

## CHAPTER 2: The Fluidity of Victimhood

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**There is a higher court than courts of justice and that is the court of conscience. It supercedes all other courts. - Mahatma Gandhi**

**We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented. - Elie Wiesel**

In the dawning of an age in which victim rights and victim-centred justice responses are gaining momentum, inspiring nation-wide debate, and giving birth to new legislation and action, we must, more than ever, consider taking sides. Indeed, if we are to truly improve the “justness” of our justice responses, we must seek *neither neutrality nor partiality* as our guiding motto, but take the side of every individual who comes within our custody, our care, our Circle, and our conflict community. This is because mounting research shows that victimization is socially constructed, imperfectly captured by our legal systems, obfuscated by contextual variables, and often shared by multiple parties in a conflict. Thus, uniting the reality of victim needs and the need for a more shared reality about victimization, this chapter calls for an increase in *multi-partiality*, an approach that allows us to speak up for not only “official” victims but all those *who experience victimization* when acts of harm occur.

### **Beyond the Act of Harm: Limits and Opportunities of Victim-Centred Legislation**

Victim-centred legislation around the world (e.g., *1994 Australian Victims of Crime Act; 1996 Service Charter for Victims of Crime in South Africa; 2012 E.U. Victims’ Directive; 2013 U.K. and Wales Code of Practice for Victims of Crime; U.S. Victims’ Rights State Amendments; proposed 2014 Canadian Victims’ Bill of Rights*) tries

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to expand the rights and protections of individuals harmed by acts of crime. Minimally, these laws often address common victim needs such as privacy, information, and respect; in some cases, as with the EU Victims' Directive, they also attend to other needs, including cultural and linguistic needs (e.g., interpreters, literacy), gender specific needs (e.g., violence against women), and age-related needs (e.g., of children).

In terms of opportunities, the vast majority, if not all, victim-centred legislation limits the definition of victim to an individual who has suffered harm as a result of a criminal act. The EU Victims' Directive, for example, defines a victim as "... a person who has suffered harm... which was directly caused by a criminal offense" and, somewhat less commonly, also "family members of a person whose death was directly caused by a criminal offense." The offender is defined as the "... person who has been convicted of a crime... [or] a suspected or accused person..."

While defining victims and offenders in this specific way, most legislation also notes that the provisions therein are "minimum rules" which, as the EU Victims' Directive explicitly states, may be extended "... to provide a higher level of protection." Thus, this chapter highlights both ways in which constricted definitions of "victim" may limit our victim-centred responses, and ways in which they provide us with an *opportunity* to go beyond the letter of the law to more fully capture its *spirit*. That is, the issues and arguments raised in this chapter do not aim to diminish or contradict victim-centred provisions and recommendations, but to extend them to all involved parties – including, perhaps controversially, to the party currently thought of as the offender or perpetrator.

### **Victimhood as a Social Construction**

The first danger of defining victimhood using a particular act of harm is that victimhood is socially and politically constructed. Just as scholars have written about the social and political construction of the “deserving” and “underserving” poor (e.g., Will, 1993), and of the phenomenon of “victim blaming” social policies which stem from the belief that individuals and groups who are disenfranchised are responsible for their problems and lower economic status (e.g., Ryan, 1976), scholars have also discussed the social and political construction of victimhood. These differing, and sometimes contradictory, constructions by media, law enforcement, and scholars serve as a reminder that victimhood is a dynamic and changing social creation.

For instance, Christie (1986) talks about a socially ideal victim being a person who holds certain characteristics that combine vulnerability (e.g., seemingly weak, physically harmed by a powerful offender) and respectability (e.g., did not provoke the offender, was doing something socially appropriate while harmed). Consistent with Christie’s conceptualization, Strobl (2004) and Vrij and Fisher (1997) found that persons who appear shy, sad, weak, and vulnerable are indeed more likely to be given victim status by law enforcement officials.

Others have written about different sets of characteristics that embody the construction of the ideal victim in different contexts. For instance, Walklate (2007), shows that historical and political influences propel certain types of victims centre-stage while keeping others behind the curtain:

Appreciating the ways in which the state operates sometimes in the interest of its citizens, but always in the interests of self-maintenance, is central to understanding the underlying (generative) mechanisms that contribute towards the kinds of victimizations which we “see” as compared to those which we do not “see”... (p.49)

This bifurcation is also seen in conceptualizations of “deserving” and “undeserving” victims, meaning both individuals who deserve to be victimized (e.g., Knox, 2001, regarding political violence in Northern Ireland) and individuals who deserve to be considered victims. For instance, Smolej (2010) examined the construction of the ideal victim by analysing violence vignettes from Finnish crime-appeal television programs (which involve the public in solving criminal cases). Contrary to Christie’s conception of the ideal victim as vulnerable and innocent-seeming, Smolej found that victims who were included in the TV vignettes were middle class, middle-aged, well-off, and part of nuclear families, and that individuals with more marginal roles (e.g., homeless, young) were excluded from the status of victimhood.

Others (e.g., Fattah, 2003; Kinsella, 2012) have also noted that people who are marginalized are often simultaneously more likely to be victimized and rejected as victims. For instance, Kinsella (2012) discusses the social and legal (i.e., in terms of police response) construction of the feared homeless perpetrator, when, in reality, those who are homeless are more likely to be victims, rather than perpetrators, of crime.

Kinsella notes that all attempts at naming or noting victimhood stem from judgments that reflect moralistic, philosophical, cultural and political biases:

Since the emergence of academic interest in the victims of crime, a preoccupation with the status of the victim has, either explicitly or implicitly, been a feature of victimology in all its forms. More specifically, academics exploring victimisation have prioritised establishing who is to blame for victimisation, and who is worthy, or deserving, of support, respect, and dignity – who is in the ‘right’. From the positivist approaches of Von Hentig, who attempted to identify proneness in victims via the development of victim typologies (Mawby and Walklate, 1994), and Mendelsohn, who categorised crime victims “from the ‘completely innocent’ to the ‘most guilty victim’” (ibid , p.12); through feminist critiques of victimology, which highlighted women as the forgotten victims of crime and sought to absolve them from ‘blame’ (Wolhuter et al., 2009); and radical victimology, which shifted blame by shining a light on the crimes of the powerful

(Quinney, 1972); to critical victimology, and its concern with who has the power to attribute victim/perpetrator status – the notion of who is at fault, who is in the ‘wrong’, is key. Within each of these victimological frameworks, the demarcation between who the victims are and who is to blame for their victimhood is clearly established according to the standpoint and political motivation of those academics developing the theory. Be it the traditional approach of the positivists focusing on the crimes of the street, or the radical approach of those drawing attention to more abstract understandings of criminal ‘harm’, there are always symbolic conceptions of ‘good’ and ‘evil’ at play (Weisstub, 1986). (p.126)

Similarly, Winkel (1991) and others have shown that culturally normative behaviours expressed by individuals from non-mainstream groups (e.g., immigrants) can lead police to label some individuals as victims and reject that status for others. Not only does the social and legal construction of victimhood affect obvious outcomes for individuals (e.g., whether they receive help), but it may also affect relationships between individuals involved in conflict. For instance, Sahlin (2004), through examination of in depth interviews with individuals involved in obtaining contact prohibition orders (i.e., orders of protection), found that the need to bifurcate their own roles as pure victims and the roles of the other as pure “villain” (in criminal proceedings) encouraged the reconstruction of themselves, the other, and their relationship along victim-offender lines.

Attempting to capture how this occurs, scholars have created models that describe the construction and “triaging” of victimhood. Miers (1990), for instance, discusses how determinations of victimhood are an interaction between the societal recognition of an individual’s victimhood and the individual’s self-identification as a victim. As a result of this combination, a person may be considered, in this model, as (a) an *actual* victim, recognized by both society and self; (b) a *rejected* victim, recognized only by oneself; (c) a *designated* victim, recognized only by society; or (d) a *non-victim*, recognized as a victim by neither. Strobl (2004) proposes a different model, which examines whether the

“offender” was motivated to create harm and whether the harm was targeted at the individual(s) who felt harmed. This model also results in four possible victimization classifications: (a) *personal victimization* (directly harmed as a result of being personally targeted by harmer); (b) *vicarious victimization* (directly harmed by accident, such as a pedestrian caught in a crossfire); (c) *mediated victimization* (harm experienced by those who are impacted by someone else’s victimization, such as family members, loved ones, and classmates); and (d) *collective victimization* (harm experienced via the indirect impact of being part of a targeted group). Strobl also discusses the complications of communication, culture, and social biases in the law enforcement response to people calling for help (e.g., a large, strong-looking man may have a harder time being seen as a victim in some cultures, compared to a smaller woman), and how these factors come together to create a “social ascription” of victim status.

What is relevant for our increased clarity of how to approach the question of victim fluidity is not the pros and cons of a particular model or definition of victimhood, but the clear understanding that victimhood is, indeed, constructed by society, media, law enforcement officials, scholars, attorneys, and our unconscious biases. These social constructions and biases result in unequal designations of some individuals – and/or individuals from some groups – as victims, while systematically rendering others as offenders on a more regular basis, as discussed below.

### **Offenders as Victims of Maltreatment**

The social construction of victimhood underlies other ways in which victimhood and offenderhood can be fluid, or even interchangeable, concepts. For instance, systemic and contextual factors between individuals involved in an act of harm can shape

victimhood beyond the actual criminal or harmful act, as with the phenomenon of the “Burning Bed.”

*The Burning Bed*, the 1980s book (McNulty, 1980) and film (Avnet & Greenwald, 1984) about Francine Hughes, a real-life mother and wife who killed her ex-husband, James "Mickey" Hughes after 13 years of brutal and well-documented<sup>2</sup> physical abuse, rape, terrorizing, and control, popularized the phenomenon of “fighting back” by victims of continuous maltreatment. After pouring gasoline on James while he slept, and setting him and the house on fire (while the children waited in the car in their coats), Francine turned herself in to the police, later to be acquitted of the murder in a Lansing, Michigan courtroom.

While examples of legislative recommendations for “victims who fight back” have seen an increase since Francine’s case (e.g., Mackenzie & Colvin, 2009; Wimberley, 2007), and similar dramatic acquittals of victims of maltreatment occasionally make it into the media (e.g., Susan Falls in Australia; Nicole Ryan in Canada; Barbara Sheehan, Donna Fryman and Lisa Donion of the U.S.), the “battered wife defence” is still frequently denied (e.g., the case of Lavern Longsworth in Belize) and considered by scholars to be under-considered in criminal cases (e.g., Kinport, 2004). In addition, international scholars and advocates note that the legal response to survivors of domestic violence who offend continues to focus on the severity of the act (i.e., a knife stab is a knife stab is a knife stab) without giving sufficient attention to the context in which the act occurred, such as a pattern of abuse. For instance, writing on the criminal justice response to domestic violence in Australia, Douglas (2005) notes:

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<sup>2</sup> The 13 years of Francine’s victimization by James were well documented in police reports, photographs, and witness accounts, as Francine repeatedly (though unsuccessfully) sought help and support for herself and her children, including the obtaining of a legal divorce.

...On the one hand the criminal justice system has continuously refused to recognise harms perpetrated against women in the private sphere as crimes... On the other hand, where harms perpetrated in the intimate sphere are prosecuted as criminal acts, the approach of criminal law often results in these criminal offences being treated like other crimes, that is, as ‘one off’ incidents that are abstracted from their context... (p.441)

Wright (1996), in *Justice for Victims and Offenders*, also states:

It has become commonplace to observe that court proceedings are based on win/lose, guilty/not guilty principles. Only at the margins are background details such as provocation or contributory negligence allowed to introduce shades of grey into the black-and-white decision. Thus, both defendants and victims are liable to be cut short if they try to mention background information which they regard as relevant (p.23).

Similarly, Miller (2005) and Swan, Gambone, Caldwell, Sullivan & Snow (2008), reviewing the literature on women’s violence against their partners, show that contextual factors are critical when examining violence and aggression in intimate relationships. For instance, they find that, while the frequency of violent and aggressive incidents seems “equal” for men and women, women’s aggression against men occurs most frequently in the context of self-defence and abuse by their partners (while men’s violence is more likely to be a way to exercise control) and men are significantly more likely to perpetuate sexual abuse, coercive control, serious and violent “intimate terrorism” and stalking. Women are also more likely than men to suffer injury in the context of domestic violence and to be further victimized by a gender neutral and acontextual social service and legal response to intimate partner violence.

Thus, Douglas (2005) and others (e.g., Mills, 2006) have argued that rather than being either “neutral” (applying an unbiased one-size fits all approach) or purely “victim centred” as defined by the harmful act (i.e., centring victim supports on the person who happens to be the target of that particular violent act) justice responses to domestic



violence should focus on the contextual factors and social interpersonal patterns between involved parties.

Research on survivors of domestic violence can also inform our understanding of the complexity of victimhood and offenderhood in cases of less obvious or seemingly less egregious maltreatment and harassment in families, schools, and organizations.

A case from our Restorative Circles practice, involving an adolescent girl and her family, provides a useful illustration.

### **“You Fat Cow”: Offenderhood and Victimhood in a Family Shooting<sup>3</sup>**

When our team responded to a request for a Restorative Circle in a family where an adolescent girl had shot and wounded her father, it seemed that the offender and victim roles were fairly in line with those outlined by victims’ legislation. As one piece of evidence, John, the father, had a surgery scar on his left side, where the bullet had entered near the heart. As another, Theresa, then 15, was being released from the local Juvenile Detention Centre (youth jail) where she had served time for her offense. However, as the preparatory meetings and the Restorative Circle itself unfolded, things began to appear more complex. Stories from Theresa, her younger sister Chloe, and their older cousin Meredith (who had been living with the family at that time), revealed what seemed to be an continuous pattern of verbal harassment of Theresa by her father, which included sexual teasing (e.g., comments about Theresa’s developing breasts), criticism of her body (e.g., comments about her being fat and gross), public denigration of her physical abilities (e.g., derogatory comments about how slow and clumsy she was in front of her soccer teammates), and attempts at coercion related to food and exercise (e.g., withholding permission for her to join the family at dinner until she performed a certain number of abdominal exercises).

Felicia, the mother, described her own implicit support of her husband’s actions and now seemed shocked and devastated to hear the effect they had been having on Theresa. Having struggled with addiction to diet pills and her own strained relationship to eating and weight, she thought she was supporting Theresa’s ultimate success in life by standing by her husband’s “tough love” tactics, since Theresa needed to “watch herself” more if she were to have a chance to be “popular and attractive to boys in school.” Meredith admitted that she had been appalled by these family dynamics and had repeatedly urged Theresa to “not take it any more” and to “stand up for herself and fight back.”

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<sup>3</sup> All case illustrations have been altered to protect confidentiality and/or presented with consent from participants.

While most of us would likely agree that it was still Theresa's choice to take her father's gun and pull the trigger, and while many of us could engage in a lively debate about the proportionality of Theresa's action in relation to her experience in her family, the relevant point in this context is that many of the other people around the Circle felt co-responsible and considered themselves co-offenders in what happened. Just as importantly, many individuals in the Circle, including Chloe, the youngest (who saw Theresa as her ally and protector from their father), felt victimized by Theresa's imprisonment and of the continuation of the destructive family dynamics, which not only had not been addressed in any positive way by Theresa's time in jail but had now begun to shift onto Chloe.

Thus, for those of us who wish to go beyond the minimal "requirements" of victim-centred legislation and actually centre and support everyone victimized by "the act and its consequences," one strategy is to remain open to the possibility of multiple victimization and offer victim-centred supports and rights to as many involved parties as possible (Lyubansky & Barter, 2011; Barter, 2012).

With this expanded view, our team approached each person in Theresa's case as potentially experiencing victimhood, and in this way, supported several of the stated objectives of the EU Victims' Directive:

**Dignity and Respect.** We tried to express respect and acknowledgment of the underlying dignity of all involved parties by, for instance, listening to each person without expressing judgment or condemnation; asking everyone the same restorative questions in our preparation and Circle meetings (i.e., not using a different set of questions with the identified offender); offering refreshments to all parties (i.e., not offering water or snacks only to adults or only to the official victim); and facilitating the

Circle conversation in a way that allowed mutual responsibility and mutual understanding to emerge among all those directly involved and impacted by the event.

**Protection from Intimidation and Coercion.** To help increase protection of all possible “victims” from further intimidation and coercion from all possible “offenders”, we stressed the voluntariness of the process at several points along the way; talked to all participants about barriers to full participation (e.g., fear of retaliation or consequences); generated strategies that could increase participants’ sense of safety (e.g., seating arrangement, location of Circle), and tried to attend to possible power dynamics in our facilitation (e.g., between parents and children) by staying “multi-partial” in our facilitation and Circle support.

**Supports, Justice and Restoration.** To help increase appropriate supports and access to justice and restoration for everyone experiencing victimization in the case, we made a restorative justice process available to Theresa and her family (among other options); explained the process clearly during preparatory meetings; allowed time and space for individuals to tell their stories and clarify their needs in private before the Circle meeting; provided everyone with copies of our restorative questions (so they could follow along and have the same access to our procedures as the facilitators); allowed opportunity for everyone to speak and to be heard during the Circle; and supported the co-creation of an Action Agreement that took into consideration the multiple facets of victimization and offenderhood that had been discussed, in order to help address the multiple deep needs on the table. These agreements included family therapy, individual eating-related counselling for Felicia, the reinstatement of several family practices aimed at increasing cohesion (e.g., family dinners, family game nights), and reconnection to

moral actions (e.g., John and Felicia attending church more regularly). For Theresa, who was also worried about her re-integration into school, we also made plans to offer a Circle process in her classroom which would include students and teachers impacted by their knowledge of Theresa's "violent history."

Just as Theresa's example illustrates the phenomenon of social construction and attempts to illustrate the complexity of victimhood and offenderhood when maltreatment may be present, Theresa's is also a good introduction to the complexity of victimization and offenderhood within family and group systems.

### **Offenders as Victims of Systems**

A system is a set of interacting or interdependent components forming an integrated whole. A system has recognizable behaviours which are distinct from those of its individual parts, boundaries, and sub-structures that govern its operations, and feedback loops that influence its functioning. Systems are found in both the natural world (e.g., forest bio systems, marine systems) and social world (e.g., families, organizations, congregations) (Pidwirny, 2006).

In the social world, systems theories provide explanatory mechanisms for how individuals interact with, and are influenced by, systems and system substructures. For instance, Bronfenbrenner's ecological systems theory (e.g., 1994) describes the way individuals interact with their family and peer systems and are impacted by social systems such as neighbourhoods, social service systems, and local policies (direct impact), and systems at the national and international level, such as culture and national attitudes, policies, and ideologies (indirect impact).

A multitude of research over many decades has shown that certain factors found across these systems (e.g., poverty, family aggression and childhood maltreatment, institutionalized discrimination based on group membership), unequally affects the chances that an individual will be cast as an offender, as well as the chances that an individual will offend. This research serves as yet another reminder that victimhood, even in cases of indisputable harmful acts, can be shared by multiple involved parties.

First, children and adolescents who have been victims of adult violence (physical and sexual) and/or parental neglect are significantly more likely to aggress against others and break the law than those who have not been maltreated (see review by Widom & Wilson, 2009).

In addition, children and adolescents are vulnerable to the presence and absence of positive peer and adult role models in their environments and to the various influences of poverty, such as absence of positive youth activities or jobs in their community (e.g., Caputo, 1987; Becroft, Te Kaiwhakawa Matua o Te Kooti Taiohi o Aotearoa, & Thompson, 2006; Loeber & Farrington, 2012; Wasserman et al, 2003). Individuals who are part of closed systems, such as families, schools, gangs, and organizations are also more likely to engage in reciprocal aggression in which acts of harm are passed back and forth among individuals (e.g., Lauritsen, Sampson & Laube, 1991). In addition, individuals within the system who do not seem to be directly involved in the harmful act are often involved in co-creating the conditions for the act to take place, or in co-creating the menu (along with other systemic realities and influences) from which the actors choose their actions (Barter, 2012). Thus, a particular criminal act of harm, in which one

party is the official offender and the other the official victim, may not capture the dynamic and fluid nature of the actual victimization(s).

Structural inequity and past maltreatment also continue to disproportionately affect adult offenders. International studies of adult prisoners, both male and female, have shown them to have extensive histories of trauma and abuse (e.g., Sindicich, 2014; Arnold, Stewart & McNeece, 2001). In addition to higher levels of maltreatment in their families of origin, incarcerated individuals are more likely to have come from families living in poverty and struggling with untreated addiction and mental health issues. For instance, Crane & Heaton (2008) found that almost 75% of incarcerated individuals reported drug and alcohol addiction in their family, with over 80% reporting that drug and alcohol contributed to their offense. A 2006 study by the U.S. Bureau of Justice Statistics found that over half of all jail and prison inmates have mental health issues. Specifically, an estimated 1.25 million inmates suffer from mental illness, over four times the number in 1998, and two to four times greater than the general population (James & Glaze, 2006). Incarcerated individuals are also more likely to have parents, siblings and other adults in their life involved in the legal system. In one study, 66% of incarcerated individuals in the U.S. reported that they had family members in jail, prison or on probation (Crane & Heaton, 2008).

International data, though heavily weighted by U.S. findings due to the severity of the issue there, also show disproportionate percentages of incarcerated individuals to come from certain ethnic, racial<sup>4</sup>, minority or disadvantaged groups. For instance, in the

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<sup>4</sup> While scholars agree that “racial” categories are sociological rather than biological concepts, they are referred to here not as a way to support the idea of racial classification, but as a way to acknowledge the inequity and discrimination that continues to result from the use of these classifications in parts of the

U.S., African Americans make up about 13% of the general population, but 30% of arrested individuals and almost 50% of the prison population. Black men, in particular, are almost 6 times more likely to be incarcerated than White men, and men of Hispanic origin twice as likely as White men (Mauer & King, 2007). In Australia, individuals who self-identify as Aboriginal and Torres Strait Islander are about 3% of the general population but 27% of the prison population (Australian Bureau of Statistics, 2013). In the U.K., individuals self-identifying as Black make up about 9% of custody convictions, despite being 3% of the national population (Ministry of Justice, 2013), and individuals identifying as Muslim, who make up about 5% of the population, comprise 13% of the prison population, a 200% rise in the last 15 years (Berman & Dar, 2013). In other European countries, where ethnic statistics are often protected or not collected (Simon, 2007), similar trends are also seen where data are available (e.g., Albrecht, 1997 on foreign nationals in Germany; Gounev & Bezlov, 2006 on the Roma in Bulgaria). While Tonry (1997) cautions against international comparisons of criminal system responses along racial and ethnic lines, because, for instance, there are critical philosophical differences among nations regarding concepts of race, he also notes that:

Members of *some* disadvantaged minority groups in every Western country are disproportionately likely to be arrested, convicted, and imprisoned for violent, property, and drug crimes. This is true whether the minority groups are members of different “racial” groups from the majority population, for example, blacks or Afro-Caribbeans in Canada, England, or the United States, or of different ethnic backgrounds, for example, North African Arabs in France or the Netherlands, or – irrespective of race or ethnicity – are recent migrants from other countries, for example, Yugoslavs or Eastern Europeans in Germany and Finns in Sweden. Important social policy dilemmas that are seen in individual countries to be uniquely their own, such as race relations in the United States or assimilation of Aborigines in Australia, are not unique at all but are instead variations on common themes of social structure that characterize many countries.

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world where they are currently relevant social concepts. In addition, for the purposes of this paper, “Black” and “African American” are used interchangeably for the U.S. context.

Though reasons for this type of over-representation of some groups are still under debate (e.g., Albrecht, 1997), studies suggest that this disproportionality in the criminal justice system results, at least in part, from legal policies and practices reflecting implicit (unconscious, unintended) and explicit biases against certain groups. That is, based on categories of social class, ethnicity, race, religion, and immigration status, justice systems are more likely to (a) cast their fishing nets within certain populations; (b) consider certain populations as offenders rather than victims; and (c) in some nations, provide harsher sentencing for individuals belonging to certain groups, even when such differential treatment is not intended.

In the U.S., these differences are thought to be due, at least in part, to the unsuccessful, but racially biased, “war on drugs” started by the Reagan administration in the 1980s (e.g., Alexander, 2010). Specifically, Alexander argues that a combination of anti-drug possession laws, monetary incentives for drug-related arrests and raids, mandatory sentencing laws, a legal system which provides people with high incomes a significantly higher level of legal defence, and policies and practices that discriminate against ex-prisoners (e.g., barriers to employment, inability to vote) has perpetuated a caste system not unlike the Jim Crow practices and laws of a century ago<sup>5</sup>.

Though the international examples below attempt to individuate these practices for purposes of illustration, it is important to note that they actually interact, build upon, and exacerbate each other, as in Alexander’s description.

**Over-fishing.** As an example of legal over-fishing within certain populations,

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<sup>5</sup> “Jim Crow” refers to a system of laws (e.g., segregation of public schools, public transportation and public spaces by racial category) and practices (e.g., unfettered harassment, torture and homicide of African Americans by individuals and groups such as the Ku Klux Klan) which operated during the U.S. post-slavery and Reconstruction era (1870s-1960s) to create a caste system in which African Americans were held back economically, legally, and socially.



U.S. studies show significantly higher rates of police automobile searches for citizens who are phenotypically Black versus White, despite significantly smaller *percentages* (per group) of contraband being found for Black versus White citizens in those geographic locales (Lyubansky & Hunter, 2014). Similarly, in England and Wales, ten years after the changes wrought by the landmark 1993 Lawrence case<sup>6</sup>, the likelihood of being stopped and searched by police officers continues to be 7 times greater for individuals who are Black, and twice as likely for individuals of South Asian descent than for persons who are White (Bennetto, 2003), same as rates cited by the UK Government in 1998 (Borooah, 2001).

Other international studies also reveal racial, ethnic, and religious profiling by police and unequal rates of stopping, searching and/or arrests of citizens along ethnic lines, including France, Germany, Italy, the Netherlands, and other EU member states (Neild, 2009) and Canada (Meng, 2006; Ontario Human Rights Commission, 2003), though the underlying causes remain controversial.

Another example of potential over-fishing is found in analyses, performed by Human Rights Watch, of almost three decades of FBI data which reveal that, despite rates of drug offenses (e.g., possession, sale/manufacturing) remaining roughly equal for Blacks and Whites in the U.S., "...between 1980 and 2007, blacks were arrested nationwide on drug charges at rates relative to population that were 2.8 to 5.5 times higher than white arrest rates" and "...at rates in individual states that were 2 to 11.3 times greater than the rate for whites" (Felner, 2009, p.1). A report by the American Civil

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<sup>6</sup> The racially biased murder of 18 year old Stephen Lawrence by seven White youths, and the subsequent investigation, which revealed racially biased police handling of the case, and structural racism within the department, raised public awareness of racial bias in policing and generated policies and laws to address the issue.

Liberties Union (Edwards, Bunting, & Garcia, 2013) looking at more recent data and focusing on arrests for possession of marijuana, which accounted for almost 50% of U.S. drug arrests in 2012, shows similarly staggering – and increasing - differences along racial lines, despite roughly equal reported rates of marijuana use among people identifying as Black versus White<sup>7</sup>. For example, nationwide arrest rates for marijuana possession were almost 4 times higher for people identified as Black or African American than White, with arrests of Black citizens in some counties and states being 6 to 30 times higher than those for White citizens.

**Social Construction.** As an example of social construction of victimhood and offenderhood along social class and racial lines, research has shown that both youth and adults who are poor and/or Black and have disabilities or symptoms of mental illness are more likely to be funnelled into the justice system, whereas individuals with the same mental health symptoms and disabilities, who are middle class and White, are more likely to be funnelled into the mental health or special education system (e.g., Tulman & Weck, 2010). Other research has shown that youth identified by police as Black are more likely to get arrested in cases of more ambiguous, not violent-crime, and that neighbourhood characteristics affect police officer discretion, such as whether to arrest a youth (Leiber & Peck, 2013). In England, the infamous Stephen Lawrence case, which produced multiple investigations and reports, found metropolitan police response to be rife with fundamental errors, such as failure to give first aid to the wounded (Black) man, and arrest-related and investigation-related errors which were later linked to possible racial motivation (e.g., Bridges, 1999).

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<sup>7</sup> These differences are also not explained away by amounts of marijuana found in the possession of Black vs. White individuals (e.g., Dillon, 2013).

**Bias in Prosecution and Sentencing.** In the U.S., the bias in capital punishment sentencing against individuals who are poor and Black is well documented (e.g., Levinson, Smith, & Young, 2014; Taslitz, 2013), with other research showing bias in non-capital prosecution and sentencing. Generally, individuals who are Black are more likely to be detained, held, prosecuted, and given longer and harsher sentences (e.g., Kutateladze, Andiloro, Johnson, & Spohn, 2014; Lynch, 2013; Sutton, 2013)<sup>8</sup>. Other countries with prison populations which are not representational along racial lines have also begun to examine and find some preliminary evidence for racial bias in sentencing (e.g., Snowball & Weatherburn, 2007 with individuals of Aboriginal descent in Australia; Weinrath, 2007 with individuals of Aboriginal descent in Canada).

Thus, while systemic victimhood (past or current maltreatment, trauma, discrimination, and biases) does not excuse, minimize or diminish the very real negative consequences of people's acts of harm, it suggests an ethical justification for offering at least some victims' rights and supports to multiple people involved in a justice case, including the official offender. This will be illustrated by the case of Lamar in the next section.

### **Offenders as Victims of Their Offense**

Though much research exists on the negative psychological effects of being the target of aggression, violence, and social transgression, there is also evidence that those who offend against others also suffer negative psychological consequences as a result of their actions. MacNair (2002a) examined post-traumatic stress scores in a random stratified sample of more than 1,000 U.S. veterans of the Vietnam conflict and found that

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<sup>8</sup> While there is agreement among researchers that significant racial bias exists in capital sentencing, the bias findings in non-capital sentencing are contested by some scholars (e.g., Talich, 2013; Warner, 2000).

self-reported post-combat trauma symptoms (e.g., nightmares, flashbacks, intrusive memories) were higher for those who said they killed others than for those who only witnessed killing, and *highest* for those who killed in “non-traditional” ways as opposed to in “traditional combat”.

Similarly, an analysis of interviews with a different sample of over 350 U.S. combat veterans involved in the conflict in Vietnam revealed that those who were directly engaged in killing others reported elevated symptoms of post-traumatic stress (after returning home) compared to those who only “passively” witnessed traumatic events (Van Winkle & Safer, 2011). Another U.S. study of veterans from more recent conflicts in Iraq and Afghanistan showed that, contrary to predicted outcomes, soldiers reporting the highest levels of post-traumatic and depressive symptoms were those who *returned fire* after being attacked, as opposed to those who were attacked and did not return fire (fewer symptoms) and those who were neither attacked nor attacked others (fewest symptoms).

Based on these and other studies, MacNair coined the term “Perpetration-Induced Traumatic Stress” (PITS). In her book, *On the Psychological Consequences of Killing* (2002b), she reviewed evidence from studies and post-hoc analyses of those who have killed others, including combat veterans, paid executioners, police officers, individuals incarcerated for killing, and members of the Nazi party in WWII Germany. This and consequent scholarship (e.g., Papanastassiou, 2004) suggests significant traumatic and other psychological consequences (depression, suicidality) for those who have killed others.

While, understandably, homicide seems to lead to the most consequential psychological sequelae for the author of the act, it turns out that the perpetuation of other harmful acts (e.g., physical violence not resulting in death, coercion, emotional violence, social exclusion), also results in negative consequences for the “offenders.” For instance, in one study of incarcerated men who had committed violent offenses, post-traumatic symptoms were found in over half of the sample, with 80% having *no prior history of significant trauma* and reporting the violent offense as the traumatic event (Pollock, 1999). Similarly, Byrne (2003) found that individuals who had committed violent acts suffered significant levels of traumatic symptoms, especially those with no prior history of violence and those whose violence was aimed at a familiar other. Gray et al (2003) also found that in a sample of individuals already suffering from mental illness (as defined by a prior diagnosis), symptoms of trauma were *highest* for those who had committed a violent offense and most *frequent* for those who expressed regret for the offense.

Negative emotional consequences also exist for perpetrators of less overt acts of harm. For instance, while many are aware that children and adolescents who are the target of continual harassment, sexual teasing, social exclusion, and physical aggression are more likely to develop symptoms of depression, anxiety and suicidality, the data also show that perpetuating these actions against others is significantly associated with many of these same symptoms (e.g., van der Wal, de Wit, & Hirasing, 2003). Showing a more direct causal effect, a recent longitudinal study of more than 1,000 fifth graders found that those who were *both targets and sources* of peer aggression and exclusion in fifth grade reported higher levels of depression in sixth grade than those who were only targets

(Henrich & Sahar, 2014). A series of laboratory experiments also showed that social exclusion and ostracism negatively affected those who were the “perpetrators” of these behaviours (the official “offenders”) as well as the official “victims” (Legate et al, 2013; Paulsen & Kashy, 2011).

To conclude, while both the targets of violence, aggression and social exclusion, and the family and loved ones of those who were killed, suffer continuous and significant harm that needs to be taken seriously by our justice responses, those who perpetuate harm are also victimized by their own actions. A broader understanding of the fluid nature of victimization would not excuse or minimize the harm, but instead, allow a fuller justice response that could lead to greater community healing and social safety for all involved.

The case of Lamar illustrates the combination of these elements (victimization caused by one’s offense) and of systemic victimization discussed in the previous section.

### **A Life for a Life: Offenderhood and Victimhood in a Fatal Peer Shooting**

Through our team’s work within the local Juvenile Detention Center (JDC) we became acquainted with Lamar (aged 16), who was awaiting trial for the fatal shooting of Kareem (aged 21). Lamar and the JDC staff heard through the rumour mill that Kareem’s brothers and cousins, all well known to Lamar, were planning revenge for Kareem’s death as soon as Lamar was released. Since several of these young men (all African American) were familiar with Restorative Circles through our weekly restorative justice programming, they agreed to participate in a Circle when Lamar initiated one.

Some of the things that became evident as a result of this Circle were that (a) Lamar and Kareem were best friends (more like brothers), as echoed by every young man in the Circle; (b) the shooting had been an accident resulting from Lamar and Kareem’s handling of the gun; (c) despite “a” and “b,” the other young men still planned on a revenge killing of Lamar after he was released, as this most accurately reflected the law of the street (a life for a life); and (d) Lamar also seemed to be suffering high levels of post-traumatic symptoms as a result of the close-range and bloody killing of a close friend. This was evidenced by his recurring nightmares, flashbacks, and intrusive memories. In addition, during the

Circle, Lamar went into periods of what seemed to be dissociation<sup>9</sup> while trying to talk about the afternoon of the shooting. Lamar also displayed signs of depression, hopelessness, and mild suicidal ideation (although the event was not recent), as evidenced by things he wrote to Kareem on the memorial poster he would later co-create with the other young men from the Circle. Finally, in our private preparation meeting, Lamar discussed his concerns for his own safety, as well as those of his family. Indeed, we created a safety plan with one of the other young men in our individual preparation meeting, to support him in not attacking Lamar during the Circle.

As we sat within the Circle, witnessing the young men trying to find their way towards honouring Kareem's death without more violence and incarceration (for them) it became painfully clear that Kareem (the deceased) and his mother and brothers were certainly not the only ones victimized by this tragic case. First, Lamar was victimized by the trauma of killing his friend at close range, as described above. Lamar was also victimized by the tyranny of chance, as both young men were handling the gun (which belonged to Kareem), and the gun went off when Lamar was holding it, rather than when Kareem had it a few minutes earlier. In addition, Lamar was a clear victim of homicidal threat. According to systems analyses, the young men who were threatening him were also, themselves, victims of their cultural heritage, community values, and absence of positive male role models (because so many of their fathers and older brothers, all African American, were in prison). This left them with the belief that the only way to honour a loved one was through revenge, even though this risked their incarceration and separation from their remaining loved ones, something they actually did not wish. Finally, in an ever-expanding circle of victimization, if the young men (some of whom had children) had carried out their revenge plans, they would likely be incarcerated, further victimizing their own families. For instance, some research has shown that mothers of incarcerated

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<sup>9</sup> Temporary emotional and cognitive disengagement from the situation as evidenced by blank stare, lack of tracking, unfocused/glazed look, emotional numbness or detachment, "blank periods" of time unaccounted for by daydreaming or attention on something else.

sons experience increased grief, anxiety and financial difficulties, as well as childcare burdens (having to help care for their grandchildren) (Green, Ensminger, Robertson, & Hee-Soon, 2006) and that children of incarcerated individuals also have poorer academic, psychological, and financial outcomes than children in the general population (e.g., Travis & Woul, 2003).

Again, it is important in cases like Lamar's, where the harm is serious and irrevocable, to neither minimize nor excuse the real tragic consequences of the loss for those impacted by Kareem's death. It is just as important, however, if we are to move out of the cycles of violence and injustice, to broaden our horizons and provide "offenders" like Lamar the same attention and rights as official "victims" like Kareem and his family.

Without a broader understanding of victimization, which would take into consideration not only the very real victimization of Kareem's mother, brother, cousins, friends and other loved ones, but also of Lamar and his family, our justice response would not be able to maximally attend to the real needs of everyone involved. By leaving open the possibility that everyone affected by the case was experiencing victimization (including the author of the harm and his family), and therefore, offering all members of the Circle similar levels of support, we were able to better address the needs of everyone involved. Moreover, by attending to Lamar's needs for restoration and support, we were able to better provide for the healing and restoration of others. For example, Kareem's mother, who had not been able to speak to Lamar since the shooting, had a tearful meeting with him as one action resulting from the Circle, which was healing not only for Lamar but also for her. Similarly, the memorial poster jointly created by the young men wound up being displayed in a public community space where other youths were able to



add their words of grief and honour for Kareem, bringing some restoration and healing not only to the members of the Circle but to the wider community. In addition, Lamar's symptoms of grief and trauma were more directly addressed through referrals to counselling and mentoring, strategies that can only help Lamar's community as he grows into his manhood.

### **Moving Forward: Addressing the Paradox of Victims' Legislation**

As has been clear from the introduction and numerous examples throughout, this chapter is a call for broadening our conceptualization of victimhood beyond the person directly harmed by a criminal act, and, consequently, employing increasing multi-partiality in our justice approaches. The chapter also suggests that one vehicle for addressing multiple victimizations is to offer and employ restorative justice approaches as a response to conflict and harmful acts. The EU Directive explicitly lists the availability of restorative justice (RJ) services as one of the rights of all victims, and repeatedly addresses certain safeguards in the context of offering individuals RJ options, which include attention to voluntariness, unbiased information about the RJ process, and confidentiality guidelines (European Union: Council of the European Union, 2012). As illustrated in the case studies in this chapter, these minimum requirements can greatly enhance the level of overall restoration for all parties when they are more broadly applied to multiple individuals within the conflict.

Hudson's 2004 chapter on *Victims and Offenders* in "Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?" concludes:

... restorative justice is concerned with providing constructive outcomes for both victims and offenders, and is not simply part of the victim movement... Essentially, it is a way of moving forward from the 'zero-sum' approach to victims and offenders, which sees rights for one being at the expense of rights for

the other, concern for one being at the expense of concern for the others. Restorative justice is envisaged as a way of dealing constructively with both victims and offenders, jumping off, rather than on, the populist bandwagon, which believes that what helps the victim must necessarily hurt the offender...

Indeed, restorative justice allows us to attend to the needs of both the official victim and offender. However, let us stretch beyond even this laudable goal, rejecting the duality of victim-offender and see, instead, the concepts of victimization and offenderhood as more complex and fluid, even within the restorative justice field.

Facing the inherent paradox of victim-centred legislation requires us, as Rumi says, to go into that somewhat uncomfortable field beyond wrongdoing and rightdoing<sup>10</sup>, facing the inherent paradox of victim-centred legislature. From there, numerous strategies can be adopted to increase the multi-partiality with which all parties in a conflict are treated. What is important, according to Barter (2011), is to differentiate the victimhood of individuals who are involved in a conflict from their roles in relation to a specific act of harm. For instance, in the previous example of Theresa, the young woman who shot her father, Theresa would be understood as the Author of the act, the father would be understood as the Receiver of the act, and the mother, younger sister, and other people present in the Restorative Circle would be understood as the Conflict Community (people indirectly impacted by and/or contributing to the conflict in some way). It is important to note that, in this case, Author and Receiver are *not* synonyms for Offender and Victim, since it is understood that many – if not all – the people in this conflict feel some sense of victimhood. Instead, these designations help us orient ourselves during the process of support, protection, and restoration for which we strive.

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<sup>10</sup> “Out beyond ideas of wrongdoing and rightdoing, there is a field. I will meet you there.” - *Rumi*

Going beyond these important linguistic and symbolic designations, Barter's Restorative Circles take other measures (e.g., using the same restorative questions and offering the same accommodations to each individual) to help ensure that all parties experiencing victimization receive the recognition, respect, support, care and restoration intended by victims' rights legislation. What may be most important, however, is not the actual way multi-partiality is carried out, which will differ by locale, culture, and need, but that we become more open to the idea of multi-partiality as a way to go beyond the letter of victim-centred law to the heart of its spirit.

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