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**EMPATHY AND WORTHINESS: THE MODERN VICTIMS' RIGHTS MOVEMENT
AND THE GROWTH OF MASS INCARCERATION**

by

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**SUBMITTED TO SCRIPPS COLLEGE IN PARTIAL FULFILLMENT OF THE
DEGREE OF BACHELOR OF ARTS**

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Introduction

In the United States, the incarceration rate has skyrocketed in the last half-century, leading to a massive prison industrial complex (PIC) that controls over 7 million individuals through detention, probation, and parole. A number of factors led to this explosion, but few factors have been so effective in driving mass incarceration as fear. People fear being victims of violent crime and want to ensure safety for themselves and their loved ones; for many, this fear was not only theoretical but driven by lack of state recognition of the harms that had occurred. Parallel to the rise of the PIC was the rise of a movement advocating for “victims’ rights,” many of the policies of which are important measures in responding to the traumas of violence and creating greater community safety. However, this movement was and still is deeply flawed, because the institutionalization of anti-violence and trauma recovery work limit victims of crime to state responses. Though rooted in radical beginnings with demands for safety of all citizens, the mainstream victims’ rights movement has been coopted by the state to drive the harshly punitive carceral system and maintain state repression.

This thesis will seek to examine the historical movement over victims’ rights and the ways in which victims of crimes have been used to further state power and offer a legal analysis of the goals and victories of the movement. Specifically, I will look at how the state uses victims and their families to support capital punishment, the harshest and most final penalty it has the power to inflict. I will examine in detail the landmark case of *Payne v. Tennessee*, which was a major victory for victims’ rights as well as death penalty supporters. Lastly, I will take a look at some alternatives to the criminal justice system as a response to crime and their effect on victims, such as victim compensation systems and restorative justice.

Victims and the Criminal Justice System

History

Prosecution of crime in the pre-founding era was, like its common law counterpart in England, a private enterprise. A crime victim or their family would investigate, apprehend, and prosecute the perpetrator, or if they had the means, would hire a private detective and lawyer to do so. Victims with few resources to investigate or little knowledge of the legal system found themselves with no legal redress to the crimes they had suffered. Virginia was the first colony to appoint an attorney general as a public prosecutor in 1643, and other colonies eventually followed suit over the next century and a half¹. The public model of crime became more popular as populations increased, leading to an uptick in crime, and as enlightenment ideals infused practices of governance. One central reformer in this area was Cesare Beccaria, an Italian philosopher who declared that “crimes are only to be measured by the injury done to society,”² and not to individuals. The advent of public criminal justice did somewhat alleviate access issues, but the system still gave huge advantages to wealthy, connected, and most importantly, white individuals.

The history of racial oppression in the United States has always been deeply connected to crime, be it state-constructed crime used to control black people, or state-sanctioned crime against black people. In the slavery era, black people could find themselves forced into hard labor for the simple crime of existing, and had so little recourse that they were not entitled to the

¹ Davis, Angela J., *Arbitrary justice: The power of the American prosecutor*, (Oxford University Press, 2007), 9

² marchese di Beccaria, Cesare, *An essay on crimes and punishments*, (Philip H. Nicklin, 1819), 17

right of bringing a claim in court as a citizen³. Starting during reconstruction, the desire for free labor combined with visceral racism lead to black codes and convict-lease systems, where black people could be punished for crimes as petty as vagrancy, leased out to private companies, and worked to death. The mere claim of sexual violence by black men led to thousands of extrajudicial lynchings, often attended and supported by officers of law. Peaceful protests during the civil rights era were met with mass arrests and even more state-sanctioned violence. The infamously racist War on Drugs, started soon after the civil rights era, continues to this day, and incarcerates hundreds of thousands of people, mostly black and brown. In contrast, white people were permitted to kidnap, enslave, beat, rape, torture, or kill black people with impunity as long as they held “property” claims over them. After slavery, as racial terrorism became a norm in the South (though it certainly was not limited to there), rape of black women, cross burnings, bombings, mob gatherings, and of course, lynchings, were all used by white people to exert power over black people, met with little resistance or punishment by authorities⁴. Police killings of black individuals frequently continue to go unpunished or under-punished, as evidenced by the rise of the Black Lives Matter movement (another series of peaceful protests responded to with violence).

This dissonance in which “crimes” were punished was the focal point in a lot of early crime victim advocacy. The 1944 case of Recy Taylor, a black woman gang raped by six men in Abbeville, Alabama, became an issue of national interest and organizing. The investigation and

³ *Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691, 15 L. Ed. 2d 691 (1857).

⁴ McGuire, Danielle L, *At the dark end of the street: Black women, rape, and resistance--A new history of the civil rights movement from Rosa Parks to the rise of black power*, (Vintage, 2010); Rothstein, Richard, *The color of law: A forgotten history of how our government segregated America* (Liveright Publishing, 2017)

grand jury hearing yielded no indictments, despite one of the attackers being identified and naming all of his co-assailants on the night of the crime. Rosa Parks, then secretary for the Montgomery chapter of the NAACP, along with organizers from the Southern Negro Youth Congress (SNYC) led a campaign that brought representatives from many different organizing groups, “representing middle-class mainstays like the YWCA, the NAACP, and the National Council of Negro Women, as well as leftist labor unions like the CIO and the Negro Labor Victory Committee”⁵ together to form the Committee for Equal Justice for Mrs. Recy Taylor (CEJRT). The committee eventually garnered chapters in several cities, and letters and petitions demanding a real investigation poured into the Alabama governor’s office. The CEJRT expanded its focus to also advocate for justice in other interracial sexual assaults; Henrietta Buckmaster, chairwoman of the national committee, wrote, “When we say ‘Equal Justice for Recy Taylor,’ we are also saying Equal Hope, Equal Joy, Equal Dignity for every woman, child and man the wide world over.” Though a second grand jury investigation in Recy Taylor’s case also yielded no indictments, the CEJRT was an early example of extensive organizing for the right of protection against violent crime⁶.

Grassroots organizing around violence continued to grow through the 1970s; “by the middle of the decade, more than 500 feminist-run rape crisis centers and refuges for abused women had been established throughout the country...All embraced a philosophy of radical self-help and mutual aid, and many included staff who self-identified as rape survivors and formerly battered women.”⁷ Feminist organizing around violence was finally reaching the national

⁵ McGuire, 19

⁶ Id., 38

⁷ Thuma, Emily L., *All our trials: Prisons, policing, and the feminist fight to end violence*, (University of Illinois Press, 2019), 5-6

agenda, but the movement was not always able to live up its radical roots. “The antiviolenace movement’s early rhetoric of *it can happen to any woman*,” writes Emily Thuma, which was initially meant “to make plain that rape and battering were pervasive cultural phenomena and not matters of individual pathology...took on a new valence—it can *even* happen to white, middle-class, gender- and sexual-conforming women.”⁸ This distortion came at a dangerous time for the movement, because fear of crime was sweeping through white America with deep and lasting consequences.

Crime rose steadily through the 1960s and early 70s in a phenomenon without clear academic consensus of the causes; criminologists blame a variety of factors such as the baby boom, the heroin epidemic, and lead emissions⁹. Fear of crime, however, did not follow quite the same pattern, instead rising and falling somewhat drastically. Katherine Beckett examines potential causes for this fear from 1964-1974 and found that while the crime rate had a slightly negative (not statistically significant) correlation to public concern about crime, both media coverage of the crime issue and state anti-crime initiatives had a significant positive correlation to public concern¹⁰. These state anti-crime initiatives are worth examining.

In 1965, President Johnson declared a “War on Crime” and set out to address the crime boom in several different ways, most notably with the creation of the President’s Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) in 1965, the National Commission on the Causes and Prevention of Violence (the Violence Commission) in

⁸ Id., 6-7

⁹ Forman Jr, James, *Locking up our own: Crime and punishment in Black America*, (Farrar, Straus and Giroux, 2017), 50

¹⁰ Beckett, Katherine, *Making crime pay: Law and order in contemporary American politics*, (Oxford University Press, 1999), 16-22

1968, and the Law Enforcement Assistance Administration (LEAA), part of the Omnibus Crime Control and Safe Streets Act of 1968¹¹. A notable difference between Johnson and his major successors, however, was his concern with civil rights. A champion of the Civil Rights Act and the Voting Rights Act, he sought to address the root causes of crime with his Great Society, also leading a “War on Poverty” and, after major unrest in the form of riots such as the Watts uprising, creating the National Advisory Commission on Civil Disorders (the Kerner Commission)¹². Despite his more sociological approach to crime, though, Johnson had brought crime to the national agenda, a move that set precedent for an explosion of change in criminal law and also institutionalized responses to violence. Rather than the grassroots-based, survivor-focused organizing that had been going on, a new, more dominant avenue was emerging for victims of crime in an ever-expanding justice system.

After Johnson left the white house, the Nixon administration ushered in the infamous tough-on-crime era that saw an extraordinary expansion of spending on law enforcement, a blatantly racist war on drugs, and a massive boom in prisons. Nixon’s “southern strategy” of appealing to racist whites through dog-whistles that equated black people and criminality was massively successful, with decades-long deeply ingrained racial attitudes laying plenty of groundwork. The trend of tough-on-crime politics has been viewed as a backlash against the civil rights movement¹³, a backlash against the Warren court’s huge expansion in protections for the

¹¹ Glenn, Leigh, *Victims' rights: A reference handbook*, (ABC-CLIO, 1997), 40-41

¹² Kerner, Otto, *The Kerner Report: The 1968 report of the national advisory commission on civil disorders* (Pantheon, 1988), xiv-xvii

¹³ Gillon, Steven M., *Separate and unequal: The Kerner commission and the unraveling of American liberalism*, (Basic Books, 2018), 295

criminally accused¹⁴, and/or as a “frontlash” by conservative issue entrepreneurs to put crime newly on the agenda¹⁵. This era (which lasted, arguably, through the early 2000s) saw no mercy for convicted persons, either in rhetoric or in practice.

Conservative animus was not the only driver of tough crime policies, though. Crime was a significant issue for African Americans, who, along with the aforementioned disparities in treatment of white-on-black crime, were also more likely to live in cities (where crime was more concentrated) and were hit particularly hard by the heroin epidemic¹⁶. It was also a significant problem for women, who, with the rise of second wave feminism, were beginning to bring up rape and domestic violence as political issues. These were groups that were actually more likely to be victims of crime¹⁷, rather than the white men targeted by the southern strategy. They wanted the freedom from fear—the “first civil right of every American”¹⁸ that Nixon named in his nomination acceptance speech in 1968. Activists wanted the root causes of crime addressed, but they also wanted to see the perpetrators of crime punished with all the resources of the state as well. As James Forman Jr. writes, “while many blacks embraced an all-of-the-above strategy that combined increasing criminal penalties with attacking inequality, conservatives often framed the choice as either-or...conservatives won.”¹⁹ Out of the women’s movement was the rise of

¹⁴ Dubber, Markus Dirk, *Victims in the war on crime: The use and abuse of victims' rights*, (Vol. 47. NYU Press, 2006), 124

¹⁵ Weaver, Vesla M., "Frontlash: Race and the development of punitive crime policy," (*Studies in American political development* 21, no. 2 (2007)), 230-265

¹⁶ Forman Jr, 25

¹⁷ Beckett, 26

¹⁸ Murakawa, Naomi, *The first civil right: How liberals built prison America*, (Oxford University Press, 2014), 1

¹⁹ Forman Jr, 76-77

“carceral feminism,” which, taking the fear from the “it can happen to any woman” rhetoric, advocated for harsh, punitive sentences for crimes committed against women²⁰.

Out of the joint desires of many tough-on-crime conservatives, African Americans, and women grew the Victims’ Rights Movement (VRM). In the 1970s, Local crime victims’ assistance programs (including the first law enforcement-oriented ones in 1974) were established in a number of states, the LEAA Crime Victim Initiative provided its first grants to prosecutors’ offices (1974), the first ever Victims’ Rights Week was held in Philadelphia (1975), major book *The Victims* was published (1975), the National Organization for Victim Assistance (NOVA) was created (1975), the first “victim impact statement” was used in sentencing (1976), and the National Coalition Against Sexual Assault and National Coalition against Domestic Violence were created (1978). The next decade saw the movement explode, with victims’ issues being of high priority for President Reagan. Wisconsin passed the first Crime Victims’ Bill of Rights (1980), a move that 19 states would follow by 1994; Reagan proclaimed the first National Victims’ Rights Week (1981); the Victims’ Assistance Legal Organization, Inc (VALOR) was founded by *The Victims* author (1981); a presidential Task Force on Victims of Crime was established (1982); the first victim impact panel was sponsored by Mothers Against Drunk Driving (1982); the Victim and Witness Protection Act was passed (1982); the Office for Victims of Crime (OVC) was established in the justice department (1983); the Victims of Crime Act (VOCA) was passed and created the Crime Victims Fund (1984); the National Victim Center was created (1985); and the Victims’ Rights and Restitution Act was passed (1990)²¹. All of these programs grew out of the desire for safety from violence or dignity after violence, but

²⁰ Thuma, 6-7

²¹ Glenn, 42-83

many of their effects ended up supporting the tough-on-crime politics of the day, deepening the false dichotomy of victims vs. defendants, or ingraining existing attitudes about which victims were “worthy.”

Analysis

As mentioned in the previous section, the criminal justice system has a long history of not treating victims of crime with the dignity they deserve. As Markus Dubber describes, “crime is the serious interference with one person’s autonomy (the ‘victim’) by another (the ‘offender’). The state’s response to crime must be designed to reaffirm the autonomy of the former without denying the autonomy of the latter”²² This goal, as Dubber explains, is far from reality. Since the shift from private prosecution to a public justice system, the ultimate victim is not the actual crime victim, but the state. It is the state that is named as party in each criminal case, and prosecutors are attorneys representing “the people.” The best example of this is the existence of victimless crimes such as possession offenses that bloomed during the war on drugs. This effort to protect society leads to mistreatment of both defendants and victims, as victims can be viewed as nothing more than tools to accomplish the goals of the state. They are not whole individuals endowed with personhood, but witnesses, evidence, obstacles or advantages to the machinery of incarceration. This is also not to say that victim mistreatment comes only from state actors; it also comes from defendants, defense attorneys, judges, or their own family, friends, or community. Skepticism, indifference, victim-blaming, or outright hostility are all unfortunately common responses to victims, and they all serve the opposite purpose of vindicating autonomy.

²² Dubber, 210

However, the actual needs of victims in order to restore this autonomy may not be available to them through a criminal justice framework. The public system was never meant to serve the individuals, only the amorphously defined “society.” It is also hard to define how to restore autonomy; different victims and different crimes produce a varying set of needs. Some crimes come with deep lasting trauma, anger, and pain (physical or emotional); others consist of simply a loss of material belongings or money, with the victim left merely wanting back what was taken. Many others fall somewhere between the two. Danielle Sered, director of the non-carceral victim service program Common Justice, identifies several needs for survivors of crime:

Survivors first want validation that what happened to them was wrong. They want their pain taken seriously...survivors want answers. Information contributes substantially to what people in the trauma recovery field describe as the formation of a ‘coherent narrative’...the more information a survivor has about what happened and why, the more thoroughly and quickly they are positioned to heal...Survivors do not only want to ask questions. They want to speak and they want their voices heard...they want a sense of control relative to what happened to them...survivors want access to the resources they need to heal and be safe...many survivors want the person who harmed them to repair the harm as best they can...survivors want to be safe...every single survivor we have spoken to has wanted one thing: *to know that the person who hurt them would not hurt anyone else*²³

The VRM is an attempt to bring these goals to institutions not built to meet them. It is not insignificant that Sered uses the term *survivors* and the law (and the movement) uses the term

²³ Sered, Danielle, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*. (The New Press, 2019), 23-30 (emphasis in original)

victims—a survivor is a *person* who has survived some harm but maintained that personhood, whereas a victim is by definition *victimized*, in a diminished position still linked to the crime and its perpetrator. As Dubber points out, “A victim is essentially a person, and only incidentally a victim...tying benefits, or status, to victimhood only provides an incentive to prolong one’s victimhood.”²⁴ By pushing for state-controlled programs, victimhood is prolonged in order to receive those benefits because the avenue in which those benefits are given defines the survivors as victims.

The criminal system is not made to accommodate the needs of survivors that Sered identifies. A system in which victims are merely tools used to protect society from the threat of the criminal is not centered on a trauma-based approach. Traditionally, victims are meant to be isolated from the process, both figuratively and sometimes literally; under rule 615 of the Federal rules of evidence “the court must order witnesses excluded so that they cannot hear other witnesses’ testimony.”²⁵ This rule is important, as human memory is easily manipulated, so even a witness who claims to remember everything they say may actually be incorporating information and accounts from other witnesses’ testimony into their own. The downside, though, is that it literally locks out victims from facing the perpetrators of the crime, from forming the “coherent narrative” of what took place, from feeling in control of the process. Their chance to speak and have their voices heard is limited to exactly what happened and at what times, and not whatever they might need to say to confront the offender or process their trauma. These are problems that the VRM targets, but its remedies consistently try to fit these needs into a process that is not meant to serve these needs. The Victim’s Rights and Restitution Act of 1990

²⁴ Dubber, 154-5

²⁵ Fed. R. Evid. 615

incorporated a “Victims Bill of Rights” to federal crimes that guarantees “the right to be present at all public court proceedings related to the offense unless the court determines the testimony by the victim would be materially affected if the victim hears other testimony at trial.”²⁶ This helps the victim feel as if they have more control throughout the process and allows them to piece together their “coherent narrative,” but it can do so at the cost of the original intention of the rule. Having the court determine that the victim would be materially affected places a higher burden on the defendant than having the default assumption be that it would. Witnesses and prosecuting attorneys may not know what they do not know, and so cannot be expected to accurately assess whether they would acquire new information by joining the proceedings. This allows victims to take the stand with an advantage that they would not normally have, and the awareness of new information can make the difference in securing a conviction. It also balances out the optics of the courtroom setting. Defendants sit at the defense table, and they are observed (for benefit or detriment) throughout the entire proceedings. They can make themselves ‘look innocent:’ dress well, cry, shake their heads at things they claim to be false, and otherwise perform (both intentionally and unintentionally) to the jury. By having the victim at the prosecution table, it no longer becomes about the state against the defendant, but about two individuals, interests at odds, competing for the sympathies of their peers.

Criminal justice is fundamentally about judgment; it is about judging whether or not a defendant committed a crime, whether they are worthy of our empathy and how much, whether they deserve leniency or enhancement in their sentence, our mercy or our wrath. Value judgments are made towards both the victim and defendant when deciding whether to bring a case, what to charge, and how to prosecute it. Many of the flaws in the justice system recognized

²⁶ Glenn, 24

by victims' rights activists were due to these judgments; African Americans would have their pain dismissed and seen as less important, while white victims were upheld as paragons of goodness and innocence. The juxtaposition of lynchings for black men who were thought to have consorted with white women (often with their consent) against dropped cases and meager fines for white men who felt entitled to black women's bodies is the clearest example of this. The application of the death penalty was also a clear example of this; in *McCleskey v. Kemp*, statistics were cited from a study in Georgia that showed that in cases with white victims, the death penalty was always more likely to be sought. The death penalty was brought in 19% of cases with white perpetrators and black victims, 15% of cases with black perpetrators and black victims, 32% of cases with white perpetrators and white victims, and 70% of cases with black perpetrators and white victims²⁷. White victims were seen as "worthy" of avenging with the might of the criminal justice system, more than doubly so when it could also reinforce notions of black criminality. Despite these statistics, the Supreme Court ruled that this was not enough to prove the Georgia death penalty "arbitrary and capricious" in violation of the 8th amendment. The VRM pushed hard for the presence of the victim (both literally in the courtroom and figuratively with more involvement in the process). They polarized the system by fighting sympathy for sympathy; a defendant sitting at counsel table looking innocent is counteracted by a victim at the other table looking undeserving, a defendant's appeal for an easier sentence is counteracted by the victim's appeal to the harms they suffered, a defendant's appeal for release on parole is counteracted by the victim's same appeal to the harms they suffered. But this push would only serve the victims to whom judgments were positive in the first place; it did not eliminate the disparity, but instead permitted it to flourish. A victim with a low IQ who struggles

²⁷ *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), 357

to answer questions, or with noisy children who could not be taken to daycare, or who enters in shackles themselves, or is black, or Hispanic, or visibly queer does not garner the same sympathy as the stereotypical young, white, educated, “innocent” woman. Every opportunity that the VRM seeks to open up to victim participation, whether it is to accomplish the needs discussed above or to “balance” the process, also opens up the victim to judgment. For many of the leaders of the VRM, this would only benefit them, but it is certainly not a universally beneficial tactic.

Payne v. Tennessee

Background

The Victims’ Rights movement had one particularly significant victory in the early 1990s when the Supreme Court took up the case of *Payne v. Tennessee*. In this case, the defendant, Pervis Payne, was sentenced to death after being convicted of the murder of Charisse Christopher and her daughter Lacey. During the sentencing phase of his trial, the prosecutor pointed to evidence that Nicholas Christopher, who was also stabbed along with Charisse and Lacey but who survived the attack, missed his mother and sister, and asked about them frequently. The prosecutor strongly implied that it was the wish of Nicholas to have Payne executed, despite the fact that Nicholas was far too young to form an informed opinion of this sort. The question at hand was whether the victim impact testimony presented in the sentencing stage of his trial was constitutional under the 8th and 14th amendments (cruel and unusual punishment and due process, respectively).

It was remarkable that the court even granted this case, because it had ruled on this question only four years prior in *Booth v. Maryland*. That 1987 case had ruled 5-4 that victim impact testimony in capital cases was inadmissible because impact unforeseeable to the

defendant at the time of the murder did not contribute to the defendant's "moral guilt." The court even clarified the *Booth* opinion two years later in *South Carolina v. Gathers*, which ruled that evidence of the victim's character that came in on the guilt phase but was equally unforeseeable to the defendant could not be used in the sentencing phase.

Pervis Payne was charged with two counts of murder and one count of assault with intent to murder for an attack that occurred on June 27th, 1987. Charisse Christopher, her 2-year-old daughter Lacey, and her 3-year-old son Nicholas were attacked and stabbed in her apartment building; Charisse and Lacey died, and Nicholas suffered severe injuries. Payne was found guilty on all counts in 1988, so the case continued to the sentencing phase of the trial, where the jury was given the task of deciding between life imprisonment and the death penalty. Under *Booth v. Maryland* precedent, victim impact testimony was prohibited, but the prosecutor in Payne's case brought in the mother of Charisse Christopher who testified to Nicholas' trauma after the attack. She testified, "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie...He says, I'm worried about my Lacie."²⁸ During closing arguments, the prosecutor also made the argument that it was imperative for the death penalty to be chosen in order for justice to be done for Nicholas, saying to the jury, "Somewhere down the road Nicholas is going to grow up, hopefully...He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer."²⁹ The defense counsel argued that these were inadmissible appeals to victim impact that would serve to be more prejudicial than probative. When Payne appealed, the state supreme

²⁸ *Payne v. Tennessee*, (501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)), 814

²⁹ *Payne v. Tennessee*, 815

court argued that his rights were not violated, and that any violation that did exist was harmless beyond a reasonable doubt.

When the case made it to the Supreme Court in 1991, the makeup had changed somewhat. Justice Powell, the moderate author of the *Booth* opinion, retired later in 1987, and the confirmation battles for his replacement were fraught. President Reagan first nominated Robert Bork, an archconservative whose views were too extreme to get him confirmed by the democratic majority in the senate. His next nomination, Douglas Ginsburg, was discovered to have used marijuana several years prior, and in the heat of Reagan's drug war, this was enough to end his prospects. Finally, Reagan nominated Anthony Kennedy, another moderate, to Powell's seat. Despite his moderate views, Kennedy differed from Powell in one (for these purposes) very essential way; his support of victims' rights. In a statement from Frank Carrington, the aforementioned father of the victims' rights movement, to the Senate Judiciary Committee, he stated that "On issues of primary concern to crime victims, Judge Kennedy has taken a forthright position that a balance must be struck between the rights of victims and the rights of accused and convicted criminals."³⁰ The next replacement on the court was that of William Brennan by David Souter. Brennan had been one of the most liberal justices on the court, and importantly, was an ardent opponent of the death penalty his entire career and had committed to ruling against it each time it was presented. In contrast, Souter, though he eventually moved to the liberal side of the court, was moderately conservative for his first few

³⁰ Frank Carrington, "Statement of Frank Carrington," 871

terms, and had favored the death penalty during his times as attorney general and state judge of New Hampshire³¹.

These changes were significant; in 1991, the court ruled 6-3 against Payne, with the majority consisting of the 4 *Booth* dissenters and the new Justices Kennedy and Souter. The Court's decision overturned *Booth* and *Gathers* and once again allowed victim impact testimony to be used in capital sentencing, citing as justification the victims' rights movement that had grown in popularity since their decision in *Booth*. Through analyzing the opinions in this case, we can see how the victims' rights movement was leveraged for an increase in state power.

Analysis

The court was upfront about its reasoning for taking up *Payne v. Tennessee*; they wanted to "reconsider our holdings in *Booth* and *Gathers*."³² The justices wanted this opportunity to overturn the precedent that had only just been set, a choice that, as Justice Marshall pointed out in his dissent, had significant implications considering the court's longstanding doctrine of *stare decisis*. While it is true that *stare decisis* is not rigid, particularly for constitutional cases, it is generally expected that any ruling that violates it has "special justification" or "extraordinary showing" for doing so. In the majority opinion, the justification provided was that "*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts,"³³ though it provided little evidence of the latter claim. This defense that the decision should be overturned simply because

³¹ Johnson, Scott P., "The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution"

³² *Payne v Tennessee*, 817

³³ *Payne v Tennessee*, 828-830

it is unpopular with the court was met with deep criticism from Justice Marshall, who claimed that this was not justification enough to overrule recent precedent. His point, that the majority was making the “radical assertion that it need not even try”³⁴ to provide reason beyond the dissents of *Booth* and *Gathers*, is an important one. *Stare decisis* is an important doctrine to protect the role of the court as a counter-majoritarian institution that often makes decisions to uphold the constitutional rights of minorities even in the face of public opinion. If courts can overturn precedents simply because they were set “over spirited dissents,” then potential justices can be screened by the public to ensure their views on particular issues fit with the dominant public opinion, even if that would be in defiance of the constitution. The justification offered by Justice Scalia in his concurrence was a passing mention that *Booth* “conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.”³⁵ He does not cite any achievements of the movement that occurred between *Booth* and *Payne*, or any evidence that the movement had gotten stronger in those 4 years. This is yet another example of the VRM, without regards to its specific demands and needs, being leveraged to increase power over criminal defendants—in this case, the power to kill them.

Because of how little external justification the court gave, the VRM was not discussed significantly outside of Scalia’s brief reference to it, but crime victims were certainly central to the arguments. It was so central in fact, that the word victim appears a total of 182 times in the decision’s 59 pages. The court’s opinion quickly endorses the idea of the dichotomous justice system, saying that “*Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may

³⁴ *Payne v Tennessee*, 848

³⁵ *Payne v Tennessee*, 834

introduce concerning his own circumstances, the State is barred from either offering ‘a quick glimpse of the life’ which a defendant ‘chose to extinguish,’ or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.”³⁶ The “and to society” in this statement is an attempt to make an adversarial system that pits the victim against the defendant into the public system where “the people” are the party. Viewing the justice system in this adversarial way is deeply incorrect; unlike civil trials in which one person wins and another loses, the scales do not need to be fairly weighted. This is the state trying to impose its most final, awesome power of death upon a person. It is not choosing who lives or dies between victim and defendant, in which case the scales might be apt, but deciding whether the defendant’s life is worth saving. The justice system is not designed to be the retributivist “an eye for an eye, a tooth for a tooth,”³⁷ as Rehnquist admits in the majority opinion. Nor is it wholly consequentialist; the potential danger of the defendant is not the only factor, but the mitigating evidence that the court views as unfairly tipping the scales is an essential part of making the determination that a life is worth keeping.

The jury must have a view into the defendant’s humanity in order to be fully responsible for what they are imposing. Some early protections for defendants were also meant as protections for jurors. For example, the phrase “beyond a reasonable doubt” was meant to protect a jury member’s soul lest they be wrong about the verdict they find; in the Christian faith, they could not be barred entering heaven for wrongly convicting someone as long as they did so without any reasonable doubt in their minds³⁸. Attorney Clarence Darrow once summed up this

³⁶ *Payne v Tennessee*, 822

³⁷ *Payne v Tennessee*, 819

³⁸ Whitman, James Q., "The Origins of ‘Reasonable Doubt’"

dilemma in a death penalty case to a judge whom he told, “where responsibility is divided by twelve, it is easy to say: ‘Away with him.’ But, Your Honor, if these boys hang, you must do it... You can never explain that the rest overpowered you. It must be by your deliberate, cool, premeditated act, without a chance to shift responsibility.”³⁹ Anyone who imposes a death sentence is making this deliberate, cool, premeditated decision. Jury members do not need this same view of the victim’s humanity because they are not making this choice for the victim; killing the defendant will never bring back the original victim. Impact evidence only inflames an emotional reaction that strives for vengeance, and in a collective setting where extreme emotions run high, it makes it all the easier to say, “away with him”.

Even Beccaria, who was a proponent of viewing crimes as harm to society, cautioned against assessing the moral value of the victim, “others have estimated crimes rather by the dignity of the person offended than by their consequences to society. If this were the true standard, the smallest irreverence to the Divine Being ought to be punished with infinitely more severity than the assassination of a monarch.”⁴⁰ Yes, it is true that victims are members of society, but to say that impact evidence indicates the amount of loss to society is reflective of the long-standing tradition of treating some victims as more worthy than others. In a democratic society, there are no monarchs, no divine beings recognized by the law; a person is a person is a person, regardless of whether they leave behind no mourners or hundreds. It is the essential personhood of the victim that is meant to drive the law, yet in trying to humanize victims with impact statements, the opposite effect happens, and the victim is reduced to the external meaning

³⁹ Darrow, Clarence. "Closing Argument. The State of Illinois v. Nathan Leopold & Richard Loeb. Chicago, Illinois, August 22, 1924."

⁴⁰ Beccaria, 17

they provided to others, their loss framed not as the absence of the self but as the grief they leave behind.

This framing of the victim brings up the same issue of judgment as discussed before; only this time, the stakes are as high as they can possibly get. Stevens criticizes the opinion for this reason in his dissent, “the fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others.”⁴¹ He compares the dangers of victim impact evidence to the dangers that prosecutors were permitted to get away with in *McCleskey v. Kemp*, where white victims were more worthy of protection than black victims. Introducing impact evidence is another opportunity for the victim’s family to participate, but, as mentioned before, every opportunity for participation is an opportunity for judgment. *Payne v. Tennessee* extended this judgment to the traumatic arena of grief, the consequences of which have the potential to extinguish another individual’s whole personhood.

Pervis Payne has appealed several more times since the 1991 case, but is set to be executed on December 3rd, 2020. This is despite his intellectual disability that would have disqualified him from death penalty eligibility had his crime been after *Atkins v. Virginia* in 2002. It is despite all of the mitigating evidence that went to show his contribution to his family, friends, and community; all of the potential that he had at the time and still has now. It is despite the significant possibility of his innocence of the crime due to DNA testing and suppressed

⁴¹ *Payne v. Tennessee*, 866

evidence kept from the defense at the time of his trial. This is the power of victims used to support the state's endeavors; the intense pain, confusion, and loss felt by the family of Charisse and Lacey Christopher was taken and put into the 30-year task of sending a man to his death.

Victims' Rights Post-*Payne*

The impact of *Payne v. Tennessee* has been felt both in and out of the VRM. For those in death penalty courts, the results are substantial, and their limits vague. In 2003, more than 10 years after the initial decisions, there were no clear procedural limitations for the use of victim impact evidence by the states. Of the 31 states that still had the death penalty, there was a wide variety of policies on limits to the use of impact evidence, which and how many people could present impact evidence, whether notice to the defendant or an in-camera hearing was required, or whether the witnesses could present their opinion on the death sentence (despite *Payne's* holding that opinions would not be admissible)⁴². One attorney describes the difficulty of defending after *Payne*, "If [impact evidence] is admitted, its emotional power will frequently produce a death sentence. Its introduction over defense objection, no matter how emotionally charged it may be and likely to result in a death sentence 'based on ... caprice or emotion' rather than reason, will almost never provide the basis for a successful argument on appeal."⁴³ Essentially, the exact opposite of the 8th amendment jurisprudential restriction is now allowed to play out in jury after jury, virtually unchallenged.

The ruling was not only useful for prosecutors, but also a huge boost to the VRM, lifting it up on the national stage and declaring that the rights of victims are in opposition to the rights

⁴² Blume, John H., "Ten Years of Payne: Victim Impact Evidence in Capital Cases,"

⁴³ Burr, Richard, "Litigating with victim impact testimony: The serendipity that has come from *Payne v. Tennessee*"

of defendants, even the right to one's life. The movement has had a number of significant victories since *Payne*, in particular the passage of the Violence Against Women Act (1994), Megan's Law (1996), the Crime Victims' Rights Act (2004), and the adoption of Marsy's law in several states (starting in 2008). Just like the victims' rights victories in the 70s and 80s, these laws were passed alongside a huge wave of crime legislation. President Clinton, conservative democrat, regularly used the same dog-whistle rhetoric of his republican colleagues, most famously with the myth of the "super-predator," young criminals lacking empathy or conscience.⁴⁴ His administration saw the endorsement of 3-strike laws (1994), the Brady Bill (1993), the Violent Crime Control and Law Enforcement Act (1994), the Antiterrorism and Effective Death Penalty Act (1996), and "the largest increases in federal and state prison inmates of any president in American history."⁴⁵ The VRM achievements were in concert with these goals, with many victims' organizations now working together with prosecutors, police unions, and parole boards. The campaign for Marsy's law is an excellent exemplification of the grassroots movements of early victim advocacy being coopted. The campaign is funded by billionaire Henry Nicholas, who lost his sister Marsy to murder by an ex-boyfriend in the 1980s. Rather than a restorative approach through dialogue or preventative approach through education about gendered violence, the rights provided by Marsy's law all serve to isolate victims (or victims' families) from their offenders. It prevents "disclosure of confidential information" to a defendant or someone on their behalf and allows victims to "refuse an interview, deposition, or

⁴⁴ Drum, Kevin. "A Very Brief History of Super-Predators."

⁴⁵ Alexander, Michelle, *The New Jim Crow: Mass incarceration in the age of colorblindness*, (The New Press, 2020), 56

discovery request by the defendant,”⁴⁶ both of which serve to hinder the defense’s opportunity to properly prepare themselves for trial. It is also not necessarily productive in meeting the needs of survivors. Instead, it is a campaign that one man has poured millions of dollars into that comes off as grassroots—a move sometimes referred to as astroturfing, that harms defendants.

Alternatives

We are not locked into a pursuit of vindication for victims that relies on courtrooms, cages, and violence. The dichotomous view of victims and offenders is not only false, but harmful to the rights and needs of both parties. There is great work being done building alternatives to a carceral system that actually focuses on the needs of those who have suffered harm. The radical, feminist, and grassroots core of victim advocacy that was exemplified by Rosa Parks’ campaign for Recy Taylor has not been lost to the bureaucratization of victims’ rights.

Non-carceral organizing for safety, particularly the safety of women, is still an ongoing fight, as Emily Thuma details in her book *All Our Trials*, a history of feminist anti-violence work. Thuma discusses the participatory defense campaigns around Dessie Woods, Joan Little, Inez García, and Yvonne Wanrow. These 1970s cases complicate the conception that victims and defendants are dichotomous, as each of these women had killed a sexual assailant. The campaigns in their defense were a broad coalition of “black liberation, feminist, and prison movements that, in turn, transformed leftists’ understandings of who should be considered a political prisoner.”⁴⁷ By placing these self-defensive violence by low-income, racialized women

⁴⁶ “Victims' Bill of Rights.” State of California - Department of Justice - Office of the Attorney General.

⁴⁷ Thuma, 10-11

at the forefront, the campaigns “forced a reckoning” with the carceral mode of addressing violence. Thuma also details campaigns against incarceration as violence, such as the Coalition to Stop Institutional Violence, which organized to prevent abusive prison regimes, specifically blocking the construction of a “locked treatment center for ‘violent women’ prisoners at a state mental hospital.”⁴⁸ This is an important example but is certainly not unique; many organizations, coalitions, and campaigns exist at the local, state, and federal levels to organize against incarceration. These movements push back against the victim narrative claimed by lawmakers and the mainstream VRM to push for harsher policies. Recently in Pennsylvania, the Coalition to Abolish Death by Incarceration (CADBI) organized against life without parole by interrogating the narrative that puts victims and offenders at opposite ends:

Like two sides of a coin, [CADBI speaker Lorraine Haw] and others like her say there’s nothing incompatible about the notion of considering themselves twice victimized: once by the accused — and convicted — killer of their loved ones, and then again by an incomprehensible criminal justice system that condemned family members to the effective living death of endless imprisonment — where they sit without hope of redemption or eventual release.⁴⁹

This notion of “dual victims” of both incarceration and violence is much more compatible with the reality of crime than the false notion of innocent victims and evil offenders. The reality is that those who are likely to be victims of crime are also likely to be perpetrators of crime, both

⁴⁸ Thuma, 11

⁴⁹ Micek, John L., “‘No One Can Ever Tell Me We Don’t Exist’: Dual Victims Caught in the Cracks of Pa.’s Criminal Justice System Deserve Recognition”

demographically (crime victims and perpetrators are disproportionately young low-income black men⁵⁰) and individually (violence begets violence, and trauma is likely to be cyclical⁵¹).

Though movements against incarceration are essential in their practical accomplishments and dialogue shifts, they cannot be the only answer. Dismantling the prison industrial complex is about both destructive actions (the actual dismantling—advocacy against incarceration) and constructive actions (building organizations and institutions that address crime in a better way). Constructive changes to victimless drug sentences are becoming increasingly common, with many treatment centers and programs being chosen as alternatives. There are fewer utilized alternatives to violent crime, but that does not mean they are not there. As Thuma discusses, there were many survivor-focused organizations such as rape crisis centers and domestic violence shelters that centered around feminist principles. Two examples of anti-violence, anti-carceral work she points to are the Coalition for Women’s Safety in Boston, and DC’s Rape Crisis Center that organized the First National Third World Women and Violence Conference in 1980. This conference held conversations of antiviolence that recognized the need to contend with police violence against people of color, reflected “an understanding of rape and battering as fundamentally social problems, rather than the results of individual pathology,”⁵² and a came to consensus on solutions requiring reeducation rather than incarceration for perpetrators of gendered crime.

In a more institutional response, though still outside of the mold of the criminal justice system, Dubber points to victim compensation laws as a potential area for change and expansion.

⁵⁰ Dubber, 155

⁵¹ Sered, 12

⁵² Thuma, 147

This goes back to his earlier argument about conceiving crime as violations of personhood, “it is this focus on the victim, rather than on the act, that distinguishes compensation jurisdiction from punishment jurisdiction,”⁵³ that is, compensation law is about the victim as a person, and how the state (through money) can actually restore their autonomy as a person, whereas punishment law is “about longer sentences, first and foremost,”⁵⁴ quick to point backward to the act when denying sentence reductions, but eager to point forward to the offender’s potential when justifying sentence enhancements. This focus on victim compensation is, however, more about potential than reality, as Dubber also discusses at length the many flaws inherent in the statutes as they exist today. Again, it is made clear the danger of turning to the state to solve problems of the state, because victim compensation jurisdiction is made up of the same views of worthiness that plague the criminal justice system. Victims who participated in any way in the crime (whether as an accomplice, conspirator, or provocateur), and in many states, victims who have been convicted of any crime, not only the one at hand, may be ineligible for benefits. “The language of victim compensation thus is full of moral and religious images. The availability of compensation is a matter of the state’s ‘grace.’ Only ‘innocent’ victims will be considered compensable,” the exploration of which, Dubber points out, is “also frightening, unfettered as it is by concerns about injustice and arbitrariness, prejudice and discrimination, and the proper limits of state intrusion into the affairs and habits of its constituents.”⁵⁵ Victim compensation is an area that has mainstream support with the VRM, but also has the potential to create an alternate, more victim-focused, response than incarceration. Its many limitations, though, show that it needs significant reform before being a practical response that is useful for all victims of

⁵³ Dubber, 248

⁵⁴ Id., 325

⁵⁵ Id., 319-323

crime, including some of the most vulnerable, such as those who find themselves victimized while also being incarcerated.

Lastly, a huge area in constructive action is with the process of restorative justice. Restorative justice focuses on dialogue between survivors and offenders to heal the trauma caused by crime. Restorative techniques have been applied even in the most extreme case of murder, with high profile examples of families forgiving the murderers of their children (such as the case of the Grosmaires⁵⁶) But building a restorative justice framework is not only about extreme cases such as these; as Sered points out, “most of us lie in the vast space between complete hatred and full forgiveness. And far less than is true of extreme mercy, that messy middle is almost nowhere in our public understanding of violence, justice, and healing.”⁵⁷ That messy middle makes up the majority of criminal cases in this country, and its being “almost nowhere” is indicative of how carceral-minded the VRM has been. The main organization focusing on this is Sered’s Common Justice in Brooklyn, which centers its approach around the needs of survivors discussed earlier, and it operates as an incarceration-alternative program (and is the first such program in the US to focus on non-juvenile violent felonies). The success of this organization highlights its need; ninety percent of victims, given the choice to pursue incarceration or a restorative justice process, chose the latter (and, as Sered points out, this is out of the less than half of crime victims who actually call the police). The reason that incarceration has flourished as a response to violent crime is because it has a monopoly on the process; people do not have the option of pursuing alternative routes, or even if they do have the option, they do not know about its existence or what it does. Given the choice between something (incarceration)

⁵⁶ Sered, 21

⁵⁷ Id., 22

or nothing, victims pursue something, trying to make something come of their harm. When we build an infrastructure that is not focused around the state, but around the survivor, it can support the needs of the survivor in ways that do not perpetuate harm to the offender. Both are respected as persons, and their autonomy is restored (as much as it can be) in a positive, constructive way.

Conclusion

The criminal justice system is far from just, either for defendants or for victims of crime. It has always relied on findings on one's fundamental personhood, and this introduces all the problems that follow such value judgments, such as the elevation of the "innocent" or "worthy," and the dehumanization of those deemed "other"—usually historically oppressed groups. It asks who is deserving of our empathy, and the answer it gives is binary: either the victim is, or the defendant. Victims of crime have various needs and wants after their personhood is violated, and the Victims' Rights Movement emerged out of these needs. It's failing, though, was in trying to manipulate the criminal justice system into fulfilling these needs, rather than building up new systems that change how we respond to violence in the first place. New systems are being conceived of and built, though, and as attitudes towards incarceration shift, perhaps we will see more of them being adopted as a society. It is not a measure of strength to bring forth vengeance on those who have committed violence, no matter how easy a solution it might be. Strength is confronting the violence all over our society, whether in individual crimes or institutional oppression, and it is necessary if we ever want our justice system to be just for those who have faced harm.

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