Pace Law Review

Volume 28
Issue 4 *Summer 2008*
Symposium: Victims and the Criminal Justice System

Article 1

June 2008

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Recommended Citation
Luis E. Chiesa, *Foreword Symposium: Victims and the Criminal Justice System*, 28 Pace L. Rev. 617 (2008)
DOI: https://doi.org/10.58948/2331-3528.1104
Available at: https://digitalcommons.pace.edu/plr/vol28/iss4/1

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Volume 28 Summer 2008 Number 4

Symposium: Victims and the Criminal Justice System

Foreword

Luis E. Chiesa*

On April 4, 2008, Pace Law School hosted a groundbreaking symposium that brought together various prominent criminal law scholars to address pressing questions about the importance of the victim in the administration of criminal justice. The distinguishing feature of the symposium was its international flavor. This was the first time that American and Spanish scholars engaged in an academic debate about important issues of criminal theory. As such, it constituted an important step in bridging the gap between common and civil law approaches to penal responsibility issues. At first glance, one might be tempted to conclude that Anglo-American criminal law scholars have little to learn from their continental counterparts and vice-versa. The contributions to this symposium issue reveal, however, that there is much to gain and little to lose from reaching out to scholars on the other side of the Atlantic.

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After all, if the problems of criminal law are universal in nature, it seems obvious that we will profit from engaging in a transnational debate about the fundamental problems of criminal theory. And profit we did.

The contributors to the symposium presented papers on a wide array of issues. Some, like Leo Zaibert and Íñigo Ortiz de Urbina, broke new ground by focusing on old (and not so old) debates. Zaibert took the George Fletcher/Michael Moore exchange on the role of victims in the theory of retribution[1] to the next level by cogently arguing that an appeal to victims is present in many conceptions of retributivism, including—notwithstanding his contention to the contrary—Moore's own version of the theory.[2] This approach constitutes a direct affront to the conventional wisdom, for retributivists usually argue that the victim's desires should have little, if any, bearing on determinations of punishment. Ortiz de Urbina, on the other hand, seized on a debate sparked by Vera Bergelson's impressive article on comparative liability in the criminal law[3] to shed light on various important issues. With great acuity (and a healthy dose of humor), Ortiz de Urbina undertook several notoriously difficult tasks, such as ascertaining the rationales underlying the consent, self-defense, and provocation defenses and explaining the different ways in which the rights specification, conditionality of rights, and forfeiture theories may inform our conception of justification defenses.[4]

A couple of interesting articles focused on answering the questions about "how, what, and how much to punish." Jesús María Silva Sánchez tackled the "how to punish question" by suggesting that, as a general rule, victim-centered theories of punishment should lead to rejecting offender imprisonment, for victim vindication can be successfully achieved by resorting to "symbolic" and "expressive" declarations of condemnation (e.g.,

1. *See* George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999); Michael S. Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999).

2. Leo Zaibert, *The Ideal Victim*, 28 Pace L. Rev. 885, 899 (2008).

3. Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in the Criminal Law*, 8 Buff. Crim. L. Rev. 385 (2005).

4. *See generally* Ortiz de Urbina, *Old Wine in New Wineskins? Appraising Professor Bergelson's Plea for Comparative Criminal Liability*, 28 PACE L. REV. 815 (2008).

by procuring a guilty verdict).[5] Regarding the "how much to punish" question, Guyora Binder argued that victims' suffering provides the State with good reason to punish actual harm more severely than risky conduct that does not cause harm. This argument offers a solution to the moral luck puzzle: the punishment of harm matters because doing so "contributes to the legitimacy of the criminal justice system by vindicating victims" that have been humiliated by the perpetrator's injurious conduct.[6]

Vera Bergelson, Manuel Cancio Meliá, and Russell Christopher discussed how the victim's acquiescence to engage in certain conduct with the alleged offender may operate to relieve the defendant of criminal responsibility. Bergelson offered a well-reasoned plea in favor of a general defense of consent. However, she suggested that the defense should only attach if the following three requirements are met: (1) the victim freely consented to the perpetrator's conduct, (2) the state of affairs that results amounts to an objectively preferable outcome, and (3) the offender is subjectively aware of the victim's consent and believes that it is necessary to harm the victim in order to achieve the preferable outcome.[7]

While Bergelson focused on the exculpatory effect of consent, Manuel Cancio Meliá inquired about whether the victim's voluntary decision to engage in a risky joint enterprise with the offender should preclude imposing liability on the offender. For Cancio Meliá, a person with freedom to act must assume responsibility for the harms directly caused by his autonomous conduct, regardless of whether the person harmed is a third party or the victim herself. Therefore, those who engage in a dangerous joint enterprise must assume responsibility for their own harms in much the same way as they must accept responsibility for the injuries that their dangerous conduct may cause to

5. Silva Sanchez, *Doctrines Regarding "The Fight Against Impunity" and "The Victim's Right for the Perpetrator to be Punished"*, 28 PACE L. REV. 865, 877-79 (2008).

6. Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 736 (2008).

7. Vera Bergelson, *Consent to Harm*, 28 PACE L. REV. 683, 699 (2008).

others.[8] In such cases it is difficult to single out one of the parties that is jointly engaging in the conduct as either victim or offender.

Russell Christopher's article also discusses the subtle ways in which victimhood and offenderhood intertwine by examining, among other cases, instances of statutory rape in which a minor convinces an adult to engage in sexual intercourse by falsely representing that he or she is over the legal age of consent. Christopher argues that while the perpetrator who has sex with the underage child is the offender of the crime, the child has also committed rape, in his case, by fraud. Thus, both the child and the adult should simultaneously be considered both victims and offenders of the crime of rape. When the victim and offender labels get confused in such a manner, Christopher argues that both parties should have a defense for the crime that they have otherwise committed. The child should be relieved of responsibility for rape by fraud and the adult should not be held liable for statutory rape.[9]

Several of us attempted to expand the concept of "victimhood" to encompass offenses that would traditionally be considered "victimless crimes." Carlos Gómez Jara Díez, for example, argued in favor of affording victimhood status to corporations that are mismanaged, even when both the shareholders and the management consent to the mismanagement.[10] This amounts to a reconceptualization of the status of corporations, for the traditional view holds that their interests are inextricably tied to the interests of management and shareholders. Audrey Rogers undertook a reconceptualization of her own when she proposed that we reject the traditional interpretation of possession of child pornography statutes as offenses that merely seek to deter future harmful conduct. In her opinion, it is better to think of these crimes as offenses that seek to redress conduct that causes actual harm to the child depicted

8. *See generally* Cancio Meliá, *Victims and Self-Liability in Criminal Law: Beyond Contributive Negligence and Foreseeability (Without Blaming the Victim)*, 28 PACE L. REV. 739 (2008).

9. *See generally* Russell Christopher, *Should Being a Victim of a Crime Be a Defense to the Same or a Different Crime?*, 28 PACE L. REV. 783 (2008).

10. *See generally* Gomez Jara-Diez, *Corporations as Victims of Mismanagement: Beyond the Shareholders vs. Managers Debate*, 28 PACE L. REV. 795 (2008).

in the photo.[11] I also attempted to challenge the conventional understanding of victimhood when I proposed that animals be treated as "victims" for many purposes, including the possibility that restitution be paid to the creatures. The point of departure for my argument was the surprising decision of a United States District Court to order that the now infamous football superstar Michael Vick make restitution for the full amount associated with the care of the dogs that he kept for his illegal dog fighting operation.[12]

Finally, David Aaronson provided us with a thorough examination of the ebbs and flows of the victims' rights movement from the early 1980s to the enactment of Crime Victims' Rights Act of 2004.[13] Aaronson's piece helps us understand the ways in which the criminal process has changed in order to accommodate the interests of victims and the challenges that such changes raise.

I am delighted to see these papers published in the Pace Law Review. The contributions to this special issue demonstrate the benefits that can be reaped from engaging in a transnational dialogue about fundamental issues in criminal theory. One can only hope that this will be the first of many conversations between American and Spanish criminal theorists. It was an honor to have played a small role in this venture alongside the members of the Pace Law Review, especially Jennifer Ramme, Ayokeji Ayorinde and Deborah Sommers. Without their invaluable assistance this project would not have come into fruition.

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11. *See generally* Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847 (2008).

12. *See generally* Luis Chiesa, *Of Persons and the Criminal Law: (Second Tier) Personhood as a Prerequisite for Victimhood*, 28 PACE L. REV. 759 (2008).

13. *See generally* David Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623 (2008).