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Justice and Fairness in the Protection of Crime Victims

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JUSTICE AND FAIRNESS IN THE PROTECTION OF CRIME VICTIMS

by
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In this Article, Professor Fletcher discusses the crucial distinction between justice and fairness—as well as its effect on the shifting "boundaries of victimhood"—from a comparative viewpoint by examining the approaches that various human rights instruments take to the problem of victims' rights. While the European Convention on Human Rights represents an evolving "middle ground" in the treatment of victims' rights (such recent cases as X. & Y. v. The Netherlands, A. v. United Kingdom, *and* M.C. v. Bulgaria *are examined), only the* Rome Statute *of the International Criminal Court gives real priority to victims of crime with its emphasis on the eradication of "impunity" in international criminal cases. Indeed, Fletcher asserts that the ICC represents a significant victory for the victims' rights movement as a whole.*

I. INTRODUCTION

Sydney Morgenbesser, late professor of philosophy at Columbia, was well-known for his impious humor. He buttonholed us as we walked across campus and, like Socrates in the Agora, he posed questions that would both make his colleagues laugh and keep us pondering for the rest of the day. His wit also held great wisdom, as exemplified in the following encounter with a lawyer in court that occurred in the aftermath of the 1968 protests on the Columbia campus and the police intervention.

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During a trial about alleged police brutality, a lawyer asked Sydney under oath whether the police had beat him up unfairly and unjustly. He replied that the police had assaulted him unjustly, but not unfairly. The lawyer was puzzled. "How is that possible?" he queried. "Well," Sydney reportedly said, "They beat me up unjustly, but since they did the same thing to everyone else, it was not unfair."

This anecdote reveals an important distinction between the concepts of justice and fairness. Justice is about what we deserve—individually. Fairness is about the way we are treated in comparison to others. In criminal procedure, we encounter this problem every time we acquit or reverse the conviction of someone who is in fact guilty of a crime. Criminals might, in principle, deserve punishment for their deeds, but they are subject to conviction and punishment only if the state has given them a fair trial and proven their guilt beyond a reasonable doubt.

By and large, in criminal cases, justice is associated with the interests of victims; fairness, with the interests of defendants. If we hear the slogan, "No justice, no peace," we know immediately that it pertains to the interests of victims.[1] Indeed, one pro-victim website now takes this slogan as its title.[2] Fairness speaks to the interests of defendants, without assuming guilt or innocence. A fair trial is one that satisfies two desiderata of equal treatment. First, as Sydney's anecdote reveals, the defendant must be treated the same way as are other defendants, and that means that we must accord the same treatment to those we strongly suspect are guilty as to those who are probably innocent. Also, there must be some effort to maintain "equality of arms" between the prosecution and the defense, though the proper balance between the two has never been clearly worked out.[3] The defense is permitted many privileges not available to the prosecution. For example, in the common law system, the prosecution must prove guilt beyond a reasonable doubt, and verdicts of acquittal are not subject to appeal—though verdicts of guilty are. By contrast, the common law prosecutor has many advantages in the field of substantive law; for example, the possibility of overcharging in order to induce a plea bargain.[4] However the balance of advantage between prosecution and defense is struck, the now widely accepted requirement of a fair trial speaks not to what the particular defendant deserves, but to how criminal defendants as a class should be treated in assessing individual liability.

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[1] One of the first instances of this slogan occurred when Hasidic Jews began to protest the killing of Yankel Rosenbaum on August 19, 1991. *See* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 1 (1995).

[2] *See No Justice No Peace*, *at* http://nojusticenopeace.blogspot.com/ (devoted specifically to issues of violence and injustice in Haiti).

[3] See my exploration of the issue in FLETCHER, *supra* note 1, at 149–76.

[4] For a systematic consideration of the differences between the position of the defendant in common law and civil law trials, see GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS 531 (2005).

II. THE UNDISCUSSED BOUNDARIES OF VICTIMHOOD

When we are discussing the rights of victims, we take it for granted that, regardless of whether the particular defendant is guilty, we know who the victim is. We rarely refer to an "alleged victim" in the way we routinely speak about alleged offenders. One reason for this disparity is that the person identified as the victim has actually suffered, and there appears to be at least a plausible connection between the suffering and the wrongful actions of some criminal suspect. Nonetheless, our confidence in who the real victims are should give us pause.

In fact, the easy assumption of victimhood camouflages a number of very difficult conceptual issues. First, it has always been difficult to figure out who the victim is in homicide cases. Of course, in one sense the decedent is the victim—but in another sense, he or she is not. We no longer believe that the blood of the victim cries out from the ground.[5] The decedent is gone. Given our modern sensibilities about rights, it is difficult to claim that the dead have rights or even interests.

It is more plausible to treat the family members as the victims, but this too is puzzling. Certainly they feel the loss and grieve for the decedent. But the number of people included in this category—as well as their ranking—remains elusive. Are cousins included? Are spouses more important than parents or children? Do friends count? What about mistresses and lovers? We encounter similar problems in defining the category of people who have standing to complain of wrongful death under the legislative variations of *Lord Campbell's Act*.[6] But there is no reason to assume that being harmed for purposes of tort law is the same as being victimized under the criminal law.

Further, not all persons who suffer count as "victims." Consider aggressors who are injured by legitimate actions of self-defense. Are they victims? What about those who are executed in conformity with a lawful judgment? The aggressor and the condemned criminal may suffer, but they are not victims in the ordinary sense.[7] Yet there might be other cases—say, of excused rather than justified conduct—where the object of the violent excused behavior would nonetheless be called a victim. When the offender is excused by reason of insanity, for example, the person he or she has killed is still called a victim. Even though the distinction between justification and excuse has not always been recognized in the literature of the common law, our usage of the term

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[5] This is the way the Bible speaks of the victim of the first homicide. *See Genesis* 4:10 (Oxford Annotated Bible) (Cain and Abel).

[6] Lord Campbell's Act, 1846, 9 & 10 Vict. c. (Eng.) (entitled, "An [a]ct for compensating the [f]amilies of [p]ersons killed by [a]ccidents"), soon served as the model for similar legislation in most of the American states as well as Canada. The first U.S. variation was passed in New York in 1847. *See generally* FRANCIS B. TIFFANY, DEATH BY WRONGFUL ACT: A TREATISE ON THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH (1893).

[7] Someone might refer to persons condemned and executed as the "victims of our system of criminal justice." It is clear that this usage would be metaphorical.

"victim" implicitly incorporates the distinction.[8] This is, of course, true in other languages as well.[9]

Other conundrums arise in the borderlands of the concept. Attempted offenses typically endanger specific persons. A person aims a gun and pulls the trigger, but the gun jams. It is the person being aimed at a victim? Probably not. Would the answer come easily if the person being aimed at were asleep? Yet, the defendant is guilty of attempted murder regardless of whether anyone else is conscious of the danger manifested in his actions. Perhaps it is the case that victims must actually be hurt and not merely threatened.

For most purposes, the analysis of victimhood remains outside the law applied in the courts. There is one instance, however, in which very strong assumptions are made about who is a victim and who is not—namely, in the law bearing on victims' impact statements in capital sentencing in the United States. The question is, who is entitled to make a statement to the court on behalf of the victims? I am afraid that this problem has not received the principled analysis it deserves. One could well argue that the relevant victim for purposes of sentencing should not be the particular decedent but the abstract person whom we protect by asserting that all human beings enjoy a right to life.[10] Whether the right to life is violated does not depend on whether the victim has a family, or whether that family will miss him or her. The right bears the same value whether it is instantiated in a young mother with three children or a gutter bum despised by all around him. Yet the way capital sentencing works in practice, it makes a tremendous difference whether the decedent had a family and whether they were closely attached.[11] In a case like the Menendez case in California, where two sons were prosecuted for killing their immigrant parents, no one appeared at trial or during the sentencing phase to bear witness to the victims' importance as human beings.[12] Does it make sense as a principle of justice that those who kill the unloved among us should receive a lighter sentence?[13] On the contrary, justice for victims requires that we abstract from the particular victim and focus on elements of humanity shared by all.

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[8] There is now a vast literature on the distinction. *See* Russell L. Christopher, *Symposium Forward*, 39 TULSA L. REV. 737, 744, 751 (2004).

[9] I do not address in this Article the profound phenomenon that in virtually all languages tied to Abrahamic religions (Judaism, Christianity, and Islam) the word for the victim of crime is the same as the victim of religious sacrifice. This topic is examined in detail in my forthcoming book GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, EUROPEAN AND INTERNATIONAL (forthcoming 2006).

[10] I have argued this line in FLETCHER, *supra* note 1, at 247–48.

[11] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[12] For a discussion of the case, *see* FLETCHER, *supra* note 1, at 141–48.

[13] This is one point in which I part company with the conventional victims' rights movement, which apparently endorses victims' impact statements at sentencing. *See* FLETCHER, *supra* note 1, at 247–48.

III. TWO TYPES OF BASIC LAWS

With one exception, the basic instruments of human rights ignore the status and rights of victims. None of the constitutions of the world, so far as I know, even mention the victims of crime. The American, German, and Canadian constitutions elaborate the rights of criminal defendants but ignore the other side of the equation. They are devoted to the problem of a fair trial for the accused, not the issue of justice for those who have suffered from crime. The one big exception to this pattern, which I take up below in detail, is the *Rome Statute* establishing the International Criminal Court (ICC).[14] The *Rome Statute* begins in its *Preamble* by referring to the twentieth century problem that "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[15] The purpose of the *Rome Statute* is to vindicate the interests of these victims.

The proper question we should ask ourselves is how and why this enormous gap in orientation has arisen. Why do the basic legal documents of human rights and civil liberties fall into these opposing categories—the many that focus exclusively on fairness for the accused, and the one that stresses the problem of justice for victims?

The European Convention of Human Rights (ECHR) represents an important middle ground between these two extremes. The jurisprudence of the European Court of Human Rights in Strasbourg is worth reviewing in some detail because it reveals the difficulties of generating principled recognition of the rights of victims. The absence of constitutional protection for victims is hardly an accident. Extending the concept of individual rights to encompass victims requires considerable legal imagination.

The text of the ECHR, adopted in 1949,[16] is silent on the rights of victims, but in 1985, the Strasbourg Court began to explore the doctrinal possibilities of recognizing a violation of the Convention when states fail to adequately prosecute criminal offenses. The first case was *X & Y v. The Netherlands*,[17] where a mentally handicapped young woman was induced by a young man to have intercourse while she was a resident in a mental hospital. The Dutch penal code provided for liability, but only if the victim herself filed a complaint. The prosecutor decided that the victim was not mentally competent to file the complaint, and they would not accept her father's complaint as a substitute. The father brought a complaint to the Strasbourg Court on the grounds that the Dutch authorities had violated his and his daughter's right to a "private life" under Article 8 of the ECHR. The Court decided that the failure to prosecute

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[14] U.N. International Criminal Court, Rome Statute, art. 1, U.N. Doc. A/CONF.183/9* (1999).

[15] U.N. International Criminal Court, Rome Statute, Preamble, U.N. Doc. A/CONF.183/9* (1999).

[16] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950.

[17] X. & Y. v. The Netherlands, App. No. 8978/80 (Feb. 28, 1985), *available at* http://www.echr.coe.int/Eng/Judgments.htm.

was indeed a violation of his right to privacy. The remedy, however, was merely to provide a minimal compensation (3000 guilders—about €1400) to the victim.[18] There was no order directing the state to prosecute and surely no way that the Council of Europe itself could have undertaken prosecution. Indirectly, however, the message was that the Netherlands must correct the flaw that led to the failure to prosecute the case—and in fact, they did so.

The legal theory of the case, however, based on the right to privacy, is a bit farfetched. It might have made sense to say that the young man who had sex with Ms. Y violated her personal privacy. But it is not clear why the failure to prosecute the crime in itself constitutes a violation by the state of the same article. In effect, the Court was applying the German constitutional theory of *Drittwirkung* (third party effect), by which private parties secure protection under the constitution against other private parties, but there was no explicit invocation of the German doctrine. Instead, the Court refers vaguely to the possibility of "positive obligations inherent in an effective respect for private or family life."[19]

In an even more intriguing development, the Strasbourg Court devised a way to regulate private relationships under a broad interpretation of Article 3 of the ECHR, which holds: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[20] At first blush it seems that the terms "torture" and "punishment" should apply only to actions of the state, but the Court has read the provision to protect children against corporal punishment by their parents. In *A. v. United Kingdom*, decided in 1998,[21] a stepfather had beaten his nine-year-old stepson and was prosecuted for assault, but acquitted on the grounds that he was entitled to use a reasonable amount of force as chastisement. The Court found that the stepfather's beating the boy had constituted "degrading. . . punishment" and therefore the U.K. was in violation of the Convention for not having protected the victim.[22]

The reasoning of the Court takes a middle position between the imposition of duties under the ECHR on private parties and the stressing of the "positive obligations" of the state. Here is the general language:

> The court considers that the obligation on the high contracting parties under art 1 of the convention to secure to everyone within their jurisdiction the rights and freedoms defined in the convention, taken together with art 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.[23]

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[18] *Id.*

[19] *Id.* at para. 23.

[20] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16, at art. 3.

[21] A. v. U.K., App. No. 25599/94 (Sept. 23, 1998), *available at* http://www.echr.coe.int/Eng/Judgments.htm.

[22] *Id.*

[23] *Id.* at para. 22.

In its latest move to protect victims, the Strasbourg Court imposed a broad general duty, in *M.C. v. Bulgaria*, to enact an effective criminal law protecting women against rape.[24] The Court submitted a highly learned opinion that canvassed the recent legal developments of several European states, the United States, and the ad hoc international tribunals on the relevance of using or threatening force to the definition of rape. The conclusion was that Bulgaria breached its duty under Articles 3 and 8 (the two provisions invoked in the prior cases discussed) by failing to adopt a definition of rape that would provide women with protection against unwanted sex in the absence of the traditional emphasis on force or threat of force.[25]

This holding is a far cry from the two earlier cases. The case of *X. & Y. v. The Netherlands* was based on what appeared to be an arbitrary exception for mentally handicapped victims of rape. The case of *A. v. United Kingdom* reflected private conduct that could be properly called "inhuman or degrading punishment" as explicitly prohibited by Article 3 of the ECHR. In the most recent case against Bulgaria, the notion of degrading punishment has merged with the broader idea of ill-treatment. Though the Court did say, as quoted above, that the member states of the Union must take measures "designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals," the range of the former now seems to have no bounds. The Strasbourg Court has assumed the remarkable burden of supervising and rewriting the criminal codes of all the member states.

It is important to keep in mind, however, that in these cases the power of the Strasbourg Court is severely limited. They do not order states to change their laws, nor do they reverse judgments entered in the national court. The only remedy offered is monetary damages to the victim. Thus, a new species of international tort law seems to be emerging, based on the failure of states to protect their citizens against harm. Of course, there might have been a tort remedy available in Bulgaria against the defendants, but the Court holds, without much reasoning, that the member states must provide criminal sanctions for this type of harm.[26] In a separate concurring opinion, Judge Tulkens of Belgium properly expressed reservations about the propriety of insisting on a criminal remedy at the national level. She emphasizes that "criminal proceedings should remain both in theory and in practice, a last resort or subsidiary remedy."[27] One would think so, particularly because in these cases the Strasbourg Court itself recognizes only tort liability for breach of the Convention.

Though there are obvious anomalies in the jurisprudence of the Strasbourg Court, these cases represent a salutary development in the protection of victims' rights. The United States lags far behind in this area. Even if state

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[24] M.C. v. Bulg., App. No. 39272/98 (Dec. 4, 2003, final judgment Mar. 4, 2004), *available at* http://www.echr.coe.int/Eng/Judgments.htm.

[25] *Id.*

[26] *Id.* at para. 149.

[27] *Id.* (concurring opinion).

officials are negligent in failing to provide protection for abused children, the courts refuse to find state action liable and treat the abuse as a constitutional violation.[28] American courts have not even considered invoking the concept of privacy to reach the result of the Strasbourg Court in 1985 – namely, that an unjust and arbitrary decision not to prosecute is a violation of the victim's right to privacy.

IV. THE INNOVATION OF THE ROME STATUTE

Against this background, we should consider the dramatic shift represented by the *Rome Statute* adopted by the International Convention of States Parties in Rome in the summer of 1998, and now ratified by more than 90 states. The United States signed the treaty under President Clinton and then, reversing this decision under President Bush, adopted a position of apparent hostility towards the ICC. In April 2005, however, the United States dramatically signaled a new policy of support for the ICC by abstaining from (rather than vetoing) Security Council Resolution 1593 referring the situation in Darfur to the Court for investigation and prosecution of offenses against the *Rome Statute*.[29]

The *Rome Statute* is the first major international document to place the interests of victims as fundamental to the pursuit of justice. The *Preamble* to the Statute stresses the atrocities committed in the wars of the twentieth century, a source of injustice compounded by the impunity of the offenders.[30] The rights of the accused are mentioned, but only later in the statute, beginning in Article 63, which gives the accused the right to be present at the trial.[31] The more significant rights constituting a "fair hearing" are detailed in Article 67.[32]

The ICC constitutes nothing less than a major victory for the victims' rights movement, a reversal of priorities between justice and fairness that is unprecedented in the history of criminal law. For this reason, it is important to examine precisely what justice requires for victims. What do the advocates of victims mean when they proclaim, "No justice, no peace"? They cannot mean that they have a right to see the accused convicted and punished, any more than the accused can translate the right to a fair trial into a right to acquittal. Yet the rights of victims consist in more than an echoing of the defendant's right to a fair trial. The key to understanding the special position of victims is the word "impunity" as used in the *Rome Statute Preamble*: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and . . . [d]etermined to put an end to impunity for the

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[28] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

[29] *See* George P. Fletcher & Jens D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, __ J. INT'L CRIM. JUST. (forthcoming 2005).

[30] U.N. International Criminal Court, Rome Statute, Preamble, U.N. Doc. A/CONF.183/9* (1999).

[31] U.N. International Criminal Court, Rome Statute, art. 63, U.N. Doc. A/CONF.183/9* (1999).

[32] U.N. International Criminal Court, Rome Statute, art. 67, U.N. Doc. A/CONF.183/9* (1999).

perpetrators of these crimes."[33] Of course, the question that any legal philosopher would ask is, "Why?" The *Preamble* lamely suggests that the issue is the "prevention of such crimes," but this is clearly a makeweight argument.[34] Even a complete skeptic about the possibility of deterring future crimes would insist that the Eichmanns and Milosevics of the world be punished for their crimes against humanity.

What is so terrible about impunity? This is the central question, I believe, in formulating a theory of justice to victims. An answer often given, and one that I advocated some ten years ago,[35] is that when the state tolerates criminality that it has the capacity to punish, it becomes complicit in the crime. The state, which derives its legitimacy in part from its mission to protect its citizens against crime, becomes an agent of criminality by failing to prosecute.

The concept of impunity relates closely to the complementarity underlying the jurisdiction of the ICC. According to the *Rome Statute* in Article 17(1)(a), the ICC may prosecute only if the state that would otherwise have jurisdiction "is unwilling or unable genuinely to carry out the investigation or prosecution."[36] Therefore, the ICC functions in a way that is complementary to the administration of criminal justice by nation states. Cases of impunity in the twentieth century were instances of states—mostly fascist or communist—that were unwilling to prosecute. Today, there are more likely to be instances in which states such as the Congo and the Sudan are "unable genuinely to carry out the investigation or prosecution." In either case the victim is left alone, effectively abandoned by the one power that should have prevented the crime and should insure that the offender is properly punished for his or her actions.

The paradox of the *Rome Statute* in the modern world is that it endorses a form of retributive punishment. The supporters of the *Rome Statute* would probably not want to identify themselves as adherents of "an eye for an eye" justice, but if deterrence is in fact dubious, then why must the state punish the offender? The only plausible reason is the retributivist claim that, as a matter of justice, crime must always be punished. Recall the words of the *Rome Statute Preamble*: "Affirming that [these crimes] . . . must not go unpunished . . ."[37] This is a simple claim of justice as an end in itself.[38] The guilty must be punished—that is simply what justice requires.[39]

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[33] Rome Statute, Preamble, *supra* note 15.

[34] *Id.*

[35] *See* FLETCHER, *supra* note 1, at 6–7.

[36] U.N. International Criminal Court, Rome Statute, art. 17(1)(a), U.N. Doc. A/CONF.183/9* (1999).

[37] Rome Statute, Preamble, *supra* note 15.

[38] The leading text on retributive punishment is IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans. 1996) (1797).

[39] For a debate on whether the advocacy of victims' rights in fact endorses retributive thinking, see George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999), and Michael S. Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999).

V. THE ICC AS THE TRIUMPH OF VICTIMS' RIGHTS

The proper question to ask ourselves is, "How did this transformation occur?" How did the leading nations of the world come to the conclusion that the impunity of those who commit crimes "of concern to the international community as a whole" must not go unpunished? How did the question of justice for victims gain a place equal, if not superior, to the commitment to a fair trial for the accused?

The roots of this transformation lie, I believe, in the legal events of the mid-1980s. We have already seen the way in which the European Court of Human Rights began to vindicate the rights of victims in the case of *X. & Y.* in 1985. At the same time, the concept of *impunidad* (Spanish for "impunity") became an influential value in post-junta Argentine legal politics under President Raul Alfonsin, elected in 1983. The prosecution of the generals responsible for the "disappearances" recorded in *Nunca Más*[40] became a major precedent for the ICC.[41] More than he realizes, Jaime Malamud Goti, who has also contributed to this Symposium, is one of the heroes of this historic series of trials. As the Presidential Advisor responsible for the trials, Malamud Goti fervently believed in the evil of *impunidad*. The point of trials, he explained to me at the time, was to demonstrate that no one was above the law. That is another way of saying that democratic Argentina could not tolerate the impunity of dictators who committed grave offenses against humanity. Of course, as a philosopher and academic, he is skeptical about the lasting significance of the Argentine trials.[42] When the history of this period is properly understood, however, the Argentine experience will stand in bold relief as a key legal event that led, fifteen years later, to the adoption of the *Rome Statute*.

Is it possible that the United States was not part of this major reorientation of legal thought? I believe we were indeed part of it, but that racial and gender politics have obscured the shift in our thinking. In a whole series of cases involving gays, blacks, Jews, and women as victims, we began to take more seriously those who belonged to these legally disadvantaged groups. These are cases known largely by the name of the victim, as in the Rodney King affair. No one remembers the names of the police officers who were prosecuted and eventually convicted for beating up Rodney King, but no one will forget King's name. To a lesser extent, the same is true of Harvey Milk, the gay city councilman assassinated in San Francisco; of Yankel Rosenbaum, the Hasidic Jew killed on streets of Brooklyn; and of Desirée Washington, the woman who was allegedly raped by Mike Tyson. These were the headline-grabbing cases in

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[40] NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (1986).

[41] The immediate legacy of the Argentine trials is the recognition of the systematic or widespread "enforced disappearance of persons" as a crime against humanity. *See* U.N. International Criminal Court, Rome Statute, Art. 7(1)(i), U.N. Doc. A/CONF.183/9* (1999).

[42] *See generally* JAIME MALAMUD-GOTI, GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE (1996).

America in the 1980s and early 1990s. They are our counterpart to the jurisprudential shift toward victims' rights in Strasbourg and the prosecution of the generals in Argentina. In the public responses to the cases of Harvey Milk, Rodney King, Yankel Rosenbaum, and of rape victims who took to the streets to "take back the night," we too participated in the jurisprudential transformation that has converted impunity for offenders into an evil we can no longer tolerate.

Yet, for Americans, the issue of justice for minorities seems to have overshadowed the question of justice for victims. The prosecution of the African-American celebrity O.J. Simpson was seen as a continuation of the injustice done to Rodney King. Indeed, the backlash from the King affair probably generated undue sympathy for Simpson. Since South Central Los Angeles rioted after the Simi Valley acquittal of the police officers who beat-up King, the media speculated about racial unrest if the jury convicted O.J. As I have argued, the failure to do justice for victims generates a sense of second-class citizenship in the group as a whole. This loss of self-esteem, generated by the sense that offenders enjoy impunity, is typically absent when a member of the same group is subject to prosecution.

The same phenomenon of minority group-identification accounts, in part, for the shift in American policy toward the ICC. The alleged crimes in Darfur are perceived to be atrocities committed by Arabs against blacks. African-Americans—indeed all Americans—bring a keen sense of injustice to these events, particularly after the shameful failure of the United States to intervene in the Rwandan genocide. American leaders have been even quicker than the Security Council to allege that the atrocities in Darfur constitute genocide.

VI. CONCLUSION

As in domestic criminal justice, ethnic identification with the victims of crime often enables people to give voice to their sense of justice. Their active engagement may begin with a sense that people of their own group have suffered and therefore, they personally feel attacked. To become effective in courts of law, however, they must transcend partisan identification and seek a form of discourse that protects all persons against similar forms of injustice.