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The Justice of Recovery: How the State Can Heal the Violence of Crime

LINDA G. MILLS*

No matter the motives, conscious or unconscious, it was my responsibility, my choice, that I was in Central Park that night. I don't feel sorry for that choice or for myself, and I don't blame myself for having made it. Though I never, ever imagined the run would have the result it did, I understand why I was out there.1

—Trisha Meili (also known as the Central Park Jogger)

INTRODUCTION

Punishment alone does very little to heal the gaping wound a crime can leave on victims and their families.2 Instead, healing is an arduous,

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* Linda G. Mills is Professor of Social Work, Law and Public Policy, and Executive Director of the Center on Violence and Recovery at New York University. Very special thanks to NYU Law student Matthew Popowsky, who brilliantly navigated us through several thorny legal issues, including theories of punishment. His citation work was invaluable and his overall commitment to the project of reforming the criminal justice system was pivotal to this rethinking. Jason Wuiger, also an NYU Law student, contributed his passion for the subject and a very thorough study of Victim-Offender Mediation. Margaret Neri, an NYU Social Work student contributed her research and clinical skills with great insight and vision; both are qualities in Margaret I deeply appreciate. Mollie Stone’s early contributions, especially her excitement for performativity theory, were central to the evolution of the piece. Debra Cole, Attorney at Law and Research Assistant at the Center on Violence and Recovery, did a very close re-reading of the relevant research. Her meticulous and precise legal mind made all the difference. Nicole Pezold, Director of Communications at the Center on Violence and Recovery, always improves the writing, but more importantly, contributes in so many spoken and unspoken ways to the bigger picture—Nicole is truly amazing. Thanks, as always, to the Center’s Director of Projects Peggy Grauwiler, whose hard work, ideas and overall love for this subject are central to my thinking. Julia MacEwan, my assistant, was a fabulous editor as well as a Jane-of-all-trades. Avery Newberry and Trisha Meili—my profound appreciation for sharing your trials and your triumphs with the rest of us. And finally, thanks to Peter Goodrich, who is always at the heart of my ideas.


Anecdotally, victims who expected that the punishment or even execution of the offender would bring them relief, satisfaction, gratification, or an end to the effects of the trauma often find that the effects remain and the “victory” is a Pyrrhic one. Unlike the neat, easy solutions portrayed daily on television and in movies, moral ambiguity and unaddressed issues from the trauma frequently remain to haunt the victim. This may be especially true when the victim has focused all of her or his attention on blaming and punishing the
dynamic and lengthy process that requires victims themselves to take active steps to facilitate their own recovery. Many victims and their families suffer as passive witnesses to public justice while they seethe with anger, or even guilt; the sad part is that the justice system does very little to address the feelings—or healing—associated with crime.\textsuperscript{3}

One need only think of the now famous Central Park Jogger, Trisha Meili, to realize how vast and deep the crevasse runs between court justice and true healing. Meili describes the role the arrest and prosecution of her suspected attackers played in her recovery;\textsuperscript{4} a key fact is that the convictions of all five of the youths originally charged with rape, against whom she testified, were ultimately overturned in 2002.\textsuperscript{5} She contends, in her tell-all book, that it was not the prosecution that gave her comfort, but rather her own psychological and spiritual journey toward understanding what happened the night she was brutally raped.\textsuperscript{6} Through this journey, Meili comes to accept that her negative body image and accompanying anorexia pushed her to go running alone in Central Park the night of April 19, 1989; becoming aware of this fact not only gave her greater control over her life, but also illuminated the path toward her recovery from this otherwise inexplicable attack.\textsuperscript{7}

One of the assumptions of the criminal justice system is that victims benefit in some way from the prosecution and punishment of the person who caused them harm.\textsuperscript{8} While such legal redress may indeed benefit some crime victims, it provides none with a meaningful opportunity to heal. Contemporary approaches circumscribe victim participation in the prosecution of the victimizer to acting in the narrow role of a trial witness, and later, to delivering a victim impact statement at sentencing.\textsuperscript{9} In this Article, I argue that victim healing involves more than punishing the offender, and that by rethinking the roles victims perform in the criminal justice system, we may provide them with a more comprehensive menu of options to facilitate their recovery from crime. The societal goals of punishment and accountability and the individual desire for healing are not mutually exclusive. Rather, I contend that incorporating recovery approaches from both the science of victimology and theories of restoration in the justice process allows a more

\begin{itemize}
\item \textit{offender} rather than confronting her or his own responsibility for healing from the trauma.
\end{itemize}

\textit{Id.} (emphasis omitted).

3. \textit{Id.}

4. See \textit{Meili}, supra note 1, at 167–98.


7. \textit{Id. at} 32, 164.

8. See Heather Strang & Lawrence W. Sherman, \textit{Repairing the Harm: Victims and Restorative Justice}, 2003 \textit{Utah L. Rev.} 15, 24 (arguing that victims' satisfaction is correlated with the perception of fairness throughout the sentencing process rather than the specific outcome).

9. For a discussion of these roles, see infra Part II.A.I.
encompassing perspective that has the potential to both reduce the propensity of victims to become victimizers themselves and interrupt the transmission of victimization across generations.10

Historically, the criminal justice system has taken very little interest in the healing process of victims. This is no surprise. Many legal scholars would argue that an individual victim's interests are antithetical to the theories, purposes, and goals of the criminal justice system and, therefore, are only incidental to its functioning.11 Whether one subscribes to a retributive or utilitarian justification for punishment, the feature common to both theories is a focus on the offender. Either the offender’s moral culpability12 or the prevention of future offenses by the offender13 (or some combination of the two) justifies punishment. Implicit in these theories is the assumption that the victim will also benefit in some way from the state’s action against the offender, but it is in no way a central concern of the state, nor should it be.14

Although victims obviously play an integral part in every case prosecuted by the state, both retributive and utilitarian theories of punishment subsume a victim’s individual concerns to the state’s larger interest in the pursuit of public justice.15 Victims are needed, for example,

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10. On the propensity of victims to become victimizers, see Bessel A. van der Kolk, The Compulsion to Repeat the Trauma: Re-enactment, Revictimization, and Masochism, 12 PSYCHIATRIC CLINICS N. AM., 389, 390–91 (1989) (“Re-enactment of victimization is a major cause of violence. Criminals have often been physically or sexually abused as children.... Victims of rape are more likely to be raped and women who were physically or sexually abused as children are more likely to be abused as adults.”).

11. See, e.g., Michael S. Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. REV. 65, 67 (1999) (“I think victims should and must be ignored if you are claiming to be doing retributive theory.”).


14. GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 69 (2002) (“Punishment shows that the wrongdoer’s behaviour is regarded as unacceptable.... that is not the same as demonstrating that the victim’s injury is a matter of deep social concern.”); Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 YALE L.J. 85, 136 (2004) (noting that the state controls the criminal court case, while the victim is often reduced to a minor role in the proceedings, often remaining unaware of basic facts concerning the case and its progression).

15. Amanda Konradi, Pulling Strings Doesn’t Work in Court: Moving Beyond Puppetry in the Relationship Between Prosecutors and Rape Survivors, 10 J. SOC. DISTRESS & HOMELESS 5–28 (2001) (noting that as criminal cases appropriate the witnesses’ experience of victimization for use as a prosecutorial tool, rape victims appearing as witnesses often experience a dual loss of ownership); see also Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 221 (“[Victims are often exploited by the state, used as props to support a conviction or sentence but otherwise barred from the decision making process and ignored once the
to bring criminal charges against a suspect, and are critical even to murder cases, where family members are called as witnesses to evoke jurors' sympathies. Despite this heavy reliance on the immediate and even more proximal victim, the decision to prosecute a defendant does not ultimately rest with the victim or the victim's family. Prosecutors pursue sentences against convicted defendants on behalf of "the people" of a given state rather than the individuals most directly injured by a crime. In fact, prosecution may proceed despite a victim's reluctance, and prosecutors can use the power of the state to compel unwilling victims to testify. The state may view victims as important parties to an offense in need of redress, but any victim may be sidelined in the actual deliverance of justice. In some cases, victims may even be perceived as interfering with a prosecutor's true interests to defend the state.

The victims' rights movement has, for the past thirty years, attempted to rectify the tension between prosecutor and victim and to give victims a voice in the criminal process. Victims' Bill of Rights constitutional amendments have now been introduced in thirty-two states, statutory victims' rights laws are now on the books in every state, and the federal requirement that courts solicit victim impact statement's goals have been met.


17. Beyond their general role as protectors of the state, prosecutors may focus undue attention on their success rate, which may further marginalize the needs of victims. See, e.g., Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REv. 125, 134 (2004) (noting "emphasis district attorneys' offices place on conviction rates" as measure of "that prosecutor's success in an occupation where job performance, aside from anecdotal evidence, is otherwise difficult to gauge").

18. Mandatory prosecution policies in domestic violence cases are the most extreme example of this phenomenon. See Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 HARV. L. REv. 550, 557 (1999).


20. See, e.g., Paul H. Robinson, Should the Victims' Rights Movement Have Influence over Criminal Law Formulation and Adjudication?, 33 McGeorge L. REv. 749, 749 (2002) ('Victims' rights organizations ought to have limited influence over adjudication—and individual victims ought to have no influence—because an offender's liability and punishment ought to depend on his blameworthiness... not on his good or bad luck as to the forgiving or vindictive nature of his victim.').


statements have all but guaranteed that victims play *some* role in the criminal process. Critics of the victims’ rights movement, however, question the substance of these laws, noting that victim participation in criminal trials is largely symbolic. Moreover, courtroom dynamics subscribe a passive role to victims, who perform only when the prosecutor and the law invite such participation. The victim’s participation in this court setting has one specific purpose: to determine the offender’s guilt and punishment.

Even those scholars who recognize the importance of the victim to the criminal process have tended to regard this participation at a level of abstraction that ignores the individual in favor of a *class* of victims. This generalized view of the victim as “representative,” whose main interest is merely to have a say in the degree of punishment to be meted out, has obscured rather than clarified any significant role for individual victims in the criminal justice system.

Cost is another frequently cited challenge to the idea of reforming the criminal justice system to include victims in more meaningful roles. After all, shouldn’t the public focus precious resources on the primary goals of the criminal justice system, namely to convict and punish offenders? This is a fair question. Significant resources are already spent, however, on victims of violent crime and their families. In fiscal year 2004, $426 million in federal spending went to compensating victims. Medical expenses were the largest expenditure, comprising fifty-one percent of the total cost, with mental health counseling for crime victims at nine percent. Lost wages comprised nineteen percent of the total.


23. Payne v. Tennessee, 501 U.S. 808, 821 (1991) (“Congress and most of the states have, in recent years, enacted [victim impact statement] legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant.”).


25. See, e.g., George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52 (1999) (“The crime of homicide protects life—not the life of particular persons but the right to life in the abstract .... The abstract nature of these protected interests accounts for the minimal relevance of the views of the particular victims about sentencing a convicted offender.”).


[The image of victims in the victims’ movement is one of helpless and vengeful individuals. This plays nicely into the war on crime, exploiting victims for state interests. Active and strong victims are an impediment to officials while helpless victims are malleable and grateful. The victims’ movement ... prefers cries for help and simplistic solutions (such as extreme punishment) instead of confident explorations by victims of the meaning of their victimization and the healthiest response.

Id.


28. Id.
While the state has taken little interest in the kind of treatment victims receive, it continues to fund a growing victim assistance budget. Directly addressing the evident medical and mental health effects on victims would ensure that public funds were spent in ways most likely to promote victim healing. Thus, reforming the criminal justice system in a manner that facilitates a victim's recovery from crime offers the state economic benefits, as well.

Identifying which programs or responses would help crime victims recover is a critical and perplexing question, considering that the criminal justice system is, in theory, incompatible with victims' interests, and, in practice, often hostile to them. Stephanos Bibos and Richard Bierschbach recently proposed integrating remorse and apology into the criminal process but their focus was primarily on the offender. For victims, remorse and apology are end products. Few victims take the long and arduous path toward remorse and apology, largely because this avenue has not been opened to them. To begin to conceptualize how such an undertaking may be encouraged or even facilitated, we must understand exactly how victims have been, or are likely to be, affected by crime, what strategies can meet their complex recovery needs, and what procedures or programs might help restore them to health. The science of victimology, or the study of victims, is the sixty-five-year-old companion to criminology and can offer insight into victims' needs within a well-established theoretical framework. Surprisingly, victimology research has yet to be incorporated into how legal scholars contemplate the administration of justice.

The science of victimology offers a method of actually examining victims' interests and needs in relation to the offender and the crime, rather than simply theorizing what victims may need or want. While victims' interests have generally been assumed compatible with the

29. Id.
32. Id. at 92 (noting that "criminal procedure does little to encourage or even allow meaningful apologies and expressions of remorse from offenders to their victims and the community").
34. See Bibas & Bierschbach, supra note 14, at 137-39 (noting that according to empirical data, victim dissatisfaction stems from the marginalization and lack of rights victims experience in the criminal justice system, as opposed to leniency in sentencing); see also Jan J.M. van Dijk, Crime and Victim Surveys 127 (1996), available at http://www.aic.gov.au/publications/proceedings/27/vandijk.pdf (finding, in contrast to the myth of the vengeful victim, that victims in western countries typically favor community service and non-custodial sentences, rather than long periods of incarceration).
passive roles assigned to them in the criminal justice system, the victimology research shows that victims have multiple needs beyond the punishment of the offender. Importantly, victims' most likely path to recovery is not passivity; for victims to heal, they must play an active role in their recovery. This so-called activity takes different forms, and may include the following: engaging in self-reflection on the crime and the resulting traumatization; breaking down the elements of the event that could be controlled by the victim or may be controlled to avoid similar victimizations in the future; and, finally, interacting with offenders to draw out their perspectives, and possibly an apology or signs of remorse.\textsuperscript{35} The victimology research reveals that victims feel more control and less traumatized when they understand how they may have positioned themselves in relation to the crime.\textsuperscript{36} Such insight gives victims what is called "perceived control" over their environments, and thereby enables them both to make sense of what happened and feel more confident that they can prevent a similar incident in the future.\textsuperscript{37} In addition, studies show that victims who interact with offenders after a crime, in a conference or Victim-Offender Mediation as it is sometimes called, feel a significant reduction in fear and a significant increase in their sense of security.\textsuperscript{38}

According to Heather Strang and Lawrence Sherman, such notions of reconciliation and restoration once represented the predominant response to crime in most societies.\textsuperscript{39} The consensual process of restorative justice, however, stands in sharp contrast to the current adversarial proceedings of our federal and state criminal justice systems. Restorative justice focuses on the impact of the offender's actions on the victim and a defined community, while our criminal justice system abstractly centers on the harm suffered by the state.\textsuperscript{40} This difference is pronounced in the divergent conclusions of the two systems: restorative justice takes into account the individual aspects of the offense and culminates in positioning the parties for healing, while criminal justice levies a state-mandated sentence seeking to punish, isolate and/or rehabilitate the offender.\textsuperscript{41} A restorative approach considers the impact

\textsuperscript{35} See infra Part I.
\textsuperscript{36} See van Dijk, supra note 33, at 1–3.
\textsuperscript{37} Ruth E. Fleury, Missing Voices, Patterns of Battered Women's Satisfaction with the Criminal Legal System, 8 VIOLENCE AGAINST WOMEN 181, 185, 198 (2002) (finding that among 178 survivors of intimate partner violence, perceived control was strongly related to overall satisfaction); see also infra Part II.
\textsuperscript{38} See Strang & Sherman, supra note 8, at 29–30 (describing a study that showed victims of violent crimes whose cases were dealt with in court were about five times more likely to fear revictimization than those who attended conferences with the offender).
\textsuperscript{39} Id. at 16.
\textsuperscript{40} See id. at 16–17.
\textsuperscript{41} JOHNSTONE, supra note 14, at 161 (comparing the current criminal justice system in which
of the offender's actions on the victim and provides a method of restoring those immediately harmed by the offense. But it does not stop with restoring the victim; this type of justice has "the potential to change an offender's perspective—to make them fully appreciate the human side of the harm they have done—which can change their behavior when an opportunity for crime arises in the future."  

Critics of restorative approaches worry that due process, confidentiality, and the right to avoid self-incrimination may be compromised if the state organizes direct confrontations between victims and offenders. Others have worried that restorative justice practices are incompatible with the current adversarial system and, therefore, may delude either's efficacy. Proponents of both criminal and restorative justice have tended to regard these two approaches as incompatible with one another; however, restorative justice programs do not undermine the traditional rationales for punishment under the criminal law, including retribution and utilitarianism. Several programs throughout the United States have found ways to integrate elements of restorative justice into the current criminal justice system and/or provide restorative justice alternatives to the administration of justice with positive results.

offenders mainly "pay for their crimes through suffering" to a restorative justice system which instead focuses on "ensuring that [offenders] repaired the harm, both material and symbolic, which they had caused").

42. See Luna, supra note 15, at 229 ("[A] primary objective [of restorativism] is making amends for the offense, particularly the harm caused to the victim, rather than inflicting pain upon the offender."); Lawrence W. Sherman, Violence In The Family: Domestic Violence and Restorative Justice: Answering Key Questions, 8 VA. J. SOC. POL'Y & L. 263, 267 (2000) ("The most basic feature of restorative justice is that it restores the state of affairs prior to the commission of a crime, at least to the extent possible. The restorative justice approach aims for this restoration of pre-crime status in different ways—for victims and their loved ones, for communities, and for offenders and their loved ones.").


45. Id. at 690-91.

46. See Jan Peter Dembinski, Access to Justice: Restorative Justice in Vermont: Part Two, 30 VT. B.J. 49, 50 (2004) (explaining that state legislatures and the Department of Corrections in Vermont have established community and restorative justice programs, such as conferencing, reparative panels, pre-charge programs, young offender panels, mediation and conferencing). Mary Ellen Reimund writes:

Law and restorative justice are not foes in the search for justice within the criminal justice system. When united, they provide a powerful force by giving victims a voice, holding offenders accountable to right their wrongs and allowing communities to participate in the process. There are rays of that power radiating from restorative programs in operation today. One only has to look at the programs in Iowa, Minnesota, and Wisconsin to see that restorative justice and the law can be successful complements to the criminal justice system.

Reimund, supra note 44, at 691; see also Robinson, supra note 43, at 385 (citing examples of restorative justice programs working in conjunction with or parallel to the criminal justice system in Minnesota, Delaware, Vermont, New South Wales and New Zealand).

In addition, the Center on Violence and Recovery is currently implementing a program in
The science of victimology supports the conviction that extending the criminal justice system to include programs and services that can restore victims and move beyond guilt and punishment opens a new door into fighting crime. In fact, healing victims and offenders offers the greatest hope for extinguishing future crimes. It is now well-established that a personal or family history of victimization makes some people more vulnerable to becoming both future victims and offenders of violent crime. If the state does not recognize and interrupt this pattern of victimization and the physical, emotional, and psychological problems associated with that pattern, it will allow an entirely new wave of statistically likely victims and offenders to be created.

In Part I, I take up the question of the compatibility of the traditional structure and values of the criminal justice system with the broader need for victims to heal from crime. Although retributive and utilitarian theories have often been viewed as being at odds with victim interests, upon a closer, victimology-oriented inspection, they may...
actually complement one another and enhance the state's efforts to reduce crime. My claim, introduced in Part I, is that restorative justice programs that recognize the multiple needs of victims are fully compatible with contemporary theories of punishment and rehabilitation and the overall goals of the criminal justice system. I argue that the criminal justice system should integrate the concerns highlighted in the victimology research and galvanize victims to participate to a greater degree in crime prevention.

In Part II, I describe the science of victimology and the key arguments for rethinking the administration of justice in the United States to incorporate a victim's point of view. In this section, I also describe the crucial importance of performative theory in examining victims' prescribed roles in the legal system, which can, ironically, undermine their recovery. Hence, Part II provides the theory and science necessary for a richer understanding of the system's relationship to victims and how it can influence their recovery from the traumas of crime.

Part III develops a set of reforms consistent with the criminal justice system's overall goals that expand the options available to crime victims. While other avenues of reform may exist, I propose integrating restorative justice-based practices, such as Victim-Offender Mediation and Family Group Conferencing, with the criminal justice system's existing punitive measures. These two restorative approaches are now widely practiced in several countries, and I will review both models to illustrate their healing capacity in action.

I conclude with a call for reform. Policies and programs that focus on healing individual victims can be compatible with the overall criminal justice goal of interrupting crime and reducing public harm. Only a shift that allows victims to perform more complex roles in the system can smooth the way for a more holistic, healing approach to crime that has true potential to reduce its devastating causes and effects.

I. RECONCILING HEALING AND PUNISHMENT

Punishment serves as the enforcement mechanism of criminal law but is not in and of itself a goal of criminal law. Rather, the goal of criminal law may be viewed either as an affirmative expression of a community's norms and values, the violation of which merits punishment, or as a means to prevent criminal behavior by creating law-abiding citizens. These purposes fit the two primary justifications for

50. The significance of the state's relationship to the victim is especially critical in what I call "intimate crimes" (domestic violence and rape), where legal practices and theories have been tailored to female victims, but are too often at odds with what female victims need and want in order to heal.

51. Compare Ehrensaft et al., supra note 48, at 473 (arguing that criminal law is "a vehicle by
punishment: retribution and utilitarianism. Broadly speaking, "a retributivist claims that punishment is justified because people deserve it; a utilitarian believes that justification lies in the useful purpose the punishment serves." Accordingly, this Part reconciles retributive and utilitarian theories of punishment as an enforcement mechanism with society's interest in victim well-being.

Over the years, retribution and utilitarianism have fallen in and out of favor as justifications for punishment, but they remain the dominant paradigms against which all criminal laws are tested. Prior to the twentieth century, "strong" retributivists, such as Immanuel Kant, were proponents of lex talionis—"an eye for an eye"—as morally required punishment. Today, the majority of scholars and policymakers view a less harsh form of retributivism as the best justification and guiding principle of just punishment. Though they do not demand an eye for an eye, they argue that punishment must be commensurate with some valuation of the crime committed and is justified by the moral guilt of the offender. Meanwhile, the American prison system as a "reformatory" or "penitentiary," which was meant to rehabilitate criminals, represents the most recognizable manifestation of a utilitarian purpose of punishment.

Any idea that seeks to alter radically the scope and purpose of the criminal law must answer the challenges of both retributivists and utilitarians, and should do so by meeting the goals each theory which the community debates, tests, and ultimately settles upon and expresses its norms"), with Johs Andenaes, General Prevention—Illusion or Reality?, 43 J. CRIM. L. CRIMINOLOGY & POL. SCI. 176, 179 (1952) ("By general prevention we mean the ability of criminal law and its enforcement to make citizens law-abiding.").

Here is what I mean by doing justice: Giving a wrongdoer punishment according to what he deserves—no more, no less—by taking account of all those factors that we, as a society, think are relevant in assessing personal blameworthiness. Justice, then, requires that, in assessing an offender's blameworthiness, we must take account of not only the seriousness of the offense and its consequences but also the offender's own state of mind and mental and emotional capacities, as well as any circumstances of the offense that may suggest justification or excuse.

Id.
In the decades after the American Revolution, the members of Philadelphia's humanitarian coteries became convinced that only imprisonment could rehabilitate criminals and secure public order. . . . Insisting that their target was the soul of the criminal, humanitarians often ignored the violence undergirding penal authority and claimed that physical punishments were reserved only for those who resisted their ministrations.

Id.; see also James J. Willis, Transportation versus Imprisonment in Eighteenth- and Nineteenth-Century Britain: Penal Power, Liberty, and the State, 39 LAW & SOC'Y REV. 171, 176–77 (2005) ("[T]he purpose of the nineteenth-century penitentiary was to punish and reform criminal offenders.").
propounds for the justice system. Until now, the legal literature has focused primarily on the divide between the traditional ideas of criminal justice and alternative conceptions, such as restorative justice. Indeed, restorative justice proponents have often agreed with this assessment, advancing restorative principles by denying the relevance and efficacy of traditional criminal justice. Both criminal and restorative justice camps have emphasized how they are different, fundamentally incompatible, and essentially at odds. For all their well-explored differences, I argue that criminal and restorative justice can actually complement one another to punish and rehabilitate offenders, allow victims’ recovery, and interrupt the reproduction and transmission of violence.

Before engaging in this discussion, it is important to recognize what I do not propose. Unlike Alfred Mendelsohn, who advocated for victimology as an attempt to mitigate punishment, I do not believe that incorporating a victim’s perspective and/or new roles for victims should necessarily affect the punishment of offenders. The proposals developed in Part III are aimed at expanding the menu of options victims have in the criminal justice system so that they can better heal from the trauma of crime. In addition, I do not intend to conflate criminal laws with civil remedies by applying tort principles of contributory fault, or return the criminal law to a period where certain victims, particularly women, received blame for the crimes committed against them. Instead,

56. See, e.g., Bibas & Bierschbach, supra note 14, at 91 (recognizing “deterrence and retribution [as] legitimate guideposts for sentencing,” but claiming that “the restorative justice movement mistakenly contends” that restorative practices can “supplant deterrence and retribution”); Stephen P. Garvey, Punishment as Atonement, 46 UCLA L. Rev. 1801, 1844 (1999) (“Missing from the restorativist agenda, however, is the idea of punishment as moral condemnation.”).

57. See van Dijk, supra note 33, at 1 (“For Mendelsohn, a defense counsel, victim precipitation was a mitigating circumstance in meting out punishment for the offender.”).

58. It is important to note, however, that personal victimizations are not necessarily correlated with a preference for severe sentences. See van Dijk, supra note 34, at 122 (“Personal victimisations were found to be unrelated to a preference for severe sentencing .... Punitivity was partly seen as a consequence of media-induced, exaggerated fear.”).


60. See David P. Bryden & Sonja Lengnick, Criminal Law: Rape in the Criminal Justice System, 87 J. Crim. L. & Criminology 1194, 1196 (1997). Bryden and Lengnick note that “[i]f the rape victim’s conduct prior to the crime violated traditional sex-role norms, police commonly disbelieve her report or blame her for the rape. . . . When they do prosecute, the system puts the victim rather than the defendant on trial.” They also contend that “[i]uries, motivated by the same biases as other participants in the system, often blame the victim and acquit the rapist.” Id. Finally, they observe that “most rape scholars believe that, in large measure, these travesties of justice have been due to rules of law, fashioned by male judges over the centuries, that promote victim blaming.” Id.; see also Harriett R. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 793, 793–94 (1986).

[In the United States in the mid 1970s a] woman who did not fulfill the stereotype of a previously chaste victim who had been attacked in a dark alley by a total stranger and who had fought to the finish to preserve her chastity was often viewed as having “precipitated” the attack or as having given consent when none was given. Indeed, rape complainants as a
I seek only to recognize that crime does not take place in a vacuum, and that all crimes create a relationship between victim and offender, whether acknowledged or not. This recognition does not exculpate the offender or minimize in any way the violence perpetrated against the victim. It does, however, provide victims the opportunity to understand what happened, to come to terms with the crime, while also regaining a certain degree of control over their lives.

A. A RETRIBUTIVIST THEORY OF PUNISHMENT

A retributivist justification for punishment implies a certain reciprocity in behavior under the criminal law. If a person diverges from societal norms by breaking laws, this offender does so at the expense of the community of "others" who follow the law. Punishment is concerned with the unfair advantage this offender gains over society by not obeying its rules; its purpose is to equalize the offender with the rest of society and to ensure that "this advantage is in some way erased." According to Kant, society has a moral duty to punish the person who has broken its rules in order to avoid the appearance that society is complicit in the crime itself:

Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the dessert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.

Although contemporary retributivist scholars have eschewed Kant’s harsh eye-for-an-eye retributivism, most agree that it would be immoral and unjust for the criminal law to provide different degrees of punishment for different offenders based on a victim’s desire for...
punishment or leniency.65

Several contemporary legal theorists have weighed in on the question of retribution and the precise mechanism the criminal justice system should use to correct the "imbalance" created between the offender and the victim when a crime is committed.66 Each scholar does so abstractly, however, claiming that punishment "rights the wrong" inflicted upon the victim, or, more accurately, upon society.

It is for this reason that many of the reforms that have been implemented on behalf of victims have fallen within a narrow set of programs that stay true to the theory of retribution. Victims' rights advocates, for example, have pushed to integrate the victim's perspective into the conviction and punishment of the offender.67 Legislation achieved through the Victims' Bill of Rights movement allows victims to present "impact statements,"68 which are in line with the aims of retributivism since they "enhance the chances that sentencing will be consistent with the principle of proportionality."69 The judge in a criminal trial may invite the victim to prepare a statement to be read in court before the defendant's sentencing. Although the statements recognize the harm done to a particular victim, they are almost exclusively focused on punishment and are presented too late in the justice process to offer victims any real sense of control over the trial process, let alone an opportunity to explore, in any reflective way, their relationship to the crime committed against them or the person charged with committing it.

A more significant problem with victim impact statements, however, is that they do not recognize that victims may have myriad needs beyond the desire to see the offender convicted or punished.70 Victims are not
actively engaged in ways they identify as helpful, and their limited role may actually impede their recovery. For example, some victims may believe that testifying about the impact of the crime in court could be counterproductive to their healing.\(^7\) Additionally, as the victims' rights movement has developed, it has deliberately portrayed victims as "blameless, worthy of special rights, and trustworthy not to abuse those rights," further circumscribing their role in the pursuit of justice. Such a view of victims may further the goals of the politically powerful "tough on crime" perspective—a part of this victims' rights movement—but it does little to benefit a multiplicity and diversity of victims. We know that recovery for many crime victims is a complex process, and may include an interest in rethinking their behavior leading up to the crime, a need to reassert control over their lives, or a desire to move beyond the pressure for swift and harsh vengeance.\(^7\)

Those retributivists who do consider the interests of the victim, tend to do so only at an abstract, idealized level.\(^7\) For Professor George Fletcher, a victim's needs parallel society's need to punish violators of its rules: each victim who is wronged is representative of a "class of victims."\(^7\) The problem with this idealized view is that victims are not a monolithic block with homogeneous needs.\(^7\) Indeed, some victims, perhaps most, believe that "equalizing" the relationship with one's assailant calls for more than mere punishment.\(^7\) Part III describes how victims may benefit from face-to-face meetings with their assailants in which they describe the ways the offender robbed them of their "equality" and discuss what the offender might do to rectify that loss.\(^7\)

\(^{71}\). See, e.g., Meili, supra note 1, at 169–72 (Trisha Meili speaking about how she hesitated a great deal before deciding to testify against the defendants at trial).

\(^{72}\). Gruber supra note 13, at 438.

\(^{73}\). See infra Part II.

\(^{74}\). See Paul Butler, Retribution, for Liberals, 46 UCLA L. REV. 1873, 1879 (1999) ("Another frequent retributive explanation of punishment is that it respects the personhood of the victim of crime by inflicting pain upon the person who inflicted pain on her.").

\(^{75}\). Fletcher supra note 25, at 51.

\(^{76}\). Indeed, virtually all victim-oriented retributivists tend to assume, without any scientific proof, that the victim, or class of victims, demands punishment for the wrong. Often, precisely the opposite is true. See Strang & Sherman, supra note 8.

\(^{77}\). See id. at 24 ("Although it is often assumed that victims' sense of satisfaction with the justice system is related only to sentencing outcome, the evidence shows that the main factor influencing satisfaction with the sentence is the perception of fairness with the sentencing process.").

\(^{78}\). See Bibas & Bierschbach, supra note 14, at 138 ("Most victims want to tell offenders how their crimes affected them and hear offenders answer their questions about the offense. Confronting the offender in person is an important component of this emotional interaction."); Mark S. Umbreit, Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment, 1 W. CRIMINOLOGY REV. 1 (1998), available at http://wcr.sonoma.edu/v1rst/umbreit.html (last visited Feb. 13, 2006) ("High levels of victim and offender satisfaction with the mediation process have been found, along with... reduced fear among crime victims.").
In reality, the retributivist view is only a partial picture of righting the wrong. If the offender has violated the law at the expense of the victim, the offender has advantaged himself to the disadvantage of the victim, not just society as a whole. Although the criminal justice system corrects the offender's position in relation to the crime, it does nothing to correct the individual victim's position in relation to the offender. The current system overlooks—indeed, has never imagined—the needs of victims beyond the abstract desire for punishment. If the criminal law represents a codification of the moral norms of society, the criminal justice system should have a moral imperative not only to correct the wrongdoing, but also to address those who have been directly harmed by violations of the law. This must move beyond an abstract commitment, or a limited engagement of victims in the pursuit of convicting and punishing offenders. Instead, we must consider how the criminal justice system may help restore crime victims to levels that equal the rest of society.

Restorativists have often argued that restoration eliminates the need for punishment.\[^{79}\] Having been immersed in the development of restorative-based approaches and witnessed firsthand their power to address the complex needs of victims, I sympathize with this position; however, I also understand retributivists' position that punishment is necessary in a moral society. Many restorative justice scholars have repudiated retributive theories of justice, believing that punishment should be a lower priority than restoration or used as a "last resort."\[^{80}\] Conversely, retributivists have argued quite persuasively that punishment is central to the moral condemnation called for by crime. Stephen Garvey has argued:

> Restorativism cannot achieve the victim's restoration if it refuses to vindicate the victim's worth through punishment... And if neither the victim nor the wrongdoer is restored, then neither is the community of which they are a part. In short, restorativism longs for atonement without punishment, but punishment—tragically—is for us an inescapable part of atonement.\[^{81}\]

What is missing here, and from much of the retributivist/restorativist debate, is a discussion of what victims actually need. Garvey assumes that punishment is integral to vindicating a victim's worth without considering the empirical evidence of what victims need, either individually or as a group, to heal.

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79. See, e.g., John Braithwaite, *The Practice Of Restorative Justice: Holism, Justice, and Atonement*, 2003 Utah L. Rev. 389, 395 ("Restorativists must abandon both equal punishment for offenders and equal justice (e.g., compensation, empowerment) for victims as goals and must seek to craft a superior fidelity to the goal of equal concern and respect for all those affected by the crime.").


Strang and Sherman, who have studied extensively what victims need to recover from violent crime, suggest that, when offered options, victims gain more when they are actively involved in a healing-oriented restorative program compared to their passive function in the prosecution and punishment of an offender. This finding echoes both Meili's story from this Article's introduction and the victimology research described in Part II, in which victim healing is most likely to be achieved through an active process of critical self-reflection on one's behavior, and the subsequent re-exertion of control over one's recovery and, ultimately, one's life. This is not to say that punishment has no role in a victim's welfare, but rather that a restorative approach, when added to other options available through criminal courts, may help victims recover in a more meaningful and complete way.

At the very least, retributivists should not be against broadening the menu of options for victims within the criminal justice system, if this does not replace punishment or violate the principle of equality. I am confident that retributivists will come to see just how powerful, transformative and even punitive restoration can be. For now, it is enough to add restorative options to our pursuit of public justice so that, in addition to punishing a wrong, victims may choose how best to regain what was lost through crime. A combined punitive and restorative approach would remain consistent both with the moral principles of retribution and the forward-looking goals of utilitarianism, discussed in detail below. As Professor Michael Moore has recognized, although retributivism is not particularly concerned with the future benefits of punishment, the potential for crime prevention and rehabilitation are indeed “a happy surplus for a retributivist.” These multiple goals—retribution, rehabilitation, and restoration—together embody the moral code we should strive to incorporate into the criminal justice system.

B. A UTILITARIAN THEORY OF PUNISHMENT

Unlike retributivist approaches, utilitarian theories of punishment

82. See Strang & Sherman, supra note 8, at 15.
83. See, e.g., Bibas & Bierschbach, supra note 14, at 106-07 (justifying the addition of apology to traditional criminal justice by noting that “retributivists should not care about post-offense remorse, apology, or repentance”).
84. Punitive, in this context, refers to the effectiveness of restorative approaches to equalize or balance the offender with society following a crime. I have witnessed firsthand the challenges that true recovery pose to offenders. See Interview with David Lewis, President, Free at Last, and an ex-inmate who now oversees a national campaign to reform prisons, in East Palo Alto, California. (Dec. 7, 2004). In terms of victims' responses to restorative justice, see also Kathleen Daly, Restorative Justice and Sexual Assault, Brit. J. Criminology 1, 20 (2005) (arguing that victim advocates should consider the benefits of restorative justice, which allows suspects to make admissions and parties to receive counseling and treatment, as opposed to the court process in which evidentiary standards are high and the adversarial process encourages the defendant to deny any guilt).
85. Moore, supra note 12, at 180.
are forward-looking and consequentialist. For utilitarians, moral culpability is not enough to justify punishment; some other societal goal must be furthered, such as deterrence of future crimes, rehabilitation of the offender, or incapacitation of dangerous individuals. The restorative reforms suggested in Part III are fully consistent with a forward-looking view of the criminal law insofar as the research suggests that this approach is more effective in preventing future crime than punishment alone. Indeed, consequentialist theories, such as rehabilitation of offenders and deterrence of future crimes, have fallen out of favor as justifications for criminal punishment largely because the penal system has proven supremely ineffective in accomplishing these goals. If, as has been said, “rehabilitation is dead in American corrections,” perhaps restorative justice is precisely the means to bring it back to life.

In contrast to the notions of revenge embedded in retributivism, classic utilitarian theory advocates the achievement of the greatest social good by means of maximizing the aggregate happiness of the whole. In other words, the happiness experienced by individual persons is of importance only insofar as each person’s experience either adds or detracts from the happiness of the whole. While Jeremy Bentham, the founder of utilitarianism, did not take into account the individual’s happiness, John Stuart Mill’s rendering of this idea did include a prohibition on the infringement of the liberty of individuals.

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86. See Joshua Dressier, The Wisdom and Morality of Present-Day Criminal Sentencing, 38 Akron L. Rev. 853, 853-54 (2005) (“Utilitarians believe that the infliction of pain in the form of punishment is justifiable if, but only if, it is expected to result in a net reduction of pain of crime that otherwise would occur.”).

87. See e.g., James Gilligan & Bandy Lee, Beyond the Prison Paradigm: From Provoking Violence to Preventing It by Creating “Anti-Prisons,” 1036 Annals N.Y. Acad. Sci. 300, 310-13 (2004) (arguing that the penal system and particularly prisons have failed in large part because of their structural deficits).


89. See Kristen F. Grunewald & Priya Nath, Defense-Based Victim Outreach: Restorative Justice in Capital Cases, 15 Cap. Def. J. 315, 327 (2003) (“Proponents of restorative justice argue that it ‘reinforces the social cognitive principles that have been shown to be hallmarks of effective rehabilitation programs.’” (citation omitted)).

90. H.L.A. Hart, Shell Foundation Lectures, 1978-1979 Utilitarianism and Natural Rights, 53 Tul. L. Rev. 663, 664 (1979) (“Utilitarianism is a maximising and collective principle requiring governments to maximise the total net sum or balance of the happiness of all its subjects . . . .”).

91. Thomas Morawetz, Persons Without History: Liberal Theory And Human Experience, 66 B.U. L. Rev. 1013, 1018 (1986) (“The utilitarian’s justification of action is the collective common good. The welfare of any particular individual may in principle be overridden for a sufficiently great benefit to the community. In particular, each exercise of liberty or freedom is to be weighed against other constituents of the common good.”).

alluded to a hierarchy within the paradigm of happiness in which he chronicled the moral weight of different pleasure principles. When punishment is formulated as the protection of self, incarceration is justified under both Bentham and Mill's conceptions of utilitarianism. A utilitarian, therefore, would both wish to minimize the costs of crime and maximize crime prevention. In order to secure maximum happiness, the consequences of crime must be measured against the consequences of crime prevention. If the pecuniary and emotional costs of incarceration are less detrimental than the crime itself, then incarceration may be the correct utilitarian response. Accordingly, the cost of punishment must be weighed against the expense of inaction, or not punishing.93 Similarly, if the costs of rehabilitation are less than the costs of not rehabilitating an offender (i.e., without rehabilitation the offender would likely re-offend), rehabilitation is an appropriate outcome under this consequentialist theory.

Although the scholarly literature suggests that rehabilitation is no longer a realistic goal in the criminal justice system, in practice, prison leaders are instituting several reforms that commit offenders to such a path.95 Edward LaTessa's research on the effectiveness of cognitive

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Traditionally, utilitarians have begun with the premise that the criminal justice system should minimize the sum of the costs of crime and crime prevention. Since everyone's welfare is included in the social calculus, the cost of crime prevention includes not only enforcement costs (police) and process costs (courts), but also the suffering imposed upon criminals made to undergo punishment.

Id.

94. Seidman supra note 93, at 320.

Once we establish the optimal total for prevention costs, the next step is to achieve the proper balance between its two components: punishment and enforcement/process costs. We must, in other words, decide whether it is more efficient to invest in police and court personnel so as to catch and process a large number of criminals while reducing the sentence of each criminal caught, or to achieve the same aggregate expected punishment level by solving fewer crimes but punishing more severely those criminals who are convicted.

Id.

95. Jakob Schiller, Transition Program Gives Hope to Inmates, Berkeley Daily Planet (July 13, 2004), available at http://www.berkeleydaily.org/text/article.cfm?issue=07-13-04&storyID=19245. This article showcases "No More Tears" (NMT), a program developed by inmates at San Quentin, which "bridge[s] the gap between the community and the inmates" and holds meetings with inmates and the families of victims, with the mission of "stem[ming] violence and stop[ping] recidivism among inmates." Id. The NMT program not only operates within the prison but also hopes to help with community transition and violence prevention once inmates return to the community. Id.; see also Sunny Schwartz et al., Restorative Justice and the Transformation of Jails: An Urban Sheriff's Case Study in Reducing Violence, 4 Police Prac. & Res. 399, 399 (2003) ("Recently ... urban sheriffs in particular, like other criminal justice professionals, have begun to move beyond their traditional boundaries to fill gaps in other criminal justice and social service responses.").
restructuring, for example, provides a new theory on which several prison leaders have pinned their hopes for change. Several groups of reformed offenders have developed approaches to altering the behavior of criminals based on these principles and are delivering record numbers of cognitive behavioral interventions in America's prisons.

Restorative approaches would obviously enrich the theory and practice of rehabilitation today. For example, Strang and Sherman have argued that rather than viewing criminal procedures as a "zero-sum," victim versus offender model, restorative justice can transform the process to "win/win." Not only will the victim gain insight and a sense of control, but offenders will also benefit from the reformatory nature of the restorative process. Restorative justice, therefore, offers options to salvage the very notion of rehabilitation from traditional punishment, such as imprisonment, which has proven incapable on its own of rehabilitating offenders.

The success of restorative justice programs points to both a missed opportunity for the criminal law in the past and a way for today's justice system to offer real hope of rehabilitation. Utilitarianism, like retributivism, has historically been offender-oriented: criminals should be deterred from committing future crimes or rehabilitated in order to reintegrate as law-abiding members of society. But the goals of utilitarianism can be applied quite logically to victims with the help of the science of victimology. As I argue in Part II, if victims are statistically likely to be revictimized, or to cross over to become offenders, a system that deters future victimization serves the straightforward consequentialist goal of preventing future harms. In addition, the goals of


97. The Osborne Association, for example, whose founder, Thomas Mott Osborne, spent an experimental week in an American prison in 1913, seeks to transform America's prisons from "human scrap heaps into human repair shops." The Osborne Association: Our Mission, at http://www.osborneny.org/osborne_history.htm (last visited Jan. 16, 2006). Another organization that has adopted rehabilitative goals for offenders is Free At Last, founded by David Lewis. Free At Last: About Us, at http://www.freeatlast.org/about/history.htm (last visited Jan. 16, 2006).

98. See Strang & Sherman, supra note 8, at 35–36.

99. Id. at 37 ("Offenders derive an increased sense of respect from restorative justice[,]... discover how much their family or other intimates truly love them...[and] relieve their conscience about the harm they have caused.").

100. See Gilligan & Lee, supra note 87, at 308.

[F]rom 1970 to the late 1990s, throughout the time that we were constantly increasing our imprisonment rate year after year, the United States experienced an epidemic of criminal violence, during which the murder rate remained on average twice as high as it had been during the previous quarter of a century. If the enormously expanded use of increasingly punitive prisons actually prevented violence rather than increasing it, that should not have happened. That conclusion is also supported by comparisons with the other developed nations.

Id.
deterrence are not compromised, since the underlying punishment remains an integral part of the system.\textsuperscript{101} Both retribution and utilitarianism are indeed comprehensive enough to embrace individual victims’ needs.

II. VICTIMOLOGY

Several theories, beginning in the 1940s, have shaped how we think about victims. These theories, broadly encompassed under the banner of “victimology,” have become the springboard for a research agenda on how victims experience and relate to trauma, and what steps are necessary to heal from that trauma. An unfortunate but uniting theme of the theory, research, and discourse on victims today is gender. The archetypal victim in the public mind is female. In the restricted gaze of the criminal justice system, these female victims are generally viewed as weak, passive, and incapable of controlling the circumstances surrounding their victimization, while offenders are viewed as deliberate, controlling, and unremorseful.\textsuperscript{102} Several scholars have previously shown the inaccuracy of these stereotypes and their tendency to obscure the highly complex and individual character of both victim and offender.\textsuperscript{103} Yet even the science of victimology has been touched by this reflexive rendering of victims. In addition, the victims’ rights movement has often promoted the image of a one-dimensional victim—female and helpless—and, as I will argue herein, has drawn on gender victimology theory and research to defend its position.\textsuperscript{104} Professor Aya Gruber has argued that as the victims’ rights movement has reinforced this image, the criminal justice system has become even more reluctant to scrutinize victim behavior.\textsuperscript{105}

Given this orientation to victims and victimology, gender often figures prominently in my overview of the relevant theory and research.

\textsuperscript{101} According to philosophers such as Jeremy Bentham, the punishment must be strict enough to discourage a rational-thinking individual from committing the crime. In other words, the pain of punishment must outweigh the pleasure of committing the crime. See Jeremy Bentham, Principles of Penal Law, in Works of Jeremy Bentham 396, 402 (J. Bowring ed., 1843).

\textsuperscript{102} Gruber, supra note 13, at 435.

\textsuperscript{103} See, e.g., id.; see also Harel, supra note 59, at 1181 (proposing that “criminals who act against careless victims would be exculpated or would have their punishment mitigated”); Linda G. Mills, Insult to Injury: Rethinking Our Responses to Intimate Abuse (2003) (arguing that victims and offenders often contribute to the dynamic of abuse); Cornelius Prittwitz, The Resurrection of the Victim in Penal Theory, 3 Buff. Crim. L. Rev. 109, 112–13 (1999) (noting “discovery of ‘guilty victims’”); Brenda V. Smith, Battering, Forgiveness, and Redemption, 11 Am. U. J. Gender Soc. Pol'y & L. 921, 925–26 (2003) (describing battered women’s need to forgive themselves for neglecting or abusing their children).

\textsuperscript{104} See Gruber, supra note 13, at 435 (“Positive victim imaging is largely a product of the politically powerful victims’ rights movement and is closely intertwined with negative defendant characterizations . . . .”).

\textsuperscript{105} Id. at 434.
However, I believe that victimology and the restorative programs I propose in Part III have the power to overcome the stereotypes that have deeply influenced our approach to justice and to answer the individual needs and original circumstances of each crime victim, male or female.

A. THE THEORY OF VICTIMOLOGY

1. Theorizing the Role of the Victim

German criminologist Hans von Hentig’s 1941 paper entitled Remarks on the Interaction Between Perpetrator and Victim marked the birth of victimology theory. Von Hentig quickly distinguished himself among researchers by studying the victim’s role in a particular crime with the specific purpose of preventing that crime and, more radically, by classifying the victim as “one of the participants in a crime.” It was not until 1947, however, that a science of “victimology” was actually defined. While delivering a paper in Bucharest, French criminologist Alfred Mendelsohn suggested that a comprehensive study of crime must include an analysis of how a victim may precipitate a crime through such acts as provocation. Mendelsohn, a defense attorney, was especially interested in developing a theory and science of mitigation that would aid defense attorneys at an offender’s sentencing hearing. Several theorists, including von Hentig, answered Mendelsohn’s call and developed a template for understanding in detail the victim’s role in crime. Among the explanations they developed were “negligence, carelessness, recklessness, [and] imprudence.”

By the late 1960s, the work of these early victimologists could be defined as an autonomous theory and body of research that involved “the relationships and interactions between offender and victim before, during and after the crime.” For all their focus on victims, however, these pioneers concentrated on the penal setting and were clearly interested in answering a particular question: Why does the offender

106. HANS VON HENTIG, REMARKS ON THE INTERACTION BETWEEN PERPETRATOR AND VICTIM (1941).
109. For a description of Mendelsohn’s work, see van Dijk, Introducing Victimology, supra note 33, at 1-3.
110. Id.
111. Fattah, supra note 47, at 72.
112. Van Dijk, Introducing Victimology, supra note 33, at 1 (discussing STEPHEN SCHAFER, THE VICTIM AND HIS CRIMINAL (1968)).
offend?" But in this quest, they argued the still difficult proposition that offender and victim are inextricably intertwined, and that the science of victimology, embedded in criminology, should seek to understand this relationship. Considered "interactionist" for their decided interest in the overlooked relationship between victim and offender, these early victimology theorists ultimately aimed to "satisfy the offender's need for atonement, the victims [sic] need for retribution and their joint need for reconciliation."115

Alfred Mendelsohn soon expanded his theory of victimization beyond the criminal context to study victims more broadly. Mendelsohn described a theory that encompassed "the prevention and alleviation of 'victimity' in a wide sense,"116 including victims of "accidents, natural disasters and other acts of God."117 With his encouragement, the overall purpose of victimology broadened to "minimiz[e] human suffering."118 In guiding the science of victimology beyond the offender and the penal system, Mendelsohn, a survivor of Nazi Germany,119 became the father of the victims' rights movement.

The women's rights movement in the 1970s ushered in a new era in victimology with a focus on such crimes as rape and domestic violence.120 Feminists were quick to criticize the early interactionist victimologists, whose theories on the relationship between victim and offender ran contrary to the feminist belief that patriarchy was uniquely to blame for crimes against women. Women, they argued, were victims and in no way responsible for the crimes committed against them.121 Feminists located the problem exclusively in the privilege accorded to men and in society's promotion of attitudes and beliefs that rendered women secondary to men.122 Society, they argued, should take responsibility for promoting faulty beliefs, such as the idea that men had a monopoly on power over

113. See Fattah, supra note 47, at 73.
115. Id. at 1.
116. Id. at 2.
117. Id.
118. Id.
119. Id.
120. Until this point, the law often failed to protect women from rape and sexual assault, particularly within the home. See, e.g., Model Penal Code § 213.1 (Proposed Draft 1962) (providing marital exception to rape law: "A male who has sexual intercourse with a female not his wife is guilty of rape if .... " (emphasis added)).
121. This was, at least in part, a response to a culture of blaming the victim—a culture historically associated with rape and sexual abuse, which continued to that day. See, e.g., State v. DeLawder, 344 A.2d 446, 455 (Md. 1975) (overturning rape conviction on grounds that defendant was denied right to question witness about prior sexual history).
women, and for the tangible harms that flowed forth from those beliefs.\footnote{123}{BROWNMILLER, supra note 122.}

Insofar as interactionist victimology appeared to “blame” the victim, the women’s movement challenged victimology.\footnote{124}{See van Dijk, supra note 33, at 2 (describing feminist critique of victimology as focusing on “victim-precipitation” in crimes against women).} The feminist movement refocused victimology theory, but this time so as not to divert attention away “from the structural causes of violence against women.”\footnote{125}{Id.}

This feminist strand of victimology, now well-established in criminal law, has turned the nation’s attention to the relevance of gender to crime. These feminists—I will call them “gender victimologists”—have successfully lobbied for legal reforms, including rape shield laws,\footnote{126}{See Anderson, supra note 67, at 80 (“By the early 1980s, almost every jurisdiction in this country had passed some form of rape shield law.”).}

mandatory arrest and prosecution policies in domestic violence cases,\footnote{127}{See Donna M. Welch, Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse, 43 DePaul L. Rev. 1133, 1151–55 (1994) (noting popularity of mandatory arrest laws).}

and a civil right to file sexual harassment claims on the theory that the workplace should not be “hostile” toward women.\footnote{128}{See Anderson, supra note 67, at 80.}

These laws rest on the assumption that the victim is not in any way responsible for the crime or sexist act committed, and that the gendered nature of these crimes automatically precludes any discussion of the victim’s role or participation in them.\footnote{129}{For a detailed analysis of this issue in the context of intimate abuse, see MILLS, supra note 103.}

Over the past several years, many interactionist victimologists have tried to clarify their earlier theoretical work on the dynamic between victim and perpetrator in light of these gender observations, and have even, in some cases, adapted their assumptions to account for structural sexism.\footnote{130}{See van Dijk, Introducing Victimology, supra note 33, at 2 (“Researchers who come to victimology from a gender-equality perspective have made main stream [sic] victimologists more sensitive to gender issues and to power inequalities generally.”).}

Yet interactionists have not had the same influence that gender victimologists have had; the idea that women are victims and in no way responsible for the crimes committed against them by men has contributed significantly to the view that victims should play a passive role in the pursuit of justice.\footnote{131}{See ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAW MAKING 186 (2000) (“Not only are battered women powerless in their ability to control their relationship, but they become powerless to prevent the government from interfering in their lives.”); Martha Minow, Surviving Victim Talk, 40 UCLA L. Rev. 1411, 1432 (1993) (“Victimhood is a cramped identity, depending upon and reinforcing the faulty idea that a person can be reduced to a trait. The victim is helpless, decimated, pathetic, weak, and ignorant. Departing from this script may mean losing whatever entitlements and compassion victim status may afford.”).} This has been particularly true in the
prosecution of domestic violence crimes where some feminists have advocated for the prosecution of men regardless of their partners' desire to drop the charges. As might be predicted, an approach that ignores the victim's role is inherently unconcerned with what may be the underlying factors in crime, including a history of victimization and its influence on the tendency to offend. Acknowledging additional causes of crime, which are supported by the empirical research described below, frees victimologists to broaden their theory and to question the cultural assumption that victims are, under all circumstances, passive and helpless.

2. The Research on Victims and Offenders

For a long time, evidence has shown that once a person has been victimized, he or she is vulnerable to additional victimizations. In the past several years, researchers have also established that violence can be contagious; victims and victimizers are often "interchangeable." Victims become victimizers in such cases as "vendetta, vengeance, reprisal, retaliation, getting even, paying back, settling of accounts, as well as cases of self-defense, vigilante action, auto-justice, or taking the law into one's own hands." The statistical support for the interchangeability of victim and victimizer is striking. In one study, individuals who had committed at least one offense were seven times more likely to be personally victimized than those reporting no offenses. In a Texas study, 75% of victims of stab or gunshot wounds had criminal records; 54% had a record of being incarcerated. Canadian homicide statistics revealed similar data: 52% of adult homicide victims had a criminal record. Intimate abuse cases are a

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132. See Mills, supra note 18, at 551.
133. See, e.g., Catalina M. Arata, Child Sexual Abuse and Sexual Revictimization, 9 AM. PSYCHOL. ASS'N 135, 135 (2002) ("Chronic, or repeated sexual victimization is a well-known phenomenon, which in recent years has received increasing attention in the sexual victimization literature."); Terri L. Messman-Moore & Amy L. Brown, Child Maltreatment and Perceived Family Environment as Risk Factors for Adult Rape: Is Child Sexual Abuse the Most Salient Experience?, 28 CHILD ABUSE & NEGLECT 1019, 1019 (2004) ("The experience of sexual abuse in childhood has been identified as a risk factor for future sexual victimization, the presence of which may increase the likelihood of rape in adulthood by as much as 11 times.").
134. Fattah, supra note 47, at 80 ("The roles of victim and victimizer are not fixed, assigned, or static. They are dynamic, mutable, and interchangeable. The same individual can move successively, or even simultaneously, from one role to the other.").
135. Id. at 79-80.
136. Id. at 82.
137. Id.
138. Statistics Canada, Homicides, THE DAILY, (2004) available at http://www.statcan.ca/Daily/English/040929/d040929a.htm ("Slightly more than half (52%) of all adult homicide victims and 15% of youth victims also had a criminal record."); see also Kilpatrick, supra note 30, at 75.

[There is evidence that at least one risk factor for the perpetration of violence is victimization during childhood... Therefore, in addition to their potential role in secondary and tertiary prevention of physical and mental health problems, providing appropriate
classic example of victim turned victimizer, insofar as men who experienced and observed violence in their families of origin were five to nine times more likely to become violent against their partners. 139

A closer empirical look at victims reveals that, not only are victims likely to "cross over" to become offenders, but that a vulnerability to and/or propensity for violence may be passed to subsequent generations. 140 The strongest predictor that an adult will abuse an intimate partner is a family history of violence. 141 Recent research by Columbia University Professor Miriam Ehrensaft and colleagues suggests that an unresolved history of victimization can significantly determine the victims of subsequent generations. 142 They found that children exposed to intimate abuse in their families of origin were most likely to be the victims of intimate abuse as adults. 143

The overall implication of this study and the cumulative research documenting the propensity of victims to experience multiple forms of trauma provides both moral and scientific impetus to rethink how the justice system is organized in relation to victim healing. Currently, victims play a rather scripted role in criminal justice. Fittingly, performance theory is a useful means for conceptualizing how victims perform their roles in the pursuit of justice and how this role may influence a victim's healing.

3. Performing the Role of Victim

Although victims often seek medical or mental health treatment for their trauma outside the juridical sphere, the primary site for the victim's public resolution of crime remains the justice system. The legal system, then, largely defines the roles that victims may play in contributing both to the prosecution of their victimizers and to their own healing. It is

services to crime victims might also serve some role in the primary prevention of subsequent violent behavior. Providing these services to child and adolescent crime victims might prove particularly effective in this regard. In short, we should provide services to today's crime victims to help prevent them from becoming tomorrow's perpetrators.

Id. 139. See, e.g., MILLS, supra note 103, at 88.

140. See, e.g., MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980); see also J. Kaufman & E. Zigler, The Intergenerational Transmission of Abuse is Overslated, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 209 (Richard J. Gelles & Donileen R. Loseke eds., 1993) (arguing that one-third of abuse victims experienced violence at the hands of their parents).

141. See, e.g., STRAUS, supra note 140; Kaufman & Zigler, supra note 140.

142. See Ehrensaft et al., supra note 48, at 750. More generally, poor family health (defined variably as "less closeness," "negative family environment," and "unskilled parenting"), which may or may not include interparental aggression, may contribute both directly and indirectly to aversive behavior and subsequent adult victimization. Id.

143. See MILLS, supra note 103, at 88; see also Deborah M. Capaldi & Sara Clark, Prospective Family Predictors of Aggression Toward Female Partners for At-Risk Young Men, 34 DEVELOPMENTAL PSYCHOL. 1175, 1185 (1998); Claire Burke Draucker, Early Family Life and Victimization in the Lives of Women, 20 RES. IN NURSING & HEALTH 399, 400 (1997).
therefore important to clarify what roles are currently available to victims within the criminal justice system in order to ask the central question: How do these roles facilitate or hinder victim healing?

In many contexts, we are still inclined to "protect" the victim from all blame, especially female victims who have experienced intimate crimes such as domestic violence, rape, or child sexual abuse. This protectionist approach underpins the limited role a victim currently plays in convicting an offender and in delivering a just punishment. The system assumes this is the sole role a victim needs or even desires to play, and that victims are often too traumatized to make appropriate decisions on their own behalf. It is this assumption about victims' traumatization that leads to a justification for aggressive criminal justice intervention on behalf of victims, even when they do not seek it.

Clearly victims play rather symbolic and invisible roles in the criminal justice system. I am not the first to argue this, yet I do so from a distinctly different point of view. Most victim advocates contend that victims deserve a more meaningful role in the criminal justice system on legal grounds—they deserve a real voice at the table because they are the people most directly affected by a crime. My argument, however, is that victims need a voice at the table as a matter of survival. Victims' substantive inclusion enhances the possibility of their recovery, as well as the opportunities to arrest criminal behavior and prevent the transmission of victimization to subsequent generations.

One of the best arguments for opening up new roles to victims within the criminal justice system comes from the theory of performativity. Performativity occurs when a circumscribed role is designated by one party, and in turn accepted and performed by another. For example, the legal system currently proscribes a narrow, passive role for victims, which they perform through testimony at trial and victim impact statements at sentencing. Unfortunately, acting out this passive

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144. Mills, supra note 18, at 595.
145. Id.
146. See, e.g., Henderson, supra note 2, at 581–83.
147. Erin Ann O'Hara, Victim Participation in the Criminal Process, 13 J.L. & Pol'y 229, 229 (2005) ("Criminal law scholarship has recently turned its eye toward the victim—an individual obviously profoundly affected by the crime and its consequent legal proceedings."); see also Kilpatrick, supra note 30, at 74.

[T]he criminal justice system cannot accomplish its mission without the cooperation of victims. Police cannot solve crimes or arrest alleged perpetrators if they do not know the crimes occurred because victims were reluctant to report them. Prosecutors cannot prepare cases for trial if victims are reluctant to cooperate with them. Judges cannot make appropriate sentencing decisions without input from crime victims about the impact of the crime. Parole boards cannot make sound decisions about the release of convicts from prison without information from victims. Public confidence in the entire criminal justice system is eroded if crime victims' feedback about how they were treated is negative.

Id.

role may reinforce the victim's diminished status and prevent the victim from regaining the confidence, security, and strength lost in his or her experience of crime. As Judith Butler has argued, the legal system epitomizes the performance of victimization:

Juridical notions of power appear to regulate political life in purely negative terms—that is, through the limitation, prohibition, regulation, control, and even “protection” of individuals related to that political structure through the contingent and retractable operation of choice. But the subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures.149

Political structures like the criminal justice system, Butler argues, define victims in negative terms and, in turn, reproduce them to conform to these scripted identities.150 Since rape shield laws and other evidentiary rules, for example, assume that a victim is always a pure, blameless “victim-type,” in no way a participant in the circumstances leading up to the crime, victims accordingly perform passive roles, with little or no opportunity for critical reflection or active participation in understanding the circumstances that gave rise to the crime in the first place.

Such narrowly-defined “performances” run contrary not only to the needs of most victims,151 but also to what they seek in their recoveries. If the system offered a more active role for victims, they would perform broader roles that are more likely to encompass the diversity of their needs and interests.152 The research or science of victimology, discussed below, moves our thinking beyond one essential victim identity. The research shows that victims need to play an active role in relation to their healing, reclaiming control over what happened to them during the violent event.153 In Part III, I describe in detail how these needs may be met by adopting a menu of restorative justice programs or services.

B. The Science of Victimology

1. Preventing Victim Trauma

The roots of the scientific study of victims can be traced to Sigmund

149. Id.
150. Id.
151. Most victims describe their need to regain some control over the event. See infra Part II.B.3.
152. Judith Butler, Constitutions and “Survivor Stories”: Burning Acts: Injurious Speech, 3 U. Csu. L. ScI. ROUNDTABLE 199, 203 (1996) (“[T]he figure for the one who speaks and, in speaking, performs what she/he speaks, is the judge or some other representative of the law. A judge pronounces a sentence and the pronouncement is the act by which the sentence first becomes binding, as long as the judge is a legitimate judge and the conditions of felicity are properly met.”); Konradi, supra note 15, at 8 (“The Courtroom is also a formal setting that differs from the everyday settings. Participants are limited to a specific set of roles and specific rules limit speaking turns and structure the interaction among persons present. However, there is no... formal rehearsal to socialize lay participants.”).
Freud's desire to understand the relationship between trauma, or the outcome of violence, and the presence of inexplicable physical symptoms. "Hysteria," as Freud referred to it, was the most dramatic example of the physical manifestation of violence and trauma, and precipitated a question that still frustrates scientists today: Are trauma symptoms physical or emotional? As scientists struggled to understand where the trauma lodged itself in the brain and how to extricate it, examining the memory of trauma became a critical component of the study of victimization. Researchers discovered early on that traumatic memories are often "dissociated" from other experiences and, therefore, "stored outside of ordinary awareness." This fact explained several symptomatic phenomena related to traumatic memories, including somatic complaints, flashbacks, and "behavioral reenactments," all of which suggested that trauma could neither be easily forgotten nor addressed. Scientists sought to understand better the links between victimization and its long-term effects in order to reduce such symptoms and the associated behaviors that victims frequently described as interfering with their functioning.

Enabling victims to take control of these symptoms, and their healing generally, is one of the most significant theoretical and scientific challenges in the study of victims today. The greatest hurdle in this

155. See Constance Spencer, HYPNOTIC PSYCHOTHERAPY IN THE IDENTIFICATION OF CORE EMOTIONAL ISSUES, 3 J. HEART-CENTERED THERAPIES 1, 11 (2000) (“The perceived traumatic incidents, due to their emotionality, can be retained in both the physical and the emotional aspects of the patient.”); see, e.g., van der Kolk, supra note 10 (examining the ways in which an experience of trauma affects the lives of victims and emphasizing the consequences of trauma on attachment and the propensity for victims to later engage in violent relationships).
156. Dissociation is the process by which victims of significant trauma describe distancing themselves from what they experienced—they know it happened to them, but feel it happened to another. Bessel A. van der Kolk, THE COMPLEXITY OF ADAPTATION TO TRAUMA: SELF-REGULATION, STIMULUS DISCRIMINATION AND CHARACTEROLOGICAL DEVELOPMENT, in TRAUMATIC STRESS: THE EFFECTS OF OVERWHELMING EXPERIENCE ON MIND, BODY, AND SOCIETY 182, 191–93 (Bessel A. van der Kolk et al. eds., 1996) [hereinafter TRAUMATIC STRESS].
157. Preface to TRAUMATIC STRESS, supra note 156, at ix, x.
158. Id. Behavioral reenactments occur when trauma victims reenact the trauma by placing themselves in vulnerable situations to experience the trauma again and attempt to resolve it differently. All too often this reenactment results in further traumatization, contributing significantly to a pattern of vulnerable behaviors that get transmitted to the next generation.
159. Judith Lewis Herman, TRAUMA AND RECOVERY 57 (1997) (“There is a simple, direct relationship between the severity of the trauma and its psychological impact, whether that impact is measured in terms of the number of people affected or the intensity and duration of harm . . . . With severe enough traumatic exposure, no person is immune.”).
161. See Herman, supra note 159, at 133 (“The first principle of recovery is the empowerment of the survivor. She must be the author and arbiter of her own recovery . . . . No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in
work is access: victims rarely seek psychiatric or related assistance for traumatic events, which hinders efforts to uncover the linkages between the event itself and the manifested symptomology. Treatment is more difficult with victims who do not seek assistance immediately following the traumatic event. Eventually, these untreated victims may learn ways to adapt to the traumatic event that triggered their victimization, or develop what is called “secondary adaptations.” A traumatic reaction that occurs over time further frustrates efforts to trace symptoms to specific events, especially when multiple victimizations may have occurred.

The manifestations of victimization and trauma should not be understated. If the victimization occurred in childhood, for example, the victim can develop a host of symptoms or reactions that become embedded in the individual’s core personality structure. Often these symptoms emerge without any awareness of their connection to the violent experience. The inability to control one’s emotions, including suicidal ideation, somatic complaints, dissociative disorders such as psychosis and multiple personality, and learning problems, have all been associated with a history of victimization. Evidently, the price society pays for victimization is significant, both in its impact on the individual and on the public’s health.

While the science of victimology has fueled conflicting schools of thought regarding the biological basis for symptoms of trauma and, in turn, the optimal treatment for victims, three specific findings in the

162. See Zeev Kaplan et al., A Review of Psychological Debriefing after Extreme Stress, 52 PSYCHIATRIC SERVICES 824, 824 (2001) (“Prevention strategies for diseases in general and mental disorders in particular appear to be more efficient than treating an illness in its full blown stage.”); Kilpatrick, supra note 30, at 74 (“Providing adequate services to crime victims, particularly soon after the crime occurs might be expected to reduce the risk that these problems will develop, thereby serving as effective secondary prevention.”); THE JERUSALEM FOUNDATION, CHILD TRAUMA UNIT: TREATING POST-TRAUMATIC STRESS DISORDER, at http://www.jerusalemfoundation.org/updates.php?id=158 (last visited Jan. 16, 2006). “According to Dr. Esti Galili-Weisstub, Director of Child & Adolescent Psychiatry at Hadassah University Hospital, post-trauma victims rarely seek out treatment.” Id. After establishing a Child Trauma Unit, the hospital found that in more than forty percent of cases in which children were victims of terror attacks, “they described psychological symptoms of post trauma stress . . . .” Id. However, only a quarter describing such symptoms had sought psychological help. Id.

163. Secondary adaptations occur as the traumatized person adjusts to adapt to the trauma. Usually, this is expressed in behavior. See, e.g., van der Kolk, supra note 10.

164. Kaplan et al., supra note 162, at 826.

165. See, e.g., Roscoe A. Dykman et al., Internalizing and Externalizing Characteristics of Sexually and/or Physically Abused Children, 32 INTEGRATIVE PHYSIOLOGICAL & BEHAV. SCI. 62, 63 (1997).

166. See id.

167. See, e.g., id.

168. Freud was the first to point out the economic dimensions of trauma. See LAPLANCHE & PONTALIS, supra note 154, at 466.
scientific literature support a rethinking of the criminal justice system's relationship to victims. First, victims need to take an active, rather than passive, role in their healing. Second, one important form of active healing is the victim's reaffirmation of the perception of control over his or her actions and reconciliation of his or her relationship both to the event and to the offender. And third, when victims are prevented from taking roles that facilitate active healing or lack options generally, victimization may frequently transform victim into victimizer or pass to the next generation.

2. Active Versus Passive Healing

Bessel van der Kolk, perhaps the most famous contemporary research psychiatrist working in the field of victimology science today and a proponent of active healing, started his psychiatric career at the U.S. Veteran's Administration. In his early research, van der Kolk focused on “shell shocked” American veterans who were experiencing traumatic symptoms, such as “violent trembling” and a “zombie-like demeanor.” Notably, van der Kolk found that the talk therapy so widely touted by Sigmund Freud and other psychoanalysts was ineffective in interrupting the dramatic symptoms of these shell-shocked patients. Perhaps more disturbing, van der Kolk discovered that psychoanalysis and other forms of talk therapy were ineffective in treating more typical symptoms of trauma, including nightmares, flashbacks, fearfulness, or dissociation. It was even possible, he argued, that the “talking cure” might in some way aggravate or revictimize patients rather than address their trauma.

These observations, and van der Kolk’s growing interest in therapies other than face-to-face talk therapy, were affirmed in his work with victims of Hurricane Hugo in Puerto Rico. Van der Kolk observed that action-oriented victims coped following the disaster by “actively putting their lives back together—carrying lumber, rebuilding houses and shops, cleaning up, repairing things.” Van der Kolk found that when officials asked these hurricane victims to stop their rebuilding efforts so that the damage could be assessed, the reaction was striking and instructive:

170. See O'Neill & Kerig, supra note 153.
171. See supra Part II.A.2.
172. Wylie, supra note 169, at 32.
173. Id.
174. Id. at 35 (“[F]undamentally, words can’t integrate the disorganized sensations and action patterns that form the core imprint of the trauma.”).
175. Id. at 32.
176. Id. at 35.
177. Id. at 34 (quoting van der Kolk).
Very quickly, an enormous amount of violence broke out—rioting, looting, assault. All this energy mobilized by the disaster, which had gone into a flurry of rebuilding and recovery activity, now was turned on everybody else. It was one of the first times I saw very vividly how important it is for people to overcome their sense of helplessness after a trauma by actively doing something. Preventing people from moving when something terrible happens, that’s one of the things that makes trauma a trauma.\(^7\)

For van der Kolk, the episode in Puerto Rico sparked a new question: What is the role of “activity” in recovery? His answer was simple but profound: “The brain is an action organ, and as it matures, it’s increasingly characterized by the formation of patterns and schemas geared to promoting action. People are physically organized to respond to things that happen to them with actions that change the situation.”\(^7\)\(^8\)

When people are traumatized and can’t do anything to stop or reverse the situation, van der Kolk reasoned, they “tame their disorganized, chaotic physiological systems, they start drinking, taking drugs, and engaging in violence—like the looting and assault that took place after Hurricane Hugo.”\(^9\) If victims cannot recreate a sense of safety or reestablish their physical efficacy as a biological organism, they often develop post-traumatic stress disorder.\(^1\)

Using neuroimaging, scientific studies of the brain revealed additional evidence of the value of activity in victim healing:

When [victims] remembered a traumatic event, the left frontal cortex shut down[,] particularly Broca’s area, the center of speech. But areas of the right hemisphere associated with emotional states and autonomic arousal lit up, particularly the area around the amygdale, which might be called the “smoke detector” center of the brain.\(^17\)

According to van der Kolk, these findings suggested that “when people relive their traumatic experiences, the frontal lobes become impaired and, as [a] result, they have trouble thinking and speaking. They no longer are capable of communicating to either themselves or to others

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178. Id. at 32. Those who witnessed the World Trade Center attack, or experienced it first-hand, know just how powerful the images were of people flooding Manhattan’s streets to help. Reading van der Kolk’s description of responses to Hurricane Hugo in Puerto Rico, of course, reminds one of the devolution of law and order in New Orleans following the recent Hurricane Katrina. See Eric Lipton et al., Breakdowns Marked Path from Hurricane to Anarchy, N.Y. TIMES, Sept. 11, 2005, at 1. While the looting and violence in New Orleans was no doubt the confluence of many things—food and water shortages and the immobility of security personnel among them—the pent up energy of survivors and their sense of helplessness following the storm and flooding cannot be ignored.

179. Wylie, supra note 169, at 35 (quoting van der Kolk).

180. Id.

181. Id. Post-Traumatic Stress Disorder (or PTSD) is the diagnosis associated with symptoms of trauma when they persist over a period of time. See Herman, supra note 159 (discussing the history of the diagnosis of PTSD).

precisely what’s going on.” If a victim’s thought and speech are impaired by a traumatic event, the reasoning goes, talk therapy would be virtually useless in their recovery.

Other neuroimaging studies showed that key functions of the brain are inaccessible to victims following a traumatic event. “The imprint of trauma doesn’t ‘sit’ in the verbal, understanding, part of the brain, but in much deeper regions—amygdale, hippocampus, hypothalamus, brain stem—which are only marginally affected by thinking and cognition.” But if trauma is situated in these subcortical areas, “then to do effective therapy,” according to van der Kolk, “we need to do things that change the way people regulate these core functions, which probably can’t be done by words and language alone.”

This research, together with qualitative evidence that an active approach to healing may be more effective than talk therapy, has given rise to several clinical treatments of trauma that are relevant to our discussion of creating a healing process for victims within the criminal justice system. The most common activity-oriented treatment for trauma is Cognitive Behavioral Therapy (or CBT). CBT involves changing patients’ thoughts and behaviors in order to alter their emotions. The theory behind CBT is that a patient cannot change his or her feelings simply because a therapist suggests it. Altering feelings is achieved through more rational thoughts that calm anxiety, soothe sadness, or redirect anger. For example, for a person who was mugged on the way to work and is anxious over the possibility of a second assault, a CBT

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183. Van der Kolk, supra note 10, at 296.

Research shows that in contrast with the way people seem to process ordinary information, traumatic experiences are initially imprinted as sensations or feeling states, and are not collated and transcribed into personal narratives. Our interviews with traumatized people, as well as our brain imaging studies of them, seem to confirm that traumatic memories come back as emotional and sensory states with little verbal representation.

Id.


185. Id.

186. Richard A. Bryant, Cognitive Behavioral Therapy of Violence-Related Post Traumatic Stress Disorder, 5 AGGRESSION & VIOLENT BEHAVIOUR 79, 84 (2000) (“Cognitive therapy aims to identify erroneous beliefs, and teaches individuals to modify their thoughts within a more realistic framework.”).


Cognitive-behavioral theory is based on the assumption that depressed people commit frequent errors in logic or thinking (such as over-generalization) that produce a negative view of the self, the world, and the future. . . . CBT seeks to provide new information processing skills through strategic interventions designed to identify errors in logic that produce maladaptive beliefs of cognition, test the belief against reality, and finally modify them if indicated. The process of CBT is often viewed as “collaborative empiricism,” where the therapist and patient work together to gather data to disconfirm core depressive beliefs.

Id.
approach might reinforce the importance of rational thinking that encourages the anxious person to focus on the unlikelihood that a mugger would strike the same person twice. Another CBT approach would encourage the anxious person to take an alternative route to work. One more common approach used by CBT clinicians to counter anxiety, sadness or anger entails exposing the victim to repeated and detailed imaging of the trauma in safe controlled environments. This approach, called Exposure Therapy, helps victims gain control over the fears that challenged or debilitated them during the trauma. This treatment is sometimes called "flooding" because a victim may confront a flood of memories, and reminders of memories, all at once. Desensitization Therapy, an additional kind of Exposure Therapy, combines a reliving of the trauma with relaxation techniques so that a victim may approach the trauma gradually, in a calmer state.

188. Bryant, supra note 186, at 84 (stating that CBT may address the “exaggerated beliefs about threats, vulnerability, or worthlessness” that some people develop following a trauma).

189. See Robyn D. Walser et al., Disaster and Terrorism, 19 PREHOSPITAL & DISASTER MED. 54, 56 (2004); Joe Ruzek, National Center for PTSD Fact Sheet, Coping with PTSD and Recommended lifestyle Changes for PTSD Patients, at http://www.ncptsd.va.gov/facts/treatment/fs_coping.html (last visited Jan. 16, 2006) (“If it is possible to move to a safer neighborhood, it is likely that fewer things will set off the traumatic memories. This will allow the person to reconsider his or her personal beliefs about danger.”). In addition to addressing “maladaptive behaviors,” CBT also “[a]nalyses problems in terms of specific challenging situations. When post-trauma difficulties can be viewed as specific situations that pose problems, survivors can be helped to plan for and prepare to cope with situations more effectively. Often, simply helping an individual identify what situations are causing distress can lead to more effective problem solving.” Walser et al., supra.

190. See Walser et al., supra note 189, at 58 (“Exposure-based treatments perhaps are the most widely used form of secondary intervention for PTSD and other forms of trauma-related fear and distress.”).

191. See David W. Foy et al., Trauma Focus Group Therapy for Combat-Related PTSD, 3 PSYCHOTHERAPY IN PRACTICE 59, 60 (1997) (“From a cognitive-behavioral perspective, prolonged, repeated exposure to significant elements within traumatic memories is necessary to reduce trauma-related fears and accomplish desensitization related cues.”); Sarah Glazer, Treating Anxiety, CQ RESEARCHER 99, 102 (2002) (“Research on treating PTSD overwhelmingly points to cognitive behavioral therapy (CBT) as the most effective approach. Through a technique known as ‘exposure,’ the victim of a trauma retells the story of the traumatic incident repeatedly—sometimes even re-visits the scene of the trauma—in order to become desensitized to the painful memories.”); Walser et al., supra note 189, at 59 (“CBT therapy process involves imaginal ‘reliving’ of the traumatic event. Unlike reliving in therapies based on exposure, the reliving is not repeated in each session, but occurs in less than half of the therapy sessions.”).


[Flooding is] the exposure to the traumatic cues to promote the experience of anxiety (or other aversive emotions) in the context of therapy. Clients approach the traumatic cues in the presence and safety of the therapeutic relationship, experience the emotions associated with the cues, experience the inevitable decline in affective experience (although this can sometimes take a considerable amount of time: 100 or more minutes), discuss alternative constructions of the event and its meaning, and repeat this sequence multiple times until the event or cues become increasingly less aversive.

Id.

Movement Desensitization and Reprocessing (EMDR) is a treatment that combines exposure to the trauma with techniques such as eye movements, head taps, or sounds that create an alternation of attention back and forth between one's line of vision.  

After an initial period of controversy, CBT techniques are no longer considered experimental; they are now viewed as therapies found to be both effective and efficient in counteracting the manifestations of trauma. Indeed, several studies associated passive coping behavior and traditional talk therapy with less favorable, psychological adjustment in trauma victims, especially when compared to active treatments, such as CBT, Exposure Therapy or EMDR.

In addition to these treatments, the research shows that help provided by family, friends, and neighbors can also contribute significantly to a victim's improvement. This research indicates that enhanced self-esteem and other outcomes of trauma symptoms were directly related to the level of social support offered by those close to the victim. The relational and/or active dimension of these interactions

194. Susan Rogers, An Alternative Interpretation of “Intensive” PTSD Treatment Failures, 11 J. Traumatic Stress 769 (1988). In reviewing the available controlled treatment outcome studies, this article notes the following: success in studies examining the effects of flooding on combat-related PTSD and anxiety and depression; significant positive effects for an exposure therapy involving alpha-theta brainwave neuro feedback; and the lasting improvement of EMDR treatment on non-combatant PTSD. Id.

195. See, e.g., John G. Carlson et al., Eye Movement Desensitization and Reprocessing EMDR: Treatment for Combat-Related Posttraumatic Stress Disorder, 11 J. Trauma Stress 3, 3 (1998) (EMDR group showed decrease in the mean score following treatment, which was maintained at follow-up; in contrast, control and relaxation groups exhibited relatively stable scores across the assessment periods); Judith Cohen et al., Treatment of Childhood Traumatic Grief: Contributing to a Newly Emerging Condition in the Wake of Community Trauma, 12 Harv. Rev. Psychiatry 213, 214 (2004) (noting that at the time of writing, CBT held “the strongest evidence of efficacy in addressing [PTSD] symptoms”); Glazer, supra note 101, at 101 (noting that the International Society for Traumatic Stress Studies strongly recommends exposure therapy as the first line of treatment for PTSD and also recommends CBT because of its connection to the amygdala, the part of the brain that stores traumatic memories); Reet Oras et al., Treatment of Traumatized Refugee Children with Eye Movement Desensitization and Reprocessing in a Psychodynamic Context, 58 Nordic J. Psychiatry 199, 199 (2004) (examining effects of EMDR treatment in conjunction with traditional psychodynamic therapeutic approach on refugee children experiencing PTSD, and finding that participants receiving EMDR experienced less avoidance symptoms and a significant improvement in reduction of non-PTSD and depression symptoms); Margaret M. Scheck et al., Brief Psychological Intervention with Traumatized Young Women: The Efficacy of Eye Movement Desensitization and Reprocessing, 11 J. Trauma Stress 25, 25 (1998) (comparing treatment of EMDR and more passive therapy of active listening (AL); both treatments showing general pattern of outcome improvement but for all outcome measures, the EMDR group improved more than the AL group, resulting in significant differences between the groups in post-treatment in four of the five outcome measures).

196. See, e.g., Irene Hanson Frieze et al., Describing the Crime Victim: Psychological Reactions to Victimization, 18 Prof. Psychol. Res. & Prac. 599, 307 (1987). “A number of researchers have shown that positive social support after victimization can maintain and enhance self-esteem,” speed the recovery from post-traumatic stress, make the individual feel cared for, protect those in crisis from physical maladies, depression, and alcoholism, and play a “vital role in the recovery and readjustment
appears to be central to the victim's overall success in combating symptoms of trauma, a feature which also figures prominently in the restorative approaches presented in Part III.

Additional research in Canada and Australia by sociologists Heather Strang and Lawrence Sherman confirms Bessel van der Kolk's overall assertion that activity is critical to healing traumatized victims. Strang and Sherman found that victims who actively participated in a criminal justice process that was designed to restore, rather than simply punish, were much more satisfied with the justice system overall. Their research and van der Kolk's findings—that human activity is integral to victims' recovery from trauma and to the prevention of psychological decomposition—underscore in bold the need to revisit the theory that victims are passive and helpless to direct the justice process, much less their own recovery.

3. Self-blame Versus Perceived Control

Over the past ten years, researchers have sought to understand why some victims of violence are more "resilient," or more capable of "weathering the storm" of trauma, than others. More resilient people, for example, might experience less stress from the violence, less effect on their overall identity and life meaning, and fewer emotional and physical sequelae in relation to the trauma. The question of resiliency in victims has focused especially on the issue of blame: Do victims who blame themselves for the violence inflicted on them—a relatively common phenomenon—fare better or worse in terms of resilience?

This is a challenging question to answer because victim "self-blame" lies only a hair's breadth away from the related but more positive reaction to trauma of perceived control, or a victim's "ability to influence events in one's life or control one's own outcome." While self-blame has been shown to be a maladaptive, dysfunctional response to trauma that may enhance such symptoms as suicidal ideation and somatization, perceived control is considered adaptive and helpful in improving a victim's readjustment to life. A rape victim who blames herself might,
for example, experience thoughts such as: "If only I hadn’t gone to his hotel room that night" or "if only I hadn’t taken that run in the park." In contrast, one who perceives holding some control might think: "Going to a hotel room with a man I barely know isn’t safe" or "running in the park after dark is dangerous."

Importantly, perceiving that one has control over one’s actions and inactions can easily be mistaken as self-blame. Researchers are still untangling perceived control from self-blame. In fact, these two reactions are often experienced simultaneously by victims and are, therefore, hard to conceptualize as distinct variables. I believe this link between control and blame is due in large part to a misunderstanding of these concepts and the underlying cultural meaning attributed to them, especially by those who subscribe to gender theories of victimology. Clarifying the differences between perceived control and self-blame can help re-theorize the broader field of victimology, and the role the criminal justice system should play as an institution both legally protective of victims and sensitive to their overall need to heal.

Many crime victims believe, justifiably or not, that their behavior may have contributed in some way to the crime that was committed against them. Feelings of responsibility linger, studies show, despite our efforts to persuade victims of crime that they are not to blame for the events that occurred.

For example, a victim of domestic violence may...
think she “set off” her partner. An acquaintance rape victim may worry that she allowed herself to become vulnerable when she entered her offender’s hotel room. Or, a victim of child sexual abuse may feel guilty because she kept the abuse a secret. The issue for mental health providers is not whether these feelings are justified, but rather how to address the feelings that do surface in a way that helps the patient resolve them.

Feminists, relying on gender victimology theory, have argued that the best approach to counteracting self-blame is for victims to receive mental health services in which they take an active role. However, typical services offered to rape or domestic violence victims expect the victim to “feel” differently once an advocate has spoken with them. Ironically, such services are often based on the notion inherent in talk therapy that simply discussing the trauma will heal it. The problem, as I have already suggested, is that it is very difficult—perhaps even impossible—to alter feelings through talk therapy alone. Instead, more hopeful treatments are those designed to alter a specific patient’s thoughts and behaviors, such as CBT and other therapies that work at both the cognitive and behavioral levels. It is not enough to try to convince a trauma victim to think “differently” about what happened to her; the CBT therapist works to change the patient’s relationship to the unprovoked sexual assaults or of battering to take personal responsibility for the crime.”

unprovoked sexual assaults or of battering to take personal responsibility for the crime.”); Mary P. Koss et al., Cognitive Mediation of Rape’s Mental, Physical, and Social Health Impact: Tests of Four Models in Cross Sectional Data, 70 J. COUNSELING & CLINICAL PSYCHOL. 926, 926–41 (finding that self-blame acts as a dominant force in shaping health outcomes and in predicting psychological distress); C. Buf Meyer & Shelley E. Taylor, Adjustment to Rape, 50 J. PERSONALITY & SOC. PSYCHOL. 1226, 1226–34 (1986) (finding an association between poor adjustment and both behavioral and characterological self-blame).

208. See Liz Bondi & Erica Burman, Women and Mental Health: A Feminist Review, 68 FEMINIST REV. 6, 17 (2001) (“Whether treatments take pharmacological or psychotherapeutic forms, experts diagnose, and, to a greater or lesser extent, determine treatment regimes. Feminist critics of psychoanalysis have been particularly wary of the authority traditionally assumed by and vested in psychoanalysts....”); Lenore E. A. Walker, Psychology and Violence against Women, 44 AM. PSYCHOL. 695, 700–01 (1989) (“Psychologists must downplay traditional training that emphasizes the androcentric medical model in which the authoritarian therapist must gain power and control over the therapy session. Victims of violence need to be encouraged to take control of their lives, and learning to share control of their therapy is a beginning step toward that goal.”).

209. Examples of such services include: the web-based “Rape Crisis Intervention Pathfinder,” a website for rape victims, at http://www.ibiblio.org/rcip//effectsofrape.html#therapy (last visited Jan. 16, 2006) (“You may need a safe, nurturing environment to freely express your thoughts and emotions. In order to regain control of your emotions, it is essential to feel secure enough in your environment to express your anger, grief, fear, self-blame, without feeling judged.”). UCLA’s student psychological services’ on-line brochure states that “[m]any victims avoid seeking help because they believe that ‘talking about it will only make me feel worse.’ However, the process of ‘talking’ does not create the negative feelings. Talking allows already existing feelings to surface so that you can work through them and truly move forward.” At http://www.sps.ucla.edu/brochures/rape/rape.html (last visited Jan. 16, 2006).

210. See Bryant, supra note 186, at 84.
event either by altering a behavioral pattern in relation to the feared event (e.g., taking an alternative route) or by encouraging the patient to think rationally about the emotion (e.g., "I know it is unlikely I will be mugged twice in the same location").

The real task at issue entails encouraging treatment providers to use active approaches that help patients to assert perceived control while discouraging self-blame. A study by Melanie O'Neill and Patricia K. Kerig shows the beneficial aspects of perceived control and the pitfalls of self-blame. Their study of 160 battered women found that self-blame, as opposed to perceived control, negatively affected psychological adjustment. On the other hand, perceived control "moderated the relationship between physical violence and adjustment. An increase in perceived control was related to lower symptom levels. . . . [P]erceived control was found to be beneficial but not when linked to the construct of self-blame." According to O'Neill and Kerig:

Perceived control is the belief in one's ability to influence events in one's life or control one's own outcome. . . . [E]very individual has an inherent need to feel capable of producing desired events and avoiding the undesired. This need provides perceived control with its capacity to regulate behavior and emotion under conditions of stress. Greater levels of perceived control can positively impact psychological adjustment across a variety of negative life events.

Victims should not have to negotiate the divide between blame and control on their own. The criminal justice system should develop mechanisms to facilitate victims' active reflection on behavior, such as through cognitive behavioral therapy, which in turn encourages the development of perceived control. Rethinking victims' roles can accomplish this important goal, by transforming victims into active participants in their own recovery and in the criminal justice system. The restorative justice approaches proposed in Part III provide a forum both for reformulating our image of victims so as to incorporate the relevant research, and for enhancing control while limiting the influence of blame.

III. INTEGRATING RESTORATIVE AND CRIMINAL JUSTICE

As the name implies, restorative justice concerns restoring victims, offenders, and their larger families and communities following a crime. Those affected by the crime determine what meaningful restoration signifies in each individual case, but some examples include restoring lost property, restoring a sense of security, restoring dignity, restoring a sense

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211. See Walser et al., supra note 189, at 56; Ruzek, supra note 189.
212. Bryant, supra note 186, at 84 ("People may develop exaggerated beliefs about threats, vulnerability, or worthlessness following a trauma.").
213. O'Neill & Kerig, supra note 153, at 1046.
214. Id. at 1037.
of empowerment, restoring harmony (based on the feeling that justice has been done) and restoring social support.\footnote{of empowerment, restoring harmony (based on the feeling that justice has been done) and restoring social support.\footnote{215} Essentially, the process brings the relevant parties together, including the affected parties’ extended social network, to rebuild that which was lost in the crime. See, e.g., Kay Pranis et al., Peacemaking Circles: From Crime to Community 147 (2003).}

While the scope and look of restorative programs varies considerably depending on their goals (restitution, rehabilitation, sentencing, etc.), all emphasize healing through active participation, reflection on one’s thoughts and behavior, and regaining control over one’s environment. For the purposes of the criminal justice system, I propose, as an initial and trial effort, incorporating two types of restorative justice programs: Victim-Offender Mediation,\footnote{216 For a discussion of Victim-Offender Mediation, see infra Part III.B.} in which a victim confronts the offender (with or without family members present) to discuss the crime and its impact; and Family Group Conferencing,\footnote{217 See, e.g., Family Group Decision-Making Project, at http://social.chass.ncsu.edu/jpennell/fgdm/ (last visited Feb. 13, 2006) [hereinafter Decision-Making].} where a caring community (which often includes family members) meets with the victim and offender to review what happened during the crime, its impact on the parties involved, and how to prevent it from recurring in the future. The Family Group Conferencing program I discuss in particular is called Peacemaking Circles, and is designed to work with the criminal justice system much like a court-ordered treatment program.\footnote{218 For a discussion of Peacemaking Circles, see infra Part III.C.} Although each model has its own distinctive features, many programs being developed today draw from these two in particular.

The primary strength of restorative programs is that they give victims an opportunity to perform active roles that they individually define. Critics have expressed concern that female victims may be unable to play an active role in their own recovery insofar as doing so might exacerbate rather than improve their vulnerability given the propensity of community and cultural values to blame female victims for their traumatization.\footnote{219 Donna Coker, Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking, 47 UCLA L. REV. 1, 96 (1999) (“Rather than hold the abuser accountable, community values may be just as likely to hold accountable the wife who fails or refuses to put dinner on the table in a timely manner.”).} Indeed this is a possible drawback to many interventions and one that must be considered if the proposal is to be taken seriously.\footnote{220 Angela Cameron, Restorative Justice: A Literature Review 56 (2005), available at http://www.bcifr.org/pubs/Restorative_Justice_Lit_Review.pdf (concluding that an effective restorative justice model must incorporate “attention to and attempts to address gendered power imbalances inherent in intimate violence, even in the context of particular cultural communities”).} Few programs have proposed how to address this problem in any meaningful way.\footnote{221 Id. (citing Pennell and Burford, infra note 224, and Coker, infra note 222, as examples of a “feminist, anti-subordination, or women centered approach”).}
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approaches return to the victim's individual concerns and socialization, and offer her the opportunity to find her voice within an environment that recognizes the importance of safety and the potential threat of gender imbalance.222

According to John Braithwaite and Declan Roche, those victims who seek active healing through restorative practices experience "an active conception of responsibility. It is something taken rather than something to be held to."223 It is this radical philosophy that has the potential for victims, regardless of gender, to assert themselves and overcome the silencing and damaging effects of trauma.224 Peacemaking Circles, for example, allow victims to determine and monitor what they need from the offender or larger community to heal. As one victim attests: "[The Circle] helped me move beyond the pain I was feeling. I didn't want to be called or made out a victim. I was hurt. I needed help because I was hurting, not because I was a victim."225 A notable strength of these programs is their ability to encourage change in offenders by relying on the people who care about them most to help facilitate the rehabilitation process in much the same way that social support facilitates a victim's recovery.226 As illustrated in Peacemaking Circles, these programs cast the net of reform widely: "Holding offenders accountable for their actions toward others, especially toward those

222. For an alternative view, see Donna Coker, who is concerned that restorative justice approaches may fail battered women because they do not address directly the lack of community opposition to domestic violence. Coker advocates for a different approach called "transformative justice," which "addresses the structural inequalities that frame the battering experience for men and women in subordinated communities, provides material and social support for battered women, and holds men who batter responsible for their violence." Donna Coker, Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 128, 150 (Heather Strang & John Braithwaite eds., 2002). While I do not use the term transformative justice, I do believe that the transformation that victims of intimate abuse seek can be found in the restorative justice programs proposed here.

223. John Braithwaite & Declan Roche, Responsibility and Restorative Justice, in RESTORATIVE COMMUNITY JUSTICE, 76 (Gordon Bazemore & Mara Schiff eds., 2001) (noting that "[a]ctive responsibility of all kinds . . . should be conceived as gifts rather than moral duties, and certainly not as legal duties").

224. Joan Pennell & Gale Burford, Feminist Praxis: Making Family Group Conferencing Work, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE, supra note 222, at 108, 121 (noting that "[a]ctive leadership role, began after the problem of child sexual abuse came to light in the course of alcohol treatment circles within the community. Fifty adults admitted to child sexual abuse as a result of their participation in the circle process. While no formal evaluation of the program has been conducted, there have only been two known cases of re-offending. John BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 25 (2002) (citing RUPERT ROSS, RETURNING TO THE TEACHING: EXPLORING ABORIGINAL JUSTICE 36 (1996)).

225. PRANIS ET AL., supra note 215, at 147.
226. See supra Part II.B.2.
they’ve harmed, respects them as equals and forms a basis for more healthy future relationships.\textsuperscript{227} The monitoring eyes of support people for both the offender and victim further ensure that the victim will not be revictimized for facing her offender within the circle.

A. RESTORATIVE JUSTICE IN ACTION

Before I discuss specific restorative programs, it is important to visualize how this approach might work in real-life—to wrench this seemingly foreign idea from the abstract and place it center stage. I have already discussed at length the idea of performativity in justice\textsuperscript{228} In line with this performance theme, there is an instrumental set of plays, directed by Australian playwright David Williamson, who worked with restorative justice expert David Moore, which act out how a restorative conference, mediation, or circle might work. The Jack Manning Trilogy,\textsuperscript{229} as it is known, readily illustrates the hallmarks of the best treatment approaches, including activity, self-reflection, and opportunities to regain control over a trauma that seemed impenetrable following the crime. Based on real cases, the three vignettes dramatize the many roles that victims, offenders, and their families can play in a restorative process.

I want to draw on a conference scene for a case in which a young woman was raped and murdered. (In this segment, both the offender’s and the victim’s families have reluctantly come together to discuss what happened the night the murder took place in order to reconsider the terms of the offender’s sentence.\textsuperscript{330} The offender is not present.) The conference begins with the predictable anger of the victim’s family and a wall of defensiveness by those close to the offender. The turning point in the conference comes when the offender’s brother, Mick, shares some startling information:

I could’ve saved your daughter, Mrs. Milsom [speaking to the young woman’s mother]. I knew she was goin’ t’ get raped. I saw it building up day after day. I told my brother I’d kill him if he tried it, but he’s not scared of me. He’s not scared of anyone. I’ve seen him pick fights with guys twice his size and get the shit beaten out of him and go back a few days later and do it again. I went up to your daughter and I was goin’t’say, “See that guy over there. Take every bloody precaution. He’s raped two women already and he’s looking at you.” And then she would’ve phoned you and then you would’ve had her guarded or had her live back home and then she’d still be alive. But when I say, “Excuse me, can we talk?” she looked at me, and turned on her heel. It

\textsuperscript{227} PRANIS ET AL., supra note 215, at 207.
\textsuperscript{228} See supra Part II.A.3.
\textsuperscript{229} DAVID WILLIAMSON, A Conversation, in THE JACK MANNING TRILOGY (2002).
\textsuperscript{230} Id. at 57, 64–65.
was like “Don’t come near me, scum.”

The young woman’s dad, Derek, responds: “She wouldn’t’ve reacted that way.”

“She did,” Mick says. “I had the wrong kind of accent and the wrong clothes. Simple as that.”

The conversation continues:

DEREK: She wasn’t like that.

MICK: I know I should have told her, but when I get treated like that it pisses me off, so I said to myself, ‘Fuck you, get yourself raped, you stuck-up bitch.’

DEREK: You callous little shit!

MICK: I never thought he’d kill her.

DEREK: [angrily] You wanted her to be raped? Out of sheer spite? Here you are presenting yourself as better than your brother, and you know what? You’re worse. Ten times worse. Your brother was in the grip of a compulsion. A sick, sick compulsion, but what were you in the grip of, what? Spite. Nothing more than spite. You wanted her to be raped because she turned away? Because she was understandably a little cautious.

MICK: It wasn’t that, she just thought I was shit.

Derek turns to his wife, Barbara, the victim’s mother for support: “You know damn well the last thing our daughter was a snob.”

Mick is quick to interrupt before Barbara can respond: “Sorry, I’ve seen that look a thousand times. ‘Who does this guy think he is, trying to hit on me?’”

Derek, again turning to his wife, asks for her affirmation. “Barbara tell him,” he pleads. “Our daughter was not a snob.”

After a long silence, Barbara finally replies, “Derek, our daughter could be a horrible little snob.”

With little fight left, Derek asks, “For that she deserves to die?”

Of course, the young woman does not deserve to die. Should Mick have reported his brother to authorities? Yes. The drama here captures a stark reality: After a woman has been raped and murdered, and her offender locked away, there remain two families left to deal with this crime. Testimony at trial and victim impact statements aside, these families desperately seek to understand at a deeper level what happened the night of the crime. Coming together in this way activates these family

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231. *Id.* at 96.
232. *Id.*
233. *Id.* at 97.
234. *Id.*
members to let go of the pain and anger of such profound loss, and enables them to learn how to move on from this traumatic experience.

Later in the play, and in part motivated by Mick’s confession, Derek confesses his own sense of responsibility for his daughter’s death:

She was followed once before. About six months before ... I promised I would get her one of those panic buttons. Little pendants you can hang around your neck. They look like a real necklace. You press and it’s radio relayed and it goes straight to a patrolling security firm. But I didn’t do it, did I? I was too busy with my bloody useless career. She wanted her boyfriend to move in with her and I told her I didn’t think she should make that sort of commitment just yet. “Give yourself some freedom. Give yourself some time”, that’s what I said. My real objection? He was a musician in a rock band. And he hadn’t been to a private school and he hadn’t been to university. If there’s a bit of the snob in our daughter then I guess she got it from me.... I knew she was at risk living alone in that area. Barbara kept asking me if I’d arranged for that panic button, and I kept getting irritated and saying, “I’ll do it soon.”

The power of this enactment lies in Mick’s and Derek’s ability to reveal how their own behavior may have contributed in some way to this young woman’s death. Mick admits how his bruised pride got in the way of protecting the woman. In therapeutic terms, Mick’s active involvement in this process cognitively positions him to alter and control his behavior. The next time Mick’s pride is stimulated, he can make different choices with greater awareness of his own behavior.

Derek’s confession reveals a similar process at work. He fears that his focus on work and his judgments about his daughter’s male company may have somehow contributed to her death. He blames himself and nothing anyone can say will take this away from him. However, the conference brings those feelings openly to light. In doing so, Derek has the opportunity to transform this self-blame into perceived control over his own future. Although Derek will never undo what happened to his daughter, his acknowledgement that he disappointed her will allow him to make more informed decisions for his other children going forward.

Neither Mick’s nor Derek’s confession will bring the young woman back, nor do they in any way relinquish the killer from responsibility and punishment. What their confessions offer is an opportunity to approach actively the far-reaching effects of the murder. Some may ask: Why bother? The woman will never come back to life. That’s true. But if we don’t heal the living, Mick’s children will likely reproduce his proud resentment, and Derek might follow similar dysfunctional patterns of relating to his other children. Or Derek could continue to blame himself for his daughter’s death and suffer psychologically. Freeing both Mick

235. Id. at 100.
and Derek to reflect on and take control of their behavior may be the only hope for interrupting violent patterns of revenge or the transfer of victimization to subsequent generations.

It is true that Mick and Derek are merely characters in a well-staged drama; however, their interaction provides a useful, if fictionalized, picture of how restorative justice can work to promote an active approach to healing. For a more structured look at restorative options, I turn to two specific models, Victim-Offender Mediation and Peacemaking Circles, which respond to both the healing needs of victims and the retributive and utilitarian goals of society at large. While a spectrum of restorative justice possibilities exists, these two models have become increasingly popular within and outside of the criminal justice system.

B. VICTIM-OFFENDER MEDIATION

Victim-Offender Mediation is now recognized as an effective restorative justice approach to healing the harm done to victims of both petty and more serious crimes, and is now being offered in Canada and New Zealand as well as in Native American communities and the state of Texas. Victim-Offender Mediation is most commonly used in cases involving juvenile defendants. Mediations may occur before or after sentencing as a condition of probation or parole through referrals from judges, probation officers, victim advocates, prosecutors, defense attorneys, and police, or by the victims themselves. Or, they may also be offered independent of the criminal justice system on the invitation of the victim, offender, or other party involved in facilitating recovery.

During the mediation, participants have an opportunity to examine what happened during the crime and discuss its lingering effects on the people involved. This face-to-face meeting also gives participants an opportunity to develop strategies to heal from the violence. Importantly, the offender learns about the impact of the crime and the steps to be

241. See Schwartz et al., supra note 95, at 404–10 (describing the implementation and impact of a program managed by the San Francisco Sheriff's Department that seeks to reintegrate offenders, address victim needs, and engage the community).
taken to redress the harm. The victim has an opportunity to convey to the offender how the crime has affected his or her life, both emotionally and functionally.\textsuperscript{242} The family members, as in the scene from \textit{The Manning Trilogy}, all have an opportunity to work through their residual feelings and come to terms with their own responsibility for what happened—and, hopefully, to find peace with those feelings. Ironically, through this process, offenders must face what they avoid in court: direct contact with the person they harmed and the opportunity to hear how their destructive behavior has affected the people against whom it was directed. This interaction facilitates healing for the victim in a manner consistent with the victimology research on recovery from trauma, providing an avenue through which the victim can actively engage in the recovery process.\textsuperscript{243} In sum, Victim-Offender Mediation gives participants the opportunity to take an active role in understanding what happened before and during the crime and in learning what steps can be taken to address the violent behavior, ultimately allowing them to heal from this process of revelation and human vulnerability.

There are several key components to a safe and productive mediation. First, participants must volunteer in good faith: mediation should never be compulsory. Second, facilitators should provide a safe, respectful environment. Third, only a trained and neutral party is qualified to facilitate mediations. Maintaining sensitivity to the victim's needs, especially the propensity of victims to blame themselves, is central to ensuring that the mediation allows for the organic development of increased control. In addition, the victim should be given choices whenever possible, such as where the mediation will take place, who will

\textsuperscript{242} Although this section focuses on the Victim Offender Mediation (VOM) process, Victim-Offender Reconciliation Programs (VORPs) also bring together, with a facilitator, the victim and offender for a face-to-face meeting. VOMs place more of an emphasis on reparation and restitution, while VORPs place a greater emphasis on reconciliation between the parties and holding the offender accountable. However, the two programs are often studied together and the terms are sometimes used interchangeably. Both of these mediation approaches are distinguished from Family Group Conferencing, in which family, friends, and community members are invited to join the offender, victim, and facilitator for a discussion. See Mara F. Schiff, \textit{Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade}, \textit{I W. CRIMINOLOGY REV.} I n.3 (1998), at http://wcr.sonoma.edu/v1n1/schiff.html (last visited Jan. 16, 2006) ("Early Victim Offender Mediation programs have also been referred to as Victim Offender Reconciliation Programs (VORP). This terminology is no longer popular because it implies a goal of reconciliation between the victim and the offender, which is often offensive and insensitive to the victim."); see also Mark Umbreit et al., \textit{Restorative Justice Versus Community Justice: Clarifying a Muddle or Generating a Confusion}, \textit{7 CONTEMP. JUST. REV.} 81, 82 (2004) (detailing a foundation in VOMS/VORPS); Mark Umbreit, \textit{Restorative Justice through Victim-Offender Mediation: A Multi-Site Assessment}, \textit{I W. CRIMINOLOGY REV.} (1998), at http://wcr.sonoma.edu/v1n1/umbreit.html (last visited Jan. 16, 2006) (describing VORPS) \[hereinafter Umbreit, \textit{Restorative Justice through Victim-Offender Mediation}\]. For a description of Family Group Conferencing, see \textit{Braithwaite, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION}, supra note 224, at 25-26.

\textsuperscript{243} See supra Part II.B (discussing the science of victimology).
participate, and the order in which the participants will speak. Advance, individual preparation is also crucial so that when the mediation occurs, each person understands how it will proceed and can participate actively.

Victim-Offender Mediation has already been shown to be an effective remedy for victim healing. In one multi-site evaluation of 167 mediations, eighty-one percent resulted in a restitution agreement to compensate the victim for financial losses. Moreover, seventy-five percent of victims who went through the mediation process expressed satisfaction with the justice system, whereas only fifty-seven percent of similar victims who went through normal procedures expressed satisfaction. Additionally, after meeting with offenders, victims were less likely to be fearful of them. Finally, of those offenders who participated in the program, eighteen percent committed another crime; of those who did not participate, twenty-seven percent went on to commit another crime.

In line with the victimology research, the mediation process itself, including the preparation of what to say and when and where to say it, encourages victims to take an active role in coming to understand what happened to them and the impact of the crime on their daily functioning. This active process of self-reflection, together with actually meeting the offender, helps victims take control over their lives in ways they could not through the normal avenues of justice. As the case with Mick and Derek demonstrated, participants may begin to self-reflect on their participation in the circumstances that led up to the crime and ponder what they may or may not have controlled. They may finally let go of those aspects over which they had no control, or relinquish themselves from the searing blame many victims feel following a crime. Most importantly, victims can piece their worlds back together by gaining insight into how and why the crime occurred, while affirmatively reasserting control to avoid precarious circumstances in the future, if

244. See Umbreit, *Restorative Justice through Victim-Offender Mediation*, supra note 242 ("High levels of victim and offender satisfaction with the mediation process have been found, along with... reduced fear among crime victims.").
245. Id.
246. Id.
247. See id. (indicating that twenty-three percent of victims feared revictimization before mediation, compared with only ten percent after mediation).
248. Id.
249. Id. ("Victims and offenders often speak of their participation in a mediated dialogue as a powerful and transformative experience which helped them in their healing process.").
250. Avery Newberry’s experience provides a good example of this process. Avery met the family member convicted of sexually abusing her in a Victim-Offender Mediation. When describing the process, Avery remarked, “It felt like there was a semi truck on my shoulders for 20 years and within 20 minutes it was gone. It was absolutely astounding because I didn’t understand what I was carrying—didn’t know what happened until it was gone.” Telephone Interview with Avery Newberry in New York, N.Y. (Dec. 17, 2004).
possible. If an offender offers an apology, or their family members express remorse, victims may feel additionally restored by the power of such a display of responsibility. 251

C. PEACEMAKING CIRCLES

A number of American communities have also experimented with Peacemaking Circles, although their primary use in this country has focused on issues such as interracial conflicts and drug- or gang-related problems. 252 Peacemaking Circles have recently been adapted by New York University’s Center on Violence and Recovery for intimate abuse cases, 253 and are being implemented on an experimental basis through the Santa Cruz County Court in Nogales, Arizona, as an alternative to traditional treatment approaches for batterers. 254 Like Victim-Offender Mediation, Peacemaking Circles work in concert with the criminal justice system, and are geared toward restoring victims, offenders, and communities after an offender has pled guilty to a crime and has been sentenced. Peacemaking Circles can be somewhat more complex and require a longer commitment by all involved than Victim-Offender Mediation. This program focuses on holding offenders accountable for their behavior but also engages them in creating a plan, or “social compact,” for addressing that behavior and the underlying problems that can initiate it, including alcohol abuse and a history of childhood violence. Peacemaking Circles offer the offender, the victim, and their family members a forum for discussing the crime, the roots of violence in the case, the precipitating events, and its impact on each participant.

After being accepted into the circle program and screened for safety, offenders develop an initial social compact with program personnel, which binds them to a treatment plan. Once the compact is developed, the Circle’s Facilitator, called the “Circle Keeper,” brings together the offender, victims who elect to participate, family members, children who are mature enough and wish to participate, support persons (chosen by the victim, offender and children), and other service providers, to develop weekly plans designed to build on or modify the initial social compact. The purpose is to develop the goals that the offender and the family agree to achieve. Meetings may occur weekly or bi-monthly over an extended period of time. One key feature of this program is the safety

251. See Bibas & Bierschbach, supra note 14, at 90 (“Apology, we argue, is a powerful ritual for offenders, victims, and communities, one that criminal procedure could facilitate by encouraging offenders to interact face to face with their victims.”).

252. For an example of the application of Peacemaking Circles to community work, see Peacemaking Circles at ROCA, at http://www.rocainc.org/circles.htm (last visited Jan. 16, 2006).

253. For information about the Center or their adaptation of Peacemaking Circles for intimate violence cases, see www.nyu.edu/cvr (last visited Jan. 16, 2006).

254. This program is currently being studied by NYU's Center on Violence and Recovery, supported by a National Science Foundation grant awarded in January 2005. Id.
monitor who is responsible for engaging the offender and family in safe behavior.\textsuperscript{255}

While Peacemaking Circles focus primarily on the offender, all participants are encouraged to examine the harm done by the offense and individually identify ways to help heal all the affected parties. Everyone has an opportunity to reflect on the harm caused, both directly and proximally, and how each participant may contribute to healing it. When appropriate, the Circle Keeper may identify gender dynamics, such as when women are treated in a sexist manner by their partners or family members, and use the opportunity to help participants gain insight into these issues and any accompanying behavior. Gender issues might also arise in other constructive ways, such as when women reassert control over their families once the violence subsides, and when male offenders have an opportunity to look up to male elders who model nonviolent behavior. This process positions participants for cultivating a sense of perceived control, which may help each person to avoid or prevent future crimes. In addition, the circle provides the social support that has been shown to be so instrumental in recovering from harm.\textsuperscript{256}

By fostering both emotional and intellectual growth, Peacemaking Circles promote the offender's sense of belonging and accountability to the community. Offenders who feel they possess a stake in the community are less likely to re-offend.\textsuperscript{257} By emphasizing both accountability and healing, Peacemaking Circles can help interrupt the violence now and its transmission to future generations. Additionally, victims have an opportunity to engage in an affirmative and active process that can affect both how they cognitively reflect on the crime and their behavior so as to control future events.

John Braithwaite's comprehensive review of the past decade of empirical evidence on restorative justice interventions, such as Peacemaking Circles, suggests a high level of victim satisfaction, and empowerment for all parties involved.\textsuperscript{258} Victims have described feeling restored by the process in meaningful ways; offenders have expressed

\textsuperscript{255} For a complete overview of the Center on Violence and Recovery's Peacemaking Circles, see generally Linda G. Mills, New York University Center on Violence and Recovery, Peacemaking Circles/Construyendo Circulos de Paz (CCP): A Program Guide for Coordinators and Communities (2005). For details on creating safety in restorative approaches, see Joan Pennell & Stephanie Francis, Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children, 11 VIOLENCE AGAINST WOMEN 666, 666-92 (2005); see also Joan Pennell, Safety for Mothers and Their Children, in WIDENING THE CIRCLE 167 (Joan Pennell & Gary Anderson eds., 2005) ("Although the number of outcome studies on FGC and domestic violence is limited, the findings suggest that FGC increases safety for women and children." (emphasis omitted)).

\textsuperscript{256} See, e.g., Frieze et al., supra note 196, at 307.

\textsuperscript{257} See Lawrence W. Sherman et al., The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment, 83 J. CRIM. L. & CRIMINOLOGY 137 (1994).

\textsuperscript{258} BRAINTWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION, supra note 224, at 66-69.
satisfaction with the fairness of restorative justice approaches. An offender's apology can, for example, offer symbolic reparation and an overall sense of closure. In addition, victims express an enhanced empathy for the offender, which aids the victim's healing. Evidence suggests that restoring the parties both enhances victim empowerment and hence their perceived control, and reduces offender recidivism. In addition, there is evidence that social compacts show a higher level of compliance than court orders. Members of the community benefit as well: the collaborative nature of Peacemaking Circles between the offender, the victim, and community members, creates a mutual investment in finding solutions for all involved. This suggests the possibility of reducing crime both at the micro and macro level.

One study of Family Group Conferencing, an approach with some similar features to Peacemaking Circles, involved child maltreatment and domestic violence cases. As illustrated in their 2002 report, social work scholars Joan Pennell and Gale Burford found domestic violence, child mistreatment, and alcohol abuse had decreased following a restorative justice intervention, while children's development and social supports increased. Offenders' compliance rates with their social compacts were also significantly greater than with court-mandated and monitored treatment programs.

The Miami-Dade Juvenile Court introduced family decision-making conferences, another experimental program similar to Peacemaking Circles, into the child welfare system in 1998. An evaluation of the Miami program found that parent and participant empowerment increased. The relationship between the Department of Children and Families and birth parents also improved.

One final reason to consider Peacemaking Circles is that they can be

260. See PRANIS ET AL., supra note 215, at 41.
262. BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION, supra note 224, at 51–52.
263. Id. at 67.
264. Decision-Making, supra note 217; see also Pennell, Safety for Mothers and Their Children, supra note 255, at 163. Illustrating the nexus between child welfare and domestic violence, Pennell notes that "domestic violence is a common reason for removing children from their homes, even if the battered mother has not abused the children." Id. Additionally a "child welfare caseload [includes] many women who no longer are being abused and [who] are trying to lead their lives . . . . as both they and the children deal with the aftereffects of violence." Id.
266. Id.
268. Id. at 86.
tailored to fit the cultural and religious needs of the participants. This can be a crucial aspect of offender rehabilitation. U.S. researchers have found that African-American men arrested for domestic violence crimes have higher completion rates in both specialized (fifty percent) and conventional (fifty percent) counseling sessions when the sessions are culturally-focused, in contrast to African-American men who participate in racially mixed counseling groups (thirty-seven percent). The completion rate rises to as high as seventy percent when African-American men with strong cultural identification are placed in culturally-focused groups. Victims also benefit from support that recognizes their unique and complex cultural needs. Unlike most justice practices, Peacemaking Circles allow victims and offenders to choose who participates in the circle and what cultural or religious practices influence it. This may in turn enhance victims’ control over and trust in the healing process.

CONCLUSION

The criminal law embodies the moral values of a society, the rules by which a community has agreed to live and that are sanctioned by the full power of the government. How the criminal justice system handles people involved in violations of the criminal law—both offenders and their victims—signifies society’s moral stance toward their behavior. Therefore, offenders are punished, but not before receiving full due process of law before a jury of their peers. Victims, on the other hand, have largely been left out of the process; since it is the state’s laws that the offender has broken, the state acts as the harmed (and named) party in a criminal action. Victims are deprived of any formal recognition by the state in the criminal process and participate only through narrowly


270. Dutton et al., supra note 269.


carved functions, such as providing witness testimony or victim impact statements. Given that victims are most likely to interact with the state through the criminal justice system, it makes sense that, as a society, we would want to enhance that contact to include not only punishment or rehabilitation of the offender, but rehabilitation of the victim as well.

Victimology research shows that two key ingredients are most helpful when facilitating victim healing—a necessary precondition for interrupting the transmission of violence. First, the approach should be active or delve into the relationship between the victim's cognition and behavior, inquiring into how the crime occurred and what the victim might do in the future to prevent its reoccurrence. Second, the approach should reinforce the perception of control over one's behavior rather than encourage self-blame. This delicate process involves engaging in self-discovery, exposing thoughts and feelings, and perhaps even being in contact with the offending party. Restorative justice can not only facilitate such a process, but provide the added benefit of reforming some offenders. All of these outcomes are compatible with the goals of the criminal justice system.

The power of restorative justice lies squarely in its connection to the overall administration of justice and its capacity to expand the narrow set of roles currently prescribed to both victims and offenders. By adding restorative justice-based programs to the system, including Victim-Offender Mediation and Peacemaking Circles, the state could finally address both offenders' accountability for their crimes and victims' critical need to take an active role in their healing. Without such programs, traumatized victims and their families, and even offenders, have no chance to transform their suffering or restore themselves to health. And we, the public, are left with the sobering thought that, by failing to seize this opportunity, we are choosing to perpetuate patterns of crime.