQ. 154, 154 (2001) (finding “strong [empirical] support for the premise that previous offending increases the risk of homicide victimization”); Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED.



literature's most dramatic and well-supported moves is to divide violence-involved individuals into three groups: offenders, victims, and "victim-offenders." Victims, the second group, "report no prior involvement in offending" and become criminal victims through "routine activities that place them in close proximity to potentially violent environments."<sup>191</sup> Victim-offenders, by contrast, "do report past involvement in offending," are "more likely to be male," and become victims in connection with "their prior criminal involvement and alcohol and drug use."<sup>192</sup>

So homicide victims in the ordinary case are not innocents. That is old hat for criminologists. But does that fact affect police resource allocation decisions? Here the empirical problem discussed above, that the extant studies don't test for victimization because they lack the concept of victimization, becomes a significant obstacle. There's a literature on how police allocate scarce resources in the context of crime clearance rates (especially homicide clearance rates), but that literature is organized around two theoretical models that, from a victimization perspective, are both wrong. The first model stresses victim characteristics, arguing that police will devote more effort and attention to certain classes of victims than others.<sup>193</sup> So far, so good, but then the model argues that what moves police is *social status*—and thus predicts maximal police motivation and the best clearance rates for crimes against white, middle-aged, prosperous men and reduced motivation and worse clearance rates for crimes against children, the elderly, and women, along with racial minorities and the poor.<sup>194</sup> Meanwhile, the competing model holds that the importance of all homicides and the organizational pressure to achieve high clearance rates leads police to "respond with maximum efforts and willingness to clear every homicide" regardless of victim characteristics.<sup>195</sup> Thus this model focuses on investigative characteristics (e.g., the location of the crime, the availability of witnesses, the kind of weapon used, etc.), arguing that good physical and other

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1084, 1086-88 (1993) (finding that homicide victims were more than twice as likely to have been arrested than were members of a control group).

191. Broidy et al., *supra* note 186, at 158.

192. *Id.* at 158-59.

193. See Marc Riedel, *Homicide Arrest Clearances: A Review of the Literature*, 2 SOC. COMPASS 1145, 1150 (2008); see also Kenneth J. Litwin, *A Multilevel Multivariate Analysis of Factors Affecting Homicide Clearances*, 41 J. RES. CRIME & DELINQ. 327, 328-30 (2004); Wendy C. Regoeczi et al., *Clearing Murders: Is It About Time?*, 45 J. RES. CRIME & DELINQ. 142, 144-45 (2008); Aki Roberts, *Predictors of Homicide Clearance by Arrest: An Event History Analysis of NIBRS Incidents*, 11 HOMICIDE STUD. 82, 83 (2007).

194. See, e.g., Litwin, *supra* note 193, at 329-30. Donald Black is a foundation stone here: "If the offense was committed against someone of sufficiently high status," he writes, like "a prominent politician, businessman, or socialite," a team of detectives might "be directed to work around the clock until a suspect is found and charged with the offense," but if the victim is "low status"—"homeless . . . disreputable . . . poor, black, young, transient, uneducated, and so on"—the investigation will likely be minimal, soon abandoned. DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 14-16 (1980).

195. Riedel, *supra* note 193, at 1150.

evidence, rather than greater police motivation, will predict clearances.<sup>196</sup> In short, we have here one model without red balls and another with red balls, but not for children. There is no theoretical model in the literature that focuses on victim characteristics but proposes that child, elderly, or female victims might motivate *more* police effort.

One can already see what is coming, at least if the victimization concept is right. Empirical studies will not confirm the first model's predictions, and this will be taken in the field as support for the second model—even though the second model's central claim, that all homicide cases spur maximum (and therefore equal) effort on the part of police, is totally, unconditionally belied by the qualitative evidence reviewed above. And so it goes. The empirical landscape is complicated: many of the studies disagree; they often ask the same basic question in different ways on the basis of different data; and there's always something fraught in generalizing across multiple studies without individually evaluating each one. But the most consistent findings in the literature are that homicide clearance rates are *better* where the victim is a child and *worse* where the victim is elderly.<sup>197</sup> It also seems that rates are better where the victim has no criminal record and is not involved with drugs,<sup>198</sup> though those issues are rarely tested. More tentatively, it appears that rates are better where the victim is female, though here there are a number of dissenting studies.<sup>199</sup> And findings as to victims' race<sup>200</sup> and class<sup>201</sup> are too inconsistent to support a conclusion.

Criminologists in the field do indeed take these findings, which belie the social status model, as support for the investigative characteristics model<sup>202</sup> (which after all can't be wholly false—of course good witnesses and good physical evidence help clear cases). But the choice is not either/or because there is a third model—victimization—which focuses on victim characteristics but rejects social status as the master concept, and which the empirical data supports. On a victimization model, child victims above all should motivate high clearance rates. Victims with no criminal history or drug or gang involvement should motivate high clearance rates. Female victims should motivate

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196. See, e.g., Regoeczi et al., *supra* note 193, at 145-46.

197. See Regoeczi et al., *supra* note 193, at 144, 156 (“One of the more consistent findings in the literature on homicide clearances is the high likelihood of clearing cases involving child victims, and the greater difficulty of clearing cases involving the elderly . . . .”); accord Riedel, *supra* note 193, at 1153, 1156, 1159.

198. WELLFORD & CRONIN, *supra* note 188, at ii; accord Riedel, *supra* note 193, at 1158.

199. Riedel, *supra* note 193, at 1154, 1156, 1159.

200. *Id.* at 1154-56, 1159. In fact, “depending on the study either whites or non-whites are cleared more frequently.” *Id.* at 1159.

201. *Id.* at 1155-57.

202. See, e.g., *id.* at 1159; see also Litwin, *supra* note 193, at 346 (indicating “clear and convincing support for the nondiscretionary perspective”); Regoeczi et al., *supra* note 193, at 155 (“[O]ur findings with respect to race and sex indicate no apparent devaluing of lower social status victims by police.”); Roberts, *supra* note 193, at 89.

high clearance rates outside of intimate contexts and low clearance rates in at least some intimate contexts; thus the data on female victims taken as a class should be inconsistent or ambiguous. And “social status” indicators like race or class should matter less than people might think. The data is supportive on all those fronts. Now, it must be admitted that there is, for my purposes, an important false note in the data with respect to the elderly: victimization would predict high clearance rates for them and the studies do not support that prediction. There is also an important alternative explanation for the high clearance rates in child murders, as those cases tend to be easier to solve than others (children are usually killed by someone close to them), and likewise for the low clearance rates in drug murders, as those cases might be harder to solve. But in a highly uncertain empirical terrain, the findings of the crime clearance literature give the concept of victimization some measure of support, especially when coupled with qualitative information.

## 2. *Capital juries*

Part of my argument throughout this Article has been that the concept of victimization is an element of ordinary moral thought that has found its way into criminal law. Capital juries are a good testing ground for that proposition. Like all juries, the capital jury injects a lay element into the law’s doctrinal and institutional professionalization. But unlike most juries, the capital jury cannot even by the thinnest of fictions be said to confront a purely factual question. The question it confronts is a moral one: once a defendant’s guilt is settled and aggravators and mitigators found, the jury’s final task is to decide what sentence is just. Thus capital juries are an agent of ordinary moral thought in criminal law and an important test of my victimization claim. The question here is simple and empirical: are capital juries more likely to give a verdict of death when an offender’s crime features a high degree of victimization?

### a. *Qualitative evidence*

Interviews with capital jurors show that the vulnerability and innocence of victims move their decisions for life or death. No researcher has investigated the issue directly for the reason discussed above—lacking the concept of victimization, they have not tested for it—but at least one, Scott Sundby, has demonstrated the point indirectly. Sundby was the Principal Investigator for the California segment of the Capital Jury Project, and in that capacity administered questionnaires and conducted in-depth interviews with jurors from thirty-seven cases that had split roughly fifty-fifty between sentences of death and sentences of life without parole. In *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, he argues on the basis of these interviews that capital jurors are moved by their sense of identification with the victims and thus, in deciding whether to impose a death sentence, “make distinctions

between ‘worthy’ and ‘unworthy’ victims.”<sup>203</sup> I do not quite agree with those ordering concepts—empathy, identification, and worth (at least if treated as a cousin to the idea of social status that went so awry in the studies of police clearance rates)—but in the vast literature on capital punishment, the article is, in my view, a singularly important contribution.

What Sundby inadvertently shows is that jurors attend to victims’ vulnerability and innocence. Jurors routinely described randomly selected victims as being in the “wrong place at the wrong time”; or as “just minding her own business”; or as a “typical school teacher,” “average teenager,” “anyone’s daughter,” or “regular working guy.”<sup>204</sup> One juror said: “She was just innocent. She happened to be in the wrong place at the wrong time . . . . I mean they surprised her in her bedroom at gunpoint and executed her.”<sup>205</sup> Another described the victim as an “elderly woman . . . murdered . . . with what they call the ‘coup de grace,’” emphasizing “the vulnerability of this woman.”<sup>206</sup> Another stated directly that he gave a death penalty verdict because the victim was a “regular” guy: “It could have been anybody, so there’s an outrage to it.”<sup>207</sup> A third emphasized that, although the murder wasn’t “bloody,” it was horrible because the victim was an “innocent bystander.”<sup>208</sup> A fourth stressed that the victim was “a careful man.”<sup>209</sup> Perhaps the juror who said it best put it this way: “He had her life in his hands. At that point, she was a total victim, standing there naked in the cold.”<sup>210</sup>

Turning to jurors interviewed about nonrandom victims, one remarked: “I wouldn’t say she was an innocent victim, because, well, what was she doing in the biker bar?”<sup>211</sup> Another said: “They were all dope fiends . . . . [The victim] reminded me of people who get so screwed up that something bad was bound to happen to them . . . .”<sup>212</sup> One juror commented that he “didn’t approve of [the victim’s] actions, because she put herself in danger.”<sup>213</sup> Faced with a drug dealer who killed a rival, one juror commented: “Everybody came to the conclusion that nobody felt threatened by him as long as they were not a competitor in selling drugs or not a threat to him . . . . They felt he was probably the kind of guy you can have over, have dinner with, discuss politics, whatever.”<sup>214</sup> Faced with a victim who had been highly abusive toward the boyfriend who

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203. Sundby, *supra* note 48, at 345.

204. *Id.* at 360-61 (internal quotation marks omitted).

205. *Id.* at 359.

206. *Id.* at 360-61.

207. *Id.* at 361 (internal quotation marks omitted).

208. *Id.* at 362.

209. *Id.* (internal quotation mark omitted).

210. *Id.*

211. *Id.* at 364 (internal quotation marks omitted).

212. *Id.* (second alteration in original) (internal quotation mark omitted).

213. *Id.* at 365.

214. *Id.* at 364 (emphasis omitted).

killed her, jurors explained their life sentence by commenting that she was “extremely cruel,” “used people,” was “aggressive, abusive,” “deserved what she got,” and “[i]t makes me sick to even think about her.”<sup>215</sup> One juror in a different case explained her choice for a life sentence in this way:

I thought about a scale . . . [with] serial murder involving children or women as the worst. I don’t know why that seems to me—children in particular and, unfairly, women before men. Well, when I compared this crime . . . , even though it was a terrible crime, it didn’t really compare with the worst I could imagine.<sup>216</sup>

And again, there was one juror who, by my lights, expressed the basic idea perfectly: asked whether the victim was “innocent or helpless,” the juror said, “[h]elpless, yes, but not innocent.”<sup>217</sup>

The jurors’ explanations indicate, as I’ve already suggested, that the ordering concepts Sundby uses—empathy, identification, and worth—are not the right concepts, and do justice neither to the normative considerations at work nor to the evidence Sundby himself presents. Note that none of the jurors speak to the concept of “worth” in the ordinary sense of “social worth” or “social status,” or even, for that matter, a moral-metaphysical sense of absolute “human worth.” They speak instead (and quite directly) about innocence and vulnerability, and to the extent worth factors in, it does so not as social status or metaphysics, but in the form of an everyday moral worthiness that wrongful or stupid behavior can put into jeopardy. The jurors also do not appear to empathize with every victim who reminds them of themselves in any respect (male jurors with male victims, older jurors with older victims, etc.), as a purely empathic view of the situation would suggest. Indeed, the jurors do not so much empathize with the victims they happen to identify with as they identify with the victims who are innocent or vulnerable; those victimization factors drive the sense of identification and empathy. Furthermore, the jurors’ sense of identification and empathy with victims who are innocent or vulnerable is not just sentimental or emotional, but moral: they see such victims, like themselves, as occupying a certain moral position. I argued earlier that, even if empathy helps *motivate* victimization thinking, it cannot substitute for the concept of victimization because it lacks victimization’s normative, justificatory character.<sup>218</sup> Here we see that empathy by itself is also less true to the data. What Sundby really demonstrates is the extraordinarily severe and passionate condemnation spurred by crimes committed against vulnerable or innocent victims. And what he misses, because he depends on the concepts of empathy, identification, and worth, is the extent to which the jurors were evincing not just a sentiment or emotion, but a certain kind of moral position.

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215. *Id.* at 366 (internal quotation marks omitted).

216. *Id.* at 368.

217. *Id.* at 366 (internal quotation marks omitted).

218. *See supra* notes 48-49 and accompanying text.

b. *Quantitative evidence*

In examining quantitative studies of capital juries, particularly with respect to victim characteristics, the natural place to start is with the work of David Baldus, whose life's mission was to show empirically that the death penalty is racist in application, and who famously demonstrated that a defendant's likelihood of getting a death sentence correlates strongly to his victim's race.<sup>219</sup> Some of Baldus's control variables are correlated to vulnerability or innocence and provide interesting if sidelong support for the victimization hypothesis. Death sentences are substantially more likely, Baldus shows (though it's not his point), when the victim is not acquainted with the killer or especially (this one matters even more than the victim's race) when the victim is a child of twelve or younger.<sup>220</sup> Death sentences are also vastly more likely where the victim was killed at his or her place of employment.<sup>221</sup> But on the whole, Baldus did not have the concept of victimization in hand and so neither tested for it nor controlled for it. (It would be interesting to see whether directly controlling for victimization affects Baldus's race-of-victim findings.)

Sundby, however, includes quantitative findings along with his interviews, and they are highly supportive of the victimization hypothesis. Jurors who vote for death are overwhelmingly more likely than jurors who vote for life to agree that the terms "innocent or helpless" describe the victim (91% of jurors voting for death versus 62% of jurors voting for life).<sup>222</sup> Life jurors, by contrast, are much more likely to say that the victim was "too careless or reckless" (51% versus 11%).<sup>223</sup> Life jurors are also more likely to say that the victim had "a problem with drugs or alcohol" (50% versus 23%)<sup>224</sup> or "an unstable or disturbed personality" (38% versus 7%),<sup>225</sup> and to have discussed "the victim's

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219. See, e.g., David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 203-08 (2003). The unsuccessful disparate impact argument in *McCleskey v. Kemp* was based on Baldus's earlier work. See 481 U.S. 279, 286 (1987).

220. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 319-20 tbl.52 (1990).

221. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1687 tbl.5 (1998).

222. Sundby, *supra* note 48, app. at 378 tbl.4. These figures, and those that follow, combine the numbers of jurors who thought the phrase described the victim "very well" and "fairly well."

223. *Id.* app. at 379 tbl.9.

224. *Id.* app. at 378 tbl.6.

225. *Id.* app. at 378 tbl.5.

role or responsibility in the crime” at length in deliberations (53% versus 29%).<sup>226</sup>

Those findings turn on what jurors said about themselves in responding to questionnaires. Even more telling is what they did in issuing verdicts. In cases involving random victims, which Sundby defined as cases in which the victim “played no role in bringing about the crime,” ten resulted in death sentences and one in a life sentence.<sup>227</sup> In cases involving nonrandom victims who were culpable or risk-taking (e.g., a rival drug dealer), five resulted in death sentences and eleven in life sentences.<sup>228</sup> Jurors were also more likely to give a death sentence for a female victim (58% of those cases resulted in a death sentence, versus 48% for male victims), a married victim (85% versus 33%), and a parent (60% versus 27%).<sup>229</sup> When the risk-taking or culpable victims are taken out of those categories (since of course women, spouses, and parents can be risk-taking or culpable, too), the numbers become still more dramatic: for example, 83% of cases in which the victim was a non-risk-taking, nonculpable parent resulted in a death sentence.<sup>230</sup> As Sundby summarizes his findings: “[J]urors may not care in the abstract whether the victim was a banker or a welfare recipient. They do care, however, if the banker was murdered while cruising a seedy adult bookstore late at night instead of during a robbery while honorably carrying out his duties at the bank.”<sup>231</sup>

Two closing notes are in order. First, Sundby’s data vividly show the extent to which victimization is an unacknowledged and even embarrassed element of moral thought—for when asked about victim characteristics in the abstract, jurors denied or vastly understated the effect that such characteristics would have on their decisions. About 90% denied that it would make any difference whether the victim was a drug addict, an alcoholic, or a woman.<sup>232</sup> They give a little with victims who are “known troublemakers” (25% of jurors admit that factor would make them “slightly less likely” to give a death sentence).<sup>233</sup> But for the most part, the pattern of denial—false denial—holds across victim characteristics, with one significant exception for child victims (77% of jurors admit they would be more likely to give a death verdict in that case).<sup>234</sup> One is reminded of a remark by the great moral philosopher Bernard

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226. *Id.* app. at 378 tbl.3. The ambiguity in this measure is that a jury might discuss the victim’s role or responsibility at length either because it was considerable or because it was nonexistent.

227. *Id.* at 356 tbl.10.

228. *Id.* at 357 tbl.11.

229. *Id.* at 357-58.

230. *Id.* at 358.

231. *Id.*

232. *Id.* app. at 377 tbl.1.

233. *Id.*

234. *Id.*; see also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1556 tbl.3 (1998) (showing that, when

Williams: “[W]e do not have to think that what is principally wrong with our ethical life and our understanding of it is that they are insufficiently rational: they may be, for instance, insufficiently honest.”<sup>235</sup>

Second, the victimization pattern Sundby finds in the capital jury context is paralleled by Glaeser and Sacerdote’s important study of homicide sentencing more generally, which demonstrates profound effects based on the victim’s gender, criminal history, and provocative behavior before being killed.<sup>236</sup> Where victims are female—provided, crucially, that they are not prostitutes—sentences are much longer than average. That pattern holds even where the male victims in the comparison set were not aggressive and did not initiate conflict, and, indeed, even where (as in vehicular homicides) the victim was selected at random. Where victims have a criminal history, sentences are shorter—again, even in the case of randomly selected victims, as in vehicular homicides. And “it is always true that when the victim ‘provoked’ the attack, the sentences are much shorter.”<sup>237</sup> In trying to make sense of these findings, Glaeser and Sacerdote themselves suggest that punishers might be responding to victims’ “innocence,” but such a consideration, they assume, indicates only that punishers are acting on an irrational “taste for vengeance”;<sup>238</sup> they offer no concept other than vengeance by which to understand their results. Thus their study becomes, to my eyes, yet another instance of the empirical world slipping through our fingers for want of the concepts with which to interpret it.

### III. THE CONCEPT CRITIQUED

The analysis thus far hasn’t been *proposing* the concept of victimization in a normative sense so much as bearing witness to it. Victimization is not a policy to be proposed in the same way as a flat tax or universal health care. Victimization is a facet of the moral and legal culture we live within—part of what we as a society believe insofar as what we systematically do is the truth about what we believe—and we couldn’t even begin to find our feet on the concept normatively without first making the effort to see it clearly. But that done, certain normative questions have been building from the outset. Victimization is a disturbing concept in some ways. How should we respond to it?

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interviewed, capital jurors generally deny that any victim characteristics would affect their verdict with the one exception of children victims).

235. BERNARD WILLIAMS, *What Does Intuitionism Imply?*, in MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 1982-1993, at 182, 183 (1995).

236. Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363, 371-74 (2003). The article also shows substantial victim-race effects. *Id.* at 373-74.

237. *Id.* at 374.

238. *Id.* at 380.



### A. *The Case for Victimization*

The intuitions supporting the concept of victimization are immensely powerful. To deny them even on an individual level—to genuinely think and feel no differently toward an adult who defrauds or attacks a child and an adult who defrauds or attacks a child molester—would be difficult and strange, if not freakish. And even if one were willing to bite the bullet and deny or revise these intuitions on an individual level, victimization thinking is a deeply rooted *social* phenomenon—part of our literature, public discourse, and legal system, as this Article has shown. The intuition’s place in social practice gives it the blessing of our culture, which, though of course not dispositive, does count for something, and also suggests that it might not be realistic to imagine upending the concept altogether. The case for victimization starts with the concept’s resonance in moral intuition and social practice.

I think it is crucial that victimization rests not only on intuition and practice, but also on reasons that we can reflectively endorse. Otherwise the concept might be mere sentiment or prejudice, as these sorts of latent normative impulses sometimes prove under scrutiny to be. But victimization passes the test; that is the yield of Part I of this Article. Victimization proves to be based essentially on three lines of thought: first, the other-regarding standpoint of justice (bipolar morality), which makes sense of why victim characteristics matter at all; next, the commitment to a social order regulated by just deserts, which makes sense of the concern for innocence; and last, the commitment to a social order regulated by beneficence, which makes sense of the concern for vulnerability. There is nothing in those grounds of which we should be ashamed.

This coupling of strong and settled intuition with good reasons is the heart of the case for victimization. John Rawls has argued that the process of normative justification—indeed what it *means* to have normative justification—involves coming to a “reflective equilibrium” between our abstract commitments to principle on the one hand and our intuitive but considered moral judgments on the other, “work[ing] from both ends,” “going back and forth” between the two until they are brought into accord.<sup>239</sup> That is what we have done, and what emerges is that the concept of victimization satisfies both halves of the Rawlsian equilibrium. By no means does this rule out the possibility of opposing a particular version, manifestation, or application of the concept. But it does render a general, wholesale opposition implausible.

The case for victimization has two other important, if slightly less fundamental, components. First, victimization deserves a place not only in moral thought, but also in criminal law. It has a role to play in every major theory of punishment. On instrumental views, victims’ vulnerability and innocence may affect how much punishment is needed for the system to achieve its ends: on a deterrence theory, for example, an extra measure of punishment may be neces-

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239. JOHN RAWLS, A THEORY OF JUSTICE 19-20 (1971).

sary to deter crimes against those who cannot deter them of their own power.<sup>240</sup> On expressive theories, punishment aims to reaffirm the social norms violated by a crime,<sup>241</sup> and that being so, victimization's cultural salience makes it a proper object of legal concern. On a virtue-based theory, victimization's capacity to shed light on a wrongdoer's character helps distinguish the truly depraved (those who prey upon the vulnerable or innocent) from others whose crimes are merely formally similar.<sup>242</sup> Finally, victimization plays an essential functional role in allocating punishments according to relative blameworthiness, which is a necessary operation in at least any retributive system of criminal justice.<sup>243</sup>

Second, the consequences of victimization thinking are generally attractive; the concept in operation isn't just "good in theory, bad in practice." This is an important point because, as I'll soon discuss, the concept also becomes distorted in practice, and naturally one wonders if it becomes too distorted too often to be worth preserving. But the concept serves its purpose most of the time. There really is a difference between selling drugs to an adult and selling them to a child, or between having sex with a sixteen-year-old and having sex with a six-year-old, and it is a victory for the concept of victimization that it enables us to make these sorts of distinctions.

### B. *The Objection from Equality and the Victorian Compromise*

The chief objection to the concept of victimization is that it offends the principle of equality. Justice Powell expressed this view in the controversy over victim impact statements: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions."<sup>244</sup> To punish the same crime differently based on any victim characteristic seems at first glance to imply that some people are more valuable than others, which in turn seems incompatible with a belief in the equality of persons. Surely this is why the concept of victimization is an embarrassed moral value, at work in ordinary thought and law but reluctant to show its face. American criminal law has worked out for victimization a version of what Lawrence Friedman termed the

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240. See *supra* Part I.B.

241. See, e.g., EMILE DURKHEIM, *Crime and Punishment*, in DURKHEIM AND THE LAW 59, 61-75 (Steven Lukes & Andrew Scull eds., 1983).

242. See *supra* notes 82-83 and accompanying text.

243. See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4-5 (1955) (defining retributivism as the view that "[i]t is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing," where "the severity of the appropriate punishment depends on the depravity of his act").

244. *Booth v. Maryland*, 482 U.S. 496, 506 n.8 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

“Victorian compromise” for the nineteenth-century regulation of vice and sex, where “a decent *official* moral framework” is maintained less to eliminate the behavior than to preserve the decent draperies of social life, while, unofficially, we tolerate life’s realities so long as they are “driven underground.”<sup>245</sup> Likewise, we today officially proclaim that anyone who commits the same act with the same state of mind will face the same punishment, but under the surface, we make adjustments for favored and disfavored victims. Our theorists say victims don’t matter,<sup>246</sup> our practice says they do.<sup>247</sup> Jurors deny that they would be influenced by the very thing that proves to move them.<sup>248</sup> We misunderstand ourselves; we are not candid with ourselves.

But I think something has gone seriously awry here. The Victorian compromise doesn’t make sense when we have nothing to be embarrassed about. And the conflict between equality and victimization is more apparent than real.

First, the concern for equality in criminal punishment, as Justice Powell’s remark suggests, has to do with the specter of the wealthy victim, or the well-connected victim, or the white victim, or some other such member of a favored class or caste getting better treatment on account of his or her status. But victimization is not about caste systems, social status, or wealth. In many ways it is just the opposite: victimization is about the helpless, the vulnerable, the innocent—children, the handicapped, animals. That is to say, the concern for equality is misplaced in the victimization context. In a strictly formal, abstract sense, the objection might seem to have some force. But in a practical sense, in terms of the kinds of things we ordinarily invoke the principle of equality *for*, the objection hardly bites at all.

Second, the objection from equality rests on a false assumption: to punish differently two people who committed what would be the same crime absent a characteristic of their victims is *not* necessarily to value one of the victims over the other. Consider two homicides: in one, the offender kills, intending to kill, for money, and the victim is a stranger; perhaps the offender wants his wallet. In the other, the offender kills, intending to kill, for money, and the victim is his mother; perhaps the offender wants his inheritance. (Assume also that the mother has done nothing against the child who kills her—or if that is difficult to imagine, turn it around and picture the offender as the mother and the victim as her son.) We can easily see the latter case as more blameworthy without thereby seeing the latter death as more important. From a third party standpoint, the two lives lost are of equal value, but because of a feature of the relationship between parent and child, the latter crime tells us something significant about the wrongdoer that the former crime doesn’t: it tells us that the wrongdoer has

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245. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 127-32 (1993).

246. *See supra* notes 7-17 and accompanying text.

247. *See supra* Part II.B.

248. *See supra* notes 232-234 and accompanying text.

abandoned any commitment to a value we hold dear, namely, love and loyalty within families. Thus the blameworthiness of the wrongdoer shifts with no change in the value of the two victims. Structurally, the concept of victimization works in an identical way. To be a person is to find oneself in normatively charged relationships of different *kinds*; that is the insight of bipolar morality.<sup>249</sup> Some of those relationships, because of the vulnerability or innocence of a party, implicate the values of just deserts and beneficence in a pronounced way, and how we behave within those relationships thus signals our commitment to those values.<sup>250</sup> None of that implies that one victim is of lesser worth than the other. Two offenders can stand differently with regard to beneficence because one stole from a blind person and the other from a sighted person without thereby valuing blind people more highly than sighted ones. The objection from equality misses the structure of this moral situation; the objection as applied to victimization is conceptually confused.

Finally, note that *victimization* is not the same thing as *victim characteristics*. The latter is the broad category, the big circle in the Venn diagram, encompassing not only vulnerability and innocence but all victim characteristics, including things like victims' race. We once had a criminal law that focused on such characteristics,<sup>251</sup> and it was a moral achievement to overcome it. If this Article's focus were victim characteristics in general rather than victimization in particular, my normative stance would be a qualified "no" rather than a qualified "yes." But victimization as a particularized concept, concerned solely with victims' vulnerability or innocence or lack thereof, doesn't challenge the paradigm of equality so much as it just falls outside that paradigm. Equality, being a central commitment of our political community, casts a long shadow—hence our diffidence even about victims' vulnerability and innocence. But with those particular victim characteristics, there is no need for diffidence, and if we leave victimization enshrouded, we risk losing what is best in it and allowing what is worst in it to operate under cover of darkness—an issue to which I now turn.

### C. *Prisoners, Prostitutes, and Moral Luck*

To endorse victimization in general is by no means to endorse every instance of the concept at work. The categories of vulnerability and innocence are socially constructed; the concept in operation is only as good as those categories. The concept must also be applied and is only as good in operation as the application function is ably carried out. Thus victimization thinking goes seriously wrong in certain areas of American life, beginning with the disturbing and complex set of connections between victimization and gender.

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249. *See supra* Part I.C.

250. *See supra* Part I.D.

251. *See, e.g.*, FRIEDMAN, *supra* note 245, at 84-97 (detailing the punishment of interracial crime in the antebellum and Jim Crow South).

Empirically, the basic victimization/gender pattern appears to be this: where victims are female, punishments are much harsher and arrests may be more likely than where victims are male (even in cases of wrongful accidents and even after controlling for factors like victim provocation or aggression), unless the female victim has a prior intimate link to the offender or is a prostitute, in which case arrests are less likely and punishments substantially more lenient than where victims are male.<sup>252</sup> One doesn't have to look far to see what's going on here. American law has a long, troubled history of regarding women as either "chaste" or "fallen," where the "chaste" are almost by definition vulnerable and innocent, and the "fallen" the opposite—a tradition of infantilization that favors many women, but only by effectively equating them with children, and disfavors others on grounds of sexual disapproval. Rape trials before modern reforms, which were intensely victim-regarding in highly gendered ways, are the paradigmatic example.<sup>253</sup> Another factor is the belief that a prostitute, a woman in an abusive relationship, or a woman otherwise intimately linked to the offender voluntarily assumes the attendant risks. Again, traditional rape law provides a model of the thinking.<sup>254</sup> In my view, these empirical patterns and the beliefs on which they're based enlist the concept of victimization in the service of crude ideas of gender. But it is those ideas of gender that are the culprit, those ways of filling in the concepts of vulnerability and innocence with cultural content, not the concept of victimization itself.

The favoritism toward "chaste" female victims, to start with, rests on treating gender as a *proxy* for vulnerability and innocence. But of course it's a lousy proxy. Being female can stand in for innocence only on an absurdly antiquated and sentimental idealization of female sexuality—a stupid stereotype. Gender as a proxy for vulnerability is more complicated, since women generally are less physically strong than men. An extra measure of punishment is warranted for offenders who prey upon that lesser strength. But even with respect to vulnerability, the gender difference is limited to the typical case and, importantly, to unarmed physical confrontations. (An unarmed man no less than an unarmed woman is utterly vulnerable when facing an assailant with a gun. Indeed, our cultural intuitions about male and female vulnerability in combat are really anachronisms in the age of the gun.) Meanwhile, on the other side, the indiffer-

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252. See *supra* notes 3-6, 127, 153-154, 181, 199, 216, 229, 236-238, and accompanying text.

253. See Estrich, *supra* note 154, at 1094 (detailing a complex of "rules associated with the proof of a rape . . . as well as the evidentiary rules relating to prior sexual conduct by the victim" under which traditional rape trials "focused almost incidentally on the defendant—and almost entirely on the victim").

254. See *id.* at 1092 ("At one end of the spectrum is the 'real' rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim . . . [W]here the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, . . . the understanding is different. In such cases, the law . . . often tell[s] us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.").

ence toward “fallen” female victims rests on ideas about culpability and risk-taking that in many cases are just benighted: a date rape victim doesn’t properly assume the risk of rape in virtue of going out on a date (as if going on a date were the sexual equivalent of engaging in extreme sports). Even in the case of prostitutes, while it’s true that the work is usually criminal and does involve known risks—relevant factors under the innocence prong of the concept of victimization, to be sure—it is also the case that prostitutes are often highly vulnerable. If one component of the concept of victimization is pushing them out of the circle of maximum concern, the other should be pulling them back in. The result ought to be moral complexity. Simple indifference to them—which is anecdotally quite well known; few criminal practitioners would be surprised to learn that the criminal system gives prostitutes the back of its hand—is a distortion of the concept of victimization. A similar analysis could apply to female victims within genuinely voluntary, yet abusive relationships: they take a risk, but they are also vulnerable.

Consider now the situation of mass prison rape in the United States.<sup>255</sup> There is reason to think the concept of victimization is at work here just as it is with crimes against prostitutes—a conceptual tool people use to cut themselves off morally from wrongs done to the disfavored. The rape of convicted criminals is not *that* important an issue, the thinking goes, because, after all, it is “only” criminals being raped.<sup>256</sup> And it’s true that the concept of victimization implies, as a purely comparative matter and all else equal, that it’s better for a deeply morally stained criminal to be raped than, say, for a child or a typical, reasonably upstanding adult to be raped. That’s a consequence of the desert-based roots of the innocence prong of the victimization concept. There is, it must be said, something harsh in that feature of the concept, though the harshness is only the mirror image of the concept’s concern for justice.

But again, if the concept of victimization is used to ugly ends in this instance, it is not properly used to those ends and upon scrutiny provides the instruments for its own correction. One can accept the implication that the rape of a prisoner guilty of some serious crime is not *as* bad as the equivalent rape of a child or typical adult without for a moment thinking that prison rape is acceptable or—on a mass scale—anything but a serious human rights violation that tars a nation. To act as though a claim has no value, rather than merely reduced relative value, because it comes from the culpable misses entirely the comparative character of victimization. In addition—and in direct parallel to the prostitution example—if prisoners are *less* innocent than the average citizen, they are also, as prisoners, *more* vulnerable, and indeed more vulnerable on account of

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255. See Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (2011) (“[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison.”).

256. NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 25 (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf> (“Many still consider sexual abuse an expected consequence of incarceration, part of the penalty and the basis for jokes . . .”).

something we as a society did to them: namely, lock them up. If their lack of innocence points in one direction, their vulnerability (on our account!) points in the other.

Consider finally the issue of accidental victimization: the person who criminally inflicts harm on a vulnerable or innocent victim (or the opposite) but who does not know of the victim's vulnerability or innocence (or the opposite). A negligent driver who accidentally but criminally kills a child is an example; so is the mugger who robs Bernie Madoff without knowing it is Bernie Madoff he is robbing. There is empirical evidence that the concept of victimization takes hold even in these cases,<sup>257</sup> shortening and lengthening sentences on the basis of what Bernard Williams famously called "moral luck."<sup>258</sup> Criminal law is no stranger to moral luck, but the modern trend is to regard chance as morally arbitrary and to try so far as practicable to minimize its effect on punishment.<sup>259</sup> It's troubling both to give the mugger a break because he happened to rob Bernie Madoff and to throw the book at the bad driver because he happened to hit a child.

Yet once again, victimization properly understood does not lead to these results. The function of the concept of victimization in a retributive criminal system is to allocate punishments according to relative blameworthiness, and there is no change in blameworthiness where the offender lacks knowledge of the victim's vulnerability or innocence. The same holds under other rationales for punishment as well: increasing punishment for the sake of deterrence, for example, has no bite where the offender didn't (or couldn't) know of the factor meant to deter him. The Sentencing Guidelines' Vulnerable Victim provision thus includes a mens rea term ("knew or should have known"),<sup>260</sup> which seems to me an altogether sensible way of cabining victimization's potential for excess. It might be helpful in this context to make a distinction between *blaming* and *mourning*: even when the driver was no more blameworthy, the world still seems darker when his victim was a child. We can allow ourselves that. Indeed, even when there was no perpetrator, when the accident was an avalanche, it affects us differently to know the car thrown off the road was a school bus. But that doesn't mean we should punish differently when there is someone to punish; we should refrain because the vulnerability or innocence of these chance victims has no bearing on the culpability of the offender. There's some karmic

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257. See *supra* notes 236-238 and accompanying text.

258. BERNARD WILLIAMS, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980*, at 20 (1981). Moral luck is the idea that the moral value or disvalue of one's actions, character, or life depends to some extent on chance, contingency, or luck—on factors beyond one's control.

259. The issue comes up, for example, in punishing completed crimes more harshly than attempted ones. See R.A. DUFF, *CRIMINAL ATTEMPTS* 327-47 (1996); GIDEON YAFFE, *ATTEMPTS: IN THE PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 217 (2010).

260. See *supra* Part II.A.1.

justice in Bernie Madoff getting randomly mugged, but his mugger is still just one person preying on another for money.

Thus the lesson of these examples—and of course they are illustrative, not exhaustive—is twofold. Yes, in some cases, the concept of victimization goes awry. Perhaps it is even prone to going awry in the context of certain culturally powerful and inegalitarian prejudices or sentiments. But where the concept goes awry, it can for the most part be set right *from the inside*. Once it is brought out into the open and we become aware of its role in our practices, the concept becomes a critical tool with which to challenge those same practices.

#### D. *Self-Awareness Serves Justice*

The situation, then, is this: the concept of victimization is in general a credit to American criminal justice, but because it operates unreflectively and under cover of darkness, it serves in certain contexts to effectuate moral error and prejudice. Yet where the concept is brought out into the open, the pockets of error and prejudice dissolve under a genuine understanding of what victimization is and what it is for. What we need, then, is candor about victimization. It is not always the case that reason should strip away the decent draperies of social life, but it should here; the Victorian compromise is counterproductive. We need to be honest, and thus self-critical, about what we're doing in criminal law with respect to vulnerability and innocence, because we'll do better with victimization if we understand it. Self-awareness will serve justice.

In that spirit, I'd like to close this normative analysis with a preliminary policy suggestion—"preliminary" because working out the suggestion in full is a big job for another article. The federal system has done American criminal justice a service with the Sentencing Guidelines' Vulnerable Victim provision.<sup>261</sup> The provision makes vulnerability a systematic rather than sporadic feature of federal criminal sentencing. It is missing innocence, but could be modified to include it.<sup>262</sup> It contains, as it should, a *mens rea* term. It brings the concept of victimization out into the open in the courtroom, so that sentencers must make conscious and not just intuitive decisions about whether some particular victim really was vulnerable or innocent, and must do so in an adversarial process in which each side has a stake in challenging the prejudices and misconceptions that, as we've seen, can lead the concept of victimization astray. Perhaps the provision might even enable American criminal punish-

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261. *See id.*

262. Presently the provision directs judges to enhance sentences where the offender "knew or should have known that a victim of the offense was a *vulnerable* victim." U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2012) (emphasis added). But it could be modified to include offenders who "knew or should have known that a victim of the offense was a *vulnerable or innocent* victim," defining that latter term as someone who does not culpably place himself or herself in the situation in which he or she becomes the victim of a crime.



ment—which has become the harshest in the democratic world<sup>263</sup>—to be less punitive. I've argued elsewhere that the fundamental problem in American criminal punishment is not simply being *too* harsh but being reckless about *when* and *against whom* to be harsh—that American criminal justice needs conceptual tools with which to identify the most blameworthy criminals and distinguish them from others who, though their crimes might be formally similar, are not really the worst of the worst.<sup>264</sup> Victimization is just such a tool, and perhaps by using it we might see our way toward relaxing punishments in other contexts. My policy suggestion, then, is that state governments follow the federal government's lead by adopting the Vulnerable Victim provision, and that both state and federal governments refashion that provision to be a Vulnerable or Innocent Victim provision.

#### CONCLUSION: CRIMINAL LAW'S IMMANENT MORAL CONTENT

The doctrine and practice of criminal law reflect a moral outlook in which judgments of wrong and blame are based in part on the vulnerability or innocence of victims—or so this Article has aimed to show. Implicit in that thesis is a certain model of the relationship between philosophy and law. I would like to close with a remark about that model.

The central methodological idea behind this Article is that our existing social practices and institutions imply or reflect certain normative commitments—that values are *immanent* in our social practices and institutions—and that one important philosophical project in the law is to bring those immanent normative commitments to light. The idea is also that, by bringing those immanent commitments to light, we expose them to a distinctive kind of critique. We effectively look in the mirror and ask, “Do I like what I see? Are these commitments ones I can reflectively endorse? And if so, am I living up to them? Am I realizing them in the right way?” This is social critique from the inside, and while there are multiple intellectual traditions that could be associated with it, the one I've had in view in this Article is a Hegelian tradition of normative social theory.<sup>265</sup>

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263. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

264. Joshua Kleinfeld, *The Concept of Evil in Criminal Punishment* 36 (Northwestern Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 12-42, 2010), available at <http://ssrn.com/abstract=1667093>.

265. The key is Hegel's conception of *Sittlichkeit* (embodied ethical life). See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820); see also AXEL HONNETH, *DAS RECHT DER FREIHEIT: GRUNDRIß EINER DEMOKRATISCHEN SITTlichkeit* (2011) (reconstructing the conception of justice immanent in the social practices of modern democracies); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989) (reconstructing the conception of identity immanent in modern culture); Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 *FORDHAM L. REV.* 2451, 2458-

This way of going about philosophy in law is, I submit, more faithful to and respectful of law than many of the alternatives. Rather than philosophy treating law as merely a tool with which to implement the conclusions of an extralegal philosophical inquiry—dropping in like an imperious and alien visitor, delivering pronouncements, and flying off again—the social-theoretic approach takes law as a form of embodied ethical life with a certain immanent moral content already in place, which philosophy can help bring to light and expose to question. Indeed, it is not as though the concept of victimization has long been known to moral philosophy and only just discovered in criminal law. The opposite is the case. Law was philosophy's teacher here.

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59, 2501-05 (2010) (reconstructing the jurisprudential conception of law immanent in the practices of modern lawyers and courts).