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COMMENTARY

CO-OPTING COMPASSION: THE FEDERAL VICTIM'S RIGHTS AMENDMENT

LYNNE HENDERSON*

For several years, Congress has considered a number of proposals to recommend a Victim's Rights Amendment to the Constitution of the United States. In 1996, Senators Feinstein¹ and Kyl² and Representative Hyde³ introduced proposed amendments to the Constitution that would provide certain, variously defined rights to crime victims.⁴ During National Crime Victim's Week in 1997,⁵ the Senate Committee on the Judiciary held hearings on the most current proposal, Senate Judiciary Resolution 6.⁶ The hearings were then heavily attended by members of victim advocacy groups supporting its adoption.⁷ Televised by Cable News Network, the hearings included testimony from numerous groups and indi-

* Professor of Law, Indiana University-Bloomington School of Law. This commentary was originally given as a lecture at St. Thomas University School of Law on April 17, 1997. I thank Dean Morrissey, Professors Ross, Horsburgh, Margulies, and the many other faculty and students who made my visit an enjoyable one, both personally and intellectually. I also thank *Editor-in-Chief* Nancy Campiglia and the staff of the *St. Thomas Law Review* for their patience and help in turning the lecture into this Commentary. Finally, thanks to Robert Mosteller for his helpful comment and to Santa Clara University School of Law for all their help and support.

1. Dianne Feinstein (Dem., Cal.).

2. Jon Kyl (Rep., Ariz.).

3. Henry Hyde (Rep., Ill.).

4. See *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime, Hearing on H.J. Res. 173 and H.J. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong. 1, 2 (1996). Several draft amendments were circulated in the Senate and House; the Senate Committee on the Judiciary held hearings on one version on April 11, 1996, and the House Committee held hearings on a different version on July 11, 1996. Yet, another version was proposed, and its sponsors were initially hopeful it would be adopted by Congress before it recessed on September 4, 1996. See 142 Cong. Rec. S11999, S12000 (daily ed. Sept. 30, 1996) (statement of Sen. Feinstein).

5. National Crime Victims Week ran from April 13-19, 1997. See Richard Warchol, *Local Events to Mark Crime Victims' Week*, L.A. TIMES, Apr. 9, 1997, at B2.

6. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (1997) (stating that the hearings were held on April 16, 1997). On April 28, 1998, the Senate Committee held hearings on yet another revision, Joint Resolution of March 10, 1998. The Joint Resolution was supported by thirty-four Senators at that time. Senator Biden has since supported it as well, but the National Victims Center has dropped its support (personal communication from Marla Grossman).

7. See generally *id.*

viduals, the vast majority of whom were in favor of the amendment.⁸ Additionally, Attorney General Janet Reno appeared and testified in favor of adopting some form of a victim's rights amendment.⁹ I was one of the few to speak against the proposed amendment.¹⁰

As a rape survivor and feminist deeply concerned about violence against women, you might expect me to say that I wholeheartedly endorse "victims' rights" and victim's rights amendments. As one who has argued for empathy and compassion as part of the moral fabric of law, I should be "for" victims.¹¹ Indeed, how could anyone oppose "victims' rights?" But that question masks all the very serious moral, jurisprudential, constitutional, and practical issues raised by the assertion of victim's rights. Rhetorically, to negate the assertion of "victims' rights" appears to be callous and cruel, but one cannot unreflectively support constitutional rights for victims without running the risk of creating more injustice and harm than already exists. I make this claim based both on the nature of the proposals made in the name of victims and on the nature of the very concept of rights as it is currently applied to victims of crime.

This Commentary will explore some of the jurisprudential and practical issues by examining the nature of victims' rights and victimization.¹²

8. See generally *id.*

9. See *id.* at 40. Attorney General Reno did not specifically endorse S.J. Res. 6, however. Before she testified, Senator Specter protested Senator Hatch's statement that the Committee would wait to question Reno about the appointment of an independent counsel to investigate Democratic fund raising. Specter left the hearings abruptly, after making his objection. Indeed, after Attorney General Reno spoke, only Senators Kyle, Feinstein, and DeWine remained for the morning hearings.

10. See *id.* Donna Edwards, of the National Network Against Domestic Violence, and a district attorney from Virginia both spoke in opposition to the amendment during the morning session. See *id.* at 77. Roger Pilon, of the Cato Institute, originally scheduled to testify in opposition to the amendment, learned that he would not be allowed to testify on the day of the hearings. I was told that some members of the Judiciary Committee opposed my appearance on the "victim's panel," preferring to have me testify on the "law professor's panel." Others resisted my speaking at all, but I was allowed to speak on the victim's panel.

11. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1650-53 (1997) [hereinafter *Legality and Empathy*]; see also generally Lynne Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988); Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991). Apparently, no matter what the substance of a victim's rights proposal is, anyone who objects is considered to be "against" victims. It is difficult to point out the harms that proposals could cause victims as well as the criminal process when one is so categorized.

12. See generally Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1714-15 (1997) (giving other criticisms of the amendment). For other criticisms of the amendment, see Letter from Professors Erwin Chemerinsky, Lynne Henderson, and Robert P. Mosteller, Regarding the Proposed Victim's Rights Constitutional Amendment, to Senators Orrin Hatch and Patrick J. Leahy and Representatives Henry Hyde and John Conyers, Jr. (April 15, 1997), reprinted in *A Pro-*

After a brief introduction to the history of victim's rights amendments in the United States, this Commentary will explore the images in the rhetoric that lead to unreflective support for victims' rights, then turn to images of justice and arguments for a particular kind of victims' rights, together with a critique of that vision. Finally, this Commentary suggests some alternative approaches and programs that promise to be more helpful to victims of crime than any constitutional amendment would be.

The growth of advocacy groups for victims of crime in the United States can be traced back to the late 1970s and early 1980s.¹³ Feminist anti-rape groups were possibly among the first to organize efforts seeking to improve the situation of crime victims in the courts in the 1970s.¹⁴ Also during the 1970s, legislatures established victim-witness assistance programs, adopted victim's compensation statutes and restitution requirements, and provided for the introduction of victim impact statements at sentencing hearings.¹⁵ On a national level, however, the founding of Mothers Against Drunk Driving by Candy Lightner, in 1981, marked the beginning of successful political and social recognition of victims.¹⁶ The election of Ronald Reagan and a turn toward a more conservative, crime-control model of criminal justice made the "discovery" of the victim as a symbol to counteract what was seen as over-protection of criminal defendants extremely effective.¹⁷ As Professor Paul Cassell, a leading advocate for both state and federal constitutional amendments, has argued, efforts to amend the Constitution trace back to 1982, during hearings before the President's Task Force on Victims of Crime.¹⁸ By 1985, the Task Force on

posed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary, 105th Cong. 140 (1997); Letter from Professor Paul Gewirtz Regarding Proposed Victim's Rights Amendment to the Federal Constitution to Senator Christopher Dodd (June 5, 1996) (on file with author); Letter from Professor Regarding the Proposed Victim's Rights Constitutional Amendment (Sept. 4, 1996) (on file with author).

13. See Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, NATION, Feb. 10, 1997, at 13.

14. See Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 3 (1977) ("[I]t is fitting that the 'rediscovery' of rape should coincide with the growth of the Women's Movement. . . . Women have . . . played a key role in lobbying for reforms in the law of rape.") (citations omitted).

15. See Memorandum from Henry J. Hyde, Chairman of the Committee on the Judiciary, to All Members (July 9, 1996) (on file with author); Lynne Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 944 (1985) [hereinafter *Wrongs of Victim's Rights*].

16. See Robin Estrin, *MADD Fighting View that Drunken Driving Is No Longer Problem*, SEATTLE TIMES, Aug. 10, 1997, at A7; *Wrongs of Victim's Rights*, supra note 15, at 950 & n.76.

17. See Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564, 576 (1998); *Wrongs of Victim's Rights*, supra note 15, at 951 n.80 and accompanying text.

18. See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of*

Victims of Crime recommended amending the Constitution to include "victim's rights."¹⁹ But, as I noted in 1985, many of the proposals and victims' rights amendments to state constitutions had less to do with the real concerns and needs of victims of violent crime than with law enforcement and crime control concerns.²⁰ After a brief flurry of state constitutional amendments and rejections of amendments, by the mid-1980s, the push to provide *constitutional* rights for victims of crime had waned.²¹

The explanation for the resurgence of interest in victim's rights amendments in a number of states by the mid-1990s is unclear. Certainly, the "rediscovery" of the crime victim is puzzling in a context in which the media and authorities were decrying "victim identity" and claims of "victimization" by white women, people of color, and other subordinated groups, as well as criminal defendants such as battered women,²² while society generally seemed to have little compassion or tolerance for victims.²³ One can only speculate that a combination of fear of crime, despite the fact that crime rates overall appeared to be declining throughout the 1990s, and the continuing influence of conservative crime control, which led to increasingly harsh laws and longer punishments, left little else for legislators to do in response to the demand they "do something" about crime. Those who had wanted constitutional amendments in the name of crime victims again found receptive political sponsors. State ballot measures and pressure for a federal amendment increased.²⁴

"Victims' rights" were—and are—used to counter "defendants'

Utah's Victims' Rights Amendment, 1994 UTAH L. REV. 1373, 1381 (1994).

19. See *Wrongs of Victim's Rights*, *supra* note 15, at 1021 n.306.

20. See *id.* at 968.

21. See *id.* at 945. Legislatures continued to expand statutory legal rights of victims in the areas of participation in sentencing, restitution, plea bargaining, and related areas. See *id.* at 944. Further, victims' groups were successful in persuading legislatures and courts to change substantive laws defining offenses and punishments. See *id.* at 945.

22. See Alice Koskela, Casenote & Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 190 nn.5-10 (1997).

23. See Stephanie B. Goldberg, *Make room for Daddy*, 83 A.B.A. J. 48, 48 (1997); Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives On Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1301 (1993).

24. See William G. Kleinknecht, "Victims" Rights Advocates On a Roll, NAT'L L.J., July 15, 1996, at 1, 18; Robert P. Mosteller, *Victim's Rights and the Constitution: Moving From Quaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. ____ (forthcoming) (1998); Robert P. Mosteller, *The U.S. Perspective on the Judicial Role in Sentencing: A Story of Small Victories and a Call for Partial Solutions in a Difficult Environment* 14-16 (unpublished manuscript, on file with author) (arguing victims' rights efforts continuous over time).

rights" and to trump those rights if possible.²⁵ In an argument that traces back to at least the early 20th Century, people accused of crimes are probably "guilty as sin" and undeserving of so much legal protection.²⁶ The argument continues that the constitution of a state, or of the United States, contains specific rights protecting those *accused* of crimes (and, in the case of *habeas corpus* and cruel and unusual punishments, those convicted of crimes).²⁷ Victims of crimes, on the other hand, are blameless innocents far more "deserving" of rights, and they have absolutely no constitutional rights.²⁸ To give criminals rights and deny rights to their victims appears to be patently unequal, unfair, and unjust. One fallacy in that argument immediately appears: Victims, as citizens, have many constitutional rights, regardless of the specific protections for defendants. More important, it is not clear why it is unfair and unjust for victims of a particular sort not to have constitutional rights—victims of all sorts of harms have no specific constitutional rights or remedies for those harms beyond the Seventh Amendment right to a jury trial.²⁹ What, one must ask, is so "special" about victims of crimes—sometimes limited to victims of *violent* crimes, sometimes not? The question of whether only victims of violent crimes ought to have constitutional rights, as opposed to victims of all crimes—such as victims of toxic waste dumping violations or of disasters attributable to culpable human negligence—remains unanswered.

To answer the question whether victims should have rights, first one needs to understand who is included in the term "victim" and who the victims actually are. Then we need to know what the concerns of those victims are and what their experience is. Ideally, we also need to know empirically what things help and what things hurt victims recovering from trauma. Only then can we even begin to formulate laws—or constitutional

25. See *Wrongs of Victim's Rights*, *supra* note 15, at 952. The notion that defendant's rights should be trumped certainly appeared to be a concern of Senator Kyl at the 1997 hearings and has been voiced by other supporters of the Amendment. See generally *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (1997). See also Mosteller, *supra* note 12, at 1693-94, 1697.

26. See generally LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 449-65 (1993).

27. See U.S. CONST. amends. IV, V, VI, VII, VIII.

28. Much of the literature in support of the Victim's Rights Amendment to the United States Constitution lists defendant's rights on the one hand and the absence of victim's rights on the other. Senator Feinstein used a chart listing defendant's constitutional rights on one side and the lack of victim's rights on the other; the visual imbalance clearly demonstrated the claim. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 14 (1997) (statement of Sen. Dianne Feinstein, Dem., Cal.).

29. See U.S. CONST. amend. VII.

amendments—that help victims of crimes. Since the supporters of the amendment most often use the image of victims of violence (usually homicide), this Commentary will focus on those victims as well.

Popular culture and ideology construct an image of victims and violence that, tragic and terrifying as it is, is quite limited. "Victims" are "blameless," innocent, usually attractive, middle class, and white. They are articulate and sympathetic. The *image* of victims appears to be confined to victims of particularly brutal homicides, often committed by repeat offenders, and the grieving families of those victims. Often the case is one that seems to justify, at least on a visceral level, imposition of the death penalty.³⁰ They are innocent tourists murdered by strangers, usually men of color;³¹ elderly women mugged;³² clerks or bystanders shot down in robberies;³³ the grieving families of those killed by drunk drivers with repeated convictions for driving under the influence;³⁴ or women who are victims of rapes by strangers lurking in the bushes.³⁵ They are innocent children such as Megan Kanka, raped and murdered in New Jersey, and Polly Klaas, raped and murdered in California, by seeming monsters with prior convictions.³⁶ They are the child victims of the bombing of the federal building in Oklahoma City.³⁷ To put it bluntly, the vast majority of victims of violent crime do not fit these images, many failing the tests of whiteness, innocence, and drama.

In this simple Manichaen rhetoric, to oppose victims' rights is to be-

30. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 66 (1997) (statement of John Walsh, host of *America's Most Wanted* and advocate of victim's rights) [hereinafter *Walsh Statement*]. Walsh explicitly used these images in an over-the-top speech before the Judiciary Committee on April 16, 1997, in which he also attacked battered women's groups and others who opposed the amendment. See *id.* at 70. I say over-the-top, not only because he well exceeded the very short time limit given the witnesses, but also because he used the word "bullshit" in his oral testimony to describe objections to an amendment. See *id.*

31. See Associated Press, *Robbers Kill Lost Tourist*, FLA. TODAY, Feb. 24, 1996, at 8B, available in 1996 WL 10049767.

32. See Chris Conley, *2 Arrested in Robbery, Rape of Elderly Woman*, COM. APPEAL, Feb. 26, 1998, at B1.

33. See generally *Executed in Florida*, WASH. TIMES, Apr. 1, 1998, at A7.

34. See generally *Malibu Suspected Drunk Driver Kills 2, Injures 2 in Crash*, L.A. TIMES, Dec. 11, 1997, at B4.

35. See David L. Teibel, *Police Seek to Link Rapes Tuesday in '97*, TUSCON CITIZEN, Jan. 16, 1998, at 2C.

36. See John H. Boit, *Sex Predator Law On Trial: A Patriot Ledger Special Report*, PATRIOT LEDGER (Quincy, Mass.), May 16, 1998, at 1, available in 1998 WL 8087303.

37. See Arnold Hamilton, *McVeigh Ordered Held Without Bail for Trial: A Duty Dreaded Identifying Blast's Youngest Victims Agonizes Agents*, DALLAS MORN. NEWS, Apr. 28, 1995, at 1A.

tray victims. This emphasis not only overlooks the fact that concentrating on the interests of individual victims undermines the public concern of criminal law, procedure, and punishment but also fails to recognize the fact that the experiences and voices of many crime victims simply do not fit current ideologies or the politics of crime. Accordingly, many victims are silenced in the name of giving victims a voice.

Our image of victims from the media and popular culture is skewed in many other ways. Violence against persons of color is often invisible or discounted, either because they live in "high crime" communities, and, therefore, violence is a norm and incidental, or because the victims themselves have records, fight back, or are poor.³⁸ For example, at the same time that the news was filled with the horrors of the "Central Park jogger" case, a brutal attack on a white woman by a group of young men;³⁹ Kimberly Rae Harbor, a young black single mother, was gang-raped by eight men and stabbed over one-hundred times in New York.⁴⁰ That same week, another African-American woman was also gang-raped and sodomized, then thrown off the top of a four-story building into an air shaft.⁴¹ The news media did not pay attention to either of these horrific crimes.

Another distortion of who properly is a victim springs from moral judgments about those who are harmed⁴²—judgments that may intersect with racial stereotyping and sex discrimination.⁴³ In 1996, President Clinton, during a Rose Garden speech endorsing a federal victims' rights amendment, specifically said: "We sure don't want to give criminals like gang members, who may be victims of their associates [any rights]."⁴⁴ Why is a gang member murdered by another any less entitled to "rights"? Is the killer less of a murderer because of gang affiliations, or does the victim's family grieve less? Rape victims continue to be judged for who they are, where they were, how they were dressed, how they behaved, and whether they are even victims at all.⁴⁵ The veracity of a rape victim's report is always in question, fed by publicity of cases in which recantation or admissions of falsity exist.⁴⁶ A few battered women may be "true" vic-

38. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1267 (1991).

39. See *id.*

40. See *id.* at 1268 n.84.

41. See *id.* at 1268.

42. See *id.* at 1278.

43. See *id.*

44. Clinton's Announcement in Support of a Victim's Rights Amendment (Online News Hour, June 25, 1996).

45. See Crenshaw, *supra* note 38, at 1267-68, 1278-80.

46. See *id.* at 1268-69.

tims, but as Donna Edwards of the National Network to End Domestic Violence noted at the 1997 Senate hearings: "There could be but a day's difference between the battered woman 'victim' and the battered woman 'defendant.'"⁴⁷ She asked, "How many battered women are incarcerated today never having had the opportunity to address the court regarding the abuse they endured?"⁴⁸ Under current models of victim's rights and arguments in support of such rights, of course, these women are not victims at all, they are criminals.⁴⁹ If the abused killed the batterer, then the abuser, or the family of the abuser, automatically becomes the official victim and has the right to punish the abused—to inflict further pain upon them.⁵⁰ Further illustrating the complexity of victimization is the image of the broken features and broken spirit of Hedda Nussbaum that received widespread publicity in the late 1980s.⁵¹ Nussbaum, who failed to rescue Lisa Steinberg from Joel Steinberg's violence, is not seen as a victim of Joel Steinberg's horrific violence but as a morally blameworthy person who allowed Steinberg to murder an innocent child.⁵²

The image of *certain* victims is thus juxtaposed against the image of defendants and "criminals." Defendants are subhuman; they are monsters. The criminal is Ted Bundy,⁵³ Lawrence Singleton,⁵⁴ Richard Allen Davis,⁵⁵

47. *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 80 (1997) (statement of Donna F. Edwards, Exec. Dir. Nat'l Network to End Domestic Violence) [hereinafter *Edwards Statement*].

48. *Id.*

49. *See id.*

50. *See id.* Another point against the amendment, of concern to battered women, is that by focusing on the victims participation, the amendment places battered women in the shoes of the prosecution, which could further endanger them. *See id.* The requirement that a victim provide law enforcement of her whereabouts in order to receive "notice" may lead to disclosure of a woman's whereabouts when she is in hiding from her abuser to anyone who might come in contact with the abuser.

51. *See* Tamara Jones, *The Woman Who Can't Stop Crying*, GOOD HOUSEKEEPING, June 1, 1997, at 118, 118.

52. *See id.*

53. *See* Associated Press, *Bundy Files Archived Boxes of Grisly Photos, Reports and More On the 1970's Killing Spree Are Being Preserved. But Who Will Get to See Them?*, ORLANDO SENTINEL, Apr. 6, 1998, at A8. Ted Bundy was a law student turned cross-country murderer whose killing spree during the 1970s spread terror, at first, in Washington and Oregon and later, in Colorado, Utah, and Florida. *See id.*

54. *See* Sue Carlton, *Boyfriend: Give Singleton Life*, ST. PETERSBURG TIMES (Fla.), Mar. 31, 1998, at 1B. Lawrence Singleton was recently sentenced to die in Florida's electric chair for stabbing Roxanne Hayes, a thirty-one-year-old prostitute and mother of three, after the jury learned of his criminal past. *See id.* Twenty years ago, Singleton picked up a fifteen-year-old California hitchhiker, named Mary Vincent, raped her, chopped off her arms with an ax, and left her for dead. *See id.*

55. *See generally* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON CASE CHANGED AMERICAN JUSTICE (1995); Dorine Bethea, *Survivors of Vio-*

Willie Horton⁵⁶—criminals who seem to be the very embodiment of evil. Alternatively, the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male.⁵⁷ The acquittal in the criminal prosecution of O.J. Simpson,⁵⁸ an African-American who was transformed from “nice guy” to a complete—and dark-faced—monster, provided further fuel for the argument against defendant’s rights (especially the right to a jury trial).⁵⁹

The popular image of the “criminal” certainly does not include a white fraternity member who participates in the gang-rape of a young woman he knows,⁶⁰ or a successful businessman loved by the community who just happens to beat his wife,⁶¹ or another prominent citizen who stabbed his wife multiple times.⁶² Something happened which caused these ordinary, nice men to snap, temporarily losing control.⁶³ These men are not *criminals*. They are us and deserving of sympathy and compassion or at least some understanding of their plight.

“True” victims must remain always innocent and righteously angry at the same time. The rhetoric and images of victims’ rights proponents ignore the effects of violence on the victims themselves, and those effects include victims becoming perpetrators as a result of their experiences.⁶⁴

lence Share from *Lessons Learned*, RICHMOND TIMES-DISPATCH, Mar. 18, 1998, at M5. Richard Allen Davis is the man convicted on abduction, kidnapping, and murder charges in the death of Polly Klaas in California. See Bethea, *supra*.

56. See generally Gerald Beller, *The Great Divide: Political Rhetoric, Government Policies Turning the U.S. into a Moral Minefield*, CHARLESTON GAZETTE, Mar. 2, 1998, at 5A. Willie Horton was a black man who raped a white woman and stabbed her husband while on furlough from a Massachusetts prison. See *id.*

57. See generally Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 155 (1987).

58. *People v. Simpson*, No. BA097211, 1995 WL 704381, at *1 (Cal. Super. Ct. Oct. 3, 1995).

59. See generally Leonard M. Baynes, *A Time to Kill, The O.J. Simpson Trials, and Story-telling to Juries*, 17 LOY. L.A. ENT. L.J. 549, 553 (1997).

60. The acquittal of fraternity members in the *St. John's* case is an example. See Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 151-53 (1992). The *Spur Posse* case, in which the defendants had a point system for achieving sex with underage girls, resulted in no prosecutions; the boys' conduct was proudly characterized by some of their parents as “virile,” etc. See Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM L. & CRIMINOLOGY 15, 15 nn.1, 2 (1994).

61. See Jerry Carroll, *Days of Wine and Treachery: Saratoga Author Follows Gallo Family's Trail in Tale of Arrogance, Deceit and Murder*, SAN FRAN. CHRON., Mar. 12, 1993, at B3.

62. See *Husband Describes Stabbing: Peter Horbury*, TIMES OF LONDON, Nov. 22, 1992, available in WL 10913273.

63. See *Charlton Man Allegedly Stabs Wife to Death with Kitchen Knife*, BOS. HERALD, Jan. 6, 1998, at 10.

64. See generally Elizabeth L. Turk, Note, *Abuses and Syndromes: Excuses or Justifications?*, 18 WHITTIER L. REV. 901, 901-03.

Those who are affected by the extreme trauma of violent crime, who then end up killing or harming others, are said to be hiding from their moral obligations, rather than deserving of some compassion for the circumstances that led them to strike out.⁶⁵

Generally, victim status is narrowly framed by law.⁶⁶ A defendant who has been the victim of extreme and horrible violence and who then kills, as in many battered women's self-defense cases,⁶⁷ or participates in a robbery, as Patricia Hearst⁶⁸ did during her ordeal, is criticized by the media and commentators for trying to avoid moral responsibility.⁶⁹ Bernhard Goetz, the "subway vigilante,"⁷⁰ and the Menendez brothers, who murdered their parents,⁷¹ become the argument against evidence of prior trauma as a defense to assault,⁷² perhaps because the *Goetz* case is so difficult to sympathize with for many,⁷³ and because the Menendez brothers appeared to be opportunistically using their father's abuse of them as children.⁷⁴ Commentators, including Alan Dershowitz, George Fletcher, James Q. Wilson,⁷⁵ and Anne Coughlin, mock "the abuse excuse" as a manipulative ploy by wrongdoers to avoid individual moral responsibility and free choice.⁷⁶ Despite the growing evidence correlating histories of

65. See *id.*

66. See Lynne Henderson, *Fletcher, With Justice for Some: Victims' Rights in Criminal Trials; Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1601-02 (1996) [hereinafter *Whose Justice?*].

67. See generally Martha R. Mahony, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 83-93 (1991).

68. See Malcom Glover, *Baylife 98: Past, Present and Future*, SAN FRAN. EXAMINER, Mar. 1, 1998, at W11.

69. See Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, FED. PROBATION, Sept. 1995, at 69, 69.

70. See Turk, *supra* note 64, at 910-11.

71. See ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 21 (1994).

72. See Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 462 (1988); see also David M. Posner, Note, *The Proper Standard for Self-Defense in New York: Should People v. Goetz Be Viewed as Judicial Legislation or Judicial Restraint?*, 39 SYRACUSE L. REV. 845, 871-72 (1988).

73. George Fletcher uses both of these cases as examples of the "slippery slope" in *With Justice for Some*. GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 140-48, 187-88 (1995). But see Peter Margulies, *Identity on Trial: Subordination Social Science Evidence, and Criminal Defense* (1998) (unpublished manuscript, on file with author).

74. DERSHOWITZ, *supra* note 71; see also Posner, *supra* note 72, at 845.

75. See generally JAMES Q. WILSON, *MORAL JUDGMENT* (1997).

76. See generally DERSHOWITZ, *supra* note 71; FLETCHER, *supra* note 73; Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 1 (1994). See also *Whose Justice?*, *supra* note 66 (reviewing Fletcher).

abuse and neglect—victimization—with violence in later life,⁷⁷ there is no “bad childhood” defense.⁷⁸ Sure, we all had it rough. In fact, prosecutors routinely argue that evidence of the horrific abuse suffered by those who commit terrible murders is not true “mitigating evidence” in a capital case, because the law does not allow earlier victimization and its effects on the human personality as an explanation or as a reason for compassion.⁷⁹

The foregoing images and beliefs overlook the profound effects of violent victimization on the human personality.⁸⁰ Yet, anyone who claims to care for or have compassion for victims of crime would do well to turn away from rhetoric and the surface images provided by the media in order to understand the effects of extreme trauma, both for themselves and for others. Violent crimes—sexual assault, robbery, kidnapping, assault, battering, attempted murder, and murder—threaten our very lives. They not only threaten and deny the victim's integrity or personhood, they threaten the victim's very life. Such encounters can cause a number of psychological, social, economic, and spiritual harms to the individual or her survivors.

Confrontation with death is a profound experience; confrontation with violent crime dispels our comfortable belief that we will not die—at least not at any time soon. Even if only for a short time, the confrontation can shatter the sense of invulnerability, divine protection, control, autonomy, and meaning we rely on. Rage and terror or dread are common responses, as are numbing and denial.⁸¹ Anger and fear of death can lead to fear of revictimization and feelings of helplessness, hopelessness, and despair.⁸² As one's sense of security in the world is at least temporarily shattered, so too is one's faith in oneself, others, and one's God. Survivors may conclude that life owes them something or that they are guilty for surviving.⁸³ Feelings of, and sensitivity to, betrayal may occur as one's sense of trust is diminished.⁸⁴

It is against this background that the push for “rights” for victims occurs, often with little acknowledgment of the actual effects of victimiza-

77. See Robin A. Rosencrantz, *Rejecting “Hear No Evil Speak No Evil”: Expanding the Attorney's Role in Child Abuse Reporting*, 8 GEO. J. LEGAL ETHICS 327, 338-39 (1994).

78. See DERSHOWITZ, *supra* note 71, at 18, 19.

79. See Welsh S. White, *Capital Punishment's Future*, 93 MICH. L. REV. 1429, 1434-35 (1993).

80. See JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 33, 51 (1992).

81. See *id.* at 50; see also *Wrongs of Victim's Rights*, *supra* note 15, at 959.

82. See HERMAN, *supra* note 80, at 34.

83. See Paul Gerwitz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 882-83 (1996).

84. See Shapiro, *supra* note 13, at 11, 18.

tion on individuals and those close to them. To the extent that we feel compassion and sympathy for the anguish of victims, we are justified in attempting to respond to their plight. But all too often, the compassion for a victim's suffering transforms into attacks on the criminal justice process and "criminals," rather than inquiring into how we can help victims to recover and heal. The current trend towards encouraging victims to be grateful overlooks all but a part of the process of living after trauma.

As I observed earlier, since the original victim's rights movement began, there has been a move towards harsher and longer punishments for convicted offenders. The "Three Strikes You're Out" laws,⁸⁵ the sexual predator laws,⁸⁶ the lengthening of punishment under determinate sentencing,⁸⁷ and congressional expansion of offenses punishable by death,⁸⁸ all manifest the turn to a heavily punitive response to crime. Prosecutors use victim impact statements in capital cases to promote hatred of the offender for what he did to the victim and the victim's family; the prosecution exploits the family's grief and rage to ensure execution.⁸⁹ A striking example of this selective use of "victim impact" evidence was provided by Marilyn Kight, mother of a little girl killed in the Oklahoma City bombing case.⁹⁰ Kight, a supporter of the proposed Victim's Rights Amendment, testified before the Senate Judiciary Committee in 1997 that the prosecutors in the

85. See, e.g., CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1998). "Three Strikes You're Out" is a popular term used to describe the recidivist legislation that calls for the incarceration of a violent criminal for life upon a third felony conviction. See Franklin Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243 (1996). See R. Daniel O'Connor, Note, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three-Strikes and You're Out" Scheme*, 36 B.C. L. REV. 847, 847 (1995); Nkechi Taifa, "Three-Strikes-and-You're-Out"—Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV. 717, 717 (1994).

86. See Heather M. Stearns, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027, 1042 (1995).

87. See Stuart Nagel & Kathleen Levy, *The Average May Be the Optimum in Determinate Sentencing*, 42 U. PITT. L. REV. 583, 585 (1981); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

88. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 388 (1996).

89. See Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 746-47 (1995); Sysan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 361-62 (1996); Bruce Ledewitz & Scott Staples, *No Punishment Without Cruelty*, 4 GEO. MASON U. CIV. RTS. L.J. 41, 54 (1993); Robert P. Mosteller, *The Effect-Impact Evidence of the Defense*, 8 CRIM. JUST. 24, 29 (1993).

90. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary United States*, 105th Cong. 70 (1997) (statement of Marsha A. Kight) [hereinafter *Kight Statement*].

Timothy McVeigh case⁹¹ told her that she would not be allowed to give a statement at the penalty phase should McVeigh be convicted, because she opposes the death penalty.⁹² Kight recently received "permission" to testify at the sentencing of Terry Nichols, an accomplice of McVeigh's who was convicted of conspiracy and manslaughter by a federal jury, however.⁹³

The arguments in favor of a victims' rights and the Federal Amendment appear to recognize the rage of victims almost exclusively, channeling that anger into an attack on judges, defense lawyers, and defendants.⁹⁴ There is some concern with fear, as well; the provisions for preventive detention and continued custody seem to seek to allay a victim's fear that the perpetrator will retaliate against her.⁹⁵ The main focus in the arguments and literature has been on anger rather than fear, however; the remainder of this Commentary will be concerned with analyzing the use of anger and related emotions by groups, the media, and scholars.

Individual victims and victims' groups supporting punitive responses to crime have the public and legislative ear;⁹⁶ those that do not are ignored. For example, the media quoted Kight as angrily denouncing the verdict in the *Nichols* case without noting her opposition to capital punishment.⁹⁷ No representatives from Murder Victim's Families for Reconciliation, a group that opposes the death penalty,⁹⁸ were called as witnesses against the proposed Victim's Rights Amendment.⁹⁹ Bruce Shapiro's exploration of victim advocacy groups, chronicled in his Commentary in *The Nation*, also

91. *United States v. McVeigh*, 931 F. Supp. 756 (D. Colo. 1996).

92. See *Kight Statement*, *supra* note 90, at 70-71.

93. Jo Thomas, *Leniency Possible if Nichols Helps Inquiry*, N.Y. TIMES, Mar. 26, 1998, at A1.

94. See Shapiro, *supra* note 13, at 11, 13; see also *Wrongs of Victim's Rights*, *supra* note 15, at 997.

95. See *Wrongs of Victim's Rights*, *supra* note 15, at 968-71. I am indebted to Paul Brest for pointing this out. The terror and fear victims experience is real; but to the extent that preventive detention and continued custody are justified, it is in terms of revenge and an image of offenders as monsters who will commit horrible crimes if released, rather than specific victim fears of retaliation.

96. See Shapiro, *supra* note 13, at 12, 16.

97. Professor Steven Schulhofer told me that Kight had said she was misquoted by the papers. See *Conversation with Steven Schulhofer*, Professor of Law (Jan. 6, 1998). See also Helen Kennedy, *Nichols Escapes Death Jurors Let Judge Decide Penalty*, N.Y. DAILY NEWS, Jan. 8, 1998, at 9, available in 1998 WL 5915906.

98. See Shapiro, *supra* note 13, at 19.

99. See generally *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (1997). The group did, however, submit a prepared statement. See *id.* at 160 (statement of Murder Victims' Families for Reconciliation).

notes the focus of the groups on anger and retribution.¹⁰⁰

Victims' rights presently appear to focus almost entirely on an individual's right to have an offender swiftly punished, with the punishment based on revenge and incapacitation, despite the restitution provision, and the victim's right to use the apparatus of the state to accomplish that objective.¹⁰¹ The Federal Amendment proposed by Senate Judiciary Resolution 6 would give rights to victims of violent crimes and any other crime defined by Congress, in juvenile, collateral (*habeas corpus*), and military proceedings in all federal and state courts.¹⁰² The Constitution would give such victims the right to notice and to attendance at all public proceedings "relating to the crime"¹⁰³ and:

(1) to be heard and to submit written statements at proceedings involving release from custody, acceptance of a plea bargain, or sentencing;¹⁰⁴

(2) to be heard and submit written statements at public parole;¹⁰⁵

(3) to notice of release on parole or escape;¹⁰⁶

(4) "[t]o a final disposition of the proceedings relating to the crime free from unreasonable delay;"¹⁰⁷

(5) "[t]o an order of restitution from the convicted offender;"¹⁰⁸

(6) "[t]o consideration for the safety of the victim in determining *any* release from custody."¹⁰⁹

These rights must be enforced by Congress and the states, unless "compelling reasons of public safety or for judicial efficiency in mass victim cases" requires an "exception."¹¹⁰ Although the amendment would be unique in creating positive constitutional rights requiring government to do something rather than refrain from interfering with liberties, it specifically *excludes* a number of *remedies* victims would have for violation of their rights. Section 2 of the proposal specifically provides that victims cannot sue state actors for damages for violations of their rights and that victims would have no grounds for challenging a charging decision, a conviction,

100. See Shapiro, *supra* note 13, at 12, 18, 19.

101. See *id.* at 13.

102. See S.J. Res. 6, 105th Cong. § 5 (1997).

103. *Id.* at § 1.

104. See *id.*

105. See *id.*

106. See *id.*

107. *Id.*

108. *Id.*

109. *Id.* (emphasis added).

110. *Id.* at § 3.

an order obtaining a *stay* of a trial, or a decision compelling a new trial.¹¹¹ The restitution provision as a constitutional right could be meaningless as well if the offender is poor or judgment proof, which many are. Moreover, the restitution provision as a constitutional right might "trump" the imposition or recovery of other criminal fines, which currently fund victims' compensation and assistance programs.

The focus of this amendment seems to be largely on imprisoning offenders before they are convicted and on imprisoning them for as long as possible or executing them as quickly as possible upon conviction.¹¹² Furthermore, these proposals appear to rest on assumptions about victims desiring both swift convictions and the power to determine punishments.¹¹³ This is not the only interpretation of the amendment to be sure, but it is one that is consistent with the rhetoric, the images used to promote the amendment, and the turn to retributive rationales.

Images of what constitutes *justice* in the criminal law are largely defined by punishment; not punishing the guilty is seen as "unjust."¹¹⁴ Therefore, justice requires punishment of the guilty. From the viewpoint of corrective justice—righting a past wrong¹¹⁵—crime and punishment are correlatives.¹¹⁶ The only just remedy for crime is punishment—the intentional infliction of physical and psychic harm on the wrongdoer. This view raises a troubling question—does justice require that punishment be inflicted because the wrong is to society, the individual victim, the moral order, or something or someone else?

Corrective justice does *not* necessarily demand punishment, although social practice and retributivist philosophers assert that crime and punishment are justice, needing no further justification.¹¹⁷ Kant maintained that punishment for crime is right-in-itself, that it is fitting to punish the guilty, and that justice *requires* punishment.¹¹⁸ Modern sophisticated theories of

111. *Id.* at § 2.

112. See Shapiro, *supra* note 13, at 13.

113. See Mosteller, *supra* note 12, at 1696.

114. See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 265 (1997).

115. See Gerald J. Postema, *Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice*, 103 YALE L.J. 861, 875 (1993) (reviewing JULES L. COLEMAN, *RISKS AND WRONGS* (1992)).

116. See, e.g., Matthew H. Kramer, *Of Aristotle and Ice Crime Cones: Reflections on Jules Coleman's Theory of Corrective Justice*, 16 QUINNIPAC L. REV. 279, 283 (1996).

117. See FLETCHER, *supra* note 76, at 202-03; Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1164-65 (1990).

118. See Brian J. Telpner, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2056 (1997); see FLETCHER, *supra* note 73, at 202.

moral retribution growing out of a Kantian definition of justice include Herbert Morris' argument that the offender consciously chooses to do wrong and that in doing so also chooses to be punished for the wrong.¹¹⁹ Just deserts require punishment in order to restore the moral balance of society.¹²⁰

These and similar arguments focus on the moral worth of the offender and the community's right to punish him or her; they do not depend on an individual's right to have the offender punished or any right to revenge.¹²¹ Indeed, these justifications for retributive punishment do not argue for the punishment of the guilty as duty owed to the individual victim or right belonging to the victim; rather, they argue in terms of the duty and right of the state and community to punish.

In the 1980s, with the revival of interest in retributivist theories of justice and the victim's rights movement,¹²² philosophers began to shift to arguments that vengeance and hatred were proper grounds for punishment.¹²³ Revenge, long discredited by philosophers and social scientists as unenlightened, was rehabilitated as a justification for inflicting pain on an individual.¹²⁴ Retaliatory retribution—retribution for its own sake and for emotional "release"—became respectable.¹²⁵ While the new vengeance-based justifications for punishment first concentrated on society's interest in revenge,¹²⁶ a number of serious philosophers began to frame retaliatory retributive arguments in terms of individual victims.¹²⁷

Perhaps the most well-known and thoughtful arguments framing retribution in terms of the individual victim are those made by philosophers Jeffrie Murphy and Jean Hampton in their book, *Forgiveness and Mercy*.

119. See Jeffrie G. Murphy, *The State's Interest in Retribution*, 5 J. CONTEMP. LEG. ISSUES 283, 289-90 (1994); see generally FREEDOM AND RESPONSIBILITY (Herbert Morris ed., 1961).

120. See Murphy, *supra* note 119, at 290.

121. See Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 420 (1990); Tamar Frankel, Comment, *Lessons From the Past: Revenge Yesterday and Today*, 76 B.U. L. REV. 89, 90, 92 (1996).

122. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 396-98 (1996); Stephen J. Schulhofer, *Law: What Role Vengeance?*, BOS. GLOBE, June 8, 1997, at D1; Carol Mansur, *Payne v. Tennessee: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statement*, 27 NEW ENG. L. REV. 713, 715 (1993).

123. See R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIM. JUST. 28, 28 (1996).

124. See Frankel, *supra* note 121, at 97.

125. *Id.* at 100.

126. See Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1006 (1991).

127. See Frankel, *supra* note 121, at 98.

Murphy argues that violent crime inflicts indignity on and denies the very personhood of the victim.¹²⁸ The purpose of punishment is to affirm the victim's worth and to balance the moral value of the victim against that of the accused.¹²⁹ Thus, it is the *individual* who has a right to have the wrongdoer punished as an affirmation of her moral worth. In Murphy's view, victims have the "right to hate" and *should* hate the offender.¹³⁰ The only *proper* or *moral* response on the part of the victim is anger, resentment, and hatred. Accordingly, victims have the right to inflict pain on their assailants—or, at least they have the right to use the state to inflict pain. Hampton argues against hatred and resentment,¹³¹ following a more classic moral retributivist argument,¹³² but she agrees that the moral value of the victim must be reaffirmed by punishment.¹³³ While both authors make strong, if different, arguments for retribution as the moral basis of punishment, mercy receives hardly any attention, and neither author is very clear on the morality of forgiveness. Murphy seemingly relegates forgiveness and mercy to Jesus Christ and the saints;¹³⁴ Hampton appears to suggest that forgiveness is akin to an act of grace at some point but also argues that certain moral requirements must be met by an offender to justify forgiveness.¹³⁵

Similar to Murphy, Robert Solomon, in *Passion for Justice*, argues that injustice produces anger in its victims.¹³⁶ Solomon joins the social interest in punishment with the individual's rights and well-being to assert "the ready willingness to retaliate provides stability to both the social system and one's personal sense of integrity and control."¹³⁷ Violent crime is unjust, and victims properly feel anger and resentment. Resentment, the recognition that someone is better off as the result of injustice or committing a wrong against one, begins with the personal emotions of anger and bitterness. Anger and resentment, in turn, give rise to the need for action, which is vengeance. According to Solomon, criminal assault is an injustice that produces anger, which in turn leads to resentment and then to re-

128. See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 14, 28 (1988).

129. See *id.* at 16.

130. See *id.*

131. See *id.* at 35, 38, 65.

132. See *id.* at 103, 143-44.

133. See *id.* at 126-27. Despite its title, the book gives mercy or compassion short shrift, and it highly qualifies the proper circumstances for forgiveness. See generally *id.*

134. See *id.* at 31.

135. See *id.* at 37-38, 86.

136. See ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 247 (1990).

137. *Id.* at 286.

tialiation.¹³⁸ "When current criminal law reduces the victim of such crimes to a mere bystander (if, that is, the victim has survived the crime), the problem is not that . . . without vengeance justice seems not only to be taken out of our hands but eliminated as a consideration altogether."¹³⁹ "Wrongdoing should be punished, and, especially, those who have wronged *us* should be punished, preferably by us or, at least, in our name."¹⁴⁰

Solomon argues that the impulse to "get even" is an important ingredient of justice that has been wrongly ignored and misrepresented in philosophy.¹⁴¹ As vengeance is at the very core of our sense of justice, he argues that "[t]he desire for vengeance is our natural need for retribution,"¹⁴² any account of justice must include a role for vengeance.¹⁴³ Here, of course, Solomon may be committing the naturalistic fallacy, mistaking an "is" for an "ought": He argues that because people feel anger and seek revenge at being hurt or upon suffering injustice, it is a part of justice to act out that anger in punishing those whom we perceive as the source of hurt or injustice.¹⁴⁴

In the current climate of disdain for "victim identity" or claims of victimization, Solomon suggests that only through revenge do we shed the dreaded victim identity by eschewing forgiveness or compassion for those who hurt us: "But we do not have to see ourselves as victims, and it is vengeance or at least fantasies of vengeance that make this possible. . . . [C]ompassion for one's own offender (for the object of one's revenge) is often foolish rather than noble."¹⁴⁵ For Solomon's justice, the "natural" emotions of resentment and revenge, if tempered at all, are tempered by an awareness of selfishness or pettiness, a kind of rearrangement of priorities.

That urges to retaliate, revenge fantasies, and actual retaliation exist in our culture does not make them right or moral. To question the validity of vengeance, one need only think of the endless feuding produced by "tit-for-tat" revenge that occurs historically and daily throughout the world. Despite his tendency to state that certain emotions, feelings, and actions

138. See generally *id.* at 246-63.

139. *Id.* at 277-78.

140. *Id.* at 272.

141. See *id.* at 279.

142. *Id.*

143. See *id.* at 285, 286.

144. See *id.* at 272-73.

145. See generally *id.* at 286. He goes on to state that "Justice is not forgiveness nor even forgetting but rather it is getting one's emotional priorities right, putting blame aside [not because it isn't deserving but] in the face of so much other human suffering and thereby giving up vengeance for the sake of larger and more noble emotions." *Id.*

are "natural" parts of justice, Solomon does not accept these "natural" manifestations. Instead, he both excludes blood feuds, vendettas, and horrific punishments from his concept of vengeance and notes that compassion for others has a role to play in justice, at least at certain times.¹⁴⁶

Is the focus on anger and revenge a good or compassionate response to victims of violent crime? Is it morally right to urge victims to resent and hate? Does it help their healing and their individual dignity and autonomy? I think dwelling exclusively on resentment is damaging, although denying anger is also damaging to victims of extreme trauma. Anger is frequently one of the emotions experienced by victims—anger at the offender, anger at themselves, anger at others, anger at actors in the criminal justice system, and anger at the world are understandable and likely reactions. But anger can dissipate over time or play a different role at different times in an individual's recovery from violence. Just as it is not compassionate to tell someone *not* to be angry, or to forgive and forget a horrific experience, or to put it behind them, to urge them to dwell upon hatred and revenge to the exclusion of all other emotions is damaging. It is particularly harmful and immoral to urge anger for ulterior, instrumentalist motives—*e.g.*, to increase punishments, to foster society's retaliatory response, and, perhaps, to increase conviction rates.

First, urging victims to dwell upon anger freezes the healing process into one emotion; it rewards that emotion and ignores all the others. It insists that victims and law ought to embody, encourage, and act upon rage.¹⁴⁷ Anger and resentment become the good and the just. Putting aside the fact that taking revenge may not always be morally proper, encouraging victims to nurse resentment overlooks the danger that resentment is poisonous to well-being and happiness, as well as damaging to recovery, because it deflects attention from the other issues of meaning, isolation, death anxiety, and responsibility that victimization raises. And emotions of terror and grief often exist for survivors of violent crimes or extreme trauma, and these emotions ought not go unrecognized in service to anger.¹⁴⁸ If those emotions are "wrong," they are overlooked and unhealed; they may masquerade as "rage" rather than the core emotion, or the victim may feel worse because she or he does not have the "proper" emotions.¹⁴⁹ Emotions of pity or compassion for offenders, by becoming forbidden as

146. See *id.* at 285-86.

147. However, even the Supreme Court of the United States has held that rage in sentencing is inappropriate. See *Booth v. Maryland*, 482 U.S. 496, 508-09 (1987).

148. See HERMAN, *supra* note 80, at 25, 33 (explaining the effects of psychological trauma).

149. See MALE VICTIMS OF SEXUAL ASSAULT 101-02 (Gillian C. Mezey & Michael B. King eds., 1992); see also CATHY ROBERTS, WOMEN AND RAPE 101-02, 131-32 (1989).

"improper," may exacerbate the impulse to rageful violence which underlies so many violent crimes already.¹⁵⁰

The emphasis on anger-resentment-hatred is powerfully gendered as well. Images of proper responses to victimhood in the media are often reduced to the angry male identity of the rageful Fred Goldman and Mark Klaas.¹⁵¹ Ron Goldman's mother—does anyone even know her name?—and whatever her emotions, is lost to view and has no voice.¹⁵² Klaas' rage at Richard Allen Davis' monstrous killing of his daughter received wide coverage,¹⁵³ including Klaas' raging at the jury for taking hours to determine guilt.¹⁵⁴ Mrs. Martin, the girl's mother, remained invisible and unheard.¹⁵⁵

Anger is a "male" emotion in this culture; anger may also be one of the few emotions men are culturally permitted to express.¹⁵⁶ On the other hand, females are told *not* to express anger; epithets abound which reflect attitudes towards women's expressions of anger and resistance—"shrew" and "witch" are some milder examples.¹⁵⁷ Many females in this culture—of all colors and sexual orientations—learn that anger is a "bad" emotion for a girl or woman to have. For example, to dissuade identification with feminism, note the use of "man-hating" and "angry" as almost automatic pejorative adjectives modifying the word "feminist."¹⁵⁸ For a feminist or an African-American woman to be angry is automatically to become a

150. See SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, AND RESPONSIBILITY* 26-30 (1996); HANNAH ARENDT, *THE HUMAN CONDITION* 240-41 (1958).

151. See George P. Fletcher, *Victim's Rights and Wrongs*, N.Y. TIMES, Sept. 29, 1996, at E15 ("The father of Polly Klaas stood up in a California courtroom . . . and vented his rage at his daughter's killer. . . . Klaas said [the defendant] should be condemned to Hitler's circle in hell."); see also Marc Sandalow, *Goldman Crusades for Victims' Rights Amendment*, SAN FRAN. CHRON., Apr. 15, 1997, at A3.

152. See *Goldman, Ex-Wife to Split Simpson Damages*, CHI. TRIB., Feb. 20, 1997, at 9 (stating that Sharon Rufo is Ron Goldman's ex-wife); see also B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay \$25 Million in Punitive Award*, N.Y. TIMES, Feb. 11, 1997, at A1.

153. See Fletcher, *supra* note 151; see also Harriet Chiang, *Goldman's Family Visits S.F. On Book-Selling Tour*, SAN FRAN. CHRON., Feb. 28, 1997, at A21.

154. See, e.g., Tim Golden, *Jury Recommends Death for Killer of Polly Klaas*, N.Y. TIMES, Aug. 6, 1996, at A8 ("jurors deliberated four days").

155. See Jane Gross, *California Town Mourns Abducted Girl*, N.Y. TIMES, Dec. 6, 1993, at A12.

156. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1576 & n.142 (1991).

157. See *id.*

158. See ROSEMARIE SKAINE, *POWER AND GENDER: ISSUES IN SEXUAL DOMINANCE AND HARASSMENT* 4 (1996); see also Lanae Holbrook, *Justice Barkett's Feminist Jurisprudence*, 46 U. MIAMI L. REV. 1161, 1168 (1992); Susanne Baer, *A Different Approach to Jurisprudence? Feminisms in German Legal Science, Legal Cultures, and the Ambivalence of Law*, 3 CARDOZO WOMEN'S L.J. 251, 282 (1996).

stereotype that leads to being less, not more, empowered.¹⁵⁹

While anger is relegated to males, fear is denied them, but it is allowed for women.¹⁶⁰ Accordingly, females of all social classes and many ethnic groups are likely to react to violence with fear or terror. Men are not supposed to cry, but women can, so females are also more likely to manifest sadness and grief.¹⁶¹ Women are also expected by others to be caring, compassionate, and forgiving.¹⁶² For example, the image of *mari-animism* in Latino/a culture teaches the "ethic of care" that attaches to middle class girls and women.¹⁶³ But the rush to forgive can be damaging because, like the imposition of the caretaking role on women generally, it denies women the right to deal with the many feelings, including those of anger, that come from experiencing violence.¹⁶⁴ The anger does not necessarily produce the impulse for vengeance, however.

Many women may very well be angry but not—any more than many men—choose to nurse resentment and hatred. They may be furious with sexual violence and violence against women. Much of rape and domestic violence reform came from feminist anger at the law's failure to take these forms of violence seriously,¹⁶⁵ which fits the Solomon model of anger as a signal emotion of injustice.¹⁶⁶ But punishment and punitive responses may not have been the goal as much as better treatment of rape survivors and deterring rape. That is, prevention and deterrence instead of retaliation may be the goal of many concerned who are angry about violence against women.

The focus on anger-resentment-punishment may be particularly damaging to women of color.¹⁶⁷ Angry African-American women are frighten-

159. See Grillo, *supra* note 156, at 1579, 1580.

160. See THE ENCYCLOPEDIA OF PSYCHOLOGY 195 (Rom Harré & Roger Lamb eds., 1983).

161. See *id.*; see also Jeffrey Kauffman, *Intrapsychic Dimensions of Disenfranchised Grief*, in *DISENFRANCHISED GRIEF: RECOGNIZING HIDDEN SORROW* 27 (Kenneth J. Doka ed., 1989) ("The first type of situation in which grief may be disenfranchised by one's own shame is where one is *ashamed of one's own emotions*.").

162. See LAMB, *supra* note 150, at 34-35.

163. GRAN DICCIONARIO ESPAÑOL-INGLÉS/ENGLISH-SPANISH DICTIONARY 447 (Larousse 1993) (the word derives from "Marian" of the Virgin Mary).

164. See, e.g., LAMB, *supra* note 150, at 160-66; MURPHY & HAMPTON, *supra* note 128, at 15-19.

165. See generally HERMAN, *supra* note 80, at 28-31; see also FLETCHER, *supra* note 73, at 4.

166. See SOLOMON, *supra* note 136, at 201-02.

167. See Nancy S. Ehrenreich, *O.J. Simpson & the Myth of Gender/Race Conflict*, 67 U. COLO. L. REV. 931, 932, 940-43 (1996).

ing to many whites, and the justice system is still dominated by whites.¹⁶⁸ African-American women are often seen, not only as unreliable as victims or witnesses, but also as "less cooperative" with law enforcement and less articulate.¹⁶⁹ If they are angry as well, they may fail the "test" of "true" victims. African-American women already have reason to be mistrustful of a criminal justice system that disproportionately affects the African-American community and African-American men.¹⁷⁰ The punitive history of oppression, lynching, and harsh treatment by a white-dominated legal system and the damage that system has done to the African-American communities in this country is neither distant nor unreal.¹⁷¹ To concentrate on revenge and punishment may isolate the victim and create a cruel dilemma for her by demanding she choose between her rage and her community.¹⁷²

But what of the argument that the failure of women to get angry or be motivated by revenge is a result of having been subordinated in this culture? As Catharine MacKinnon has argued, women learn to "care" and "forgive" because what else can an oppressed person do in the face of the violence of the oppressor?¹⁷³ Murphy argues somewhat similarly that the rape victim who is not angry, who does not want to retaliate against her rapist, is basically suffering from false consciousness, as women have been taught to forgive and accept when they ought to have learned to resent and resist.¹⁷⁴ Yet, as Joshua Dressler noted in his review of Murphy and Hampton, this may indicate "'an instance of a male and macho stereotype that is itself no virtue.'" ¹⁷⁵ "It is almost as if Murphy were hard to be asking, 'Why can't women be more like men, and resent and hate rather than

168. See *id.* at 941.

169. See *id.* at 942; Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 516-17 (1995).

170. See Ehrenreich, *supra* note 167, at 941.

171. See *id.* at 940-41.

172. See Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1511-14 (1974). The failure of the African-American community to support Desiree Washington's rape case against boxer Michael Tyson is one recent example of the dilemmas Black women face. See Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males about the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 998 (1992); see also Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN L. 41, 49-50 (1993).

173. See generally Catharine A. MacKinnon, *Reflections On Sex Equality Under Law*, 100 YALE L.J. 1281, 1281-82 (1991).

174. See MURPHY & HAMPTON, *supra* note 128, at 16-19.

175. Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1448-49 (1990).

forgive?"¹⁷⁶

Putting aside pressures to forgive too quickly, the assumption that anger is the proper, moral, and only response to injustice does not seem to be descriptively true. As part of his argument for revenge, Solomon breezily asserts: "Despite volumes of propaganda to the contrary, experience seems to show that to see oneself as a helpless victim makes one less, and not more, likely to open one's heart to others."¹⁷⁷ But one should be cautious of unsupported statements such as "experience seems to show." Having been a helpless victim of a terrible crime might indeed lead to bitterness, self-pity, and resentment but having had such an experience also makes it *more* likely that one can empathize with the suffering of others in similar situations.¹⁷⁸ Nor is it the "best" response or the definitional one for complete justice—compassion, as Robert Solomon notes, is also an important ingredient of a sense of justice and catalyst to action.¹⁷⁹ Even sadness, grief, and fear can be catalysts for action to change laws or make unjust situations more just.

Finally, one can ask if encouraging anger, resentment, and revenge are *empirically* helpful to victims. This is a more consequentialist analysis and arguably irrelevant for a rights theorist. That is, if one has a right to revenge, it does not matter if it is harmful or not to exercise that right, anymore than the question of whether viewing violent pornography is harmful is relevant to whether one has a right to do so. Nevertheless, when advocating rights in the name of victims, it may be morally irresponsible to ignore the consequences to victims of "giving" them those rights.¹⁸⁰ Thus, the consequentialist question of whether it is good to encourage anger, resentment, and revenge *is* important. While Solomon and Murphy assume it *is* good for victims,¹⁸¹ there are reasons to question that assumption.

Anecdotally, victims who expected that the punishment or even execution of the offender would bring them relief, satisfaction, gratification, or an end to the effects of the trauma often find that the effects remain and

176. *Id.* at 1459.

177. SOLOMON, *supra* note 136, at 286.

178. *See Legality and Empathy*, *supra* note 11, at 1574, 1584.

179. *See id.* at 225.

180. *See Wrongs of Victim's Rights*, *supra* note 15, at 953-55 (proposing "a unifying theory of the individual experience of victimization as it relates to the individual" and arguing that the theory, supported by recent research, "indicates that many current victim's rights proposals . . . may actually be psychologically destructive to the victim").

181. *See* MURPHY & HAMPTON, *supra* note 128, at 16-19; SOLOMON, *supra* note 136, at 242-46.

the "victory" is a Pyrrhic one. Unlike the neat, easy solutions portrayed daily on television and in movies, moral ambiguity and unaddressed issues from the trauma frequently remain to haunt the victim. This may be *especially* true when the victim has focused all of her or his attention on blaming and punishing the offender rather than confronting her or his own responsibility for healing from the trauma.

In a commentary by a victim of a violent crime recently published in *The Nation*, Bruce Shapiro (a victim of armed robbery) uses a story from Sister Prejean's book to illustrate how even an execution in a fairly short time (as these things go) failed to assuage the rage and grief of a rape/murder victim's father:

Vernon begins to cry. He just can't get over Faith's death. It happened 6 years ago, but for him it's like yesterday. . . . He had walked away from the execution chamber with his rage satisfied but his heart empty. No, not even his rage satisfied, because he still wants to see Robert Willie suffer and he can't reach him anymore. He tries to make a fist and strike out but the air flows through his fingers.¹⁸²

I do think this vignette is a fitting illustration of the point that rage and grief do not end simply even with the infliction of the ultimate penalty. Additionally, if *pursuit* of that penalty alone determines the survivors' lives, healing may be hindered. It is true that, without directing anger at the person who hurt them, individuals might direct their anger inward, falling into hopelessness and passivity, self-blame and depression. Denying anger is not healthy, and revenge fantasies can help someone understand another's responsibility for the wrong done.¹⁸³ Further, we should never dictate to a victim of extreme trauma that she or he should not be so angry or that they should get over it within a certain amount of time—the process varies from individual to individual. Yet, neither should we say anger is *the* proper response at all times. With a sole focus on anger and blame, one avoids taking responsibility for oneself or dealing with the other issues of extreme trauma—mourning, fear, finding meaning, and reconnecting with others. Indeed, dwelling on rage can make one more likely to be stuck and helpless. Further, resentment and vengeance can lock one into a relationship with the offender, ironically giving the offender continuing control over his victim.

Let me return to the proposed amendment. What does it give to victims? The focus is on identified offenders and keeping them in custody. It

182. Shapiro, *supra* note 13, at 19.

183. See, e.g., SOLOMON, *supra* note 136, at 40-42 ("The desire for vengeance seems to be an integral aspect of our engagement in life and, more morally, in our recognition of evil.").

does nothing for those injured by someone unknown or never caught. The amendment is grounded in arguments that an individual's feelings of hatred and revenge are proper justifications for the state to punish or imprison. Arguably, by allowing victims to oppose the release of suspected or convicted assailants,¹⁸⁴ the amendment also demonstrates respect for the fear that victims may feel.

The problem of the criminal justice system's perceived and actual insensitivity to victims remains largely unaddressed by the amendment.¹⁸⁵ The insensitivity of which many victims' groups complain is less a constitutional failing than a failing of common decency by actors in the system, together with the sensitivity to hurt and betrayal victims of violence often have in the aftermath of an extreme trauma.¹⁸⁶ No general law can sensitively address or provide nuanced responses to all the issues of trauma, of course. Yet, research may suggest that *how* victims are treated by actors in the criminal justice process is as important, if not more important, than the particular outcome or results. Thus, brisk treatment, inadequate information, being herded around crowded courtroom halls, having no one return phone calls, and having no one explain things can lead to feelings of alienation and betrayal by the various actors in the system.

Being treated seriously and sensitively by police and prosecutors may be more helpful to victims than anything else. For example, a study of the effects of rape reform legislation in Michigan found that, while there were only slight improvements in the types of cases that were successfully prosecuted, victims reported a better experience with the process than before, because police and prosecutors took them more seriously.¹⁸⁷ We obviously need more empirical studies of what works and what does not to help victims; these studies should include victims who are *not* members of advocacy groups with a particular point of view, and they should include those who have had good experiences with the "system."

Bruce Shapiro states that "all survivors of crime have an immediate

184. See S.J. Res. 6, 105th Cong. § 1 (1997).

185. See *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 75-82 (1997) (statement of Lynne Henderson).

186. See *id.* (statements of Lynne Henderson and Donna F. Edwards). Some of the earlier versions did speak of a right to due process and fair treatment for victims. Language that victims should have a right to be "treated fairly" seems at first blush to be more responsive to victims' concerns than the current amendment. These provisions dropped out as they were vague and raised concerns about interpretation and application. See S.J. Res. 52, 104th Cong. 112 (1996); H.J. Res. 173, 104th Cong. 3, 6 (1996); H.J. Res. 174, 104th Cong. 3, 6 (1996).

187. See generally JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 67-102 (1982).

and concrete need for medical care, or for lost wages, or for psychotherapy for themselves and their families, or for legal counsel."¹⁸⁸ I would guess that victims have these needs and possibly more. Although we lack empirical studies of what the "system" can do to make the experience of victims better, I have a few common sense thoughts: Generally, funding for, and commitment to, victim-witness assistance programs, crisis counseling, victim's compensation programs that help with medical and counseling expenses, and training for judges, prosecutors, and police working with victims would undoubtedly help victims.

Victim-witness programs, if well-conceived and well-run, and with adequate resources, can be of great help to victims, providing both support and a liaison between the victim and the prosecutor. Victims may need help with transportation to the district attorney's office or courthouse; they may need child care as well. There ought to be a safe place where victims can wait in relative comfort at both the prosecutor's office and the courthouse. A truly good program ought to have qualified social workers to assist in solving problems, locating good counseling services, applying for financial aid, and other matters.¹⁸⁹ Good rape crisis groups, domestic violence services, and other crisis groups can lend support at a terrible time and provide effective advice to victims. Victims' compensation funds, meant to reimburse victims for uninsured losses and medical expenses, including psychotherapy, can be of great help if they are well-run and properly funded.

Insensitivity to victims by those who are insiders in the process, such as prosecutors and judges, is a problem that needs correcting as well; training programs can help if the participants are willing to attend and learn. Working with victims is difficult: Not all victims are sympathetic; not all victims are certain of what they want or need. Victims can be demanding and in need of much support, leading prosecutors to resent or avoid them. Judges may find victims time-consuming, "too emotional," uncooperative, flighty, or otherwise difficult.¹⁹⁰ It is easy to be nice to a cooperative and attractive victim. It is harder to be courteous to an impatient, angry, or somehow uncooperative victim when trying to move a

188. See Shapiro, *supra* note 13, at 19.

189. See CRIMINAL JUSTICE AND THE VICTIM 177-82 (William F. McDonald ed., 1976) [hereinafter CRIMINAL JUSTICE]; see also *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 75-82 (1997) (statements of Donna F. Edwards and Lynne Henderson).

190. See CRIMINAL JUSTICE, *supra* note 189; see also Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victims Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT 157, 160-61 (1992).

heavy case calendar along. Police, prosecutors, and judges also might hold unconscious or conscious biases against victims of particular crimes such as rape or relationship violence, as well as victims who are members of a certain class or ethnic group.

Prosecutors might see themselves in the role of rescuers—at least for victims who in some way touch or appeal to them. This is dangerous for both victims and prosecutors, however, if prosecutors are not trained in dealing with trauma. They ought not try to be therapists or rescuers, because they may do more harm than good by violating the victim's boundaries or losing sight of their role. If the prosecutor is a self-styled rescuer and the victim is not properly grateful, the prosecutor may become angry with the victim or identify with the perpetrator of the crime, which hinders the victim's healing and the prosecutor's ability to do her job. This does not mean that they ought not deal with all victims considerately and respectfully.

Prosecutors and courts also need to be sure there are effective ways to notify victims about the status of their cases. Notice is not enough; someone, a victim-witness coordinator or prosecutor, needs to be available to explain the meaning of proceedings and to prepare the victim-witness.

If we are committed to helping victims of violent crime and wish to be compassionate towards them, we may very well want to provide a forum for victims to tell their stories, because it seems one of the needs of victims is to have someone listen. But the amendment's focus on victims only having a say regarding custody may very easily prevent the telling of the story the victim wishes to tell.¹⁹¹ Again, prosecutors may prevent members of victims' families from testifying against the death penalty in capital cases, and they are likely to be less than enthusiastic for victims' pleas for leniency in many other instances.¹⁹² Further, if the victim's voice can still be ignored, because ultimately the amendment provides no meaningful remedies for "violations" of the right to participate, it may be cruel to create the illusion of having a say. Finally, the concerns of criminal proceedings include those of fairness to defendants, at least in theory, the public, and the goals of the criminal justice process, many of which may conflict with the personal wishes and needs of an individual victim. These concerns include proportionality in sentencing and treating like cases alike—and while for a victim, the case is unique, even-handedness in justice means generalizing beyond the individual's interests. Thus, some other forum than the criminal court may be a better place for victims to tell

191. See S.J. Res. 6, 105th Cong. § 1 (1997).

192. See Karmen, *supra* note 190, at 161-63.

their stories and receive support.

The programs and ideas mentioned go directly to helping victims deal with trauma and its aftermath. Yet, these things cost money, and it is a lot easier to provide rights, which seem so symbolically powerful. However, the adoption of vast changes in constitutions does not necessarily produce "happier" victims. California has adopted two sweeping victims' rights amendments, Proposition 8, in 1982,¹⁹³ and Proposition 115, in 1991,¹⁹⁴ and yet there is little evidence that victims in California are "happier" or "feel better" as a result.¹⁹⁵ In fact, there was a large contingent of murder victim's relatives from California at the Senate Hearings in 1997, a few of whom voiced the same complaints and told the same stories to me as were told by other victims in the past to support the California amendments.

I hope this Commentary succeeds in suggesting a pause before assuming that changing the Constitution or declaring rights for victims of violent crime is an appropriate or compassionate response to their needs and interests. I hope that we resist the easy fix of providing meaningless or even counter-productive rights in the name of victims. We should think seriously about whether we wish to continue with the cycle of revenge and punishment, at the cost of compassion for victims and offenders, who are, after all, also human beings, and we should proceed with caution lest in the name of compassion we do further harm.

193. CAL. CONST. art. I, § 28. See also Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21. HASTINGS CONST. L.Q. 95, 96-7 (1993).

194. CAL. CONST. art. I, §§ 24, 29, 30. See also Van Cleave, *supra* note 193, at 96-97.

195. See Hank M. Goldberg, *Proposition 8: A Prosecutor's Perspective*, 23 PAC. L.J. 947, 970-71 (1992); see also *Foreword, Letter from Margaret Scully, President of the California Public Defenders Association, to the Board of Editors of the Pacific Law Journal*, 23 PAC. L.J. 1, 1-3 (1992).