

All for One: A Review of Victim-Centric Justifications for Criminal Punishment

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INTRODUCTION

Disparate understandings of the primary justification for criminal punishment have in recent years divided along new lines. Retributivists and consequentialists have long debated whether a community ought to punish violators of legal norms primarily because the violator has usurped communal standards (the retributivist view), or rather merely as a means toward some end such as rehabilitation or deterrence (the consequentialist view). The competing answers to this question have demarcated for some time the primary boundary in criminal jurisprudential thought.

A new fault line appears to have opened between those who maintain the historical view that criminal punishment promotes the common good and those who believe that criminal punishment should primarily or exclusively serve or vindicate the interests of individual victims. For lack of commonly-used labels, this article shall refer to the former as “Blackstonian retributivists” and the latter as “victim-centrists.” Victim-centrists would allow states and communities to punish those who usurp certain rights of particular victims and would, in some instances, excuse conduct that has historically been understood as criminal on the ground that such conduct best serves a victim’s interest.

Victim-centric justifications for punishment or forbearance from punishment can naturally be understood from a consequentialist perspective. Consequentialist reasoning provides a link between the harm suffered by a particular victim and the culpability of the perpetrator. For this reason consequentialism and victim-centrism make an obvious fit. However, the divide between the Blackstonians and the victim-centrists is not contiguous with the line between retributivists and consequentialists. Rather, some retributivists, most notably George Fletcher,¹ have pitched their tents with

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1. See generally George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3

consequentialist victim-centrists.

This article will review briefly the Blackstonian conception of criminal punishment. It will then examine some victim-centric schemes, taken as representative of victim-centric schemes offered from consequentialist and retributivist perspectives. Finally, it will survey three putative victim-centric developments in positive law. The goals of this survey are to discern whether victim-centrism constitutes an improvement upon Blackstonian retributivism and whether Blackstonian jurisdictions, including the common law states in the United States, have anything to learn from putative victim-centric developments in positive law.

Victim-centric arguments are susceptible to criticisms, both from a Blackstonian retributivist perspective and on their own terms. Concern for victims no doubt motivates the increasing use of victim-centric justifications for penal enforcement. However, this concern finds a curious manifestation when expressed in victim-centric terms. It is not immediately apparent why the approbation or disapprobation of otherwise-criminal conduct should depend upon the harm that results to, or subsequent satisfaction obtained by, a particular victim.

Furthermore, victim-centric understandings of criminal law in some cases affect the scope of what the law prohibits. If criminal punishment is conditioned primarily or exclusively upon the harm to the victim resulting from the criminal conduct, criminal punishment might be unjustifiable where the putative victim is not, on balance, harmed, as where the benefits to the victim from the otherwise-culpable conduct are deemed to outweigh any harm. Alternatively, otherwise-culpable conduct might be excused on victim-centric terms where the victim is compensated for the harm she has suffered.

A prominent contemporary example of victim-centric justification for contracting the reach of criminal prohibitions is the infanticide of newborn infants in the Netherlands. The practice is defended as a humanitarian exercise in suffering reduction; children who can expect to suffer from severe physical afflictions are relieved by fatal means. The infant is judged not to be harmed but rather benefited, on balance. Thus, punishment is unjustifiable on victim-centric terms. The Netherlands continues to deem criminal the intentional killing of humans generally, but excuses the intentional killing of severely-afflicted newborns. Thus, who enjoys the protection of a particular criminal prohibition depends upon the justification offered for the act.

Other developments in positive criminal law are defended or lauded as triumphs of victim-centrism. Civil compromise statutes in several states tend to result in victim-centric outcomes. These statutes permit courts, even over the

objection of prosecutors, to bar the prosecution of misdemeanor perpetrators who have made restitution to their victims. Misdemeanors—violations of positive, criminal law that a state has deemed sufficiently culpable to punish but insufficiently culpable to label “felonies”—are alternatively prosecuted or excused based not upon the culpability of the perpetrator but rather upon the harm to, and satisfaction of, particular victims. Where a victim has received subjectively satisfactory compensation for the harm she has suffered as a result of the misdemeanor, civil compromise statutes forbid the prosecution of the perpetrator. Thus these statutes are victim-centric, if not in principle, at least in application. Though civil compromise statutes were not victim-centric in their inception, and their victim-centric applications have been curtailed somewhat in recent years by amendments, their appearance and evolution demonstrate some of the difficulties with substituting the interests of victims for the interest of the community in penal justifications.

Finally, Fletcher lauds the Rome Statute of the International Criminal Court² as the marriage of retributivist and victim-centric penal justifications. The Rome Statute created the International Criminal Court (ICC) and established a regime under which the international community can punish certain criminal infringements of human rights. If the Rome Statute successfully adjoins Blackstonian retributivism and victim-centrism, that success would imply that victims’ interests are not inconsistent with the punishing community’s interest in vindicating usurpations of liberty. However, it is useful to examine whether, as Fletcher suggests, the Rome Statute is primarily victim-centric or whether retributive punishment on behalf of the punishing community also serves the interests of individual victims, as Blackstonian retributivists have long held.

I. THE BLACKSTONIAN APPROACH: VICTIM AS MEMBER OF COMMUNITY

In the Blackstonian view, criminal conduct is an offense not merely against the individual victim but also against society:

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it’s [sic] social aggregate capacity.³

Because, as Blackstone explained, public wrongs injure the community as a whole, they are not remedied by vindicating mere individual interests. In the

2. Rome Statute of the International Criminal Court, June 17, 1998, 2187 U.N.T.S. 90.

3. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND *5.

Blackstonian conception, murder, for example, is not considered blameworthy solely because it results in injury to the life of the individual murder victim. Instead, the loss that the community suffers—the loss of one of its members and the murderer’s disparagement of the community’s teaching that murder is immoral—suffices to justify punishing the murderer. Thus “the private wrong is swallowed up in the public” so that any satisfaction that the individual victim receives from punishment is, while not disregarded, subsumed within the satisfaction to the community.⁴

In American criminal law, the defining parameters of criminal prohibitions continue to lie along these principles. Criminal conduct, whether of commission or omission, is defined as a crime simply because it violates public criminal law. “A crime is said to be an offense against the sovereignty, a wrong which the government deems injurious not only to the victim but to the public at large, and which it punishes through a judicial proceeding in the government’s name.”⁵ The government alone, not any particular victim, has the authority and the obligation to prosecute, and the prosecution is performed as a vindication of the public law; “it is not even necessary for any person to have been directly harmed in order for conduct to constitute a crime.”⁶

For this reason, the consequences (or lack thereof) of criminal activity to the victim do not control the question whether an alleged perpetrator has committed an act for which society must be vindicated through the state. Because the authority and obligation to prosecute rest on the community, not the individual, individuals, even those injured by criminal conduct, may not condone the conduct “and no individual, even though he be the complaining witness, has power or authority to control the action of the sovereign in vindicating its dignity by punishing an infraction of its laws.”⁷ As the legal encyclopedia American Jurisprudence has affirmed, “[b]ecause a crime is by definition a public wrong, one against all the people of the state, it is ordinarily no defense that a person injured by the crime condoned the offense.”⁸

State courts that have considered the question have held that neither condonation nor ratification by the victim, nor restitution by the offender, is a defense to a criminal charge, unless explicitly and specifically provided by statute.⁹ This is a “bedrock principle of American justice.”¹⁰ It is no mere

4. *Id.* at *6.

5. 21 AM. JUR. 2D *Criminal Law* § 1 (1998).

6. *Id.*

7. *Reed v. Carrigan*, 129 N.E. 8, 9 (Ind. 1920).

8. 21 AM. JUR. 2D *Criminal Law* § 474 (1998). *See also*, 1 WHARTON’S CRIMINAL LAW § 45 (15th ed.); *Commonwealth v. Slattery*, 147 Mass. 423, 18 N.E. 399 (1888); *People v. Marrs*, 125 Mich. 376, 84 N.W. 284 (1900).

9. *See, e.g.*, *Phillips v. State*, 91 So.2d 518, 519 (Ala. Ct. App. 1956); *Hensel v. State*, 585 P.2d 878 (Ala. 1978); *State v. Garoutte*, 388 P.2d 809 (Ariz. 1964); *Bruce v. State*, 265 S.W.2d 956 (Ark. 1954); *People v. O’Rear*, 34 Cal. Rptr. 61 (App. Dep’t Super. Ct. 1963); *Wooldridge v. State*, 38 So. 3 (Fla. 1905); *Pratt v. State*, 307 S.E.2d 714 (Ga. Ct. App. 1983); *State v. Fowler*, 89 P. 757 (Idaho 1907); *People v. Dean*, 151 N.E. 505, (Ill. 1926); *Reed v. Carrigan*, 129 N.E. 8 (Ind. 1920).

happenstance that the captions of criminal actions list as complainant the “State,” the “People,” or the “United States of America.” Rather, it demonstrates the centrality of Blackstonian assumptions to the American criminal justice system.

II. VICTIM-CENTRIC SCHEMES

A. *Victim-Centric Consequentialism: Victim as Sensor*

Victim-centric justifications for criminal punishment have perhaps attained their apogee in the thinking of preference utilitarians such as Peter Singer¹¹ of Princeton. Singer ostensibly practices moral, not necessarily legal, philosophy. However, he defends a legal regime in the Netherlands that excuses as non-culpable the intentional killing of newborn infants.¹² His defense of infanticide follows no express, manifest, comprehensive theory of punishment; he does not suggest a purpose for criminal punishment that might explain why infanticide is properly excluded from the inventory of punishable homicides. However, he defends a particular conception of criminal culpability (and non-culpability) predicated upon victim-centric assumptions. Singer predicates his assertion that states ought not to treat some infanticides as criminally culpable with a set of assumptions concerning the purpose of punishment. That set of assumptions is directly at odds with Blackstonian retributivism and is distinguishable from other utilitarian conceptions of punishment. Though Singer does not express his comprehensive theory of punishment (if he has any), one may infer from his argument for the decriminalization of infanticide what he does *not* believe the purposes of punishment to be.

Unlike classical utilitarians, who attempt to measure the felicific calculus of a community, preference utilitarians, such as Singer, condemn as unethical those actions that thwart the preferences of individual persons.¹³ One might

1920); State v. Pingel, 105 N.W. 58 (Iowa 1905); State v. Ismaili, 7 P.3d 236 (Kan. 2000); State v. Dejean, 106 So. 374 (La. 1925); Commonwealth v. Rotunda, 747 N.E.2d 1199 (Mass. 2001); People v. Marrs, 84 N.W. 284 (Mich. 1900); State v. Higgin, 99 N.W.2d 902, 906 (Minn. 1959); Hilbun v. State, 148 So. 365 (Miss. 1933); State v. Eidson, 701 S.W.2d 549, 554 (Mo. Ct. App. 1985); State v. Martinez, 613 P.2d 974, 980 (Mont. 1980); State v. Fahlk, 524 N.W.2d 39 (Neb. 1994); People v. Kaye, 49 N.Y.S.2d 345 (N.Y. Misc. 1944); State v. Shipman, 163 S.E. 657 (N.C. 1932); State v. Warner, 564 N.E.2d 18 (Ohio 1990); Acuff v. State, 283 P.2d 856 (Okla. Crim. App. 1955); State v. Cooper, 113 S.E. 132 (S.C. 1922); Busby v. State, 103 S.W. 638 (Tex. Crim. App. 1907); Cook v. Commonwealth, 16 S.E.2d 635 (Va. 1941); State v. Austin, 117 S.E. 607 (W. Va. 1923); Mueller v. State, 243 N.W. 411 (Wis. 1932); Abeyta v. State, 42 P.3d 1009 (Wyo. 2002).

10. *Rotunda*, 747 N.E.2d at 1206.

11. See generally PETER SINGER, WRITINGS ON AN ETHICAL LIFE 134 (2000); see also Peter Singer's homepage, <http://www.princeton.edu/~psinger/> (last visited Apr. 5, 2008).

12. Peter Singer, *Pulling Back the Curtain on the Mercy Killing of Newborns*, L.A. TIMES, Mar. 11, 2005, at B13.

13. See PhilosophyProfessor.com, “Preference Utilitarianism,” <http://www.philosophyprofessor.com/philosophies/preference-utilitarianism.php> (last visited Apr. 5, 2008) (citing J. J. C.

expect this formulation to offer victims the fullest possible protection from criminal acts. This is not the case. Singer's victim-centric reasoning leads to conclusions that are not at all favorable to many victims, including infants in the Netherlands.

To one sympathetic to Singer's concern for individual preferences, his defense of infanticide might seem counter-intuitive. Singer defends doctors who perform infanticide on children for whom death "would be more humane than continued life."¹⁴ These acts ought not to be criminalized, Singer argues, because no "morally significant difference" appears between killing infants who are likely to suffer a low quality of life and declining to exercise heroic or extraordinary means to extend the lives of those infants, a relatively uncontroversial practice.¹⁵ In his words, "The dispute is no longer about whether it is justifiable to end an infant's life if it won't be worth living but whether that end may be brought about by active means, or only by the withdrawal of treatment."¹⁶

For Singer, the significant distinction is not the divide between the culpable action or excusable inaction of the doctor, but rather between the life or death of a suffering child, no matter the cause. In this sense, Singer's proposal would constitute a radical departure from the Blackstonian understanding of criminal law. Referring to the now-legal practice of infanticide in the Netherlands, done pursuant to a set of standards known as the Groningen Protocol,¹⁷ Singer has written:

We have an assessment of an infant's condition, we have consultation, we have a decision that it is better that life should not continue. Then we have steps taken that have the result that the infant dies. I think whether this is done by withdrawing extraordinary means of life support or whether this is done by active euthanasia is not really the crucial issue. The crucial issue is always the decision whether the infant's quality of life is so poor it is better it should not live.¹⁸

Singer's model, looking toward the suffering of the infant and away from the conduct of the doctor, disposes of the traditional, deontological concepts known in common-law tradition as *actus reus* and *mens rea*. These principles are foundational to the Blackstonian model, which deems decisions to usurp criminal norms culpable, and therefore punishable, regardless of any favorable or unfavorable results to a particular victim.¹⁹

SMART AND B. WILLIAMS, UTILITARIANISM FOR AND AGAINST (1973)).

14. Singer, *supra* note 12.

15. *Id.*

16. *Id.*

17. Eduard Verhagen, M.D., J.D., and Peter J. J. Sauer, M.D., Ph.D., *The Groningen Protocol—Euthanasia in Severely Ill Newborns*, 352 NEW ENG. J. MED. 959 (2005) [hereinafter *Groningen Protocol*].

18. *Life or Death: A Conversation with Peter Singer*, NAT'L CATH. REG., Feb. 20-26, 2005.

19. See Blackstone, *supra* note 3, at *20-21.

Singer conflates criminal culpability with non-culpable passivity and conduct on the ground that the result to the infant is what matters. Thus, he rejects Blackstonian retributivism.

Singer's rejection of the Blackstonian model is not surprising in light of Singer's self-identification with consequentialists. However, his exclusive focus upon individual victims (or, in his view, beneficiaries) of prospectively-criminal conduct sets him apart from other consequentialists. Singer does not substitute traditional consequentialist concerns—rehabilitation, deterrence, etc.—for guilty usurpation of society's legal standards as a rationale for punishment. He instead uses impediment to the putative victim's legal interest (loosely defined as freedom from pain) as a rationale for punishment. Actions or omissions are neither punishable by their nature nor as means to rehabilitate offenders, deter future conduct, etc., but rather only to the extent that they frustrate a sentient person's realization of her preferences. From this premise to legalized infanticide, however, requires yet another leap.

Singer condemns the intentional killing of adult humans because the act thwarts the preferences—the hoped-for and planned-for goals—of the particular victim.²⁰ Singer explains that the preference utilitarian deems wrong those acts, and only those acts, that are “contrary to the preference of any being” and not “outweighed by contrary preferences.”²¹ Employing this equation, killing a person who prefers to live is wrong, absent a countervailing preference. Singer clarifies that the malfeasant accomplishes the wrong the moment he thwarts the preference of his victim to live. It is irrelevant that the dead victim is thereafter unable to appreciate or express her defeated preference for life.²²

Not all preferences are accorded equal weight in Singer's calculus. Though Singer does not disclose the method by which he establishes the commensurability of preferences, he is at least clear that the preference of a person outweighs the preference of “some other being, since persons are highly future-oriented in their preferences.”²³ Singer notes:

To kill a person is therefore, normally, to violate not just one preference but a wide range of the most central and significant preferences a being can have. Very often, it will make nonsense of everything that the victim has been trying to do in the past days, months, or even years.²⁴

This begs the question who might qualify as a “person.” Here Singer imports into his calculus a bias for the preferences of adults, which is foundational to his defense of infanticide. In contrast to persons who are conscious of their own preferences, infant humans (whom Singer does not

20. Singer, *supra* note 12.

21. SINGER, *supra* note 11.

22. *Id.*

23. *Id.*

24. *Id.*

consider persons but merely members of the species *Homo sapiens*) do not plan for the future or anticipate future life. As Singer states, “beings who cannot see themselves as entities with a future cannot have any preferences about their own future existence.”²⁵ Therefore, it is not, in Singer’s view, unethical to kill a suffering newborn human.²⁶ In the Dutch context, infanticide is ethical because doctors have concluded that the infant’s interest in avoiding future suffering is pre-eminent.²⁷ With no countervailing preference for continued life, the infant’s life merits insufficient consideration to defeat the doctor’s ethical resolution to end the infant’s life.

This step in Singer’s reasoning—from the infant’s dominant interest in avoiding suffering to its conclusive interest in avoiding continued life—also depends upon distinctly victim-centric suppositions. Singer determines that some lives, like the lives of severely-afflicted newborns, are not worth living because of the extent of the suffering those lives will entail. Singer, as a consequentialist, deems human life to be of merely instrumental, not intrinsic, value.²⁸

In Singer’s conception, human life has value only as a means to enjoy other, more basic goods—happiness, aesthetics, love. The more basic goods might even be viewed as instrumental; Singer is less clear on this point. In either event, when a suffering person ceases to prefer happiness, aesthetics, and love over death, the new preference for death trumps the former preference for life. Thus, assisting suicide or euthanizing ought not be considered acts of homicide, but rather ethical responses to the victim’s preference.

This conception of human life as a merely instrumental good, rather than a good having both instrumental and intrinsic value, is arguably consistent with Singer’s focus upon the suffering victim insofar as the victim is an adult, capable of forming and expressing a preference for euthanasia. At the moment when a person rightly discerns that her life has lost its instrumental value and should be ended, the goods that life serves—happiness, aesthetics, love—are defeated. However, Singer does not explain in what way those goods are defeated in the case of a newborn infant or senile adult, who is incapable of

25. *Id.*

26. *Id.*

27. SINGER, *supra* note 11.

28. Singer explains:

We usually value life because it is the basis for everything else that we value, whether it be happiness, appreciation of beauty, creativity, love, or the exercise of our rational faculties. But there comes a time in the lives of many people when life can no longer support these things we value, or else is so racked by pain, discomfort, nausea, or other forms of suffering that it has more negative value than positive value. An individual who is adult and of sound mind is the best judge of when his or her life has lost what is positive about it. If in the case of a terminal or incurable severe illness it is reasonable to believe that these positive qualities can never be recovered, then it can also be reasonable to regard the days, weeks, or months that are left as being of no value, or even of negative value.

expressing, perhaps even forming, a preference for death. Instead, happiness, aesthetics, love and the rest simply drop out of the equation.

Singer might decline to consider those goods on the ground that the infant is not yet a person; potential, future preferences for life and its attendant goods do not count when the human is incapable of forming or expressing any such preferences now.²⁹ However, that line leaves him with no basis to consider the infant's future preference for avoiding suffering. Singer has assumed either that severely-affected infants would prefer in all cases death to life or that, regardless of what the infant would prefer if allowed to live, avoidance of suffering outweighs the enjoyment of life's benefits.

Singer's philosophy might also justify the termination of the infant based upon the preference calculus of parents who do not want to keep the child; because the preference of non-person humans do not count, the calculus of the non-person's parents would control. However, he chooses not to follow this path, instead invoking as justification the potential suffering of the infant.³⁰ We will return to these issues in the discussion of the Groningen Protocol, *infra*.

Though Singer arrogates the authority to determine whether a nascent life is worth living, he seems to be unclear on precisely how to make that determination in particular cases. He allows that "there are some questions that are more difficult" than whether to end the life of "a brain-damaged, prematurely-born infant who at five months of age was unable to breathe without a ventilator, was blind, was unable to sit up, and would probably be deaf, but was capable of feeling pain"³¹ Those more difficult circumstances include the treatment of babies afflicted with Down syndrome. Singer allows:

Those who know and care for people with Down syndrome agree that it is a life with more limited opportunities than those available to most other people, but Down syndrome is not a condition that leads to a miserable life for the person with the syndrome. People with Down syndrome often have a happy and cheerful disposition. Hence it would be difficult to argue plausibly that ending the life of a person with Down syndrome was in the interests of that person, or that life with

29. Singer might for this reason argue that the killed infant is not a victim at all. However, that proposition also would prevent Singer from considering the infant's suffering as a reason for the killing; if the infant's potential preference for life is not accounted for neither can Singer's calculus account for the infant's potential preference for avoidance of suffering. After Singer accounts for *some* interest of the child, he offers no principled reason not to account for all of the child's interests.

30. Also, as Judge Neil Gorsuch has pointed out, taking this line would lead Singer to conclude that it is permissible to kill healthy children who are unwanted. NEIL GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 174 (2006). Singer has thus far demonstrated no willingness to pursue that line.

31. SINGER, *supra* note 11, at 205. ^{HeinOnline} 13 Berkeley J. Crim. L. 39 2008

Down syndrome is a life not worth living.³²

Here again, Singer's victim-centrism is on display. He purports to distinguish between killing brain-damaged children and killing children with Down syndrome on the basis of the children's respective interests. The Blackstonian concern for the state's interest in preventing people from taking innocent human life appears nowhere in Singer's calculation. However, Singer's analysis leaves one wondering on what basis he might discern the best interests and future preferences of the child. As he stands in the stead of the afflicted child, attempting to discern whether the child's life is worth living, is the scale on which Singer weighs competing goods balanced evenly?

B. Victim-Centric Retributivism: Victim as Dominated

George Fletcher, a retributivist, does not share Peter Singer's consequentialist views. However, he also incorporates victim-centric considerations into his justifications for criminal punishment. Fletcher reads retributivist traditions through a distinctly victim-centric lens. Though he employs putatively retributivist reasoning, he predicates the community's obligation to vindicate wrongdoing not on a communal interest but rather on the interest of victims.³³ Fletcher asserts that communities take upon themselves the duty to punish wrongdoers in order to vindicate the interests of individual victims.³⁴ This argument, however, does not lead Fletcher to excuse culpable conduct that causes no other-regarding harm. According to Fletcher, once a community assumes the responsibility to punish, it must punish all wrongdoers, including those who harm no victims, so that it does not violate the norm of equal treatment.³⁵

This conception flips the Blackstonian model on its head. Whereas in Blackstone's view the victim's interest is subsumed within the interest of the community, in Fletcher's view the state's obligation to punish usurpers follows from its prior commitment to vindicate offenses against particular victims. All the resources that the community commits to criminal punishment are brought to bear upon a criminal on behalf of the individual victim. And the community ought to commit resources to that cause not to vindicate communal interests (at least initially) but rather to vindicate the victim.

Fletcher "draws on the Hegelian theory that the purpose of punishment is to defeat the Wrong, as represented by the Crime."³⁶ Punishment restores some sort of moral balance that the commission of a crime has disturbed.³⁷ In Fletcher's reading of Hegel, punishment restores balance by vindicating "the

32. *Id.* at 206.

33. *See generally* *Place of Victims*, *supra* note 1.

34. *Id.*

35. *Id.* at 60-63.

36. *Id.* at 54.

37. *Id.*

legal order, or the norm prohibiting the conduct,” or bringing about “some other intangible effect.”³⁸

Fletcher’s neo-Hegelian victim-centric approach “does not differ, in principle, from the Hegelian argument that punishment serves to vindicate the norms against those who have sought to defeat it.”³⁹ Fletcher leaves the “structure of the argument”⁴⁰ intact, and substitutes the victim’s interest for the moral norm, which the community has an obligation to vindicate. In Fletcher’s reading of Hegel’s formula, punishment restores the balance between the malfeisor and the norm he has violated. In Fletcher’s own formula, punishment restores the balance between the respective “position and dignity” of wrongdoer and victim.⁴¹

Fletcher’s conception is self-consciously informed by Kant, as well. Fletcher adapts the Kantian notion of power imbalance, substituting the victim for society’s criminal norms.⁴² Though the perpetrator continues in his role as usurper, he is a usurper of a particular victim’s (or victims’) interests; the culpability of his act stems not from his usurpation of neutral laws but rather his domination of a victim or victims.⁴³

Other retributivists have embraced this formulation. For example, Adil Ahmad Haque, another retributivist, has examined the role of victims in criminal law and concluded, “The state’s duty to punish offenders is owed to the victim of crime.”⁴⁴ Similarly, Jean Hampton, a proponent of what she termed the “‘expressive’ theory of retribution,” defined retribution as “a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”⁴⁵

38. *Id.*

39. *Place of Victims*, *supra* note 1, at 58.

40. *Id.*

41. *Id.*

42. *Id.* at 61-62.

43. Fletcher explains the model this way:

A criminal act establishes a particular relationship with the victim. The criminal gains a form of dominance that continues after the crime has supposedly occurred. This feature of criminal aggression, the principle of dominance, provides the clue, I argued some time ago, to understanding the puzzling crime of blackmail. The difference between acceptable exchanges and blackmail consists primarily in the leverage the blackmailer gains over his prey: As soon as the prey agrees once to paying hush money, the blackmailer can demand more in the future. Other crimes of violence bear a resemblance to blackmail. In the aftermath of rape, victims often fear a return of the rapist; victims of burglary have reason to feel insecure in their homes. Implicit in the threat of recurrence is the offender’s unjustified dominance over the victim. The function of arrest, trial, and punishment is to overcome this dominance and reestablish the equality of victim and offender.

Id. at 57-58.

44. Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 283 (2005).

45. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39

Though Fletcher and the Blackstonians agree that criminal punishment is fundamentally a means to restore balance, they differ on the question of whose interests are balanced against the usurping wrongdoer. In the traditional retributivist view, the criminal has usurped a norm established or expressed by his entire community; thus the community punishes him in order to right the balance between itself and him.⁴⁶ In Fletcher's view, the inequality between the criminal and his victim is the basic premise of punishment. What concerns Fletcher is the plight of the victim, who has been rendered insecure, dominated, or fearful by the criminal's conduct.

Fletcher's conception of punishment as a means to restore balance between victim and offender is criticized as inconsistent with retributivism. In particular, Michael Moore infers that Fletcher has taken the "victim's turn," after which victim preference determines punishment.⁴⁷ Moore believes that this turn moves Fletcher out of the retributivist camp and into the corrective justice club.⁴⁸ He charges that "Fletcher's move to victims turns the criminal law into an engine of victim vengeance rather than a realization of abstract justice."⁴⁹ Moore doubts that equality and proportionality will persist in retributive punishment if that punishment is left to the discretion of individual victims.⁵⁰ And he finds unpersuasive the notion that a wrongdoer's culpability can be relative to the victim's desire to see the wrongdoer suffer.⁵¹

Fletcher acknowledges some of the difficulties inherent in substituting victim for community in the retributivist equation. He allows, for example, that many crimes involve no dominance over a readily-identifiable victim. He proffers perjury as an example of an offense against the administration of justice, which "hardly seem[s] to entail victims."⁵² This shortcoming raises for him the question whether society has a duty to punish simply to avoid *impunidad*—allowing a criminal to remain unpunished for his usurpation—as the Blackstonians assume. He cites Kant for the proposition that a civil society that fails to insist upon the criminal's punishment is a collaborator in the public violation of justice.⁵³ Avoidance of *impunidad*, he argues, fills the gap left by

UCLA L. REV. 1659, 1686 (1992).

46. Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 107 (1999).

47. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999).

48. *Id.*

49. *Id.* at 76.

50. *Id.* at 77.

51. *Id.* at 77-78; see also Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 180 (2006) ("The law punishes wrongdoers even when the wrong shows no affront to the victim's value, and it can hardly be said that doing so is inherently unfair in the retributive sense.").

52. *Place of Victims*, *supra* note 1, at 59. More obvious victimless crimes come to mind, including gambling and recreational drug use.

53. *Id.* at 60-62.

his dominated-victim theory.⁵⁴

Fletcher explains the gap-filling with a two-state inquiry into justification for punishment. Fletcher predicates both stages of his analysis on a principle of equality, namely “the significance of equal treatment in the theory of justice.”⁵⁵ In the first stage, the community perceives criminal activity as a form of domination over a particular victim or victims.⁵⁶ It employs punishment “to counteract this domination and reestablish equality between the victim and the offender.”⁵⁷ In the second stage, after punishment has become an acceptable means to restore balance between criminal and victim, the norm of equal treatment mandates that the community punish all culpable acts.⁵⁸ Failure to punish culpable conduct, which Fletcher calls *impunidad*, “becomes a means of acquiring indirect responsibility for the crime.”⁵⁹

Fletcher does not explain the manner in which punishment ostensibly restores equality between victim and offender. It is not immediately clear in what sense victim and oppressor might be considered equal after the oppressor is punished. Perhaps confinement in prison, for example, might be considered an approximation of the fear, domination, or suffering that the prisoner’s victim endured. However, that is not always—perhaps not even often—the case. It is doubtful, for example, that imprisonment for a term of a few years approximates the consequences of being subjected to a rape. It is especially difficult to conceive how the rape victim has been rendered equal to the man who violated her once he has served his term and been released from his confinement. Furthermore, in at least one sense, the state’s intrusion between oppressor and victim might anneal the disparity between the two persons. One might observe that the victim was unable to assert himself against his oppressor and conclude that the community’s need to intervene on his behalf demonstrates conclusively the victim’s helplessness against the machinations of the perpetrator. For this reason, criminal punishment might reinforce at least the perception of inequality.

One sense in which equality might be restored is in the community’s divestment from the usurper of some benefit—whether money, freedom, or life. Perhaps this is what Fletcher means by the “norm of equal treatment”: the usurper is deprived of something of value just as the victim was. However, if deprivation of value is the objective, then civil actions exist to attain the goal. So if, as Fletcher suggests, the functions of criminal punishment are to counteract the perpetrator’s domination of the victim and to reestablish equality

54. *Id.*

55. *Id.* at 62-63.

56. *Id.* at 63.

57. *Id.*

58. *Place of Victims*, *supra* note 1, at 63.

59. *Id.* HeinOnline -- 13 Berkeley J. Crim. L. 43 2008

between them,⁶⁰ then criminal punishment bears a strong resemblance to civil liability.

Curiously, Fletcher's focus on vindication of individual rights leads him to commend the vindication of group rights. However, the group with which he concerns himself is not the community as a whole, but rather the sub-set of the community that identifies with the individual victim. Fletcher employs as an example the prosecution of "African-American celebrity O.J. Simpson," which some perceived "as a continuation of the injustice done to [African-American] Rodney King."⁶¹ He speculates that the acquittal of the police officers who beat King caused undue sympathy for Simpson.⁶² A conviction for Simpson would presumably have affirmed in some minds that the criminal justice system had been employed by whites to suppress blacks. Fletcher concludes, "[T]he failure to do justice for victims generates a sense of second-class citizenship in the group as a whole."⁶³

In this argument, Fletcher reveals an interesting parallel to the Blackstonian view of interests common to all persons within a community. Fletcher's argument implies that certain interests, compromised by criminal acts, might be common to some category of persons smaller than the human race.⁶⁴ A victim is, in this framework, not to be vindicated as an individual but rather as an African-American, Hispanic, Muslim, Christian, etc. Thus, Fletcher in his victim-centrism does not dispose of the concept of community. Rather, his communities are merely subsets of the community at large.

Fletcher's substitution of individual victims and/or sub-communities for the community at large in the Hegelian/Kantian retributivist framework raises numerous questions. Two in particular highlight the gaps that remain to be filled in Fletcher's conception of criminal punishment. First, it is not apparent why a group's "sense of second-class citizenship"⁶⁵ might justify punishment of the person who caused the offense. A racial slur (for example), while immoral and unjust and tending to cause disparagement, does not generally give rise to criminal liability. Perhaps in Fletcher's view racial slurs ought to be criminalized. However, Fletcher provides no account for this current disparity between his theory of punishment and positive criminal law. Furthermore, he does not suggest what limits, if any, might demarcate a theory that calls for the punishment of all conduct that causes groups of persons to feel like second-class citizens. Similarly, that one person dominates another does not presently in positive, criminal law entail that the dominator has committed

60. *Id.* at 57-58.

61. *Justice and Fairness*, *supra* note 1, at 557.

62. *Id.*

63. *Id.*

64. Haque, too, identifies victims by their ethnic groups and calls for enhanced punishment of genocidal acts that result from assignment of a person's moral status on the basis of her group membership. Haque, *supra* note 38, at 315-18.

65. *Justice and Fairness*, *supra* note 1, at 557. HeinOnline -- 13 Berkeley J. Crim. L. 44 2008

a crime. Criminal law does not now vindicate all imbalances in position and dignity between persons. Fletcher has not stated how far he might take this principle and on what grounds.

Second, to the extent that Fletcher intends to predicate criminal punishment on subordination or disparagement of an individual or group, he has moved from the ranks of retributivists to the ranks of consequentialists. He no longer justifies punishment with reference to the wrongfulness of conduct. The community is justified, in Fletcher's view, in punishing a person in order to restore an inherently consequentialist power-imbalance calculus. If this is what Fletcher intends to argue, then Michael Moore is correct in his assessment that Fletcher has surrendered his membership in the retributivist club.⁶⁶

III. PUTATIVE VICTIM-CENTRIC TRENDS IN POSITIVE LAW

It is worth asking what all of this means in practice. Have victim-centric justifications for criminal punishment had any actual bearing on positive criminal law? If so, has the effect been an improvement on the old Blackstonian model? Three areas of criminal law appear to be informed by a victim-centric understanding of criminal punishment. These deserve some attention.

A. Civil Compromise Statutes

State statutes authorizing courts to prohibit, even over the objection of prosecutors, prosecution of perpetrators who have given civil satisfaction to their victims appear, on their face, to constitute an appreciable departure from the Blackstonian understanding.⁶⁷ Such provisions seem to belie the Blackstone conception of Anglo-American criminal jurisprudence. If misdemeanors can be subsumed within the civil claims of individual victims, then the distinction between public and private wrongs would seem to be overstated. Whatever the rationale for compromise statutes, such provisions appear to be victim-centric in practice. They result in applications that bear no perceivable relation to the conduct of the perpetrator but rather depend entirely on his ability to make his victim whole. One might thus infer from civil compromise statutes that the interest of the community in prosecuting wrongdoers for culpable conduct is not so great after all. The community's interest, rather than subsuming the individual victim's interest in vindication, compensation, or restoration of imbalance, may instead appear to be subsidiary to the interests of particular victims.

1. Survey

California's compromise statute is representative:

66. Moore, *supra* note 47, at 67.

67. See Justin Miller, *The Compromise of Criminal Cases*, 13 *Berkeley J. Crim. L.* 45 (2008).
HeinOnline -- 13 Berkeley J. Crim. L. 45 2008.
 67. See Justin Miller, *The Compromise of Criminal Cases*, 1 *SO. CAL. L. REV.* 1, 23 (1927).

When the person injured by an act constituting a misdemeanor has a remedy by a civil action, the offense may be compromised, as provided in [the next section], except when it is committed as follows:

- (a) By or upon an officer of justice, while in the execution of the duties of his or her office.
- (b) Riotously.
- (c) With an intent to commit a felony.
- (d) In violation of any court [protective] order
- (e) By or upon any family or household member, or upon any person when the violation involves any person described in [the domestic violence statutes].
- (f) Upon an elder
- (g) Upon a child. . . .⁶⁸

The section that follows provides that a court may stay criminal proceedings and discharge the defendant if, *inter alia*, the injured person “appears before the court . . . and acknowledges that he has received satisfaction for the injury”⁶⁹ A number of other states have similar provisions.⁷⁰

The statutes vary as to the circumstances under which compromise is permitted. Mississippi allows compromise only after civil restitution is made to the victim and the state has given its consent.⁷¹ Oregon, by contrast, does not even require the consent of the victim.⁷² Several states—Alaska, California, Idaho, Nevada, North Dakota, Oregon, and Washington—prohibit the civil compromise of crimes of domestic violence.⁷³ Massachusetts, Mississippi, Oklahoma, Pennsylvania, and Utah do not.⁷⁴ Arizona forbids compromise of domestic violence crimes, “except on recommendation of the prosecuting attorney.”⁷⁵

68. CAL. PENAL CODE § 1377 (West 2007).

69. CAL. PENAL CODE § 1378 (West 2007).

70. See, e.g., ALASKA STAT. § 12.45.120 (2007); ARIZ. REV. STAT. ANN. § 13-3981 (2007); IDAHO CODE ANN. § 19-3401 (2007); MASS. GEN. LAWS ch. 276, § 55 (2008); MISS. CODE ANN. § 99-15-51 (2007); NEV. REV. STAT. § 178.564 (2007); N.D. CENT. CODE § 29-01-16 (2007); OKLA. STAT. tit. 22, § 1291 (2007); OR. REV. STAT. § 135.703(1) (2007); PA. R. CRIM. P. 586; UTAH CODE ANN. § 77-2-4.5 (2007); WASH. REV. CODE § 10.22.010 (2007).

71. See, e.g., MISS. CODE ANN. § 99-15-51 (2007); *Crimm v. State*, 888 So.2d 1178, 1185 (Miss. Ct. App. 2004) (“Settlements are strongly encouraged in civil cases, but in criminal prosecutions it is the State’s decision, not the victim’s choice, on whether to bring a defendant before a grand jury for indictment. . . . [A] victim in a criminal case has no power to settle the defendant’s prosecution.”).

72. OR. REV. STAT. § 135.705 (2007); *State v. Dumond*, 530 P.2d 32, 34 (Or. 1974).

73. See, generally, J. Cross Creason, *Eliminating the Use of Civil Compromise in Cases of Domestic Violence, Elder Abuse, and Child Abuse*, 29 MCGEORGE L. REV. 641 (1998).

74. See *Commonwealth v. Guzman*, 845 N.E.2d 270, 274 (Mass. 2006).

75. REV. STAT. ANN. § 13-3981(B) (2007).

2. *Origins*

Many of these statutes predate the twentieth century; Oregon, for example, allowed compromise of misdemeanors as early as 1877.⁷⁶ The origins of these provisions are explained through multiple decisions. The Alaska Court of Appeals traced the history of its compromise statute back to an 1813 New York statute that read:

That in all cases where a person shall, on the complaint of another, be bound by recognizance to appear, or shall, for want of surety, be committed, or shall be indicted for an assault and battery, or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done riotously or with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by civil action, if the party complaining shall appear before the magistrate who may have taken the recognizance, or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for such injury and damage, it shall be lawful for the magistrate in his discretion to discharge the recognizance, & c. or for the court also in their discretion, to order a *nolle prosequi* to be entered on the indictment.⁷⁷

The *Nelles* court traced the Alaska statute's lineage from New York to Oregon, the state from which Alaska derived the provision.⁷⁸

Further inquiry into the New York statute's legislative history leads one to the statute's original rationale, attributed to an 1849 statement of the New York Commissioners on Practice and Pleading.⁷⁹ The Commissioners referred to those "many cases, which are technically public offenses, but which are in reality of a private rather than a public nature."⁸⁰ The Commissioners thought that New York in those cases might best promote the public interest by avoiding prosecution. The Commissioners included in this class of cases "libels, and simple assaults and batteries; [and] those [misdemeanors] which according to [the civil compromise statute], are not committed by or upon an officer of justice, while in the execution of the duties of his office, or riotously, or with an intent to commit a felony."⁸¹ The Commissioners opined that the policy of New York's statutes, honored by New York's courts, had always been to consider such wrongdoings "fit subjects of compromise."⁸²

No significant deviation from the Blackstonian model appears in this

76. *Saxon v. Hill*, 6 Or. 388, 389 (1877); *State v. Keep*, 166 P. 936, 938 (Or. 1917).

77. *State v. Nelles*, 713 P.2d 806, 807-08 (Alaska Ct. App. 1986).

78. *Id.* at 808 n.2.

79. *Id.*

80. *Id.* at 808 (quoting *People v. Moulton*, 182 Cal. Rptr. 761, 766 (App. Dep't Super. Ct. 1982)).

81. *Id.*

82. *Id.*

recitation of legislative reasoning.⁸³ The original statutes were justified not by a rejection of the notion of public wrongs, but rather by the proposition that those crimes for which compromise was available resembled private wrongs more than public wrongs. The distinction Blackstone declaimed thus remained intact, even while other state legislatures, following New York's example, move slightly the boundary line between the two categories of wrongs.

3. *Miller's Review*

Reviewing then-extant practices, Justin Miller, a prominent judge and criminal law scholar, concluded in 1927 that compromises of criminal cases were mainly attributable to four factors. First, he blamed the proliferation of criminal laws covering wrongs previously deemed private, thus rendering impracticable full enforcement of those laws.⁸⁴ Second, he identified the inadequacy of courts to manage increased case loads.⁸⁵ Third, he acknowledged the burden that criminal prosecution placed on citizens, required to serve on juries and as witnesses in proliferating criminal cases.⁸⁶ Fourth, he cited the unwillingness of defendants to accede to the stigma attendant to conviction.⁸⁷ In short, Miller concluded that practical concerns over the burdens resulting from an expanded criminal code, not a belief that victims' sentiments should determine whether to prosecute, instigated compromise of criminal prosecutions.⁸⁸

Miller then reviewed the distinction between public and private—criminal and civil—wrongs. Initially, Miller intimated that compromise of criminal cases represented a “widespread abandonment” of the “old theory.”⁸⁹ However, he later supposed that if one begins with the assumption that the purpose of the law is “to inflict punishment upon wrongdoers in the name of the state,” then the law might logically retain the distinction between private and public wrongs.⁹⁰ Based upon this assumption, Miller concluded that states ought to eradicate compromise practices “at whatever cost.”⁹¹ He did allow, however, that the purposes of only some laws might be to inflict punishment:

If . . . society remains convinced that nothing short of criminal prosecution and punishment will suffice to discipline particular offenders, then it may be possible to distinguish between particular criminal cases and permit compromises in some cases while denying

83. *Accord*, State v. Garoutte, 388 P.2d 809, 811-12 (Ariz. 1964).

84. Miller, *supra* note 67.

85. *Id.* at 20.

86. *Id.*

87. *Id.* at 20-21.

88. *Id.*

89. *Id.* at 27-29.

90. Miller, *supra* note 67, at 29.

91. *Id.*

the privilege in others.⁹²

Miller recommended a study, which might lead to the reclassification of some crimes as “public torts.”⁹³ He also suggested the establishment of an orderly method of compromising those cases susceptible to compromise, requiring, among other things, the consent of a tribunal, the prosecutor, and the victim.⁹⁴

Miller did not assert that compromise statutes represented a complete rejection of the Blackstonian model, only that the public-wrong label might not fit every act designated by statute as a crime. This might mean that not all crimes must be punished as usurpations. However, any act designated a crime and not amenable to civil compromise is by definition a public wrong—even in Miller’s framework—and is punished as such. It makes more sense to say that states deem some of the acts condemned in criminal codes less than fully blameworthy and that those acts are not truly usurpations of criminal norms, which the state has an obligation to punish.

This reading is consistent with the 1849 report of the New York Commissioners on Practice and Pleading.⁹⁵ However, the resulting inconsistency in state law is less than satisfactory. By the operation of civil compromise statutes, some wrongful acts continue to meet diverse responses from the state, depending upon whether the act happened to result in harm to a particular victim. This bipolar classification of certain criminal acts does not reflect an abandonment of Blackstonian principles. Rather, the discrepancy reflects uncertainty concerning how wrongful acts ought to be classified. Still, classification remains a problem.

The value of Miller’s “public torts” suggestion, then, may not lie in society’s determination that only punishment will suffice to discipline particular offenders, as Miller supposed.⁹⁶ Instead Miller’s suggestion might have value because it is better for communities to be consistent about which acts deserve sufficient opprobrium to be deemed crimes and which do not. If, as the New York Commissioners supposed, some wrongs simply are not of sufficient public concern to constitute crimes, it behooves states to determine which wrongs fall into that category and to remove them from the corpus of criminal law altogether.

4. *Resistance to Victim-Centric Applications*

Regardless of intent, compromise statutes are victim-centric in practice. Prosecution of misdemeanors is predicated not upon the wrongfulness of a perpetrator’s conduct but rather on the perpetrator’s inability to compensate his

92. *Id.*

93. *Id.* at 30-31.

94. *Id.*

95. *Nelles*, 713 P.2d at 808 n.2.

96. *Miller*, *supra* note 52, at 30-31; 13 Berkeley J. Crim. L. 49 2008

victim adequately. Courts have generally decried the victim-centric implications of the statutes and legislatures, in some instances, have responded.⁹⁷ In *People v. O'Rear*, for example, a California appellate court considered application of a civil compromise statute to a prosecution for failure to stop at the scene of an accident. The court posed a hypothetical crime of excessive speed in an automobile. It noted that the crime could be committed with or without resulting injury.⁹⁸ The court doubted that the legislature intended to predicate criminal liability on the existence of uncompensated injury.⁹⁹

The right to compromise the offense of speeding in a vehicle should not depend upon this incidental matter. Neither in our opinion did the legislature intend that the right to compromise or compound the offense of hit and run with property damage . . . should depend upon whether in a particular case the offender may be subject to a civil remedy for damages. He may or may not be negligent, and still commit the offense.¹⁰⁰

The *O'Rear* court did not disclose the basis for its certitude that the legislature did not intend such capricious results. Nevertheless, whatever the legislature intended, capriciousness is what it accomplished.

For similar reasons, an Oregon appeals court in *State v. Phon Yos* protested a civil compromise statute.

While the statutory language compels [dismissal], we wish to note our objection to it. Read together, this . . . now stand[s] for the proposition that a reckless driver who misses people during his drive can be prosecuted, but one who hit someone can buy his way out. As a matter of public policy, that seems backwards. We commend the matter to the attention of the legislature.¹⁰¹

Thus courts in California and Oregon have struggled with this distinctly victim-centric feature of compromise statutes that turns attention away from the culpability of the actor's conduct and toward the effects upon any particular victim. Unwilling to abandon the Blackstonian conception, the *O'Rear* court chose unprincipled middle ground and held that where the public and private wrongs are not completely contiguous, compromise is not allowed.¹⁰² A Washington appellate court has reached the same conclusion.¹⁰³

An Oregon court in *State v. Dumond* refused to allow the compromise of a criminal prosecution for theft where the perpetrator made restitution of the

97. See generally *People v. O'Rear*, 34 Cal. Rptr. 61, 63-64 (App. Dep't Super. Ct. 1963); *State v. Phon Yos*, 691 P.2d 508, 509 n.4 (Or. Ct. App. 1984); *Dumond*, 526 P.2d at 461.

98. *O'Rear*, 34 Cal. Rptr. at 63-64.

99. *Id.* at 64.

100. *Id.*

101. *Phon Yos*, 691 P.2d at 509.

102. *O'Rear*, 34 Cal. Rptr. at 63-64.

103. *City of Seattle v. Stokes*, 712 P.2d 853, 855 (Wash. Ct. App. 1986).

\$534 he stole.¹⁰⁴ The court referenced the state's concern in deterring future crime:

Plaintiff's earnest argument is that . . . if the trial judge lets the culprit off by merely requiring repayment of that which he stole, there is little detrimental effect in the result obtained to keep others from doing the same thing. The argument carries conviction. Further, absent statute, a strict rule prevails against allowing private persons to compromise and forgive a public wrong.¹⁰⁵

In *People v. Tischman*, the California Court of Appeal declined to follow *O'Rear*, holding that a misdemeanor hit and run charge, which by statute in California involves property damage only, may be civilly compromised. At first, this ruling appears to rest upon a victim-centric understanding of California's criminal prohibition against fleeing the scene of an accident. However, attending the court's holding was insistence that the prohibition is not really criminal but rather civil in nature, its regulatory purpose being to provide injured motorists with the information requisite to civil satisfaction. The court reasoned that:

[T]he purpose of the misdemeanor hit and run statute is not to deter running for running's sake, but to ensure that parties involved in automobile accidents stop and exchange the required information so that the injured party can be compensated. Approval of civil compromises in these cases . . . would serve our need for the efficient administration of justice by resolving these relatively minor disputes without a criminal prosecution and without a civil action by the victim to recover compensation for his injuries.¹⁰⁶

The hit and run statute at issue in *Tischman*, providing that violation constitutes a misdemeanor, appears both superfluous and ancillary to the statute's civil, regulatory end. In the words of the New York commissioners, recited by the court, the commission of a hit and run, though "technically [a] public offense," is "in reality rather of a private than a public nature."¹⁰⁷

Prosecutors have challenged provisions permitting compromise without their consent.¹⁰⁸ This suggests that some prosecutors, if they do not reject the premise of the statutes altogether, are at least uncomfortable with application of the statutes to some cases. This discomfort may result in part from doubting the ability to verify the sincerity of a victim's assertion. However, these prosecutors may also seek to protect the State's interest in prosecuting usurpers. Prosecutors swear to represent this general interest, which belongs to the

104. *Dumond*, 526 P.2d at 461, rev'd, 530 P.2d 32 (Or. 1974) (holding that compromise does not require the consent of the injured party).

105. *Id.* Other state courts have resisted attempts to compromise criminal prosecutions where statutes do not specifically require the practice. *See, e.g.*, *Partridge v. Hood*, 120 Mass. 403, 407 (1876).

106. *People v. Tischman*, 40 Cal. Rptr. 2d 650, 652 (Ct. App. 1995).

107. *Id.* at 652.

108. *See, e.g.*, *Tischman*, 40 Cal. Rptr. at 652.

community, rather than any interest of a particular victim. If, as on a victim-centric reading of civil compromise statutes, the community's interest in prosecuting usurpers is subsumed within the individual's interest in compensation, then prosecutors of misdemeanors are nothing other than civil lawyers appointed to represent individual claimants at public expense.

When Idaho amended its compromise statute in 1998 to prohibit the compromise of crimes of domestic violence, the Legislature's statement of purpose noted that "the Attorney General feels that the civil compromise process should be completely repealed"¹⁰⁹ And Alaska's similar amendment followed the state Department of Law's argument for complete abolition of the compromise statute as an historical anachronism inconsistent with the state's duty to punish criminals.¹¹⁰

5. *Amendments to Exclude Domestic Violence Crimes*

Within the last several years, eight states have amended their compromise statutes to exclude crimes of domestic violence.¹¹¹ And criticism has befallen states that have not made such amendments, such as Massachusetts. Criticism of the Massachusetts statute has focused on the failure of the statute to protect victims' interests: as the Massachusetts Supreme Judicial Court noted, "We understand the Commonwealth's concern that in cases like this one, where the assault and battery occurs in the context of domestic violence, that the abuser may be able to intimidate the partner or spouse into signing an accord and satisfaction."¹¹²

The movement of states to exclude domestic violence crimes makes Massachusetts' failure to amend its compromise statute all the more dubious. However, this trend of forbidding compromise of domestic violence crimes stems from more than mere doubt that victims of domestic violence can freely and voluntarily condone the perpetrator's wrongdoing. In fact, the justifications for these amendments are mixed.

Several Blackstonian arguments appear in legislative records of amendments excluding domestic violence from compromise. Oregon amended its compromise statute in 1991 to exclude crimes of domestic violence.¹¹³ Testifying in front of the Family Justice Subcommittee of the Oregon House Judiciary Committee, Stephen Herrell, an Oregon Circuit Court judge, responded to a legislator's concern that the amendment would impede out-of-

109. H.B. 720, 54th Leg., 2d Sess. (Idaho 1998).

110. Hearing before the Judiciary Comm., 12th Leg., 15th Sess. (Alaska 1987) [hereinafter *Alaska Hearing Minutes*].

111. See am § 1 ch. 4 SLA (Alaska 1998); Ariz. Sess. Laws, ch. 295, § 2 (1986); 1992 Cal. Legis. Serv. ch. 475 (West); 1998 Idaho Sess. Laws ch. 209; 2005 Nev. Stat. Ch. 51; 2003 N.D. Laws ch. 273, § 1; 1991 Or. Laws ch. 938, § 1; 1989 Wash. Sess. Laws ch. 411, § 3.

112. Commonwealth v. Guzman, 845 N.E.2d 270, 274 (Mass. 2006).

113. H.B. 301, 1991 Leg., ch. 938, § 1 (Or. 1991).

court settlement of domestic disputes.¹¹⁴ Judge Herrell offered the manifestly Blackstonian argument that domestic violence is not merely a domestic affair but also a crime against the State.¹¹⁵ The Governor of Alaska made the same argument in favor of a 1988 amendment in that state.¹¹⁶ Proponents of these amendments also warn that compromise conveys to perpetrators that the state is insufficiently interested in domestic abuse to intervene.¹¹⁷ A legislator in Alaska supporting the amendment opined that domestic violence is a crime against society and that civil compromise is therefore offensive.¹¹⁸

Concomitant with Blackstonian justifications for these amendments is the rationale that compromise statutes, unamended, insufficiently protect the interests of victims of domestic abuse.¹¹⁹ Proponents of the amendments have expressed concern that abusers use civil compromise provisions to pressure their victims into resisting intervention by the state, where such intervention is called for.¹²⁰ Some fear the consequences to victims who are required to testify in the presence of their abusers concerning the condonation.¹²¹ And there persists concern that the abused victim is not capable of providing free and voluntary condonation as a result of coercion, lack of informed consent, or both.¹²²

In sum, justifications for domestic violence exclusions in compromise statutes have been decidedly mixed. Two additional observations are worth making. First, arguments for the better protection of individual victims, and arguments from Blackstonian principles, are offered side by side, and no one has supposed that the victims' interests are disserved by the Blackstonian approach. Second (and related to the first), the remedy for insufficient protection of victims' interests, in every state save Arizona, has been a reversion to the Blackstonian approach, rather than implementation of safeguards to ensure that compromising victims act voluntarily.¹²³ Arizona, the

114. *Hearing before the H. Subcomm. on Family Justice of the H. Judiciary Comm.*, 1991 Leg. (Or. 1991), available at http://arcweb.sos.state.or.us/legislative/legislativeminutes/1991/house/judiciary_sub_fam/1991_housejudiciaryfamily.html [hereinafter *Or. Hearing Minutes*]. Other justifications for the amendment included concerns that the victim's assent to compromise is not truly voluntary and that the cycle of violence will continue after each compromise.

115. *Id.*

116. *Alaska Hearing Minutes*, *supra* note 110.

117. Creason, *supra* note 73, at 647.

118. *Alaska Hearing Minutes*, *supra* note 110. Interestingly, the Alaska House Judiciary Committee simultaneously passed an amendment that would have expanded compromise to include petty larceny. Testifying in opposition, a representative of the state's Department of Law asserted that this proposed amendment was inconsistent with larceny's historic status as a crime against society. *Id.*

119. *See id.*; *see also Or. Hearing Minutes*, *supra* note 114.

120. Creason, *supra* note 73, at 647.

121. *Alaska Hearing Minutes*, *supra* note 110.

122. *Id.*; *see also Or. Hearing Minutes*, *supra* note 114.

123. In some states, amendments committing compromise to the discretion of the court, which legislators deemed best capable of adjudicating voluntariness of the victim's condonation, have been considered and rejected. *Alaska Hearing Minutes*, *supra* note 110; *Or. Hearing*

exception, has adopted the Blackstonian approach to domestic violence crimes as its default position.¹²⁴ Deviation from that approach requires assent of the prosecutor who represents the state.¹²⁵ Thus, each state legislature that has considered the question has concluded that vindication of the state's interests best serves the interests of individual victims of domestic violence.

6. *Observations*

It appears that the civil compromise statutes were not victim-centric in their inception. Though the statutes have found victim-centric application, those results are not embraced but rather resisted universally by courts and prosecutors. Most of the statutes are quite old, and their influence is gradually being limited. They are narrowly construed, and some courts have refused to apply them where the private and public wrongs are not contiguous. Amendments to forbid compromise of domestic violence crimes have further eroded the statutes' field of application. In short, these provisions do not represent a triumph of victim-centric jurisprudence.

Civil compromise statutes rest upon the view that some culpable acts deemed misdemeanors insufficiently affect the public interest to be classified as crimes. However, rather than resolving that concern, civil compromise statutes merely create more problems. Their victim-centric applications are unfair: to perpetrators who are unable to provide satisfaction to their victims; to victims who, because of coercion or other reasons, excuse the wrongful conduct of perpetrators; and to the community, which has an interest in seeing wrongdoers brought to justice and in seeing its criminal laws applied equally and fairly. Amendments to these statutes have mitigated some, but not all, of these problems. Of the problems that remain, many are resolved by resort to Blackstonian principles. A victim-centrist looking for a model constructed on her principles would be well-advised to look elsewhere.

B. The Groningen Protocol

Unlike civil compromise statutes in the United States, the legalization of infanticide in the Netherlands is founded upon a purely victim-centric understanding of criminal law. Pediatricians there evaluate individual cases according to a standard known as the Groningen Protocol.¹²⁶ Doctors Eduard Verhagen and Pieter J. J. Sauer implemented the Protocol in a clinic in Groningen. In 2006, the Dutch Parliament established a commission to adopt

Minutes, *supra* note 114.

124. ARIZ. REV. STAT. ANN. § 13-3981(B) (2007).

125. *Id.*

126. A. A. E. Verhagen and P. J. J. Sauer, *End-of-Life Decisions in Newborns: An Approach from the Netherlands*, 116 PEDIATRICS 736 (2005) [hereinafter *End-of-Life*]; Groningen Protocol, HeinOnline -- 13 Berkeley J. Crim. L. 54 2008 *supra* note 17.

national regulations modeled on the Protocol.¹²⁷ Candidates for infanticide under the Protocol have poor prognoses, but do not depend for survival or physiologic stability upon technological mechanisms.¹²⁸ These infants' lives would most likely be characterized by severe, sustained, and irremediable suffering.

The Protocol consists of requirements that must be met in each case before a child may be euthanized and a list of reporting obligations that doctors must perform afterward.¹²⁹ The prerequisites are five-fold: (1) the diagnosis and prognosis must be certain;¹³⁰ (2) the child must presently suffer hopelessly and unbearably; (3) at least one independent physician must confirm the diagnosis, prognosis, and unbearable suffering; (4) both parents must give informed consent; and (5) the terminating physician must perform the killing "in accordance with the accepted medical standard."¹³¹ Verhagen and Sauer do not define the accepted medical standard. They indicate that a common method of termination is "administration of drugs."¹³² However, they leave to the performing physician the task of reporting the "reasons for the chosen methods of euthanasia," suggesting that the choice of method is committed to the discretion of the individual doctor.¹³³

Prosecutors in the Netherlands have refrained from prosecuting doctors who follow the protocol.¹³⁴ Verhagen and Sauer do not report any prosecutions of doctors who failed to follow the protocol. They speculate that most cases of infanticide are not being reported to prosecutors.¹³⁵

Reports of the number of instances of this so-called "infant euthanasia" range from twenty-two over a seven-year period,¹³⁶ to between ten and fifteen each year,¹³⁷ or possibly between fifteen and twenty annually.¹³⁸ All of the reported cases involved infants with severe spina bifida,¹³⁹ a relatively common congenital defect¹⁴⁰ that, in some instances, causes suffering in the forms of functional disability, pain, discomfort, "poor prognosis," and

127. *Dutch Consider Legalizing Infanticide*, Newsmax.com, Mar. 27, 2006, available at <http://archive.newsmax.com/archives/ic/2006/3/27/115852.shtml>.

128. *End-of-Life*, *supra* note 126, at 736.

129. *Groningen Protocol*, *supra* note 17, at 961.

130. Certainty, of course, is almost always impossible. Presumably, Verhagen and Sauer mean something like "within a reasonable degree of medical certainty."

131. *Groningen Protocol*, *supra* note 17, at 961; *End-of-Life*, *supra* note 126, at 738.

132. *Groningen Protocol*, *supra* note 17, at 961.

133. *Id.*

134. *Id.*

135. *Id.*

136. *End-of-Life*, *supra* note 126, at 738.

137. *Id.*

138. *Groningen Protocol*, *supra* note 17, at 960.

139. *Id.* at 961.

140. *DICTIONARY OF MEDICAL TERMS* 522 (Mikel A. Rothenberg & Charles E. Chapman eds., 2000).
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“hopelessness.”¹⁴¹

Verhagen and Sauer make little attempt to explain their legal or ethical justification for the legalization of infanticide. Rather, they invoke reports of the Dutch Medical Association and the Dutch Pediatric Association, which “argue that in these infants, it is not the life-ending decisions but the life-prolonging decisions that must be legitimized.”¹⁴² Their focus is upon the young victim’s suffering, which the attending physician ends by an act that, if not for the Groningen Protocol, would constitute criminal homicide. Thus the victim’s purportedly conclusive interest in avoiding suffering trumps the state’s interest in prosecuting acts of intentional killing. Verhagen and Sauer do not explain this equation. Their reasoning appears to be utilitarian, resting upon the ostensible ethical obligation to reduce suffering; however, this is not explicit. Nor can the Protocol be justified with reference to autonomy or self-determination arguments because, of course, newborn infants are incapable of choosing death, much less communicating that choice.

What Verhagen and Sauer have left unsaid, Singer has voiced, arguing in favor of the Groningen Protocol on expressly victim-centric terms, inconsistent with Blackstonian retributivism. As set forth earlier in this article,¹⁴³ Singer asserts that the morally-significant fact is not the otherwise-culpable conduct of the physician but rather the result to the particular infant. And Singer would consider the physician’s intent only to the extent of discerning what result is most humane to the child. For Singer, “The crucial issue is always the decision whether the infant’s quality of life is so poor it is better it should not live.”¹⁴⁴

The most salient feature of Singer’s analysis is the notion that the infant’s putative interest in avoiding suffering trumps the state’s interest in prosecuting those who deliberately take the life of that infant. Perhaps the most striking consequence of this reasoning is that Singer accounts for some of the infant’s interests, but ignores other appreciable interests. For instance, it is possible that a child afflicted with spina bifida, if allowed to mature into an adult capable of weighing her own preferences, would then be grateful that she had not been terminated as an infant. The child might, for example, develop convictions that would lead her to see human life as more than temporal and the human soul as perpetual. In such a cases, her resulting interest in her personal and spiritual integrity might trump any desire to avoid the suffering she endured.¹⁴⁵

Singer fails to account for many other possible benefits that may accrue during a suffered life, which might outweigh the suffering.¹⁴⁶ Many benefits—

141. *Groningen Protocol*, *supra* note 17, at 960.

142. *End-of-Life*, *supra* note 126, at 737.

143. *See supra* section II(A).

144. *Life or Death: A Conversation with Peter Singer*, *supra* note 18.

145. As Singer has conceded, “If you believe every human being has an immortal soul . . . you would differ from my views on [infanticide].” *Id.*

146. Of course, as set forth above, Singer expressly disclaims any belief that infants attain the status of personhood. Because they lack sentience, infants have no future hopes or expectations, *HeinOnline*, 13 *Berkeley J. Crim. L.* 56 (2008).

relationship, aesthetic experience, humor, knowledge—attend the lives of afflicted persons in proportions indistinguishable from the experiences of healthy persons. A life marked by suffering may even produce enhanced benefits. Those who suffer often develop admirable empathy for others who are afflicted. Suffering has focused the minds of great artists, composers, and writers upon details that others take for granted, with magnificent results. Among the many creative geniuses who famously suffered from mental and/or physical affliction were Ludwig van Beethoven, Robert Schumann, Peter Ilyich Tchaikovsky, and Frida Kahlo. Though any causal link between the suffering these people endured and the masterworks they created must necessarily remain a matter of speculation, they serve to remind that a life of suffering can contain much beauty.

In short, the life of someone suffering from severe illness usually consists of much more than mere suffering. This is the great counter-intuitive revelation for those who approach Singer's work with sympathy for his apparent interest in the victim: his victim-centric approach ultimately disregards any interest intrinsic to the victim as an individual person. As H. L. A. Hart has observed in reviewing Professor Singer's work, "Individual persons and the level of an individual's happiness are only of instrumental not intrinsic importance for the utilitarian."¹⁴⁷ As a result, only those interests of an individual victim that factor into the utilitarian's aggregate calculations merit ethical or legal consideration and, thus, protection. Furthermore, by focusing on suffering to the exclusion of other aspects of a severely-affected newborn's

and thus their potential preferences warrant no ethical or legal consideration. See PETER SINGER, PRACTICAL ETHICS 171 (2d ed. 1993); PETER SINGER, WRITINGS ON AN ETHICAL LIFE 186 (2000). However, Singer has chosen not to discount the child's interests altogether, instead justifying infanticide on the basis of the child's ostensible right to avoid future, potential suffering. Furthermore, Singer's objection to considering the child's interest in continued life amounts to a temporal, not an ontological, problem; Singer does not deny that many of these infants, if allowed to mature, will develop the sentience that, in his view, will entitle them to personhood. We are, after all, considering only future potentialities. If all future considerations were eliminated from the equation, then no future suffering would appear to justify the decision to kill the children in the first place. However, one cannot fairly measure the future suffering without considering the future development of the children, which will, if unimpeded, lead to personhood even within Singer's ethical framework.

Commenting upon Singer's classification of sentient animals as persons and infant humans as non-persons, Judge Gorsuch has observed:

While it is difficult to discern anything akin to what is ordinarily understood as racism in the traditional human-animal distinction, Singer's alternative . . . is a prime example of what some would label "agism," and what I might suggest is further evidence of the arbitrariness of instrumentalist accounts of human value. In fact, under Singer's logic, it would seem to be perfectly acceptable for humans to kill not only their own young but also young animals . . . [t]he reader is left to wonder Singer, a well-known animal rights activist and author, would really want to so limit his defense of animal lives, even if he sees little basis for protecting infant human beings.

Gorsuch, *supra* note 30, at 175-76.

147. H. L. A. Hart, *Death & Utility: Review of Peter Singer, Practical Ethics*, N.Y. REV. 25 (1980).
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future life, Singer misses many instrumental values that one would expect to find in the utilitarian balance. Severely-affected newborns have the potential to add much value to the general happiness and welfare of the cultures in which they live. Singer's analysis ignores this value.

Ultimately, Singer fails to take notice of any potential preferences of the newborn child. The failure of Singer and other preference utilitarians to account for the preference that some infants might develop for life over death is curious in light of their utilitarian presupposition that goods are commensurable. This basic assumption, which predicates the utilitarian calculus, should enable Singer to determine whether the infant's potential interest in avoiding significant suffering outweighs the infant's potential interest in living, even in spite of the suffering attendant to that life, in order to experience and enjoy other goods. Inherent in the utilitarian conception of human goods as instrumental and commensurable is the result that some goods, such as the avoidance of significant suffering, will trump other goods, such as continued human life. Goods, in Singer's view, are defeated when outweighed by competing preferences. However, it appears that this only works one way. The potential preference for life cannot trump the preference for avoiding suffering. Neither Singer nor any other proponent of the Groningen Protocol has demonstrated any justification for this.

That Singer fails to consider the latter category of goods comes as no surprise to non-utilitarians. Indeed, for many, it is difficult to conceive how Singer and other proponents of the Groningen Protocol might weigh considerations favoring life against the child's interest in avoiding future suffering.¹⁴⁸ However, assuming that the competing goods are commensurable, then Singer, Verhagen, and Sauer face a dilemma. To credit the preference some afflicted persons (or, in Singer's framework, future persons) might have for continued life, they must account for, and demonstrate the insufficiency of, that preference in their justification for the Groningen Protocol. By failing to credit the life preference, they display disinterest in a significant consideration militating against the Protocol. The most forceful argument for the Protocol—protection of the infant's interest in avoiding future suffering—is thus rendered much less forceful.

Singer's calculus in favor of the Groningen Protocol, which he defends on ostensibly victim-centric grounds, actually fails to account for many interests of the victim. Thus the Groningen Protocol does not represent a triumph of victim-centrism over Blackstonian retributivism.

148. As Judge Gorsuch has concluded, "[A]ny line we might draw among human beings for purposes of determining who must live and who may die ultimately seems to devolve into an arbitrary exercise of picking out which particular instrumental capacities one especially likes." Gorsuch, *supra* note 30, at 179. HeinOnline -- 13 Berkeley J. Crim. L. 58 2008

C. *The Rome Statute*

Whether or not victim-centrism supplants Blackstonian retributivism, nothing in logic prevents consideration for victims from supplementing the vindication of wrongs as a secondary justification for punishment. One model for this marriage of justifications might be found in the Rome Statute, which established the International Criminal Court. Professor Fletcher has praised the Rome Statute as an embodiment of his victim-centric, retributive principles.¹⁴⁹ However, just as affirmation of the retributive foundation of international prosecutions does not entail foreclosing secondary, consequentialist considerations, acknowledging that the ICC vindicates the rights of victims does not undermine the primarily retributive foundation of the Rome Statute. Assuming for the sake of comparison that international prosecutions stand on the same footing as state prosecutions (though recognizing that they do not),¹⁵⁰ it is enough to note that, whatever secondary justifications are offered for international criminal punishment, retributivism, understood in Blackstonian terms, is the primary predicate for the Rome Statute and other attempts to establish international penal systems. It is significant that the urge remains to see justice done after a perpetrator has usurped the laws of a community, even where Blackstonian retributivism is not practically possible due to the weakness of the young nation state which would otherwise remedy the usurpation.

In keeping with his proposed framework, Fletcher understands the primary purpose of the Rome Statute to be vindication of the interests of victims and its secondary purpose to be the avoidance of impunity.¹⁵¹ He lauds the statute as a triumph of victims' rights. Other commentators have expressed approbation of the statute for its marriage of retributivism with compensation to victims.¹⁵²

Professor Fletcher points out that the Preamble to the Rome Statute contains the observation that "during [the twentieth] century millions of

149. See *Justice and Fairness*, *supra* note 1.

150. The purpose of this article is to comment neither on the efficacy of international law generally nor on the Rome Statute or truth and reconciliation commissions specifically. Substantial questions persist whether an international community bears the responsibility or authority to punish usurpers, as states do. Some question whether international prosecutions, which tend to be limited and selective, can satisfy the demands of retributive justice. And numerous questions arise whether international criminal prosecution will excuse nations from intervening *before* crimes against humanity are perpetrated. These questions will go unaddressed here.

151. *Justice and Fairness*, *supra* note 1, at 551, 555.

152. See, e.g., Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law*, 34 INT'L LAW 7 (2000); Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187 (2003); Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & INT'L REL. 25, 40 (2006).
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children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”¹⁵³ Professor Fletcher draws from this language the inference, “The purpose of the Rome Statute is to vindicate the interests of these victims.”¹⁵⁴ The language he cites is, on its face, ambiguous as a justification for international prosecution of atrocities. Do the atrocities shock the conscience merely because of the undisputable victimization of men, women, and children? Or does that victimization shock the conscience because it tells us something about the culpability (and depravity) of those who perpetrate the atrocities? This latter interpretation would leave the retributive foundation for the Rome Statute intact. In a retributive account, the atrocities are punishable solely because the perpetrator has acted wrongfully by usurping an international moral norm. Thus it does not matter whether he has victimized anyone.

Immediately following are recitals that fit more obviously into the Blackstonian retributivist model:

[The UN] recognize[s] that such grave crimes threaten the peace, security and well-being of the world, affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished, determine[s] to put an end to impunity for the perpetrators of these crimes, and . . . resolve[s] to guarantee lasting respect for and the enforcement of international justice.”¹⁵⁵

The Rome Statute contains rightly-celebrated provisions for reparation to victims. It requires the International Criminal Court to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation.”¹⁵⁶ The Court has the power to order convicted perpetrators to make the reparation.¹⁵⁷ And the Statute mandates the establishment of a trust fund for victims’ benefit.¹⁵⁸

That the Rome Statute supplements its retributive aim with reparation to victims is neither novel nor a departure from Blackstonian principles. Blackstonian retributivists have long held that criminal punishment may rest upon more than one justification, though the interest of the community (here defined as the international community) in overcoming the criminal’s usurpation is the *primary* justification (and goal).¹⁵⁹ C.S. Lewis, for example, wrote:

[T]he concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question

153. Rome Statute of the International Criminal Court, *supra* note 2, Preamble.

154. *Justice and Fairness*, *supra* note 1, at 551.

155. *Id.*

156. Rome Statute of the International Criminal Court, *supra* note 2, at art. 75 § 1.

157. *Id.*

158. *Id.* art. 79.

159. See, e.g., Bradley, *supra* note 46 at 105. HeinOnline, 13 Berkeley J. Crim. L. 60 2008

'Is it deserved?' is the only one we can reasonably ask about a punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice. There is no sense in talking about a 'just deterrent' or a 'just cure.'¹⁶⁰

In a similar vein, Michael Moore opines that the impact of a crime upon the victim is a relevant consideration, but is secondary to the question of the offender's desert.¹⁶¹ Indeed, the effect upon the victim is relevant precisely to the question of the wrongness of the offender's conduct.¹⁶² The question whether a particular punishment is just must precede, but does not preclude, other considerations.

Consistent with this understanding, the Rome Statute's purposes are "dispensing exemplary and retributive justice; providing victim redress; recording history; reinforcing social values; strengthening individual rectitude; educating present and future generations, and, more importantly, deterring and preventing future human depredations."¹⁶³ The "more importantly" language notwithstanding, that retribution heads the list of the Statute's purposes is not insignificant. Retribution provides the foundation for the punishment, which is tailored to accomplish secondary goals not inconsistent with punishing the wrongdoer's usurpation. To justify the punishment solely on the basis of those secondary considerations is to allow the tail to wag the dog.

The persistence of Blackstonian retributivism in international law generally, and in the Rome Statute specifically, is demonstrated by comparison and contrast with truth and reconciliation commissions. Some have suggested that such commissions, particularly the commission in South Africa following Apartheid, "emphasize victims' needs and restorative, as opposed to retributive, justice."¹⁶⁴ These commissions generally offer amnesty to perpetrators who testify, thus promoting truth in the historical record over retribution for the wrongdoing.¹⁶⁵ Significantly, their existence highlights the persistence of Blackstonian retributivism in the Rome Statute and generally in international law; former Secretary General Kofi Annan has directly contrasted the retributive aim of the Rome Statute with the conciliatory aim of the South African truth and reconciliation commission.¹⁶⁶ Thus, where used, truth and reconciliation commissions are understood to constitute a departure from the

160. C. S. LEWIS, *GOD IN THE DOCK* 288 (1970).

161. Moore, *supra* note 47, at 86-87.

162. *Id.*

163. M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 1-2 (1998).

164. José E. Arvelo, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 *GEO. J. INT'L L.* 411, 467 (2006).

165. *Id.*

166. *Id.* at 468.

retributive norm.

Even so, it is not at all clear that truth and reconciliation commissions represent an abandonment of retributivist principles so much as a response to the practical difficulties that may attend (or make impracticable) prosecution of perpetrators of large-scale usurpations.¹⁶⁷ The “harmful effects of impunity” counsel in favor of retribution for usurpations, but often must be weighed against the potentially destabilizing effect of a trial within fragile democracies.¹⁶⁸ Prosecution of perpetrators from a nation’s previous regime may fracture a nascent nation.¹⁶⁹ Faced with the choice “between the silence of perpetrators without justice being done and learning the truth without perfect justice having been done,”¹⁷⁰ South Africa has chosen the latter.

For these reasons, some countries have chosen to pursue reconciliation and full disclosure of historical facts, assisted by amnesty provisions, recognizing that retribution, though desirable, is not feasible. As one commentator has observed, “Opponents of law requiring prosecutions concede that impunity erodes the rule of law. But, they argue, if a fragile democratic government institutes prosecutions, it may provoke its overthrow by sectors that are ill-disposed to respect human rights.”¹⁷¹ In fact, both prosecution under the Rome Statute and proceedings in truth and reconciliation commissions follow from a state’s inability or unwillingness to bring about retribution for usurpations of self-evidently just prohibitions.¹⁷²

That truth and reconciliation commissions address the impasse resulting from a state’s unwillingness or inability to prosecute its own suggests that retributive (and victim-centric) demands for punishment are not inviolate. However, it does not suggest that retributive (or victim-centric) justifications for punishment fail. A community might consistently justify its intention to punish a perpetrator and yet refrain from prosecution for prudential reasons. So, truth and reconciliation commissions appear to constitute an exception to the general rule, embodied in the Rome Statute, that the international community (like local communities) acts justly when it punishes usurpations of self-evident norms. That does not resolve the question whether retributive or rather victim-centric considerations constitute the primary (or exclusive) justification for punishment when punishment is pursued.

The language of the Rome Statute itself may be construed to support either conclusion. However, when viewed in the context of its creation, and

167. See generally, Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205 (2000).

168. Orentlicher, *supra* note 167, at 2542-46.

169. *Id.* at 2544-45.

170. Villa-Vicencio, *supra* note 167, at 221 (quoting George Bizos).

171. Orentlicher, *supra* note 167, at 2546.

172. See Haque, *supra* note 44, at 323. HeinOnline, 13 Berkeley J. Crim. L. 62 2008

particularly when contrasted with truth and reconciliation commissions, the Rome Statute appears inherently retributive. In operating pursuant to the Rome Statute, the ICC vindicates the retributive interests of the international community. Conversely, when the international community refrains from punishment, as where nations employ truth and reconciliation commissions, retribution is the one interest not fully vindicated.

CONCLUSION

Blackstone taught that a community justifies its punishment of a wrongdoer on the ground that the wrongdoer usurped one or more of the community's norms. Victim-centrists reject that approach, instead justifying punishment on the ground that the wrongdoer has harmed a particular victim or victims, and excusing otherwise-culpable conduct where the person acted upon, on balance, is not harmed.

Victim-centric understandings of criminal punishment leave many questions, as do putatively victim-centric developments in positive law. First, despite the efforts of victim-centric retributivists such as George Fletcher, victim-centrism remains an inherently consequentialist theory. Though consequentialist (prudential, utilitarian, or other) considerations might supplement a retributive justification for punishment, Blackstonian retributivism resists the incorporation of victim-centric reasoning. Those victim-centrists who understand themselves to be working within a consequentialist framework, such as Peter Singer, reject retributivism altogether.

Second, it is not clear that victim-centric developments in positive law are in the best interests of victims. The Groningen Protocol demonstrates the challenge inherent in defining victims' interests in such a way as to afford victims the full protection of criminal law. When a community predicates criminal punishment not on the culpable conduct of the malfeasor but rather on a measurement of the relative harms and benefits to the person acted upon, it becomes significant who performs the measurement and with what conception of the human person the measurer starts. In the Netherlands, adherence to victim-centric justifications for punishment has resulted in legalized infanticide. This practice fundamentally injures the interests of the child, rendering the newborn child a victim of volitional killing in the cause of rescuing the child from suffering.

Third, laws that permit civil compromise of criminal prosecutions, a victim-centric application, generate inconsistencies and have suffered significant curtailment. Where, as with misdemeanors susceptible to civil compromise, the public interest is deemed insufficiently grave to justify prosecution, states ought to re-classify qualifying offenses and remove them from the realm of crimes. This would avoid the inconsistencies and injustices that inhere in the victim-centric effects of civil compromise statutes.

Finally, at least one victim-centric consideration, restitution to victims, is not inconsistent with retribution, and can serve as a secondary purpose of punishment. While victim-centric theories proliferate and lawyers (rightly) focus attention on the interests of victims of crimes, recent developments in criminal law demonstrate no apparent reason to abandon Blackstonian retributivism in Anglo-American law in favor of a victim-centric model. Rather, as the Rome Statute demonstrates, victim-centric ends might supplement retributive punishment in a criminal scheme. Recognition of the twin purposes of the Rome Statute is not to accede to the claim that injury to victims is either sufficient or necessary to justify criminal punishment. However, once a community has established that its punishment of a wrongdoer is just based on retributive grounds, it should turn its attention to the question whether the victims of wrongdoing have also been treated justly.