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I. INTRODUCTION

The victims' rights movement has become increasingly influential in setting criminal justice policy. What can be said about where its influence should be heeded, and where it should not? With regard to substantive criminal law in particular, should the victims' rights movement have influence over its formulation and adjudication? The short answer, on which I will elaborate below, is that it ought to have influence over criminal law formulation but not necessarily over criminal law adjudication. It ought to have influence over criminal law formulation because there is great benefit in formulations that track shared lay intuitions of justice, and the victims' rights movement is the dominant organization of lay persons involved in criminal justice reform. 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 upon his blameworthiness (including, primarily, the seriousness of his offense) not on his good or bad luck as to the forgiving or vindictive nature of his victim.

II. THE UTILITY OF HAVING CRIMINAL LAW RULES TRACK LAY INTUITIONS OF JUSTICE

The criminal law should care about lay persons' intuitions of justice because such concern is essential to effective crime control.[1] More than because of the threat of legal punishment, people obey the law because they fear the disapproval of their social group if they violate the law, and because they generally see themselves as moral beings who want to do the right thing as they perceive it.

The normative pressures coming from other people, generally experienced as an external force by the actor, function like the more formal deterrence mechanisms were thought to function. People obey the social norms of their groups because those groups have rewards to give for doing so and sanctions for failing to do so. Three classes of "informal sanctions" are usually identified and can be incurred when one's group judges that one has transgressed: "commitment costs," in which past accomplishments are in jeopardy; "attachment costs," involving the loss of valued relationships with others; and "stigma," discreditation in the eyes of others. These sanctions may follow arrest for a crime, but if the harm-

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1. Part II of this essay condenses the points made in Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

doing act becomes known or suspected within one's community, even if one does not get arrested, informal sanctioning processes may occur. The social costs to the offender may extend beyond the offender's friends and family. If one is thought to have committed a crime, one may lose one's job, ability to borrow money, ability to command trust from others, and possibly business partners.[2]

People's own moral rules and action-proscriptions are generally experienced as internal forces; people recognize that they come from the moral rules that they have adopted. Phenomenologically, we all have experienced this sense of obligation to act in a certain way, to avoid harm to another or to fulfill some commitment we have made.

These two barriers to deviant behavior—social sanctions and internal moral obligations—are analytically and often experientially separable, but in the long term they converge. Children are trained by a powerful socialization process into internalizing the beliefs represented in the social norms of the culture to which they belong. People come to hold the moral standards of the cultures in which they are raised; internal moral standards and external norms generally label the same actions as right or as wrong.

What is the evidence concerning crime prevention due to fear of social sanction or fulfillment of moral obligation? Harold Grasmick and his associates have done the most sustained work documenting the role of the informal determinants of law—abidingness. Their research consistently finds that both fear of social disapproval and moral commitment to the law inhibit the commission of illegal activity.[3] They comment that their "findings highlight the importance of internal control in producing conformity to the law."[4] Other researchers reach similar conclusions. Paternoster and Iovanni conclude that "the greatest effects on delinquent involvement are those from informal forces of social control."[5] Meier and Johnson conclude that "despite contemporary predisposition toward the importance of legal sanctions, [their] findings are . . . consistent with the accumulated literature concerning the primacy of interpersonal influence" over legal sanctions.[6] Tyler's review of existing studies concludes that "testing the ability of each of the attitudinal factors . . . to predict

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2. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545, 564-66 (1986); Daniel S. Nagin & Raymond Paternoster, *The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Conception of Deterrence*, 29 CRIMINOLOGY 561, 562 (1991). For an examination of the effect of criminal conviction on an offender's future earning potential, see John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEGAL STUD. 159, 167-77 (1992); John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583, 584 (1992).

3. Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980).

4. Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC'Y REV. 837, 854 (1990).

5. Raymond Paternoster & Leeann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 769 (1986).

6. Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292, 302 (1977).

variance in compliance . . . [t]he most important incremental contribution is made by personal morality, . . ."[7]

The evidence reviewed suggests that the influences of social group sanctions and internalized norms are the most powerful determinants of conduct, more significant than the threat of deterrent legal sanctions. But the law is not irrelevant to the operation of these powerful forces. Criminal law, in particular, can influence the norms that are held by the social group and internalized by the individual. Criminal law's influence comes from being a societal mechanism through which the force of social norms is realized and by which the force of internal moral principles is strengthened. That is, the law has little independent force, the way social group norms and internalized norms do. It has power to the extent that it can amplify, sustain, and shape these two power sources. It has power to the extent that it influences what the social group thinks and what its members internalize.

A. The Criminal Law's Compliance Power as a Moral Authority in Unanalyzed Cases

One effect the criminal law has in shaping conduct, specifically in gaining compliance with its demands, is its ability to resolve ambiguity as to the wrongfulness of the contemplated conduct. If it has developed a reputation as a reliable statement of existing norms, people will be willing to defer to its moral authority in cases where there exists some ambiguity.

There is evidence, largely collected and analyzed by Tyler, that people are inclined to accept the law as a source of moral authority that they themselves should take seriously.[8] This is referred to in social science as informational influence—influence produced by the information transmitted by a specific institution, in which one accepts the validity of the definition of right and wrong behavior conveyed by that institution, internalizes that definition, and expects other people to have internalized it as well. Tyler reviews the literature that relates a person's belief that a law reflects a valid moral rule to obedience to that law and finds them to be quite strongly related.[9] He notes:

> This high level of normative commitment to obeying the law offers an important basis for the effective exercise of authority by legal officials. People clearly have a strong predisposition toward following the law. If

7. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 60 (1990).
8. *Id.* at 25.
9. *Id.* at 37.

> authorities can tap into such feelings, their decisions will be more widely followed.[10]

Tyler reviews a number of studies that suggest the level of commitment to obey the law is proportional to what Tyler calls the law's perceived "legitimacy," by which he means a community's perceptions that, first, the law instantiates their moral beliefs, and, second, that the law came into being via fair procedures conducted by the appropriate authorities.[11] Tyler reasons that, if one regards the law as a legitimate source of rules, if it has what John Darley and I have called "moral credibility," then one should be more likely to regard the law's judgments about right and wrong as an influential fact in one's own moral thinking; in turn, one should be more likely to obey the law.[12] Further, one should be more likely to support the authorities that promulgated the law. To test this contention Tyler reviews a number of studies that examine individual differences in perceptions of the law's legitimacy, and relate those differences to differences in support for legal authorities and felt obligations to obey the law.[13]

> [S]ix studies . . . address the question of whether feelings of [the law's] legitimacy lead to behavioral compliance with the law and legal authorities, regardless of whether these feelings are expressed as support for the authorities or as an obligation to obey . . . . These studies suggest that those who view authority as legitimate are more likely to comply with legal authority, whether the legitimacy is expressed as obligation or as support . . . .[14]

Also as one would expect, those who perceive the political authority that governs them to be less legitimate are more likely to engage in acts of social or political protest, some of which are illegal. More research on this issue is obviously needed, but the current research supports the claim of a connection between perceptions of the law's moral credibility and obedience to the law.[15]

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10. *Id.* at 65. In another study, Grasmick and Green conclude: "each of the three independent variables [of deterrence by threat of legal punishment, social disapproval, and personal moral commitment] makes a significant, independent contribution to the explained variance [i.e., the rate of criminal behavior]." Grasmick & Green, *supra* note 3, at 326.

11. *See* TYLER, *supra* note 7, at 64-68. The specific studies noted are listed in Tables 3.1-3.3. *Id.* at 32-37.

12. *Id.* at 37-38

13. *Id.* at 31.

14. *Id.* at 31. Tyler suggests that the law gains legitimacy in two ways, only one of which Darley and I emphasize in our argument. First, and the element we emphasize, the law gains legitimacy because it is seen as in accord with the moral rules of the community. Second, it gains legitimacy because it is the product of processes such as legislation and judicial debate, which processes that society has agreed are the appropriate ones to enact such laws. The laws are the products of legitimate authority, in other words. We agree that procedural fairness is an important additional element producing moral credibility for the law.

15. Notice that, as a matter of common sense, the law's moral credibility is not needed to tell a person that murder, rape, or robbery is wrong. The criminal law's influence in this respect as a moral authority has effect primarily at the borderline of criminal activity, where there may be some ambiguity as to whether the conduct really is wrong.

B. *The Criminal Law's Ability to Facilitate the Shaping of Shared Norms*

A second and more powerful way criminal law influences conduct is by influencing the shaping of shared norms, thereby harnessing the powerful social forces of normative behavior control. The norms at issue here are of a limited sort, of course. Criminal law ought to and does have little interest in norms that influence everyday matters of style, dress, speech, and manners. Cutting in line, being rude, or wearing revealing clothing may be annoying to some people, but it generally is not, and ought not be, criminal. Even if most people frowned upon such violations of norms, the conduct ought not be criminal because it fails to reach the level of seriousness that deserves the condemnation of criminal liability, which is typically and properly limited to the violation of norms against violence and dishonesty.[16]

1. *The Educative Function of Criminal Law Adjudication and Legislative Debate*

Social science suggests that the criminal law builds and maintains societal norms in several related ways. First, criminal law enforcement and adjudication activities send daily messages to all who read or hear about them. Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender's conduct and confirms its condemnable nature.[17] The public condemnation expressed in reaction to the offense supports and encourages the efforts of those who have resisted temptation and continued to remain law-abiding. Having avoided breaking that law, people can regard themselves favorably, which in turn reinforces their moral commitment to the norm expressed in the offense.

Further, every adjudication offers an opportunity to confirm the exact nature of the norm or to signal a shift or refinement of it. Thus, an endangerment or manslaughter prosecution of a polluter points out that some instances of polluting can violate the norm against endangering others. The publicity surrounding an adjudication can teach all people about the consequences of certain kinds of polluting and, therefore, that it ought to be avoided. Kai Erikson's studies point out the role of criminal law in marking the limits between allowable, although perhaps regrettable, conduct and criminal conduct: the prosecution of a deviant

16. There are some exceptions, however. Bestiality and eating the flesh of human corpses, for example, remain criminal because the norms against such conduct remain strongly and widely felt.

17. At the same time, regular non-enforcement or a declination to prosecute or to convict tends to undermine the norm prohibiting the conduct. Thus, adultery may remain on the books, but a policy of not prosecuting it takes away the criminal law's support of any norm against such conduct that may have existed.

brands the deviant as a criminal, and casts a bright light on the exact location of a boundary that previously might have been obscure to the community.[18]

Further, people are likely to attend to the comparative liabilities that are assigned by sentencing provisions of legal systems; people intuit that more morally serious offenses should command greater penalties. As Cook remarks, "[t]he legislated (and actual) severity of penalty for a particular offense may influence the public's feeling for the seriousness or moral repugnance of this offense."[19] In the long run, for those crimes in which "moral inhibition" plays an important role, announcing high severity of punishment may be an important communication—more important than ensuring high probability of punishment, which is generally not possible.

The criminal adjudication process is not the only forum for public discussion and announcement. Legislative proposals for criminalization, decriminalization, or increased or decreased punishment, also provide an occasion for public debate that can help build norms, with the conclusion of the debate announced by legislative action, or inaction. The public discussion about the problem of hate speech and proposals to criminalize it, for example, help strengthen the shared public understanding that such conduct is condemnable. When one seeks to criminalize an act, the debate should say why that act endangers others, or otherwise fits the case of those things we are willing to criminalize. In our complex, interdependent society, this can be instructive. If lawmakers argue that an act should not be criminalized, or should be decriminalized, then they should be able to say why it does not resemble the sorts of things that are now criminalized.

2. *The Relationship Between Criminal Law and Community Norms*

The claim here is only that criminal law can *contribute* to the formation and change of community norms and individuals' moral reasoning; laws cannot themselves compel community acceptance. Passing a law cannot itself create a norm, and not passing a law against certain conduct cannot make that conduct morally acceptable to the community. The passage and subsequent failure of National Prohibition shows the law's limited ability to change norms even when the change is supported by a significant portion of the public.[20] The law is, rather, a vehicle by which the community debates, tests, and ultimately settles upon and expresses its norms. The passage of criminal legislation more often reflects a critical level of support for an incipient norm. The act of criminalization sometimes nurtures the norm, as does faithful enforcement and prosecution, and over time

18. KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 11 (1966).

19. Philip J. Cook, *Punishment and Crime: A Critique of Current Findings Concerning the Preventative Effects of Punishment*, 41 LAW & CONTEMP. PROBS. 164, 177 (1977).

20. In December of 1933, the repeal of the Eighteenth Amendment was completed by the adoption of the Twenty-First Amendment. It was, "[i]n hindsight . . . the logical outcome of a foolish, unpopular reform." DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 3 (Kent State Univ. Press 2000).

the community view may mature into a strong consensus. The criminal law is not an independent player in that process, but rather is a contributing mechanism by which the norm-nurturing process moves forward.

We have seen the process at work recently in enhancing prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence. It also has been at work in diluting existing norms against homosexual conduct, fornication, and adultery. While it is difficult to untangle how much the criminal law reform followed and how much it led these shifts, it seems difficult to imagine that these changes could have occurred without the recognition and confirmation that comes through changes in criminal law legislation, enforcement, and adjudication.

Perhaps more than any other society, ours relies on the criminal law for norm-nurturing. Our greater cultural diversity means that we cannot expect a stable pre-existing consensus on the contours of condemnable conduct that is found in more homogeneous societies. We require more public debate and discussion to reconcile conflicting views and more public education on the refinements and consensuses that result. Unlike many other societies, we share no religion or other arbiter of morality that might perform this role. Our criminal law is, for us, the place we express our shared beliefs of what is truly condemnable.

That challenge for criminal law also gives it a potential power. A criminal law that earns a reputation of moral credibility can influence the shaping of norms and, through them, conduct. But to become a moral authority, the criminal law cannot deviate too far from what the community thinks is just, that is, too far from lay intuitions of justice. Why does the criminal law care what the layperson thinks is just? Because it is only by heeding those views that the criminal law can provide effective crime control.

III. THE IMPROPRIETY OF HAVING CRIMINAL JUSTICE ADJUDICATIONS INFLUENCED BY THE VICTIM'S VIEWS OF PUNISHMENT

There are a variety of proposals for victim involvement in the criminal justice process. Many are unobjectionable, even important. For example, a recent U.S. Department of Justice report urges that victims have a right to notification of bail, trial, parole, and related hearings; notification of offender escape or release; restitution; notice of disposition of their victimizer's case; and notification of these rights and standing to enforce them.[21]

However, other proposals for victim involvement in the criminal justice process are problematic, in particular, those reforms that involve the victim in the

21. U.S. DEP'T OF JUSTICE, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY xii (1998).

adjudication of the victimizer's case. Some involvement is important, indeed central, to a just adjudication: providing information to the jury at trial or to the judge at sentencing can be essential to understanding the nature and extent of the harm caused.[22] But providing decision-makers with information on impact is quite different from influencing the decision-making process, and some proposals for victim involvement go beyond the former to reach the latter. At the extreme, for example, some would give victims a veto over plea bargains.[23] A common and somewhat more ambiguous practice is requiring prosecutors to consult with victims before entering into a plea agreement or before making sentencing recommendations.[24] Some states give the victim a right to present to the court his or her views on the sentence he or she wants imposed.[25] What these reforms have in common is their invitation to victims to not only give information about the impact of the offense but to have some influence over the punishment decision.

Why should this be objectionable? Why shouldn't victims have a say in the punishment to be imposed on their victimizer?

First, such victim influence is inconsistent with our reasons for being so careful to have impartial judges, jurors, and prosecutors. Our notions of fairness and justice demand that such decisions be made by *impartial* decision-makers who will look only to the facts of the case and not be swayed by a personal stake in it. We typically make it a crime for parties to influence decision-makers who are represented to be neutral.[26] Even prosecutors are commonly disqualified if they have a personal stake in a case.[27] (And American criminal justice typically does not allow private prosecutions).[28] If we think a prosecutor's personal stake

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22. Many states provide and the American Bar Association supports a right to present a victim impact statement. *See* MARY L. BOLAND, CRIME VICTIM'S GUIDE TO JUSTICE, 139-70 (2001) (providing a compilation of state-by-state laws); UNIF. VICTIMS OF CRIME ACT § 216 (1992).

23. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 193 (1995).

24. *See, e.g.*, ARIZ. REV. STAT. §§ 13-4401-13-4415 (2001); 120 ILL. COMP. STAT. ANN. 725 (West 1992); LA. REV. STAT. ANN. §§ 46.1841-46.1844 (West 1999); MONT. CODE ANN. §§ 46-24-201-24-213 (2000); S.C. CODE ANN. §§ 16-3-1510-3-1560 (Law Co-op. 1985). Other states require prior notification of victims of proposed plea agreements before they are presented at trial, presumably to give victims an opportunity to argue their objections to the prosecutor before the agreement is formalized. *See, e.g.*, CAL PENAL CODE §§ 679.02, 679.03 (West 1999). Giving victims a right to give their views to the prosecutor on a proposed plea agreement or to a sentencing judge on a proposed sentence is a bit of a gray area. The giving of views, it might be argued is like giving other information that is unobjectionable. But my own view is that it is importantly different. The giving of views on a proposed disposition is simply an attempt to influence. We criminalize that kind of partisan attempt at influence in other contexts—such as a party trying to influence a juror—why would it be different here?

25. *See, e.g.*, ALASKA STAT. §§ 12.61.010-12.61.030 (Michie 1962); ARIZ. REV. STAT. §§ 13-4401-13-4415; KY. REV. STAT. §§ 421.500-421.550 (Banks-Baldwin 2001); ME. REV. STAT. ANN. tit. 15, § 6101 (West Supp. 2001); N.D. CENT. CODE ANN. §§ 12.1-34-.01-12.1-34-.05 (Michie 1997); OHIO REV. CODE ANN. §§ 2930.01-2930.19 (Anderson 1999); R.I. GEN. LAWS §§ 12-28-1-12-28-10 (Michie 2000); S.D. CODIFIED LAWS §§ 23A-28C-1-23A-28C-5 (Michie 1998).

26. KAN. STAT. ANN. § 21-3815 (1995); MISS. CODE ANN. § 97-9-55 (Michie 1972); MO. STAT. § 575.260 (Vernon 1995); VA. CODE ANN. § 18.2-460 (Michie 1996 & Supp. 2002).

27. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.3 (3d ed. 1993).

28. *Id.* § 3-2.1.

in a case ought to disqualify him or her, on what grounds could we justify allowing the most interested party—the victim—to have a veto or other influence over the prosecutor's liability and punishment decisions?

Second, every victim deserves to have his or her offense taken equally seriously. Both our notions of the equality of individuals and our notions of justice demand that the murder of the homeless beggar ought to be treated as seriously as the murder of the loved family member. The punishment in a case ought not depend upon whether the victim happens to have a family that has the means and the interest to actively press for greater punishment.

Third, because different victims inevitably have different views on how they want a case handled, giving victims influence in the decision-making is to ensure disparity in punishment among similar cases. Greater punishment is appropriate for an offender who causes greater harm as compared to one who causes less harm, and greater punishment is appropriate for an offender who acts intentionally as compared to one who acts only recklessly or negligently, but greater punishment is not appropriate simply because one victim is vindictive as compared to another who is forgiving. Justice demands that a defendant's liability and punishment depend upon his blameworthiness for the offense, not upon other factors over which he has no control, such as his bad luck in having a vindictive rather than a forgiving victim.

These objections to having victim influence in the punishment decision are presented here as ethical objections, but they have an important practical component as well. As Part II of this article describes, the criminal justice system's ultimate ability to gain compliance depends in large measure upon the moral credibility it has earned with the community. Thus, the distortions of justice enumerated above—having punishment depend upon factors extraneous to the offender's blameworthiness and having disparate punishment imposed upon offenders of similar blameworthiness—undermine the system's moral credibility and, therefore, undercuts its long-term crime control power.

Thus, even if victim participation in the punishment decision might have beneficial effects for the victim at hand, the long-term effect of such participation is to de-legitimize the process and to produce results inconsistent with our shared intuitions of justice, and that hurts us all in the end. If we sympathize with this victim, we must also sympathize with future victims and show as much concern for their interests. Ultimately, the class of victims and potential victims will be better served by a criminal justice process that seeks to impose the punishment each offender deserves, no more and no less. Moreover, the natural partiality of victims tends to distort the criminal justice process from just punishment and, equally importantly, is seen to openly prejudice the search for impartial justice.

IV. CONCLUSION

It's worth confirming how important victim participation in the criminal justice process can be, including active involvement in determining the punishment. As Fletcher argues: "The purpose of 'victim participation' is to restore the dignity of the victim and all those affected by the crime."[29] Participation can help a victim regain a sense of security and to shed the sense of powerlessness that victimization often produces. And as the so-called "restorative processes" like victim-offender mediation and sentencing circles have shown, victim participation in the disposition of a case can have beneficial effects for the parties involved and for society generally.[30]

Victim participation also can provide important oversight and accountably to a system that historically has had little of either. Prosecutors can cut plea-bargains for bad reasons—to save money or for political reasons—and there is little recourse. A regular presence by victims can inspire prosecutors to avoid questionable deals. Sentencing judges also might be kept more attentive if the system had regular victim involvement.

But many, if not all of these benefits can be achieved by victim participation short of influencing the punishment decision. A right to notification and presence at hearings and a right to present all relevant information ("victim impact statements") can provide much of the needed oversight and can inspire much victim "restoration."

It may be possible to allow more participation than just the giving of an impact statement. While it may be problematic to give the victim a personal say in the punishment of his victimizer, it would not necessarily be problematic to allow participation in that decision by a *victims' organization*. The organization might help insure that prosecutors and judges will take account of the harm to the victim in determining the extent of liability and punishment. Because the organization sees the full range of criminal cases and kinds of victimizations that the individual victim does not, the organization has the ability, if properly motivated, to realistically and dispassionately assesses how the case compares to the full range of other cases. In other words, the victims' organization can fulfill the demand of justice that each offender be punished according to his *relative* degree of blameworthiness, as compared to all other offenders and offenses.

To summarize, then, I would encourage the active participation of victims' organizations in both the formulation and the adjudication of criminal law, but I would discourage the participation of an individual victim in deciding the punishment to be imposed on his or her own victimizer.

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29. FLETCHER, *supra* note 23, at 189.

30. Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* UTAH L. REV. (forthcoming 2003) (manuscript at 7-10, on file with author). Such "restorative processes" can be practiced in ways that are objectionable because they frustrate doing justice—as they often are under the "Restorative Justice" movement—but this need not be so; they can be practiced in ways consistent with doing justice. *Id.*