
THE PUZZLE OF DELEGATED REVENGE

KENWORTHY BILZ*

INTRODUCTION	1060
I. TRADITIONAL THEORIES AND THEIR FAILINGS	1063
A. <i>The Ubiquity of Delegated Revenge</i>	1063
B. <i>The Failure of Standard Explanations Offered by Economics and Psychology</i>	1065
1. Capturing Positive Externalities	1066
2. Avoiding Negative Externalities	1070
3. Procedural Justice.....	1073
C. <i>Where the Instrumental Explanations Fail – Examples</i>	1075
1. People Do Not Always Prefer the “Cheapest” Punisher.....	1076
2. People Are Not Indifferent Among State Punishers.....	1078
3. People Are Not Indifferent to the Purpose of the Offender’s Suffering.....	1081
II. AN ALTERNATIVE THEORY OF DELEGATED REVENGE.....	1086
A. <i>Crime and Social Status</i>	1086
B. <i>Applying the Social Status Theory to Solve Puzzles of Delegated Revenge</i>	1091
1. Methods of Execution.....	1092
2. Cultural Differences in Vigilantism and Delegation of Revenge.....	1094
3. Historical Differences in Agents of Revenge	1095
III. THE LIMITS OF DELEGATED REVENGE	1100
A. <i>Crimes Where Victims Refuse to Delegate Fully</i>	1100
B. <i>Populations That Refuse to Delegate Fully</i>	1105
CONCLUSION.....	1111

In the United States, as is the case in virtually every developed society, the State has a monopoly on criminal punishment. This monopoly enjoys such widespread popular support that it is rarely questioned, or even systematically explained. But why should people ever be satisfied when a third party punishes in their name as opposed to having the opportunity to exact revenge personally? When theories of delegated revenge are offered at all, they explain why a well-ordered society needs centralized punishment as a matter

* Assistant Professor, Northwestern University School of Law; J.D., The Law School – The University of Chicago; Ph.D. in social psychology, Princeton University. I would like to thank Jeffrey Fagan, Bernard Harcourt, Dan Kahan, Tracey Meares, and Janice Nadler, as well as the participants in workshops at the law schools of Chicago-Kent, Northwestern, the University of Chicago, the University of Illinois at Urbana-Champaign, and the University of Tel Aviv for comments and discussion.

of practicality. But while this approach can explain why people would begrudgingly accede to delegating their revenge, I will show that it doesn't adequately explain why they actually prefer it and why they accept some delegated agents more readily than others. Moreover, these theories do not have a good explanation for why or when delegated revenge will fail to satisfy victims, nor for when the State will relax its punishment monopoly, as it often does.

In this Article, I offer a different explanation for the phenomenon of delegated revenge; one grounded in a more psychologically sophisticated understanding of the harms of crime and the functions of punishment. Namely, I argue that victims regard punishment as an important device for restoring the losses to their self-worth and social status they suffered as a direct result of their victimization, which in turn explains and guides the (usual) preference for delegating revenge. I also argue that understanding the status-underpinnings of punishment allows us to predict when victims will reject delegation and instead choose to exact their revenge directly, as well as when the body politic will endorse their behavior. Finally, I use this theory of delegated revenge to propose ways in which we can solve failures of delegated revenge; that is, how we can reestablish the government's monopoly on punishment when individuals, or even whole communities, balk at the notion of the State as an appropriate agent of their revenge.

INTRODUCTION

Compare the following two cases:

1. On April 5, 1999, officers at the Nevada State Prison strapped convicted murderer Alvaro Calambro onto a table, inserted an IV line into his veins, and injected a lethal dose of chemicals into his bloodstream. After a physician pronounced him dead, family members of his victims spoke. George Christopher thanked the system for bringing his brother's killer to justice.¹ After expressing his own appreciation and relief, Clarence Crawford, the father of the other victim, offered: "The law works. The law worked in our case."²

2. On April 2, 1993, Daniel Driver faced a trial for the sexual molestation of four boys. Prosecutors in his small, Northern California gold-rush town had a strong case for conviction but Ellie Nessler, the mother of one of his victims, chose not to wait. On her way to the witness stand she pulled out a chrome handgun and emptied its magazine into her child's abuser, killing him.³ Nessler was not satisfied with the system exacting justice for her; she took matters into her own hands.⁴

¹ Sean Whaley, *Double Murderer Executed*, LAS VEGAS REV.-J., Apr. 6, 1999, at 1A.

² *Id.*

³ *Police: Witness Kills Man at Court*, BOSTON GLOBE, Apr. 3, 1993, at 5.

⁴ See *All Things Considered: Mother of Molested Boy Faces Murder Charges* (NPR radio broadcast June 7, 1993), available at LEXIS, News Library.

Which of these reactions comports more with your expectations of how family members of victims (or victims themselves) are likely to feel in the wake of crimes and, in particular, to the State's monopoly on punishment? Our system presumes – indeed relies on the idea – that the vast majority of victims feel like George Christopher and Clarence Crawford rather than like Ellie Nessler. And on the whole, this is right. When the system punishes criminal wrongdoers for us, generally we are satisfied that justice has been done. We know this because we don't have rampant vigilantism; cases like Ellie Nessler's and Bernard Goetz's (the "Subway Vigilante") are still unusual enough to generate national headlines.⁵

Yet there is still something deeply compelling about the idea of vigilante justice. After all, despite the fact that criminal cases are styled as crimes against "the People" or "the State" in the courts, prototypically crimes are wrongs against individuals. And psychologically, we understand the retributive impulse as a personal, even primal, desire to strike back directly at someone who has harmed us.⁶ The very idea of revenge on a wrongdoer seems, at first cut, to demand that the victim be the one to deliver the blow.

Why, then, should we ever be satisfied when a third party (such as the State) steps in and punishes in our name? Though experience suggests that we are often, even usually, happy to delegate our revenge to an outside agent, it is not at all clear why we are so obliging. Indeed, not only are we content to let others punish in our names most of the time, we often deeply resent those times when the State refuses to do our punishing for us, for whatever reason. Perhaps the government fails to achieve a conviction, or doesn't find it worth pursuing and prosecuting our case, or worse, maybe the law doesn't even consider the wrong we suffered to be a crime at all. We regard such failures as compounding the crime we have already suffered – in some sense a separate victimization in and of itself.

Simultaneously, we can recognize situations where victims feel compelled to engage in self-help, without delegating their revenge to the State, and sometimes we even forgive them for indulging this impulse. And our intuitions operate not only to tell us when it is and is not correct to delegate;

⁵ See, e.g., Joe Starita, *N.Y. "Vigilante" Sparks Wave of Hero Worship*, MIAMI HERALD, Jan. 6, 1985, at 1A (discussing the outpouring of support for Bernard Goetz, the "Subway Vigilante," who shot four teenagers inside a crowded New York subway car because he thought they were going to rob him). In addition to being nationally reported, Ellie Nessler's story was eventually made into a television movie. See Scott D. Pierce, *'Judgment Day' Offers No Pat Answers*, DESERET NEWS (Salt Lake City, Utah), June 21, 1999, at C6.

⁶ See, e.g., Benedict Carey, *Payback Time: Why Revenge Tastes So Sweet*, N.Y. TIMES, July 27, 2004, at F1; see also SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 69-70 (James Strachey ed. & trans., W. W. Norton & Co. 1989) (1961) ("It hopes to prevent the crudest excess of brutal violence by itself assuming the right to use violence against criminals, but the law is not able to lay hold of the more cautious and refined manifestations of human aggressiveness.").

we also have strong intuitions about who the *appropriate* agent of this delegation is. But what is the source of all of these intuitions?

Research and scholarship on the phenomenon of delegated revenge is surprisingly one-dimensional. In explaining why we delegate, virtually all of it reduces to a discussion of practicalities and economic efficiencies; that is, why it makes collective sense in a well-running society for the State to monopolize punishment most of the time. But the practicality of having third party punishment cannot explain the acceptability of it; still less does it explain the affirmative preference victims sometimes have for it even in the face of cheaper, simpler alternatives. Nor do these approaches help us explain why or predict how people differentiate among more and less appropriate delegates for their revenge. And most importantly, the typical theories offered are helpless at accounting for – let alone predicting and solving – the failures of delegated revenge.

In this Article, I argue that to understand the phenomenon of delegated revenge, one must turn to a more psychologically sophisticated understanding of the harms of crime and the functions of punishment. Namely, I argue that victims regard punishment as an important device for restoring losses to their self-worth and social status, suffered as a direct result of their victimization. I argue that the status- and esteem-restoring function of punishment explains and guides the (usual) preference for delegating revenge. And, I argue that understanding the status-underpinnings of punishment allows us to predict when victims will *reject* delegation and instead choose to exact their revenge directly – and when the body politic will endorse such behavior.

What are the perils of the State taking over when it is not seen as an appropriate delegate for revenge? In the best case scenario, victims may refuse to fully cooperate with police and prosecutors, and offenders may reject the idea that their punishment reflects legitimate condemnation of their actions – that is, punishment will fail to stigmatize and offenders may even wear their persecution as a badge of honor. In the worst case scenario, victims may resort to dramatic self-help measures, as Ellie Nessler did, rejecting state mechanisms altogether. Properly understanding why people prefer delegated revenge helps us to judge when punishment should not be delegated at all, but instead left in whole or in part to the victim. And, it can give us insight into ways we might delegate with subtlety, carefully choosing the *right* state avenger. Choosing an appropriate state avenger will not only maximize satisfaction with the system, it could even reverse some of the alienation that causes failures of delegation in the first place.

This Article proceeds in three main parts. In Part I, I review the theories that currently exist to explain delegated revenge, and unmask their holes and inconsistencies. In Part II, I offer an alternative explanation for the phenomenon, which turns in part on psychological literature describing the harms of crime and what individuals hope punishment will achieve. Namely, victims perceive crime as denigrating their social standing and self-worth, and they regard punishment as an opportunity to restore it. Finally, in Part III, I

show how this new perspective reveals who the appropriate agents of punishment are (and are not), why the State sometimes systematically relaxes its monopoly, and when punishment should not be delegated at all. That is, I test the limits of the State's presumed monopoly on punishment, and suggest ways to overcome them.

I. TRADITIONAL THEORIES AND THEIR FAILINGS

A. *The Ubiquity of Delegated Revenge*

While there are undoubtedly differences in its magnitude across individuals, the basic urge for retribution is a cultural universal,⁷ across time and place, and it establishes itself early in life.⁸ Some evidence even hints that non-human primates experience a retributive urge.⁹ Psychologists have demonstrated that people perceive retribution as an important dimension of criminal,¹⁰ civil,¹¹ and interpersonal¹² justice. Given the ubiquity and fundamentality of the desire to exact revenge on wrongdoers, our willingness to farm it out to third parties takes some explaining. Offenses involve harms against individual victims, at least at first cut, and the person harmed seems entitled to punish in a way that third parties do not.

Yet routinely, institutions do mediate conflicts and act as victims' agents in delivering revenge. The most obvious example of this is the criminal law, where in this country offenses are formally styled as legal cases by the

⁷ Robert Hogan & Nicholas P. Emler, *Retributive Justice*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR* 125, 131-32 (Melvin J. Lerner & Sally C. Lerner eds., 1981).

⁸ See JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 227-32 (Marjorie Gabain trans., The Free Press 1965) (1932).

⁹ See, e.g., Frans B.M. de Waal, *The Chimpanzee's Sense of Social Regularity and Its Relation to the Human Sense of Justice*, in *THE SENSE OF JUSTICE* 241, 241-45 (Roger D. Masters & Margaret Gruter eds., 1992); Toshisada Nishida et al., *A Within-Group Gang Attack on a Young Adult Male Chimpanzee: Ostracism of an Ill-Mannered Member?*, 36 *PRIMATES* 207, 209-10 (1995).

¹⁰ See John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 *LAW & HUM. BEHAV.* 659, 676 (2000); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 *J. SOC. ISSUES* 19, 27-29 (1994) (finding that Americans most often cite retribution as a rationale for supporting the death penalty).

¹¹ See Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 *J. RISK & UNCERTAINTY* 49, 72-73 (1998) (finding that punitive damage awards vary based on the jury's "outrage" or retributive intent); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 *JUST. SYS. J.* 151, 176-77 (1984).

¹² See FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 265-76 (1958); Ron A. Astor, *Children's Moral Reasoning About Family and Peer Violence: The Role of Provocation and Retribution*, 65 *CHILD DEV.* 1054, 1065-66 (1994) (observing that violent children justify their actions as retribution for perceived provocation).

government against individual offenders (e.g., *Smith v. Arizona*, or *People v. Jones*). The government initiates all criminal proceedings and pays for their prosecution. Indeed, in modern America, victims are virtually always forbidden from filing criminal cases themselves.¹³ They must rely instead on a public prosecutor, who has complete discretion about whether or not to pursue the punishment of criminal suspects.

To a lesser degree, other formal institutions also perform the role of victims' agents of revenge. Management "governs" workplaces,¹⁴ and generally, we believe management should handle offenses that happen there. For instance, if an employee steals the work product of another, or engages in sexual harassment or other discriminatory behavior, we imagine that the employer, as an institution, not only has the duty to "prosecute" the offense, but that the offended worker must refrain from engaging in personal retribution (other than, perhaps, deserved scorn or gossip).¹⁵ Ditto in the school setting: we see personal offenses as properly punished by an administrator or a disciplinary committee, rather than via self-help.

A student or worker who engages in retribution outside these formal channels may be subject to the risk of sanctions himself. For example, no matter how wrong it may be for a dorm-neighbor to play loud music during finals week, a student still risks punishment if he enters the neighbor's room and yanks her stereo's power cord from the wall instead of letting resident assistants or campus police handle the complaint. Sometimes, these extralegal institutional structures rival official law in their complexity and formality (even if not their ability to inflict corporal punishments). Indeed, the elaborate rule-making and rule-enforcing bodies of various American trade groups¹⁶ and

¹³ See generally John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994) (discussing the split of authority regarding whether private prosecutors are constitutionally permissible and concluding that they are not). Note, though, that this conclusion was not historically true, nor is it the case in every culture today. *Id.* at 518.

¹⁴ See DAVID W. EWING, *FREEDOM INSIDE THE ORGANIZATION* 15-16 (1977).

¹⁵ Some institutions even frown on – and occasionally forbid – gossip and grudges once offenders have been dealt with by the institutional powers-that-be. See Nadya Labi, *The Gentle People*, LEGAL AFF., Jan.-Feb. 2005, at 24, 26 (describing how the Amish consider it sinful to withhold forgiveness and that "anyone who refers to a past misdeed after the Amish penalty for it has ended can be punished in the same manner as the original sinner").

¹⁶ See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1771-77 (1996) (reviewing the complex set of arbitration rules developed by the National Grain and Feed Association). And, of course, while it acts under the authority of the Securities and Exchange Commission (a federal agency), the Financial Industry Regulatory Authority (formerly the National Association of Securities Dealers) is a private organization that heavily regulates and manages disputes among those who participate in the trading industry. About the Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/index.htm> (last visited Oct. 5, 2007).

the “tribunals” of the Catholic Church¹⁷ encompass a vast system of evidentiary and appeals “courts” with the ability to punish errant members for transgressions against other members or the institution itself.

What’s especially surprising about this state of affairs is that this state of affairs isn’t especially surprising. We rarely second-guess the propriety of delegated revenge. Even to think of it as such sounds strange, yet this is exactly what it is – an entity other than the person harmed meting out punishment to the offender. So how to explain it?

B. *The Failure of Standard Explanations Offered by Economics and Psychology*

The usual answers, when they are offered at all, focus on practicalities. Indeed, the benefits of delegated revenge are hard to question.¹⁸ A state monopoly on criminal punishment helps ensure even-handed, impartial justice¹⁹ that doesn’t get out of hand,²⁰ and (at least in theory) protects the rich as well as the poor.²¹ The necessity for centralized, impartial enforcement of personal and property rights, of course, is the central theory behind the social contract ideas of theorists such as Locke,²² Hobbes,²³ and the ancient Greek philosopher Lucretius.²⁴ In the (hypothetical) social contract, people agree to band together and give up their absolute individual freedom to do as they please and take what they wish in return for the security and cooperative gains they receive from being part of a collective. And, of course, one of the freedoms they give up is the ability to directly avenge harms against them. If this critical right were not relinquished, it would be impossible to control the

¹⁷ See generally John J. Coughlin, *A Comparison of the Administrative Law of the Catholic Church and the United States*, 34 LOY. L.A. L. REV. 81 (2000).

¹⁸ Which, of course, isn’t to say that they aren’t. See, e.g., Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 13-16 (1974); David Friedman, *Efficient Institutions for the Private Enforcement of Law*, 13 J. LEGAL STUD. 379, 394-96 (1984); David D. Friedman, *Law As a Private Good*, 10 ECON. & PHIL. 319, 327-28 (1994).

¹⁹ See Philip B. Kurland & D.W.M. Waters, *Public Prosecutions in England, 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 499-500.

²⁰ See WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING 184-87, 304-07 (1990) (discussing the brutality of blood feuds that occurred in early Icelandic history before the existence of a state).

²¹ See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 510 (1973); cf. Kurland & Waters, *supra* note 19, at 500.

²² JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324-25 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

²³ THOMAS HOBBS, LEVIATHAN 226-27 (C.B. Macpherson ed., Penguin Books 1986) (1651).

²⁴ LUCRETIUS, ON THE NATURE OF THE UNIVERSE 206 (R.E. Latham trans., 1973) (“Mankind, worn out by a life of violence and enfeebled by feuds, was the more ready to submit of its own free will to the bondage of laws and institutions.”).

exploitation of those without the resources to retaliate and to prevent the escalation of conflicts.

As everybody knows, theories of the social contract make greater claims to usefulness than truthfulness – no one ever asked any citizen to sign the contract, nor was anyone provided the opportunity to opt out of its provisions. It is by now cliché to note that the social contract is merely a hypothetical construct used to explain the delegation of all manner of authority to the State for practical reasons. Seeing all the benefits of the social contract, the argument goes, people would surely sign on the dotted line. Delegating retribution is efficient and sensible, reasonable people should prefer it, and so as a society, we should do it.

What exactly *are* the practical arguments for delegating revenge to the State? They fall roughly into two categories: (1) capturing the positive externalities of delegated revenge, and (2) avoiding the negative externalities of personal revenge.

1. Capturing Positive Externalities

Crime imposes losses on individuals: physical, psychological, and financial.²⁵ Crime also imposes costs on whole communities, caused by fear,²⁶ disorder,²⁷ and declines in neighborliness.²⁸ If punishment deters crime – and evidence indicates it does, even if imperfectly²⁹ – then sanctioning lawbreakers makes us all better off.

Unfortunately, punishment is costly. Enforcers must expend resources to catch offenders³⁰ and to inflict sanctions upon them.³¹ These costs are compounded by the fact that offenders (both innocent and guilty) presumably will expend resources to avoid capture and sanctioning.³² Furthermore, the

²⁵ Kenworthy Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1233-34 (2004).

²⁶ See C. Hale, *Fear of Crime: A Review of the Literature*, 4 INT'L REV. VICTIMOLOGY 79, 131 (1996).

²⁷ WESLEY G. SKOGAN, DISORDER AND DECLINE 21 (1990); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

²⁸ See Wesley G. Skogan, *On Attitudes and Behaviors*, in REACTIONS TO CRIME 19, 29-35 (Dan A. Lewis ed., 1981).

²⁹ Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 55-65 (1996).

³⁰ See e.g., MATTHEW J. HICKMAN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS 2000, at 7 (2003) (stating that the total operating budget for State and local law enforcement agencies during fiscal year 2000 was \$65.7 billion).

³¹ See e.g., KRISTEN A. HUGHES, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, at 1 (2006) ("Expenditures for operating the Nation's justice system increased . . . to over \$185 billion in 2003 . . .").

³² See, e.g., Jacob Nussim & Avraham D. Tabbach, *Controlling Avoidance: Ex-Ante Regulation Versus Ex-Post Punishment 2* (Bar-Ilan Univ. Pub. Law and Legal Theory, Working Paper No. 07-2, 2007), available at <http://ssrn.com/abstract=962850>.

benefits of punishing redound only partly to the party doing the punishing. For instance, if I shoot a man who robs me, I not only disable the robber from harming me, but I have also made everyone else a little safer. This, however, poses a problem: if carrying a gun is socially useful for its crime-fighting capacities, then the fact that individuals can't capture *all* the benefits of gun ownership means that on the margin, not enough people will do so. This is because carrying a concealed gun is a pure public good; that is, "consumption" of it by anyone does not diminish the ability of anyone else to consume it, and it is impossible to exclude others from doing so.³³ Because of these features, pure public goods are classically vulnerable to free rider problems and there will always be less of the good than is socially optimal.³⁴

An admittedly drastic oversimplification makes the point. Imagine that carrying and using a gun costs \$10 and by shooting the robber I avoid losses to everyone (myself included) of \$100. If this is so, then I should (economically and socially speaking) use the gun. However, imagine I never carry more than \$9 in my wallet. A robbery would only cost *me* \$9. In contrast, carrying a gun costs me \$10 and so I save a buck by not carrying a gun and taking my chances. Why should I be the one to spend the money to carry when the benefits go mostly to my neighbors? Even if I do have an incentive to carry the gun (say I routinely carry \$1000 in my wallet), I am still going to be tempted not to because I can just rely on my neighbors to carry; that is, I can take a free ride, since potential muggers will not know whether I am carrying or not and, to the extent they are doubtful, are more likely to leave me alone.³⁵ Why should I spend any money carrying a gun if my neighbors will shoot or intimidate all the robbers themselves, and I get the benefits scot-free?

To further compound the problem, bear in mind that this example is at its strongest when considering up-front expenditures to prevent particular or future crimes. That is, I should be most willing to spend at Time 1 to avoid being the victim at Time 2. Even though I won't have incentive to spend *enough* at Time 1 to prevent crime, I will at least be willing to spend sufficiently to address my own personal victimization; that is, I'll carry a gun if doing so will save me from loss.³⁶ But what if my expenditures would have to come at Time 3 – say, upon *ex post* punishment after the crime has already taken place?

³³ See, e.g., JOSEPH E. STIGLITZ, *PRINCIPLES OF MACROECONOMICS* 181 (1993).

³⁴ *Id.* at 182.

³⁵ For the value of concealed guns for just this purpose, see JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME* 5-6 (1998) ("When guns are concealed, criminals are unable to tell whether the victim is armed before striking, which raises the risk to criminals of committing many types of crimes."); Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43, 47 (1998) (finding that the presence of anti-theft tracking devices in some cars leads to a reduction in car thefts, even for cars without the devices).

³⁶ Cf. Ayres & Levitt, *supra* note 35.

Imagine I have been robbed (say I left my gun at home), but I know who did it and I can find him and punish him. Doing so would teach him a lesson and make it less likely that he would victimize me or anyone else in the future. Imagine further that punishing him would cost me only \$1 in effort, and that I lost a full \$1000 as a result of the robbery, which the robber promptly blew at the racetrack. Should I punish? No; here I have virtually no incentive at all to sanction the robber even though my losses far exceed the cost of doing so. The reason is that my losses are sunk – I can't get them back by punishing him.³⁷ I am always better off *threatening* to retaliate, but not following through on my word should my threats fail. So again, if left to private enforcement, punishment expenditures will be far less than socially optimal because victims should systematically fail to retaliate.³⁸

In sum, any rational individual should prefer to free ride on the enforcement efforts of others, and little if any punishing should ever occur. First, I would rather all of you spend the money to deter the town thief since I will get the benefits whether or not I pay for them. Second, victims must pay the punishment bill well after the individual losses from a given crime have already occurred, leaving little incentive to punish after the fact. Third, even if victims are willing, *ex post*, to punish offenders up to the cost of the losses

³⁷ Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 74 (1980). This is usually a reasonable assumption. In the real world the goods that were taken are only part of (maybe even in a small part) of the costs of a robbery. The victim also may suffer physical harm, psychic damage, lost productivity, etc., none of which are recoverable via retribution under this view of punishment. Punishing the man who broke my nose in a pool hall brawl doesn't speed up my physical healing, so I should get no value out of retribution.

³⁸ Of course, individuals might want to develop a reputation for punishing, in order to deter future victimizations. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 178-86 (1994) (describing reputation as a solution to the lack of incentive to punish in one-shot or otherwise finite interactions). In eighteenth- and nineteenth-century England, where public prosecution was unheard of and private prosecution was costly, thousands of "prosecution associations" arose to overcome the problem of a lack of *ex post* incentive to punish. Merchants would pay a fee into the association's common fund which would be used to fund the prosecution of any crimes subsequently suffered by any member. David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 485-86 (1995). Nevertheless, to the extent that membership in such groups is at all opaque (or can be faked), it is still not clear why firms joined, since there was always the temptation to simply free ride off of others' membership. Moreover, even for the "prosecution associations" themselves, it is still not clear why they would not always be better off threatening retaliation and then failing to follow through in any given instance. These problems, of course, are routinely solved in the real world – the very existence of these associations is evidence of just that. The point is that the standard stories of economics and game theory have a hard time credibly explaining how. For one possible – but ultimately flawed – solution for developing a truly credible reputation for retaliation, see *infra* Part I.B.2.

they themselves have suffered, they will still not take into account these same potential losses to others.

On this view, then, relying on individual victims leads to chronic under-enforcement because those who must purchase the good cannot fully internalize all – or in some cases any – of the benefits from the expenditure. The solution, therefore, seems simple: establish an entity with a monopoly on punishment (namely, the State) who can force individual beneficiaries of punishment (namely, its citizens) to pay for it. Just as it would do if it perceived a need to build a bridge, the State can total up all the benefits of punishment, divide by the number of citizens (or weight the burdens in some sensible manner), impose a tax, and efficiently sanction to its institutional heart's content. This solves all three problems in one fell swoop, and this ability to optimize punishment expenditures is the standard justification for a state monopoly on punishment typically offered by law and economics scholars.³⁹

As an added bonus, centralization of crime-fighting resources has the considerable advantage of economies of scale.⁴⁰ Instead of everyone having to purchase a gun and be always on the alert, we can hire just one police force to do our patrolling for us. We need only establish one set of courts and build only one prison system to do all of the punishing for the whole community.

On the other hand, a state monopoly on punishment imposes its own inefficiencies. The bureaucracy required to run a centralized criminal justice system that *completely* solves the problem of systemic under-enforcement would be truly colossal – the deadweight costs of information-gathering, implementation, and taxation would cripple any government. Indeed, even as enormous as the combined local, state, and federal crime-fighting regime is in this country,⁴¹ it doesn't even come close to performing the entire job. Private individuals and institutions still spend considerable amounts of money on prevention and even enforcement.⁴²

Even if a government could discover and control crime completely, it still wouldn't be efficient for it to do so, as these dead-weight costs render it cost-ineffective for the State to get involved in every petty grievance (“Who stole my soda out of the refrigerator?!”). It is cheaper, quicker, and more reasonable for individuals to carry the burden of punishing most small injustices – even criminal ones – privately. Moreover, even in areas where the State

³⁹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 22.2, at 599 (4th ed. 1992).

⁴⁰ Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204 (1985).

⁴¹ See HUGHES, *supra* note 31.

⁴² See, e.g., David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 634 (1999) (reporting that during the early 1990s, Americans spent \$682 million per year on padlocks and almost \$2 billion per year on gates); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1174-77 (1999).

unambiguously takes the lead on enforcement and engages in the bulk of enforcement and prevention, it still must rely on the cooperation of victims to do so effectively. An uncooperative victim will usually derail even the most vigorous criminal prosecution, yet cooperation is costly to victims in terms of time, resources, and perhaps even mental health. As a result, on the standard story of punishment, victims will not have adequate incentive to cooperate with state punishers any more than they have incentive to punish directly.

Indeed, complete centralization would induce a special form of free riding – on the State.⁴³ If we could rely on enough police officers to patrol our neighborhoods, we would not need to lock our doors or be careful where we walked or what we carried; we would have no incentive to engage in any prevention behaviors at all. But locks and caution are far less expensive than police officers and prisons. Also, individual people and firms will always have better information about their own risks than any bureaucracy ever could and, consequently, are much better equipped to implement optimal levels of private enforcement relative to the costs of potential victimization.

So the State, lest it be drowned by criminal justice expenditures, *does* have to rely on at least some private crime avoidance and punishment. It does so by deliberate under-enforcement. But once we accept this, we're back to the problem we had before: why, on the economic view, do people ever agree to do any of their own, personal crime fighting, when the individual benefits to them are marginal to nil, no matter how efficient it is for the system as a whole that they do it themselves?

2. Avoiding Negative Externalities

The answer is to hypothesize a “taste” for punishment. That is, people have developed an adaptive retributive impulse,⁴⁴ or what might also be called “genetic hotheadedness.” Hotheadedness gives an advantage to the individual by lending him punitive credibility.⁴⁵ The threat to retaliate will only work to deter victimization if potential wrongdoers believe a target will go through with it⁴⁶ – and considered only after the crime has already taken place, it never makes economic sense to do so. But if one can develop a credible reputation

⁴³ See Tomas J. Philipson & Richard A. Posner, *The Economic Epidemiology of Crime*, 39 J.L. & ECON. 405, 408 (1996) (suggesting that greater public protection can crowd out private protection).

⁴⁴ Posner, *supra* note 37, at 78-79, see also Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35, 49 (1971). For an argument for a taste for retribution that does not rely on biological evolutionary foundations, see RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* 88-89 (1996) (hypothesizing that “cultures of honor,” where individuals are more prone to exact revenge, are a result of sociological factors such as protecting one’s reputation for toughness in frontier and herding societies).

⁴⁵ See ROBERT H. FRANK, *PASSIONS WITHIN REASON* 66-67 (1988).

⁴⁶ *Id.* at 5.

for always retaliating, no matter what the costs, a person won't be as much of a target in the first place, and so on net, people would be better off always retaliating. A reputation for retaliating becomes credible when the target is genuinely a hothead; that is, when she no longer resents having to spend resources on punishing wrongdoers. Indeed, she might get satisfaction out of it, in the same way she gets satisfaction out of scratching an itch.

This retributive impulse hypothesis solves both the free rider problem of ex ante crime fighting and the sunk costs problem of ex post punishing because it posits a world where it is psychologically motivating to foil and avenge wrongdoing, for its own sake. If we further hypothesize that people derive satisfaction not only from foiling and avenging wrongs against themselves but foiling and avenging wrongdoing generally,⁴⁷ then we even solve the problem of people failing to internalize the full *social* benefits of punishment. A taste for retribution is the standard psychological explanation for punishing, whether it is described explicitly or implicitly.⁴⁸

While this offers a (partial) solution to the problem of private punishment, it is the source of another problem. In the same way that private enforcers will not internalize the benefits to others of punishing, they also will not internalize the *costs*. Although punishment costs the enforcer, it also costs the one being sanctioned, and, less obviously, many people who might depend on or identify with the offender.⁴⁹ Optimally, when deciding how harshly to punish, the enforcer would factor in such things as lost productivity, loss of productive resources and capacities, and social embarrassment suffered by the person punished and by people such as family members and employers who interact with or depend on him. But there is nothing natural in the taste for retribution that would limit itself to matching the harm done to the victim (and others), and no more.⁵⁰ At most, the victim is likely to only pay attention to her own

⁴⁷ See Posner, *supra* note 37, at 74-75 (emphasizing that not only the victim, but also her family and friends derive satisfaction from punishing the offender). Indeed, it is empirically demonstrable that third parties do seem to take pleasure in punishing offenders and will even incur personal cost to inflict it at no conceivable material benefit to themselves. See, e.g., Dominique J.-F. de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCIENCE 1254, 1258 (2004); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137, 137 (2002).

⁴⁸ Modern psychologists are more likely to speak in terms of a "justice" motive, usually without unpacking the concept further. See, e.g., John Darley, *Just Punishments: Research on Retributional Justice*, in THE JUSTICE MOTIVE IN EVERYDAY LIFE 314, 324 (Michael Ross & Dale T. Miller eds., 2002).

⁴⁹ See, e.g., Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 206-08 (1998) (finding that tough sentences for drug-related crimes have adverse effects on those associated with the offender).

⁵⁰ See Posner, *supra* note 37, at 82. This lack of natural limits is more a problem in theory than in practice which, again, economics has a hard time accounting for. See Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRIT. J. SOC. & CLINICAL PSYCHOL. 293,

losses and will probably not be sensitive to all of the harms punishment inflicts.

In other words, rather than needing encouragement to punish, once we posit a simple taste for retribution, people's punitive impulses need to be reined in. The problem with non-delegated punishment, then, is not just under-enforcement, but ironically *over*-enforcement. When I attack you for hurting me, especially if I cause more harm than I was "entitled" to cause from my victimization, then you are motivated to punish *me*. The problem escalates when others connected to the main actors, such as kin, get involved; and they almost certainly will since they will suffer "collateral" punishment for which they will feel (rightly) compelled to exact retribution in turn.

In a regime where victims have a taste for retribution, wrongdoers will be sanctioned more harshly than they deserve (from the standpoint of the amount of harm they inflicted on their victims), and bystanders will suffer from retribution for activities in which they had no or little part. This triggers a desire for retribution in all those sanctioned excessively or wrongfully, and so begins a cycle that can easily spiral out of control. The result is costly, dangerous blood feuds.⁵¹

Just as before, we can cure the problem of private over-enforcement by giving the State a monopoly on punishment. We forbid victims from indulging their taste for retribution and instead let the State total all the harms caused by a particular wrongdoing and assign an appropriate sanction that costs no more than that harm – a sanction that will not be excessive, like the one inflicted by a victim would predictably be.⁵² But it should be obvious that this is an unworkable system as well. Because there is no natural stopping point for people's retributive urges, the State would have to expend enormous resources to control them. Moreover, it would have to deal with the widespread resentment this cabining would inspire. *Without* a taste for retribution (one in which people are interested instead only in minimizing their own expenditures on safety and security), the State is overwhelmed by the costs of controlling offenders. But *with* a taste for retribution, the State is overwhelmed by the costs of controlling victims.

293 (1978); cf. MILLER, *supra* note 20, *passim* (describing how, in Icelandic feuds, retributive harm done in excess of initial harm received was compensated for by property).

⁵¹ Francesco Parisi, *The Genesis of Liability in Ancient Law*, 3 AM. L. & ECON. REV. 82, 87-88 (2001); see also MILLER, *supra* note 20, *passim*. Miller, however, does not argue that there is *no* limit to blood feuding. In fact, the point of his book is to show how a society with literally no government at all (as in Medieval Iceland) can nevertheless manage to maintain order. MILLER, *supra* note 20, *passim*; see also William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in LAW IN THE DOMAINS OF CULTURE 161, 177 (Austin Sarat & Thomas R. Kearns eds., 1998); William Ian Miller, *In Defense of Revenge*, in MEDIEVAL CRIME AND SOCIAL CONTROL 70, 79 (Barbara A. Hanawalt & David Wallace eds., 1999).

⁵² Posner, *supra* note 37, at 82.

3. Procedural Justice

A final practical defense of the State monopoly is that the State is best equipped to exact punishment in a *manner* that comports with our desires for justice. The American legal system as a whole has an obvious preference, reflected prominently throughout the Bill of Rights,⁵³ for using procedurally just methods in dealing with criminal offenders. The argument here is that as a polity, we have an interest not only in exacting revenge against wrongdoers, but we have a separate (and sometimes competing) interest in punishing them in a fair and equitable way.

Free-agent punishers, unlike the State, do not have the resources to spend on vast procedural safeguards such as impartial police, prosecutors, judges, juries, and correctional facilities, each of which helps to ensure that the right offender gets caught and dealt with fairly. But again, the task is not to justify why we delegate revenge to the State as a matter of sensible public policy. Instead, it is first, to explain why victims ever tolerate such delegation, and second, to explain when, why, and how the delegation does (and does not) occur.

Even if it is true that everybody, more or less, has tastes for both revenge and procedural justice, for direct victims the hot, first-order desire for revenge risks overwhelming the cooler, second-order desire for procedural niceties (and even accuracy). But even as a foundational matter the idea that the public has a desire for procedural justice for criminal offenders is depressingly debatable. True, there is a vast literature showing that people do seek procedural justice even at the expense of favorable material outcomes.⁵⁴ And the very existence of constitutional protections for criminal suspects and convicts, and laws embodying and enforcing those protections, implies indirectly that people value them at least enough not to subvert or repeal them. However, most of the procedural justice literature focuses on how much people value *their own* fair treatment at the hands of authorities for the instrumental, psychological, and social status rewards it bestows.⁵⁵ While it is true that people can – and at

⁵³ See U.S. CONST. amends. IV-VII, XIV.

⁵⁴ See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 89 (1988); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 118 (1975) (reporting that the adversary system “produces greater satisfaction with the judgment, regardless of the outcome of the case”); Tom Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 72 (1985); Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV 1401, 1415-16 (1979) (concluding that perceived outcome fairness does not affect perceived procedural justice).

⁵⁵ See, e.g., THIBAUT & WALKER, *supra* note 54, at 2; Gerda Koper et al., *Procedural Fairness and Self-Esteem*, 23 EUR. J. SOC. PSYCHOL. 313, 323 (1993) (finding procedural injustice lowers self-esteem); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281, 281 (1980); Tom Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J.

least sometimes do – perceive when third parties are being treated with procedural unfairness,⁵⁶ the boundaries of when they care about such injustices are unclear.

For one thing, people are overall less likely to respond to procedural injustices experienced by others than to those experienced personally. Either because of a lack of full information, or the traditional attribution processes that tend to result in blaming others for their own misfortune, people discount the unfairness of others' mistreatment.⁵⁷ Moreover, sensitivity to suffering is a function of social identity: we care more about the misfortunes of third parties when we identify with them.⁵⁸ It's hard to imagine most victims identifying in a meaningful way with their own offenders.⁵⁹ For both of these reasons, a victim's desire to treat – or more to the point, to see others treat – her offender in a procedurally just fashion cannot be presumed.

At a minimum, concerns about procedural justice cannot explain victims' willingness to delegate punishment to the State. Much less does it explain their usual whole-hearted embracing of such delegation and their resentment when the State leaves them to their own devices for redressing wrongs committed against them. Finally, it offers no coherent account of those times when victims will refuse delegation and indulge in self-help.

In sum, while each one of these explanations might explain when and why the State, as a matter of good public policy, will prefer to handle punishment itself and when it will leave things to victims, none tell us when and why victims themselves will prefer to delegate versus act. If we explain the State monopoly by saying that victims have a strong preference for procedural justice, or that they will always shirk rather than expend effort on self-help

PERSONALITY & SOC. PSYCHOL. 913, 913 (1996) (testing whether fair procedures communicate identity-relevant information).

⁵⁶ See Kees van den Bos & E. Allan Lind, *The Psychology of Own Versus Others' Treatment: Self-Oriented and Other-Oriented Effects on Perceptions of Procedural Justice*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1324, 1331 (2001).

⁵⁷ See E. Allan Lind et al., *The Social Construction of Injustice: Fairness Judgments in Response to Own and Others' Unfair Treatment by Authorities*, 75 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 14-15 (1998); van den Bos & Lind, *supra* note 56, at 1331-33.

⁵⁸ So, for example, although people tend to derogate victims of misfortune generally, they do so less to the degree they share features, such as political affiliations, with the victim. See, e.g., Frederick D. Miller et al., *Predicting Perceptions of Victimization*, 6 J. APPLIED SOC. PSYCHOL. 352, 356-57 (1976).

⁵⁹ See generally Jennifer T. Lupfer, *Untitled Manuscript* (unpublished manuscript, on file with author) (discussing the extreme and surprisingly recent history of treating criminal offenders as an anthropologically distinct class). This literature arguably lives on today, albeit in disguised form, in discussions of clinical "psychopathy" and "sociopathy." See, e.g., ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF PSYCHOPATHS AMONG US* 6-7 (1993); Linda Mealey, *The Sociobiology of Sociopathy: An Integrated Evolutionary Model*, 18 BEHAV. & BRAIN SCI. 523, 523, 536 (1995).

whenever they can, then people should always prefer to delegate. If instead we posit a taste for retribution, then people should always prefer self-help. Yet people seem to prefer to do a little of both.

Perhaps these explanations work in concert. Each relies on the idea that the occasionally overridden State monopoly on punishment optimizes certain instrumental values; it minimizes the efforts victims must expend on their own safety and security, while at the same time indulging their tastes for both retribution and procedural justice. Depending on which value is dominant at any given time, victims will sometimes want to delegate, other times to act for themselves. On this view, if we more fully understood the conditions which made one or the other value dominant, we could predict when victims would prefer to delegate.

The major problem with this view is parsimony. It posits a complex witch's brew of motivations, whose delicate balance will determine victims' behavior. And though it does seem true – as I hope to show through several examples – that the retributive urge is minutely sensitive to context, in this model there are so many moving parts, and we have so little information about how much people value each part and when the different pieces will be salient, that it would be virtually impossible to use it to make predictions about behavior.

Still, it would be a more complete solution to the puzzle of delegated revenge than any of the standard explanations offered individually. However, this Article argues that another construct – namely people's desire for social standing within groups they value – can do a better job of both explaining and predicting, and further, that it does so more simply. But before defending that account, I offer in the next Section a sample of real world examples that underscore more concretely the failings of the traditional explanations for delegated revenge.

C. *Where the Instrumental Explanations Fail – Examples*

The bottom line of the traditional explanations for delegation of revenge is that victims either should prefer it because, for them, delegating their revenge is cheaper and less perilous than engaging in any form of self-help, or should resent it because it interferes with their ability to indulge their visceral desire for personal retribution. The State should prefer delegation because a state monopoly enables a more orderly, temperate and functional criminal justice system.

But evidence abound suggests that the State monopoly on punishment is neither a mere shouldering of a social good that victims themselves are too lazy or uninterested to bear, nor is it a grudging concession by victims to practicality or procedural justice concerns. Individual victims clamor for state punishment, rather than either resenting or being indifferent to it. This is so even where victims can get nothing material out of a successful prosecution. And it is so even where a victim could wreak private vengeance more cheaply and quickly than she could via the formal criminal justice system. Moreover, victims exhibit strong preferences about the identity of their agents of revenge,

and about the mode and purpose of punishment. That is, holding constant the level of suffering inflicted on their offender, victims care deeply about who inflicts it, how, and why. The instrumental view of delegated revenge explains these intricate preferences badly, if at all.

Admittedly, the evidence I offer in this Section is somewhat speculative, and sometimes anecdotal. However, it gives teeth to an intuition that I hope most readers will quickly recognize: victims are getting something out of delegated revenge that is simply not captured by the standard explanations.

1. People Do Not Always Prefer the “Cheapest” Punisher

As taxpayers, victims have to pay their share of the costs of state-monopolized punishment, just like everyone else. But in fact, victims tend to expend even more of their own resources than the average taxpayer because they are usually expected to cooperate with police, testify at trials and parole hearings, and the like. So, even when victims delegate their revenge, under any instrumental view of punishment we should expect victims (and everyone else, for that matter) to prefer the cheapest agent of revenge available. Trials are expensive, and imprisonment even more so. A jailhouse suicide or murder on this view is a real bargain – justice is delivered quickly and completely (if excessively), and with minimal victim cost. Yet rather than feeling grateful or relieved when their offenders are punished in this way, victims often express resentment.

One of the more dramatic examples of this happened in the prison murder of defrocked pedophile priest John Geoghan. At the time of his murder, Geoghan was serving a nine- to ten-year sentence for one (of the more minor) of the scores of child molestation accusations that had been levied against him.⁶⁰ Fellow inmate Joseph L. Druce – who claimed to be motivated by a hatred of pedophiles stemming from his own sexual victimization as a child⁶¹ – strangled Geoghan inside his prison cell.

After Geoghan’s murder, reporters asked his victims how they felt about what had happened. These victims did not express gratitude, as taxpayers, that the State would no longer have to continue to pay for Geoghan’s incarceration. Still less did they express relief that they would no longer have to go through the expense, inconvenience, and trauma of testifying at the trials in their own pending cases. Instead, many responded with resentment. In interviews they said they felt *Geoghan*, not them, “got off easy” because he would not have to face additional trials.⁶²

⁶⁰ Kathleen Burge, *Geoghan Sentenced to 9-10 Years*, BOSTON GLOBE, Feb. 22, 2002, at A1.

⁶¹ See Sean P. Murphy, *Tests Ordered for Druce in Geoghan Killing: Suspect Condemns Abuse of Children*, BOSTON GLOBE, Oct. 4, 2003, at B5.

⁶² See, e.g., *The Early Show* (CBS television broadcast Aug. 25, 2003), available at LEXIS, News Library; *The NewsHour with Jim Lehrer* (PBS television broadcast Aug. 25, 2003), available at LEXIS, News Library.

Victims felt that something valuable had been taken from them. Indeed, a newspaper editorial described Druce as having “robbed” the victims of their day in court.⁶³ But what, exactly, had they been robbed of? Geoghan was an old man at the time of his murder and had been accused by over 150 children;⁶⁴ there was no way he could have lived long enough to even be tried, let alone serve time for each one of them. Nevertheless, victims didn’t see additional trials for their own cases as overkill. They felt they would have gotten something out of official condemnation and punishment delivered by the State, something that they didn’t get when it was an inmate doing the condemning and the punishing.

Even more than jailhouse murders, victims resent jailhouse suicides. Consider this newspaper editorial written shortly after accused murderer Ian Huntley was found comatose in his jail cell after swallowing two weeks’ worth of anti-depressant medication he had hidden in a box of teabags:⁶⁵

Although Ian Huntley has emerged from the coma that temporarily smothered him, he nearly achieved a devastating result.

....

It is not only that Huntley – whether guilty or innocent – nearly escaped the system, but that he also nearly escaped the social and judicial demands that you and I place upon somebody suspected of a criminal offence.

....

... [T]o utter a cliché [sic] that is so true that its inherent moral beauty has been diluted by overuse, not only must justice be done, but it must be seen to be done.

Justice by pub-talk or lynchmob is summary and brutal, but it is not real justice, for it lacks the intellectual satisfaction of evidence adduced and weighed, and it is empty of that moral soundness that comes from a decision made by us, as represented by 12 of our number, affecting the final destiny of the prisoner.⁶⁶

It is not that victims don’t want to see their offenders suffer. Probably, many of Geoghan’s victims even would have liked him see him get the death

⁶³ Editorial, *The Wrong Penalty*, BOSTON GLOBE, Sept. 2, 2003, at A12.

⁶⁴ Murphy, *supra* note 61.

⁶⁵ Tom Whitehead, *Police May Quiz Huntley Over ‘Confessions,’* PRESS ASS’N, Nov. 26, 2004, at Home News. Huntley has since unsuccessfully attempted to commit suicide two more times. See Charlotte Gill, *Huntley in Third Suicide Attempt*, DAILY MAIL (London), Sept. 29, 2007, § 2, at 7.

⁶⁶ Brian Masters, *He Cannot Be Allowed To Escape Justice*, DAILY MAIL (London), June 11, 2003, at 12.

penalty for his offenses,⁶⁷ and a majority of the population in the United States do approve of the death penalty for murderers.⁶⁸ But the desire is for the death penalty inflicted by the *right* punisher (here, the State) – a desire that can't be explained by the traditional view of delegated revenge; according to which, if they care at all, victims should prefer the *cheaper* of two punishers. As cheap as they are, neither a suicidal offender himself, nor a fellow inmate – even one acting in the victims' names as Joseph Druce claimed to be – is perceived to be a legitimate agent for a victim's revenge.

2. People Are Not Indifferent Among State Punishers

One might argue that victims don't want inmates to do their punishing for them because they want to make absolutely sure they have the correct offender. Or, they want the information they can only retrieve during a trial. Or, they have competing concerns for procedural justice that simply are not met by summary justice rendered by jailhouse murders and suicides, and these concerns drown out the desire for cheap punishment.

For example, when Jack Ruby murdered Lee Harvey Oswald, not only was he stealing from the American public their right to collectively wreak vengeance on the man who murdered their president, but they also lost the ability to glean important information about the assassination. Moreover, the resulting black box has fed countless conspiracy theorists who believe that we did not capture the complete set of assassins. When the government does the adjudicating, the risk of mistake is reduced, and the opportunities for information-gathering and fair procedures are maximized.

Yet still, this instrumental story does not explain every anecdote about people's desires – often very strong – for very particular state punishers. The case of the D.C. Snipers, Lee Boyd Malvo and John Allen Muhammad, provides a recent, vivid example.

Even a plain vanilla capital trial costs counties an enormous amount of money – estimates range from two to seven million dollars on average to take them all the way to execution – with most of those costs coming at the local level either from tax increases or reductions in police and capital spending.⁶⁹

⁶⁷ *But cf. The NewsHour with Jim Lehrer, supra* note 62 (quoting plaintiffs' attorney Mitchell Garabedian as saying that most of the plaintiffs felt Geoghan should have served out his time and been given an opportunity to reflect). That such a sentence would be unconstitutional does not diminish the wish, or the point. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that the death penalty is a "grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment").

⁶⁸ In a telephone survey, 65% of Americans reported that they favored the death penalty for persons convicted of murder. ABC News, Washington Post Poll, June 22-25, 2006, Public Opinion Online, The Roper Center at the University of Connecticut, accession no. 1658721, available at LEXIS, News Library.

⁶⁹ Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, ADVANCES ECON. ANALYSIS & POL'Y, 2004, vol. 4, issue 1, art. 6, at 1-3, available at

The trials of Malvo and Muhammad were expected by all to cost far more than a typical capital trial and, indeed, did cost multiple millions of dollars.⁷⁰

Where more than one place has jurisdiction – and here, at least seven did – an economist would predict a fight over where an expensive prosecution like the D.C. Snipers trial will occur. True to prediction, there was an enormous battle over who would prosecute the D.C. Snipers, and the decision ultimately had to be made by United States Attorney General John Ashcroft, since one of the jurisdictions in play was federal. But contrary to a standard economic view, the fight was not over who *had* to prosecute the snipers, it was over who *got* to prosecute them. Even more interesting was the nature of the arguments the various prosecutors made to press their cases. They spent relatively little time arguing about who could assemble the best evidence. Instead, prosecutors focused almost invariably on the “rights” of the dead victims, such as claiming their own jurisdiction had lost the greatest number, or that their jurisdiction suffered the first killing.⁷¹

Virginia “won” the right to take the first crack at the snipers, and successfully secured a death sentence against Muhammad, and a life sentence without parole against Malvo.⁷² Remarkably, after the jury handed that sentence down, a new round of fighting among prosecutors emerged over who was entitled to prosecute them *next*.⁷³ This is especially hard to comprehend from the perspective of the traditional view of delegated revenge – what could possibly be gained by spending millions more on duplicative trials, when a man can only serve one life sentence, or for that matter, only one death sentence? Surely no new information, for instance, would be gleaned from another trial.

Even if rival prosecutors had been battling initially because they didn’t trust that the others could secure a conviction – an outcome that could affect the safety of their own citizens – this concern falls away once the penalty is secured. The prosecutors, in fact, should have felt lucky not only to have

<http://www.bepress.com.ezproxy.bu.edu/bejeap/advances/vol4/iss1/art6>
“Download” hyperlink).

(follow

⁷⁰ See Paul Bradley, *For Snipers, It May Be Life and Death*, RICHMOND TIMES DISPATCH (Virginia), Mar. 8, 2004, at B1.

⁷¹ See, e.g., Carol Morello & Katherine Shaver, *Prosecutor Initiates Sniper Case Charges; Gansler to Seek Death Penalty for Muhammad*, WASH. POST, Oct. 27, 2002, at A1; Editorial, *Poor Execution of Jurisdiction*, CAVALIER DAILY (Virginia), Oct. 29, 2002; *CNN Late Edition with Wolf Blitzer* (CNN television broadcast Nov. 3, 2002), available at LEXIS, News Library.

⁷² Josh White & Patricia Davis, *N. Va. Looks To Be Next Stop for Sniper Case*, WASH. POST, Jan. 25, 2004, at C1.

⁷³ See Frank Green & Rex Bowman, *Alabama, Maryland Queue Up for Snipers: Each Wants To Bring Its Own Case Against Muhammad, Malvo*, RICHMOND TIMES DISPATCH (Virginia), Nov. 21, 2003, at A18; Tom Jackman & Josh White, *Prosecution Groundwork Laid for More Sniper Trials*, WASH. POST, Dec. 25, 2003, at B1; White & Davis, *supra* note 72.

avoided the prosecution in their own jurisdiction, but also the execution: death sentences are incredibly expensive to implement, as are lifetime incarcerations.⁷⁴

When pressed, prosecutors argued that the additional trials were necessary for “insurance,”⁷⁵ but a couple of considerations put the lie to this claim. Ashcroft chose Virginia precisely because it had the quickest, most efficient path toward executions.⁷⁶ But even more importantly, things could unfold in a second trial in a way that might reveal inconsistencies, errors, or improprieties in the first trial, opening the door to the very thing prosecutors claimed to want to avoid: a challenge to Virginia’s sentence. Why take such a risk? At best, the increase in certainty of an ultimate execution has to be weighed against the increased risk of reversal occasioned by problems revealed in a second (and third, and fourth) round of trials. When one factors in the multimillions of dollars that additional trials would cost, it’s hard to take the prosecutors’ “insurance” claims very seriously.

Of course, one might argue that since prosecutors are politically ambitious, we shouldn’t be surprised to see them jockeying for position over a case that would likely make their career. But prosecutors’ political ambitions trade on public support for their actions. Why would a prosecutor be rewarded for visibly costing his or her county millions of dollars when a large number of other counties could just as easily do the work and get stuck with the bill? These trials were boondoggles from a financial perspective. Why wouldn’t taxpayers reward their own prosecutors for smartly free riding?

No one did fault the prosecutors for “wasting” resources. Even commentators who did not necessarily support the death penalty believed that each jurisdiction should get their turn at prosecution. As Aaron Brown, then of CNN, argued: “Economy is the last issue we should be concerned with. That is something the families and their victims, of course, deserve.”⁷⁷ He instead chided prosecutors that “[i]f these guys are the snipers, they should stand trial everywhere they killed and answer for every life they claimed, every single one.”⁷⁸

⁷⁴ See Baicker, *supra* note 69; Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 50 (2000) (claiming executions are much more expensive than lifetime imprisonment).

⁷⁵ Matthew Cella & Jon Ward, *States Vie for Sniper Suspects*, WASH. TIMES, Dec. 4, 2003, at A1; *see also* Green & Bowman, *supra* note 73.

⁷⁶ Michael C. Dorf, *Ashcroft and Rehnquist Go on a Shopping Spree: The Problem with Choosing Jurisdictions and Judges Based on Predicted Results in the Sniper and Terrorism Cases*, FINDLAW, Nov. 27, 2002, <http://writ.news.findlaw.com/dorf/20021127.html>; *cf.* Morello & Shaver, *supra* note 71.

⁷⁷ *CNN Newsnight Aaron Brown*, (CNN television broadcast Oct. 28, 2002), available at LEXIS, News Library.

⁷⁸ *Id.* As a more recent example of a similar phenomenon, consider the resentment felt by Kurdish Iraqis when Saddam Hussein was executed for the massacre of 148 Shiites in

The D.C. Snipers case shows powerfully that victims and communities, again, *get something* out of criminal trials that is separate from both the incapacitation effects of locking up particular offenders, and from the mere information or accuracy-maximizing effects of delegating their revenge to the State. They even get something more than the mere spectacle of seeing the wrongdoers suffer. Rather than being content to free ride on the punishment efforts of other states, citizens clamored to spend millions of their own taxpayer dollars for the opportunity to hold trials within their own borders – even when doing so could at best duplicate, and at worst put at risk convictions that other jurisdictions had already obtained.⁷⁹ People are simply not indifferent to where – let alone to whether – offenders are punished.

The taxpayers in these jurisdictions are not stupid; they are willing to pay only for something they actually value. Prosecution in the *right* jurisdiction buys them something that prosecution in the *wrong* jurisdiction cannot. The right jurisdiction is powerfully symbolic; it indicates a public acknowledgement of and solidarity with *their* victims. As the sniper prosecutor in Maryland argued: “We had six homicide victims here in Montgomery County; none of them has had their day in court. Neither has the community at large had its day in court.”⁸⁰ Or as the Louisiana prosecutor more poignantly phrased it: “They murdered a very nice Baton Rouge woman They have a date with Louisiana justice. I’ll be doing everything I can to see that they will make that date.”⁸¹

3. People Are Not Indifferent to the Purpose of the Offender’s Suffering

Victims do not just want to delegate their revenge to the right agent, nor do they even just want to delegate it to the right *state* agent. Victims care that the

Dujail, before his trial for the chemical attack on thousands of Kurds in Anfal was even completed. As Christopher Hitchens reported for Slate:

Every Kurd I know was eager to see this episode properly aired in court and placed on the record for all time, with its chief perpetrator on hand to be confronted with his deeds. Instead, the said chief perpetrator was snatched from the dock – in the very middle of his trial – and thrown as a morsel to one of the militias.

Christopher Hitchens, *Lynching the Dictator*, SLATE, Jan. 2, 2007, <http://www.slate.com/id/2156776>.

⁷⁹ The public’s desires also can’t easily be explained by a sort of “reputation” effect; that is, the opportunity to hold the trials in their own jurisdictions to send a powerful – and powerfully expensive – deterrence message to would-be criminals to stay out of their State. People expressed outrage in Montgomery, for example, at the idea that the prosecution might be federal, rather than local, despite the fact that the physical jurisdictions are overlapping. See Morello & Shaver, *supra* note 71.

⁸⁰ Tom Jackman, *Va. Judge Dismisses Case Against Muhammad*, WASH. POST, Oct. 2, 2004, at A1.

⁸¹ Brett Barrouquere & Josh Noel, *Sniper Suspects Indicted in BR*, THE ADVOC. (Baton Rouge, La.), Nov. 15, 2002, at A1.

suffering inflicted on the offender reflects an official condemnation of *their* crime.

Perhaps unsurprisingly, there have been no empirical demonstrations of the exact point that victims will be satisfied by seeing their criminal offenders suffer when, and only when, the suffering has been inflicted explicitly for their own victimization. But by extrapolating from two psychological theories, we could make such a prediction. The first is “equity theory,” which argues that people are motivated to maintain an even “balance sheet” between themselves and others, with assets and debits extending far beyond strictly economic inputs and outputs, to intangible goods such as respect and fair treatment.⁸² Acts of disrespect (such as committing a criminal offense against another) are resented because, as William I. Miller has phrased it, they constitute “gifts, of negative moral value to be sure, but as gifts nonetheless . . . [that] demand[] repayment.”⁸³

The second relevant theory is “mental accounting,” first articulated by Richard Thaler. He found that people do not treat money from different sources as fungible, but instead categorize expenditures and income by type, and such “labeling” affects their purchasing decisions.⁸⁴ To illustrate, consider the famous experiment conducted by Daniel Kahneman and Amos Tversky. Respondents were asked one of two questions. In the first, they were told to imagine that after arriving at a theater and opening their wallet to pay for the \$10 ticket, they realized that somewhere along the way they had lost a \$10 bill. They were then asked if they would go ahead and buy the \$10 theater ticket, and 88% said they would. In the second version, respondents were told that they had purchased the \$10 theater ticket in advance, and upon arrival and opening their wallet, they realized they had lost the ticket itself. They were then asked if they would go ahead and buy another \$10 ticket; but in this version, fewer than half of the respondents said “yes.”⁸⁵

People also file monetary expenditures and windfalls in separate categories, and adjust their spending accordingly. In another experiment, Chip Heath and Jack B. Soll found that when participants were told to imagine that they had

⁸² See, e.g., William Austin, Elaine Walster & Mary Kristin Utne, *Equity and the Law: The Effect of a Harmdoer's "Suffering in the Act" on Liking and Assigned Punishment*, 9 ADVANCES IN EXPERIMENTAL PSYCHOL. 163, 165-67 (1976).

⁸³ WILLIAM IAN MILLER, HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 16 (1993).

⁸⁴ Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DECISION MAKING 183, 184 (1999); see also Chip Heath & Jack B. Soll, *Mental Budgeting and Consumer Decisions*, 23 J. CONSUMER RES. 40, 40 (1996) (“Consumers often set budgets for categories of expenses (e.g. entertainment) and track expenses against their budget.”). See generally Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980) (arguing that in certain situations, many consumers act in a manner that is inconsistent with normative economic theory).

⁸⁵ Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 347-48 (1984).

purchased a sweatshirt, they reported that they would be less likely to purchase other items of clothing (gloves, a costume, blue jeans) in the same month, but their likelihood of purchasing unrelated items like pizza, wine, or a boat tour decreased only slightly.⁸⁶ The same was true when they were told they were given the sweatshirt as a gift.⁸⁷

In other words, rather than counting them as functionally equivalent, people tend to treat losses, expenses, and gains as interchangeable only to the extent that they perceive them as similar. If wrongs inflicted by others are also measured as losses on an interpersonal balance sheet – as equity theory suggests they are – then people should not treat these losses, whether in the form of dignity, physical injury, or material deprivation, as fungible. Nor should they uniformly treat the suffering of their wrongdoers as credits against those losses. Punishment should only balance the account if the wrongdoer's suffering is, in the mind of the victim, part of the same transaction as the crime committed.

Although not about the punishment of wrongdoing per se, a study published in 1978 is at least suggestive of the point.⁸⁸ Participants were first insulted by a confederate, and later had the opportunity to aggress against the confederate by “punishing” him (with, as these things were typically done in aggression studies of the era, electric shocks) for making errors on a learning task. In between these two events came the experimental manipulation: the experimenter came in and either berated the confederate for his ill-treatment of the participant, berated him for an unrelated misdeed (coming late to the experiment), or, as a control, did not berate him at all.⁸⁹ Consistent with predictions, the unrelated “punishment” (the tongue-lashing by the experimenter for being late) did not significantly reduce aggression on the part of the participant once he had the opportunity to express it in the form of punitive shocks, when compared to the no-punishment control condition. In contrast, the related admonishment (for the insulting behavior) did reduce later aggression.⁹⁰

Though direct empirical evidence is lacking, consider as a real world example the outcome of the trial for serial murderer Charles Ng. Ng tortured and killed at least twelve people; among them, Paul Cosner.⁹¹ Sharon Sellitto was Paul's sister. Sharon had been instrumental in catching Ng, and had

⁸⁶ Heath & Soll, *supra* note 84, at 45-49.

⁸⁷ *Id.*

⁸⁸ Steven J. Kingsbury, *Self-Esteem of Victim and the Intent of Third-Party Aggression in the Reduction of Hostile Aggression*, 2 MOTIVATION & EMOTION 177, 180-82 (1978).

⁸⁹ *Id.* at 181.

⁹⁰ *Id.* at 183-84.

⁹¹ *Id.*

traveled from her home in St. Paul, Minnesota to the courtroom in Northern California in order to attend every single day of the four month capital trial.⁹²

On February 24, 1999, the jury returned eleven guilty verdicts for first degree murder – but hung on the twelfth count, the killing of Paul.⁹³ In the case of a deadlocked jury, the judge must of course declare a mistrial on that count, but Charles Ng was headed for the execution chamber regardless.⁹⁴

What was Sharon's response to her brother's murderer being sentenced – eleven times – to death at the hands of the State of California? Instead of being satisfied that Ng would pay the ultimate price for his crimes, Sharon was outraged.⁹⁵ Ng might suffer, but not for murdering *Paul*.

Sharon spent the next few years lobbying the prosecution team to retry Ng on the twelfth count. Incredibly (at least to a conventional economist), although the trial had cost \$12 million,⁹⁶ and a retrial would not cost much less (if any less) the second time around, the prosecutors actually held meetings to debate whether to do so. Ultimately, they decided that they simply could not justify expending their limited resources on another such trial, and the case was dropped.⁹⁷

Sharon's disappointment with the verdict is hard enough to understand using traditional accounts of delegated revenge, but her response to the prosecutors' final decision not to pursue a second trial is impossible to explain. Sharon could not give up on her quest for an official, public statement about how her brother died and who was responsible for his death. So, she did something rather remarkable: she went to the San Francisco Municipal Court, and applied for a death certificate for Paul. When the courts issue a death certificate, they must list a cause for the death. Sharon received a one-page, handwritten court order, stating the following:

Paul Steven Cosner went missing in San Francisco on November 2, 1984. He has not been heard of since and ~~it appears~~ the Court finds that he was the victim of murder at the hands of Leonard Lake and Charles Ng.⁹⁸

⁹² Telephone Interview with Paul Cummins, San Francisco prosecutor in Ng case (Oct. 13, 2004).

⁹³ Rene Sanchez, *Jury Convicts Man of Murdering 11; Victims Were Tortured in Remote Calif. Cabin*, WASH. POST, Feb. 25, 1999, at A3.

⁹⁴ *Killer Charles Ng Sentenced to Death*, L.A. TIMES, July 1, 1999, at A3 (stating Ng was condemned to die by lethal injection).

⁹⁵ Sanchez, *supra* note 93.

⁹⁶ Telephone Interview with Paul Cummins, *supra* note 92.

⁹⁷ *Id.*

⁹⁸ *In re Paul Steven Cosner*, No. PES-01-281341 (Cal. Super. Ct. Mar. 7, 2001), available at http://www.sftc.org/minds_asp/Mainpage.asp?web_server=207.215.212.15&minds_server=ntimagex&category=P&DocID=00247193 (strike-through in handwritten original). Charles Ng had an accomplice, Leonard Lake, who, after being arrested, swallowed cyanide pills sewn into his lapel. See Daniel Yi, *Jury Convicts Ng on 11 Counts of Murder*, L.A. TIMES, Feb. 25, 1999, at A1.

Even more remarkably, Sharon purported to be satisfied with this simple court document. Upon receiving it, she said:

I think it's finally over now I think this will allow us to finally move on with our lives. . . . Up until Judge Dearman signed this order, there had been no justice, no one held responsible. Now someone has been.

. . . .

[The court order] makes all the difference to me – it really does

. . . It's certainly not closure – because there will never be closure. But it takes a lot of the hurt out of what the jury did.⁹⁹

Sharon didn't just want Ng to suffer, and she didn't just want him to suffer from a formal, procedurally just, state-inflicted punishment. She wanted him to suffer *for her brother*. She wanted a public, official acknowledgement of how disgusted and outraged we all were about how Paul's life was taken. And she took this acknowledgement however she could get it – even if she had to construct it herself.

If the instrumental view is right that victims prefer to free ride on the enforcement efforts of others, then there is no particular reason we should expect victims to have a preference for *who* does their punishing for them. If there is a preference, it should be because one or the other delegated agent is the cheaper and more efficient agent for the victim. Moreover, if victims have a visceral, cognitively-unsophisticated “taste” for retribution, that is, for lashing out at those who have offended them and making them suffer, there's no good reason to expect them to have a particular preference about *why* or *how* they suffer – they should only be concerned about the magnitude of that suffering. And yet as the discussion above demonstrates, they do have such complex preferences.

Though the instrumental view of delegated revenge may well be correct that the State monopoly on punishment makes good political and economic sense most of the time, it still provides – at best – only a partial explanation for the phenomenon. Demonstrably, victims' preferences are not guided only by a desire for the cheapest punisher as an economist might predict, nor by a raw taste for retribution as a psychologist might predict, nor even by a desire to see procedurally just trials and sentences as a jurisprudential scholar might predict. Something important is missing from these usual accounts.

⁹⁹ Bill Wallace, *Family of Missing Man Finds Peace in Ruling; Judge Says Serial Murderers Killed S.F. Auto Broker*, SAN FRAN. CHRON., Mar. 12, 2001, at A20.

II. AN ALTERNATIVE THEORY OF DELEGATED REVENGE

A. *Crime and Social Status*

People crave social status.¹⁰⁰ They resent events which deprive them of it and they actively seek out opportunities to gain or affirm it. There's nothing revolutionary about noting that, across the world, people will frequently sacrifice a great deal of material wealth and objective well-being to get it: they will accept a lower salary for a more prestigious job, pay more money for the "right" consumer goods, enter into marriages of convenience to maintain or solidify the social standing of themselves or their families, and the list goes on.

The idea that people value a positive social identity is virtually axiomatic in the field of social psychology. Not only do people strive for a sense of belongingness with others,¹⁰¹ but they aspire to be well-regarded members of the groups to which they do belong,¹⁰² and they value their group having high standing compared to other groups.¹⁰³

Status is so important to people that when they do not have the capacity to gain objective status directly, they will employ numerous cognitive strategies to achieve, at least subjectively and psychologically, something close to the same thing. For example, we may bask in the reflected glory of others with whom we identify (so long as there is little chance of being compared negatively to them).¹⁰⁴ When we are outperformed, we may degrade the importance of the field in which we have done poorly,¹⁰⁵ or we might upgrade the abilities of the one who has outperformed us (as it is less embarrassing to be outdone by a genius, after all).¹⁰⁶ We might also shift the group to which

¹⁰⁰ That is, they desire to belong to well-regarded groups, Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7, 16-17 (Stephen Worchel & William G. Austin eds., 1986), and to be well-regarded members of the groups they value, see Tyler et al., *supra* note 55. Both of these desires may be grounded in an overarching and general "need to belong," or need to affiliate with other people. See Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCHOL. BULL.* 497, 497 (1995).

¹⁰¹ E.g., Roy F. Baumeister, *Self and Identity: An Introduction*, in *ADVANCED SOCIAL PSYCHOLOGY* 51, 73 (Abraham Tesser ed., 1995).

¹⁰² E.g., Tyler et al., *supra* note 55, at 926.

¹⁰³ E.g., Tajfel & Turner, *supra* note 100.

¹⁰⁴ Robert B. Cialdini et al., *Basking in Reflected Glory: Three (Football) Field Studies*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 366 (1976); see Abraham Tesser, *Toward a Self-Evaluation Maintenance Model of Social Behavior*, in 21 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 181, 182 (Leonard Berkowitz ed., 1988).

¹⁰⁵ See David Dunning & Geoffrey L. Cohen, *Egocentric Definitions of Traits and Abilities in Social Judgment*, 63 *J. PERSONALITY & SOC. PSYCHOL.* 341, 350 (1992).

¹⁰⁶ Mark D. Alicke et al., *The Person Who Outperforms Me Is a Genius: Maintaining Perceived Competence in Upward Social Comparison*, 73 *J. PERSONALITY & SOC. PSYCHOL.* 781, 781 (1997).

we compare ourselves in a way that improves our sense of how well we stack up. For example, women paid objectively less than men tend not to consider themselves underpaid because they use women, not men, as the relevant object of comparison.¹⁰⁷

Still, actual status is better than the mere perception of status and so although we have a desire to self-enhance, we also have a desire to objectively assess our actual social standing¹⁰⁸ and the standing of our group.¹⁰⁹ Whether the news is either good or bad, knowing where we stand has consequences for our ability to predict and control our surroundings and our opportunities. Moreover, we need to know our status ranking in order to be able to effectively climb – or at least maintain our position in – status hierarchies.

One indicator of our social worth, and by proxy, the social worth of our ingroups, is simply how well we are treated. When we are treated with disrespect by a fellow group member, particularly by a highly representative or authoritative group member, we infer that we are not a member of good standing within the group.¹¹⁰ When we are treated poorly by an *outgroup* member (where our different group memberships are salient), we will infer that our own group is not as highly valued in the collective as a whole, than if the outgroup member treated us well.¹¹¹

¹⁰⁷ See, e.g., FAYE J. CROSBY, *RELATIVE DEPRIVATION AND WORKING WOMEN* 168-69 (1982); Brenda Major & Maria Testa, *Social Comparison Processes and Judgments of Entitlement and Satisfaction*, 25 J. EXPER. SOC. PSYCHOL. 101, 118 (1989).

¹⁰⁸ Indeed, in some circumstances, the needs for consistency, self-understanding, and control will lead people to prefer negative feedback to positive if the former comports better with their own evaluation of themselves. See, e.g., William B. Swann, Jr. et al., *Agreeable Fancy or Disagreeable Truth? Reconciling Self-Enhancement and Self-Verification*, 57 J. PERSONALITY & SOC. PSYCHOL. 782, 783 (1989); William B. Swann, Jr., *Identity Negotiation: Where Two Roads Meet*, 53 J. PERSONALITY & SOC. PSYCHOL. 1038, 1039 (1987). When will people with a negative self-evaluation prefer positive, and when negative, feedback? Roughly speaking, Swann and his colleagues have found that when trying to maximize positive feelings people will prefer positive feedback, but when trying to accurately assess their abilities (that is, when the emphasis is on cognition, not affective responses) people will prefer the feedback that comports with their self-image. See William B. Swann, Jr. et al., *The Cognitive-Affective Crossfire: When Self-Consistency Confronts Self-Enhancement*, 52 J. PERSONALITY & SOC. PSYCHOL. 881, 886 (1987). Under most circumstances, however, the preference for positive affect will dominate the desire for consistency. See Baumeister, *supra* note 101, at 72.

¹⁰⁹ See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115, 166 (Mark Zanna ed., 1992).

¹¹⁰ E.g., Heather J. Smith et al., *The Self-Relevant Implications of the Group-Value Model: Group Membership, Self-Worth, and Treatment Quality*, 34 J. EXPER. SOC. PSYCHOL. 470, 472 (1998); Tyler et al., *supra* note 55, at 913, 923.

¹¹¹ Jennifer Kenworthy Bilz, *The Effect of Crime and Punishment on Social Standing* 72-73 (2006) (unpublished Ph.D. dissertation, Princeton University) (on file with Princeton University).

Importantly, the criminal punishment of our offenders can be thought of as respectful treatment by fellow group members. That is, when we are harmed by a criminal offender, there is an element of doubt about whether or not we deserved it, or whether *others* will think we deserved it. Not only is there some doubt about whether the offender was entitled in some sense to treat us that way (either through our own actions, ignorance, or weakness), but also doubt about whether or not our safety, security, property, and well-being are valuable enough to the community that it will make efforts to punish any violators who try to take them away from us.¹¹²

Because of this, the spectacle of criminal punishment is much more than a decision about the liability of a particular offender. It is also, importantly, a referendum on the social standing and worth of the victim. A successful punishment indicates that the community values the victim. A failure to punish indicates something less – perhaps indifference toward the victim, perhaps even disdain.

While moral philosophers have persuasively made the normative case for this expressive function of punishment,¹¹³ there is growing empirical evidence for it as well. For one thing, research consistently shows that victims and third parties alike are motivated to punish not out of instrumental motives such as deterrence, incapacitation, or rehabilitation, but out of a desire for retribution.¹¹⁴ My own experimental research suggests that this retributive urge is itself fundamentally driven by social standing concerns.¹¹⁵

Specifically, when a criminal offender is punished, community members increase their estimation of the social standing of the *victim*; they admire, respect, and value her more. In contrast, when the offender escapes conventional punishment, community members report admiring, respecting, and valuing the victim *less*. I have found this result for violent, personal crime (rape), and even for highly impersonal crime where the victim does not ultimately suffer any material damages (credit card fraud). Moreover, victims

¹¹² See Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 12 (Wesley Cragg ed., 1992).

¹¹³ E.g., *id.*; see, e.g., JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 118 (1970); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS & MERCY* 2 (1988).

¹¹⁴ E.g., Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 *J. EXPER. SOC. PSYCHOL.* 437, 437 (2006); Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 284, 284 (2002); Darley et al., *supra* note 10, at 659; Ellsworth & Gross, *supra* note 10, at 29 (in the context of the death penalty); Robert M. McFatter, *Purposes of Punishment: Effects of Utilities of Criminal Sanctions on Perceived Appropriateness*, 67 *J. APPLIED PSYCHOL.* 255, 255 (1982). See generally Robert M. McFatter, *Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions*, 36 *J. PERSONALITY & SOC. PSYCHOL.* 1490 (1978) (discussing the impact that underlying punishment philosophy has on the duration and severity of punishment doled out).

¹¹⁵ Bilz, *supra* note 111.

are perfectly aware of the status stakes in criminal punishment; they perceive these social standing shifts that occur as a result of whether their offender is punished.

I found these social standing effects even when the offender didn't escape punishment altogether. This underscores the powerfully symbolic nature of criminal punishment. For instance, in one study I found that when a rapist pleaded to a lesser, nonsexual offense that nevertheless carried the same formal jail term as forcible rape, the community still devalued the victim as a consequence of the perceived "nonpunishment" of the offender. Similarly, I found in another study that when a credit card con-artist pleaded guilty to criminal offenses against the merchants and banks she had defrauded, if she was acquitted for those very same behaviors against the person whose credit information she actually stole (on the theory that the credit card holder was no victim at all since she was reimbursed for all purchases and her credit rating was fully restored), then even *that* victim was relatively devalued.

Putting it together, punishment of one's offender is a form of respectful or disrespectful treatment by one's community, which in turn indicates to victims their social standing. Since victims, like everyone else, desire high social standing in their group, and know how to read social information (such as punishment of their offender) to assess their standing, it should come as no surprise that, in most circumstances, a victim should prefer third parties – particularly those whom she identifies as credible sources of information about her social standing – to do her punishing for her.

In straightforward terms: if John throws a punch at me, it might be satisfying at a primal level to punch him back. But how much more satisfying would it be if my friends Tracey, Bernard, and Dan get together to punish John on my behalf? And how unsatisfying – indeed, insulting – would it be if, having witnessed John's transgression, Tracey, Bernard, and Dan shook their heads, put up their hands, and said: "He was wrong to do that, but we're not getting involved in this one"? If they punish him for me, that is an indication that they think I am worth defending; I am one of their own. If they decline, it is a negative marker of my value; in a sense, it is casting me out of the inner circle. While it is true I could satisfy a visceral urge to hurt John on my own, I can acquire no social status that way. Social status is, by definition, *social*: I cannot get it unless others agree I should have it. Others punishing on my behalf is an indication they think I should.

The idea of punishment as respectful treatment indicating my good social standing within my group explains not only why I will prefer to delegate my revenge in most instances, but also explains why I will have preferences about whom my agent should be. Work by Tom Tyler and others demonstrates that the more representative or authoritative the person I'm interacting with is, the more diagnostic of my social standing I will perceive my treatment by her to

be.¹¹⁶ Other work shows that the more I identify with a group (that is, the more connected to the group I feel, and the more valuable I find my membership in it), the more diagnostic I will find my treatment by group members.¹¹⁷ Thus, to the extent I seek accurate information about (and restoration of) my social standing via punishment of those who have wronged me, I should prefer the most relevant agent of a group for my revenge. An ingroup member with whom I strongly identify, or who is particularly representative¹¹⁸ or authoritative, would be in the best position to provide that to me.

Similarly, to the extent I seek out social standing information not of myself within my own group, but of my group within the collective as a whole, I actually might prefer an outgroup agent for my revenge. My own research has suggested this very phenomenon.¹¹⁹ I conducted an experiment, where I asked participants to vividly imagine a particular crime had been committed against them, and the perpetrator was punished by either an ingroup or an outgroup jury. The verdict by an ingroup jury affected the victim-participants' perception of their social standing within their ingroup, but had no effect on their perception of their group's standing in the rest of the world.¹²⁰ The opposite occurred for the outgroup-jury condition: "guilty" versus "not guilty" verdicts did not affect victim-participants' perception of their standing within their own group, but did result in shifts in their perceptions of the standing of their group as a whole.¹²¹

The view of punishment as a referendum on social standing also explains parsimoniously why victims care about the *reason* their offender is punished. It is not enough that a criminal offender suffers; she must suffer specifically for what the victim endured. While victims surely do care at least a little bit – and perhaps quite a lot – about the absolute magnitude of suffering the offender experiences, they also unambiguously care about the symbolism of the suffering, because it is an indicator of the victim's good social standing if the punishment happens in his name.

Finally, this view of punishment explains well the failures of delegated revenge. If the agent *is* inappropriate – say the victim doesn't identify with it –

¹¹⁶ See, e.g., Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values*, 66 SOC. PSYCHOL. Q. 153, 162 (2003).

¹¹⁷ Cf. Tom R. Tyler & E. Allan Lind, *Intrinsic Versus Community-Based Justice Models: When Does Group Membership Matter?*, 46 J. SOC. ISSUES 83, 86-88 (1990) (“[Group-value theory] predicts that group membership and sense of community will be crucial variables in justice-related attitudes and behavior.”).

¹¹⁸ This is perhaps another justification for a “jury of his peers.” True enough that it is supposed to be peers of the offender, but psychologically, it is certainly important to the victim that they be representatives of her, as well.

¹¹⁹ Bilz, *supra* note 111, at 60-75.

¹²⁰ *Id.* at 70-73.

¹²¹ *Id.*

then he will resist or resent delegation. This also works on the offender, since punishment is a referendum on the absolute social standing not only of the victim, but very obviously of the offender as well (and of the relative standing between them). To the degree an *offender* does not identify with the agent of revenge as a legitimate source of information about his own social standing, then the punishment will not sting as much, and as such will not be as valuable to the victim.

B. *Applying the Social Status Theory to Solve Puzzles of Delegated Revenge*

Things that looked like puzzles are rendered explicable by applying this analysis to the examples set forth in above. Consider again Joseph L. Druce, the self-appointed agent of revenge for the countless victims of John Geoghan's sexual abuse. If official punishment by a representative jury provided an opportunity for us as a community to say to the victims that we acknowledge not only the harms Geoghan inflicted on them, but that his abuse should *not* cause them to feel devalued, then Druce truly did steal something important to them. The victims might have prized the specter of Geoghan's suffering, but they also wanted the symbolic affirmation of solidarity that only a legitimate agent of revenge could provide – and by “legitimate,” I mean one with whom they could identify. Druce – criminal, sociopath, murderer – most certainly did not qualify.

Similarly, a trial of the D.C. Snipers in Virginia could not provide the citizens of Maryland with the same satisfaction that a trial within their own borders, by their own community members, could. Relatively speaking, people will naturally identify with citizens of their own states more strongly than with citizens of other states. If it is true that citizens who had been terrorized by the snipers regarded prosecution as an opportunity to pronounce on the worth of one of their own, then all else being equal, they should have preferred that pronouncement to come from within. Their preference for a local trial is even more striking in that, in this case, all else was *not* equal – the ability to make an ingroup pronouncement carried with it a cost of millions of dollars, yet each community valued the pronouncement enough that it was willing to pay that price. Does this clamoring for local prosecutions happen with every crime? Probably not, for at some tipping point, the size of financial costs will outweigh the value we place on the opportunity to pronounce solidarity with fellow-citizen victims. But in this case, with the events themselves having so thoroughly traumatized these communities *as* communities, and with the frenzy of media attention given to catching and prosecuting the snipers, a local trial would purchase a lot more symbolic value here than in a more anonymous case.

Finally, there is Sharon Sellitto, the distraught sister who tried to mitigate her disappointment in the failure of a jury to convict her brother's killer by obtaining a death certificate, on which the municipal judge detailed the official cause of Paul's demise as being “the victim of murder at the hands of . . .

Charles Ng.”¹²² The fact that Sharon claimed any measure of satisfaction from this pronouncement exposes theories of delegated revenge that depend on a taste for retribution, efficiency, or procedural justice at their absolute weakest. But the social standing view of delegated revenge explains Sharon’s actions clearly. Ng was facing eleven death sentences for a series of murders in which her brother was but one among many victims. Ng would be made to pay, and his punishment would be the final output of a fairly-operating criminal justice machine, at virtually no cost to her. Yet none of this spoke to the value of *Paul Cosner*. Indeed, the failure of the jury to convict for Paul’s murder added an additional blow to Paul’s worth as a human being – if such a thing were possible – to the one delivered by Ng himself. Sharon got nothing at all material from the municipal court’s pronouncement, *other* than a pronouncement – but she found that pronouncement alone extremely valuable.

The previous examples are particularly problematic for the standard theories of delegated revenge. There are other features of the criminal justice system, though, that can be awkwardly explained using traditional theories of delegated revenge, but for which the social standing theory supplies at least as plausible an explanation, if not better.

1. Methods of Execution

Consider the formalities states engage in when actually implementing a death sentence. Historically, executioners at beheadings and hangings wore hoods so that none could identify them.¹²³ In front of firing squads, all but one shooter carried a blank in his gun.¹²⁴ A modern-day equivalent of these responsibility-obscuring techniques is reflected by the “strapdown team” at the Angola State Penitentiary in Louisiana:

[T]his six-man team escorts the inmate along his final steps. The members are dressed the same, like a team, wearing dark blue uniforms and thin black ties. The six officers remove all nametags and marks of distinction Each has a very specific duty: left leg, right leg, left arm and torso, right arm and torso, head, and one to supervise. . . . Since the duties of each member of the strapdown team are so distinct, every person is able to complete his role efficiently, focusing on a part of the body and trying to avoid contemplating the whole human being. . . . The number of people involved and the specifics of the rituals and the roles appear to

¹²² *In re Paul Steven Cosner*, No. PES-01-281341 (Cal. Super. Ct. Mar. 7, 2001), available at http://www.sftc.org/minds_asp/Mainpage.asp?web_server=207.215.212.15&minds_server=ntimagex&category=P&DocID=00247193.

¹²³ See, e.g., Jonathan Bridges, *Hooding the Jury*, 35 U.S.F. L. REV. 651, 653-58 (2001).

¹²⁴ *Id.* at 656 (“None of the squad members know which of them is firing the blank, and thus each may be comforted by the possibility that he did not cause the condemned’s death.”).

help the officers view their part as strictly professional and their role as a somewhat minor one in sending someone to death.¹²⁵

Though these various designs are described as a way to make the members willing to do their task, this explanation doesn't ring very true. It's not difficult to find vengeful souls willing to do this dirty work. For example, in the last firing squad execution in Utah, which took place in 1996, state law provided that volunteer shooters from the population of peace officers be used. Perhaps confused about how volunteers would be selected, the State corrections department was flooded with hopeful candidates seeking the privilege – so many that the spokesman for the state corrections department drew up a form letter to state they were not taking applicants for the positions.¹²⁶ Sadly, finding people willing to pull the trigger (either literally or figuratively) at an execution is not a particularly difficult task.¹²⁷

The technique also doesn't seem designed to avoid trauma to the executioners, since at least at Angola, the less visible members of the execution team (such as the warden who gives the signal to proceed, and the ultimate executioner who starts the lethal IV drip into the body of the condemned) act alone.¹²⁸ If anything, interestingly, prison personnel attendant at executions tend to be *more* well-adjusted than average. They tend to take their jobs very seriously and proceed despite often feeling deeply conflicted about it; they know exactly what they are doing and the consequences of their actions, and are nevertheless committed to the rightness of their roles.¹²⁹

It is not enough to argue that we simply don't accept volunteer executioners with a thirst for blood because it would be unseemly to do so. One must ask, what is unseemly about it? Why do we *not* want an executioner who takes individual, personal pleasure at fulfilling his job duties? The intuitive answer is that we do not want to risk having criminal punishments be seen as coming from any one vindictive individual. Nor do we want the sentence to be seen as coming from any identifiable subgroup. To see this, consider the outrage expressed by the public when the hanging of Saddam Hussein was conducted by executioners who revealed themselves, through the shouting of political

¹²⁵ Michael J. Osofsky & Howard J. Osofsky, *The Psychological Experience of Security Officers Who Work with Executions*, 65 *PSYCHIATRY* 358, 363 (2002).

¹²⁶ James Brooke, *Utah Debates Firing Squads in Clash of Past and Present*, N.Y. *TIMES*, Jan. 14, 1996, § 1, at 16.

¹²⁷ To their credit, prisons take extremely seriously the solemn nature of administering the death penalty, and fill the executioners' job with psychologically well-adjusted people; often, interestingly, ones with profound doubts or even opposition to state-sponsored killing. Osofsky & Osofsky, *supra* note 125, at 359 (citing R.J. LIFTON & G. MITCHELL, *WHO OWNS DEATH* (2000)).

¹²⁸ *Id.* at 362-64.

¹²⁹ *Id.* at 367-69.

slogans, to be representatives of Sadr Al Muqtada's militia.¹³⁰ Instead, we want executions – as with all criminal sentences – to reflect society's condemnation as a whole. All of the visible, responsibility-obscuring measures taken during executions, both historical and modern, are perfectly constructed to enhance the perception that the death sentence is being implemented by *all of us*, as a collective punishment, not by any individual avenger.

2. Cultural Differences in Vigilantism and Delegation of Revenge

More speculatively, the social standing theory of delegated revenge can explain why vigilantism is more prevalent in some cultures than in others. Namely, we would predict that where the State has less legitimacy as a whole, victims (and citizens generally) should be less willing to delegate their revenge to it, even where the State is able and willing to take on the role. In such circumstances, the State isn't a particularly good representative of the community, and thus delegating revenge to it doesn't convey good information about the social standing of the victim.

Consistent with this prediction, vigilantism has historically been a phenomenon of the western states in America,¹³¹ where citizens are also more likely to be individualists than collectivists.¹³² That is, they are less likely to identify with the State, or to care about how they are regarded under a large umbrella that is united only by shared political citizenship. It also may be no coincidence that the "victims' rights" movement in this country, which was marked by demands for increased victim participation in the criminal justice system,¹³³ happened in the 1970s,¹³⁴ a period marked by increased public skepticism of and alienation from the government as a consequence of Watergate and the Vietnam War.¹³⁵ In other words, victims began rejecting – relatively speaking – delegated revenge by the State and demanding, instead, more direct participation in criminal justice, at the exact same time that they began to reject the legitimacy of the State as a whole.

¹³⁰ See, e.g., Lauren Frayer, *Sunni Mob Ravishes Shrine: Hundreds in Iraq Protest Saddam Hussein's Hanging*, GRAND RAPIDS PRESS, Jan. 2, 2007, at A3; Sudarsan Raghavan, *Final Moments For Saddam*, HOUS. CHRON., Dec. 31, 2006, at A1.

¹³¹ See Timothy Lenz, *Republican Virtue and the American Vigilante*, 12 LEGAL STUD. F. 117, 118-19 (1988).

¹³² See Joseph A. Vandello & Dov Cohen, *Patterns of Individualism and Collectivism Across the United States*, 77 J. PERSONALITY & SOC. PSYCHOL. 279, 289 (1999).

¹³³ See Bilz & Darley, *supra* note 25, at 1237-38.

¹³⁴ See Heather Strang, *The Crime Victim Movement as a Force in Civil Society*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 69, 72 (Heather Strang & John Braithwaite eds., 2001). For a description of some of the forces that led to the victims' rights movement, see *id.* at 73-75.

¹³⁵ See Susan J. Pharr et al., *A Quarter-Century of Declining Confidence*, J. DEMOCRACY, Apr. 2000, at 5, 10.

The social status theory of delegated revenge also predicts that in locales where identification with the State is weak but solidarity with smaller familial, tribal or village units is strong, we will see persistent rejection of State attempts to establish a monopoly on punishment. But rather than (or in addition to) seeing extensive self-help in such areas, we should observe a preference for delegating revenge to those more informal or extralegal institutions with whom residents *do* identify. That is, we should not see a rejection of delegated revenge per se, but we should see a rejection of the State as the legitimate agent of that revenge. And again, this is exactly what we do see, for instance, in Pakistan and Afghanistan where the weak central government has no choice but to defer to a vast network of tribal councils who execute the majority of criminal punishments in that nation.¹³⁶

We also see this pattern to a much lesser extent in the United States itself. Sociologists Robert Sampson and Dawn Bartusch have shown that residents of inner city communities are actually less tolerant of deviance than their white suburban counterparts, but at the same time, are also less trusting of the government.¹³⁷ Given this, we might expect low victim cooperation with police in these communities, and relatively more willingness to delegate the regulation and punishment of criminal offenders to institutions with more legitimacy than the State (such as churches, networks of neighbors, or other informal community organizations). And again, this is what we find.¹³⁸

3. Historical Differences in Agents of Revenge

The social standing view of punishment also offers a different perspective on the path that every developing society eventually takes in moving from systems of exclusively private prosecution of wrongs to virtual state monopolies on punishment. Francesco Parisi summarizes the history of this

¹³⁶ In Afghanistan and Pakistan, these tribal “courts” operate extensively and in lieu of the formal legal system. For a description, see generally Nafisa Shah, Faislo: *The Informal Settlement System and Crimes Against Women in Sindh*, in SHAPING WOMEN’S LIVES: LAWS, PRACTICES AND STRATEGIES IN PAKISTAN 227 (Farida Shaheed et al. eds., 1998) and Marie D. Castetter, Note, *Taking Law into Their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils*, 13 IND. INT’L & COMP. L. REV. 543 (2003).

¹³⁷ Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC’Y REV. 777, 800-01 (1998).

¹³⁸ Cf. Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 163-64 (1997) (claiming that “participation in a neighborhood-based group in support of community policing is likely to lead to law-abiding behavior *directly*” because it breeds community solidarity and law-abiding norms); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 818-19, 827-29 (1998) (arguing that bridging the gap between the church – a stable social institution in many inner city communities – and the police would provide an effective means of law enforcement).

progression, arguing that societies uniformly have moved from a “discretionary retaliation” stage at their most primitive (characterized by a lack of rules about proportional punishment), to a *lex talionis* stage (an “eye for an eye” – which tailored magnitude of punishment to the harm inflicted, and was typically less harsh than the previous stage), then to a “blood money” stage (where wrongdoers could buy out the right of retaliation from the victim), and finally to the most developed stage of fixed, proportionate penalties.¹³⁹ The usual view of this progression is that it is top-down, in the sense that the State, once organized, will force its citizens to stop using self-help for redressing wrongs. This view, I believe, is a function of the dominance of the standard economic and psychological understandings of why people punish.

Academics holding this view often note that undeveloped populations are characterized by more vigilantism, leading them to the corollary assertion that less developed societies are “more retributive” than highly developed ones.¹⁴⁰ But the important difference may not be in relative levels of retributive sentiment in such societies, but simply in their relative unwillingness to delegate punishment to the State due to a widespread lack of identification with the emerging government.

Academics have tended to characterize any failure of the organized state’s monopoly on punishment as “self-help,” or as a preference for personal retribution.¹⁴¹ Yet people rarely lash out and punish their wrongdoers directly, even in the least developed societies. Notably, even in the most primitive stage of development, Parisi argues that “the interaction between early *groups* was governed by the most elementary law of nature: what one group could do to another, the other could do back to it, subject to the limits of their relative strength. This relationship based on force permeated the interaction between *clans* in early societies.”¹⁴² Outside of mythology, no one ever describes a pervasive sociology of victims systematically, *individually* retaliating against their offenders. Even if victims are capable of delivering it, in most circumstances individual retaliation will not give victims the social standing boost they are looking for via punishment. Punishment inflicted by their extended families, clans, villages, tribes, or religious groups, on the other hand, *can* provide it – and so long as victims continue to identify with such subgroups more than to the State, they will delegate accordingly.

Among the very definitions of a developing society, of course, is the strengthening of the State, and of people’s deference to and identification with

¹³⁹ Parisi, *supra* note 51, at 84-85.

¹⁴⁰ See, e.g., Vincy Fon & Francesco Parisi, *Revenge and Retaliation*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 141, 142-44 (Francesco Parisi & Vernon Smith eds., 2005); Posner, *supra* note 37, at 75-76.

¹⁴¹ See, e.g., Douglas Ivor Brandon et al., Special Project, *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 *VAND. L. REV.* 845, 850-51 (1984).

¹⁴² Parisi, *supra* note 51, at 86 (emphasis added).

it as a legitimate institution. As this progression takes place, not only might citizens be *willing* to defer to state-led punishments, but in fact they might *clamor* for it. Daniel Klerman has written an account of the centuries-long transition from a purely private to a (mostly) public punishment regime in England, which I believe describes this process exactly.¹⁴³ He described the move from truly private, wholly local prosecutions of crimes – where fines and penalties (“bot” and “wergild”) were paid to the victim by the offender – to “appeals,” which, for clarity, I will call “civil prosecutions.”¹⁴⁴ Civil prosecutions were somewhat of a cross between current American tort and criminal law. They were tort-like in that victims spearheaded, and even paid for, the prosecutions and criminal in that they used the machinery of state trials to operate and sanctions consisted of corporal punishments or fines paid to the crown rather than the victim.

The transition from civil prosecutions to fully state-dominated prosecutions began in the tenth century and was not (formally) fully complete until 1985.¹⁴⁵ However, the thirteenth century – Klerman’s main focus – was an important era in the transition. Civil prosecutions were somewhat common at the beginning of that century but had mostly disappeared by the end, having been replaced by more truly public criminal procedures spearheaded and fully dominated by the State. Klerman’s interest was in the decline of the civil prosecution, and his explanation centered on decreasing judicial respect for out-of-court settlements of disputes for criminal violations. This lack of respect for settlements made civil prosecutions decreasingly useful as a device for offenders to avoid public criminal sanctions; if they settled, they might still get a second hit from the State.¹⁴⁶

What Klerman doesn’t explain, however, is why civil prosecutions were ever more desirable than the very local, compensatory bot/wergild regimes which they slowly replaced. That is, the question for my purposes is not so much why civil prosecutions were crowded out by more truly public prosecutions, but why truly private prosecutions were crowded out by civil prosecutions that the victim still had to spearhead and pay for, but for which she would receive no compensation if successful (unless she managed to settle with the offender).

As Klerman points out, before the emergence of the more formal civil prosecution – and even during a transition period afterwards – private suits

¹⁴³ Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 *LAW & HIST. REV.* 1, 1-3 (2001).

¹⁴⁴ *Id.* at 5-7. These civil prosecutions existed side-by-side with criminal prosecutions (“presentment”) for several centuries. However, their domains were somewhat distinct. Until the fourteenth-century, presentment was used exclusively for homicide and theft, whereas civil prosecutions covered not only many homicides and theft, but also “rape, mayhem, wounding, false imprisonment, assault and battery.” *Id.* at 7 (footnote omitted).

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.* at 43.

“could also take place in local, nonroyal courts.”¹⁴⁷ It’s hard to imagine that victims pursued private prosecutions because local courts were less convenient – indeed, given Klerman’s descriptions, it’s hard to imagine a costlier system for victims to pursue justice than the private prosecution system that emerged. A victim who filed such a case faced almost unimaginable procedural hurdles. She had to “raise the hue and cry” at the time of the offense, publicize it, and then personally initiate suit at the next monthly county court.¹⁴⁸ The accused was granted several opportunities to respond at subsequent county courts, and at each of these, the accuser had to attend to “renew” her accusation.¹⁴⁹ If the accused appeared to object to the accusation, trial had to be postponed until royal justices arrived on the circuit, which could take anywhere from four years (at the beginning of the century) to up to *twenty* years towards the end.¹⁵⁰ Moreover, male accusers had to be ready to defend their accusation by being willing to physically battle their offender, and women had to “offer to prove the . . . [accusation] ‘as the court adjudges,’” meaning she might be subjected to an unpleasant or dangerous “ordeal.”¹⁵¹ Finally, recall that even if adjudged guilty, the accused would be punished not by having to pay the victim, but would be subjected to a corporal punishment such as hanging, castration or blindness, or a fine . . . *payable to the crown*.

Klerman estimates that 57% of civil prosecutions were settled before ever reaching trial.¹⁵² But what is remarkable is not how many such cases were settled after filing and before trial, but how many were actually carried through to the end. Klerman estimates that almost 20% were – a stunningly high statistic given the costs to the victim for pursuing such a civil prosecution, and the tiny (nonexistent?) returns she could expect if successful.¹⁵³ Why were victims ever willing to pay such a price?

Perhaps the answer is, at least in part, that as the English increasingly identified themselves as *English*, and subjects of the crown, they received increasing psychic satisfaction from using the formal machinery of the State to punish those who criminally offended them. On this view, the slow move toward fully public prosecutions may not have been top-down demands from a king trying to assert his power and authority, but instead were the products of bottom-up demands from a populace wanting official emblems of the King’s, and their fellow citizens’, respect. It is hard to imagine a relatively weak but emergent royal government being able to impose the appeals from above. Victims, who could have instead pursued justice locally and received

¹⁴⁷ *Id.* at 4.

¹⁴⁸ *Id.* at 10.

¹⁴⁹ *Id.* at 11.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 12.

¹⁵² *Id.*

¹⁵³ *Id.* at 12 n.36. A traditional, economic view of punishment, of course, would have trouble explaining why 100% of cases did not settle.

compensation if successful, must have believed there was something they simply couldn't get unless they used the civil prosecution. I would argue that this "something" was formal, official adjudication of the wrongs committed against them. The increasing use of an increasingly state-dominated punishment regime tracked the emergence of the crown as a legitimate governing force more generally.

The motivations of the populace during this era are, of course, obscure and perhaps undiscoverable. Moreover, causation is impossible to tease out in this example – did people use official remedies because they increasingly identified with the State, or did people increasingly identify with the State because the State began to take over criminal remedies? But the social standing explanation is at least plausible on its face, where both the traditional rational actor economics and retributive psychology explanations simply fall flat.

I offer this analysis as an explanation for why thirteenth-century English victims were increasingly willing to use such costly formal channels for their relief, instead of exercising their option to keep their justice local. But the same arguments should hold true for the transition of any society from Parisi's "discretionary retaliation" stage to a fully modern – and fully delegated – fixed, proportionate penalties stage.

All of the above examples are, of course, anecdotal and speculative. There are other possible explanations for higher levels of vigilantism in the South and West, and in other cultures as well.¹⁵⁴ Inner city residents could resent formal state punishments for reasons that have less to do with legitimacy and more to do with the systematically devastating consequences typical penal sanctions have on their families and communities.¹⁵⁵ And the formal state has, for reasons discussed in Part I, as many or even more reasons to prefer that its citizens delegate their revenge, as do the citizens who populate it. Undoubtedly, more research on this theory needs to be done before we could be fully confident that people want to delegate their revenge, at least in part, out of a desire to gain social standing in the eyes of third parties.

Yet unless I make a case for the usefulness of believing this theory, the systemic motivation for delegated revenge doesn't matter, nor does it make sense to invest research resources into discovering it. So long as people are *willing* to delegate their revenge to the State, perhaps it doesn't matter *why* they do so. In the next section, I argue that defending the social standing theory of delegated revenge is more than a mere academic exercise. Understanding the social status underpinnings of punishment helps us to make more accurate predictions about when delegated revenge will *fail*, that is, when people will refuse to allow third parties to do their punishing for them, or more importantly, when they will refuse to allow the State specifically to function as

¹⁵⁴ See, e.g., NISBETT & COHEN, *supra* note 44, at 81-91.

¹⁵⁵ See Meares & Kahan, *supra* note 138, at 813. See generally DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004).

the agent of their revenge. In turn, I also argue that understanding these failures can help us to correct them in a socially useful way.

III. THE LIMITS OF DELEGATED REVENGE

When someone criminally offends, the default position and preference seems to be: “Let the State handle it.” Even vigilantes prototypically step in only as a last resort, after the State fails to punish in a case where a victim or community believes punishment is deserved. Nevertheless, and no matter how grudgingly, people do occasionally refuse to delegate. They might do so through dramatic self-help actions, or more passive refusals to cooperate with prosecutions. Whenever such failures of delegation happen, they pose a problem for the stability of the criminal justice system, and potentially for civil society itself.

For all the practical and moral reasons reflected in the traditional views and outlined in the first part of this Article, we rely on the fact that victims are normally content to let the State punish for them. Most obviously, we need to avoid as many outright Bernard Goetzes and Ellie Nesslerers as we can – their approach is chaotic, usually excessive, always procedurally unjust, and definitely dangerous. Slightly less obviously, for society to operate smoothly, we need victims who will report their crimes, and who will cooperate with the police and prosecutors who punish them. Most subtly of all, we need victims to respect the criminal justice system and regard the way it operates as legitimate, so that they will continue to obey the law themselves.¹⁵⁶

So wherever we find individuals or, worse still, whole communities of people who regard delegation of their revenge to the State to be relatively repugnant, we need to know why they balk. If we just rely on the traditional explanations for delegating revenge, we will misdiagnose and almost certainly mistreat the illness. If instead we see the problem as one bred of concerns about social standing – for instance, as a product of a self-helper’s failure to identify with the State or to regard state punishment as an accurate or important indicator of her own social status – then this understanding will suggest very different solutions for fixing the problem.

In this final Part, I show how the social status perspective reveals who the appropriate agents of punishment are (and are not), why the State sometimes systematically relaxes its monopoly, and when punishment should not be delegated at all.

A. *Crimes Where Victims Refuse to Delegate Fully*

Vigilantism aside, there are vast swaths of criminal behavior where the State systematically relaxes its punishment monopoly, in the sense that it doesn’t

¹⁵⁶ See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (examining the extent to which normative factors – commitment to the law as a result of morality and perceived legitimacy of the enforcing authority – influences compliance with the law independently of deterrence judgments).

punish – or doesn't punish as much – victims who engage in self-help. Some of the more obvious examples are self-defense in murder, the provocation defense to murder generally, and laws that allow property victims to prevent the theft of or even retrieve their goods. In at least one crime, rape, victims traditionally (and controversially) have even been required to engage in a certain amount of self-help before the State will punish their offenders at all.¹⁵⁷

One thing to note about such doctrines is that if the thesis of this Article is correct, we should find them more frequently in *jurisdictions* marked by honor and social standing concerns. In the southern and western United States, as discussed before, citizens are significantly more likely to be motivated by a highly developed sense of personal honor than elsewhere in the country.¹⁵⁸ These same regions do indeed sport the broadest and most widely-employed self-help doctrines: in the Northern United States, for example, the overwhelming majority of states require victims to retreat in the face of deadly force if at all possible.¹⁵⁹ In the South and West, by contrast, about 40% of the states do not require this.¹⁶⁰ The roots of this run deep; historically, the South and West United States were characterized by honor norms and marked by widespread use of extra-legal remedies such as dueling.¹⁶¹ Not only are southern and western states more likely to allow the use of force in defense of both life and property, but research shows that the more an individual believes the law *ought* to reflect those policies, the more they believe their own state *does* reflect them.¹⁶²

We should also find that these self-help doctrines tend to apply to *domains* where personal honor plays a strong role. While I have argued that one cannot get a social standing boost unilaterally, it also must be true that to gain honor, one must behave honorably in the community's eyes. Thus, in crimes where personal honor can play a large role (such as rape, murder, and defense of the home), victims should be relatively motivated to directly address the specific insult levied by the crime: that the victim is weak, or vulnerable, or promiscuous. Acting decisively at the time of the insult can undermine that insulting implication: violent self-defense is a particularly effective show of strength; physical resistance to a rape is a particularly effective assertion of chastity. Waiting to delegate to a third party, on the other hand, would

¹⁵⁷ See, e.g., *Hazel v. State*, 157 A.2d 922, 925 (Md. 1960).

¹⁵⁸ NISBETT & COHEN, *supra* note 44, *passim*; see also Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567, 568-75 (1998).

¹⁵⁹ Cohen & Vandello, *supra* note 158, at 578 (“[S]tatutory and case law in 20 of 23 northern states adopts the retreat rule, forcing a person to exhaust all possible options of escape before using deadly force.”).

¹⁶⁰ *Id.*

¹⁶¹ See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 177-79 (1993).

¹⁶² John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 168 (2001).

reinforce rather than answer the insult: a true man would not pusillanimously wait for someone else to protect him; a pure woman would not run the risk that others would believe intercourse under the circumstances was consensual. Consistent with this view, in some circumstances, third parties will actually feel less sympathy for a victim who makes no attempt to defend himself.¹⁶³

The legal system reflects a distinct sympathy for this understanding of honor crimes, and the consequent indulgence of self-help. Legislatures, for instance, have been remarkably stubborn to reforms of rape laws that would release women from the requirement to exert “utmost resistance” to negate the defense of consent.¹⁶⁴ This official resistance on the part of lawmakers reflects underlying popular norms: citizens themselves are more likely to infer that intercourse was nonconsensual when the victim suffers injury (indicating physical resistance) than when she does not.¹⁶⁵

The defense of provocation, which reduces a killing from murder to manslaughter, serves as another example. In its original form, the defense was limited explicitly to “crimes of honor” – killing in response to “adultery, mutual combat, false arrest, and a violent assault”¹⁶⁶ – that is, to cases where the victim was seen to deserve, to some extent, the offender’s wrath. Even the “reform” position, embodied in the influential Model Penal Code, which purports to focus not on the victim’s desert but instead on a neutral assessment of the offender’s subjective state of emotional arousal, has been repeatedly shown to be applied in a way that reflects these (frequently hierarchical or otherwise illiberal) underlying honor norms. Offenders are entitled to offer the defense in those cases where their violent response to the victim’s actions comport with the way an honorable person would behave.¹⁶⁷ In other words, the law again indulges to some extent a refusal on the part of the attacker to delegate revenge for a wrong inflicted by the provoker; instead of waiting for the State to handle the provocation, the attacker is allowed to exact immediate and personal revenge (or at any rate, is punished less than he otherwise would be for doing so).

In each of these doctrines, the State has, in effect, relaxed its monopoly on punishing wrongdoing, by allowing (or even requiring) a certain measure of self-help. Academics argue about whether mitigation doctrines are a

¹⁶³ See Richard B. Felson, *Aggression as Impression Management*, 41 SOC. PSYCHOL. 205 (1978); Richard B. Felson, *Impression Management and the Escalation of Aggression and Violence*, 45 SOC. PSYCHOL. Q. 245 (1982).

¹⁶⁴ For a cutting analysis of the problem, see generally STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998).

¹⁶⁵ Lisa R. Harris & David J. Weiss, *Judgments of Consent in Simulated Rape Cases*, 10 J. SOC. BEHAV. & PERSONALITY 79, 86-87 (1995).

¹⁶⁶ Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1341 (1997).

¹⁶⁷ See *id.* at 1370-71 (citing MODEL PENAL CODE § 210.3 cmt., at 62 (1985)); see also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 307 (1996).

concession to the futility (in terms of deterrence) of punishing people who cannot help but act in response to certain provocations – as in Oliver Wendell Holmes’s famous line, “[d]etached reflection cannot be demanded in the presence of an uplifted knife”¹⁶⁸ – or are instead the legal system’s concession to a contingent and contested system of social norms and values held by the public¹⁶⁹ – as reflected by the words of a Southern juror at a 1930s trial of a man who shot three others in response to repeated taunting: “Good God Almighty, bub He ain’t guilty. He wouldn’t of been much of a man if he hadn’t shot them fellows.”¹⁷⁰ Similarly, academics argue about whether a lack of explicit consent or instead the presence of explicit refusal by the victim should be a required element of rape.¹⁷¹ In either case the law is taking a stand on how and whether an honorable victim should be expected to exercise self-help in the face of unwanted sexual advances and, thus, whether she is entitled to legal protection.

We might regard each of these doctrines instead – or at least in addition – as the legal system’s implicit acknowledgment of the limits of its ability to legitimately monopolize the punishment of wrongdoing. If the State were to deny victims a legal safety-valve in those cases where engaging in self-help is necessary for victims to preserve their worth in the eyes of others, it would risk being perceived as illegitimate. This perceived illegitimacy could lead to outright defiance in the form of jury nullification or, more likely, a general loss of respect for the law.¹⁷² Indulging victims’ preferences for engaging in self-help instead of delegating their revenge in this limited way, on the other hand, satisfies victims’ desires to protect their social status in the face of threat by a criminal offender, while simultaneously preserving the image of the legal system as the “sole” punisher of criminal offenders.

This doesn’t mean, of course, that the State is perpetually helpless to rein in the self-help tendencies of victims of honor crimes. However, reform tends to be most successful when it self-consciously recognizes and transforms the social status meanings of either self-help or State intervention. This is unlikely to happen if we perceive the problem in terms of the traditional views of punishment. For instance, if one believes that self-help in the face of provocation is the result of an overdeveloped taste for retribution, then one might be tempted to try to solve the problem by increasing the penalties for lashing out against the provoker. However, this solution promises to be not only expensive (both in terms of actual costs of enforcement, and in loss of perceived legitimacy), but possibly even perverse.

¹⁶⁸ *Brown v. United States*, 256 U.S. 335, 343 (1921).

¹⁶⁹ See Kahan & Nussbaum, *supra* note 167, at 273-74.

¹⁷⁰ HODDING CARTER, *SOUTHERN LEGACY* 50 (1950).

¹⁷¹ See, e.g., SCHULHOFER, *supra* note 164, at 270-73.

¹⁷² See John Darley et al., *Enacting Justice: The Interplay of Individual and Institutional Perspectives*, in *THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY* 458, 465-72 (Michael A. Hogg & Joel Cooper eds., 2003).

Consider the problem of dueling, a practice limited in the United States to elite Southern gentlemen. Attempts to ban the practice differed in their effectiveness.¹⁷³ Those states which – consistent with the view that dueling represented an overdeveloped taste for retribution – merely introduced criminal penalties for the practice, were not successful in eliminating it.¹⁷⁴ However, those states that instead understood the social status implications of the practice came up with more creative and effective solutions. For example, Lawrence Friedman notes that Massachusetts attempted to eliminate dueling by providing a punishment that “maximized *dishonor*: the convict was to be ‘carried publicly in a cart to the gallows with a rope about his neck,’ to sit there for an hour, and then to go to jail for a year, or ‘in lieu of the said imprisonment,’ to be publicly whipped, up to ‘thirty-nine stripes.’”¹⁷⁵ Friedman also describes how a New York prosecutor emphasized to the jury the low class and poor education of a defendant charged with dueling as a way to break the positive association of dueling with aristocracy.¹⁷⁶

Changes in rape law will have to be similarly sensitive to norms about honor. It’s hard to imagine the possibility of complete reform while society still believes to any extent that honorable women will always struggle (even at the risk of suffering physical injury) against an attempted rape. Indeed, to the degree reformers have successfully eliminated the physical resistance requirement, success has closely tracked popular rejection of gender hierarchies. But what if we don’t want to wait for a complete change in public attitudes about how honorable women should be expected to behave? Can’t we use the law to change the belief that only dishonorable women will fail to physically resist, and establish the belief instead that *prudent* women might fail to do so?

If we wish to change these beliefs, we must be sophisticated in understanding what is at stake in rape doctrine. If we see requiring resistance as simply reflecting a mistaken belief that women have inadequate motive to engage in self-help in the face of sexual attack, then the obvious solution is to just drop the requirement. Unfortunately, such a move has proved to be politically unpopular and unworkable, because it fails to apprehend that the resistance requirement is as fraught with questions of honor as dueling was.

Imagine instead a reform that created two categories of rape: one category for rapes without physical resistance on the part of the victim, another (with harsher penalties) for victims who do engage in a degree of self-help by physically resisting. Anyone who has read Dan Kahan’s article about the problem of “sticky norms” in law and public attitudes will recognize the

¹⁷³ Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 970-72 (1995).

¹⁷⁴ *Cf. id.* at 971.

¹⁷⁵ FRIEDMAN, *supra* note 161, at 177.

¹⁷⁶ *Id.* at 177-78.

potential of this solution.¹⁷⁷ As Kahan's framework suggests, the weaker penalties for non-resisting rape should encourage otherwise reluctant law enforcers (police, prosecutors, jurors) to bring the law down on perpetrators who would otherwise be acquitted. Moreover, the very fact that such defendants were being successfully prosecuted would slowly change attitudes about what honorable women should do in the face of sexual attack: honorable-but-prudent women might indeed fail to engage in self-help.

I do not mean to imply that victims of honor crimes (however a particular culture at a particular time defines them) will only want to engage in self-help and will unambiguously resent any and all delegation. Probably, the ideal situation for such victims would be to stave off the crime through self-help, but then to have the perpetrator's attempted crime punished to the full extent by an appropriate delegated agent. In this way, the victim would maximize both personal honor and social affirmation. The main point is that whether and when a victim will agree to delegate for honor crimes depends on how doing so will address the insult of the crime. If the social status view of crime and punishment is correct, dealing with self-help problems in honor crimes will be a delicate and complex business. This delicacy and complexity is not predicted in the more traditional views of punishment, and consequently, their solutions are far less likely to work.

B. *Populations That Refuse to Delegate Fully*

The previous Section described types of *crimes* where the State relaxes its monopoly on revenge. But as already alluded to before, there are also *people* who are less likely to want to delegate their revenge to the State. The social status view of crime and punishment would predict that the reluctance to delegate by these individual is, in significant part, a problem of insufficient identification with the punisher. Individuals who don't regard the State as particularly representative of themselves are not likely to see the State as an appropriate agent of their revenge. This is because they will not see State actors as proxies for their ingroup and, for the most part, it is with their ingroups that individuals seek social standing. This is problem enough when single individuals here and there fail to identify with the State, but when it generalizes systematically to entire populations (or cultures), the State faces a real crisis.

I have already mentioned inner city communities, where it is more common for victims to resent (or even resist) delegation of their revenge to the State. The problem there is even worse than just the victims' failure to identify. Offenders too are less likely to see the State as a legitimate agent of punishment and, as such, official state punishments may fail to sting. Worse still, they can, on occasion, become a badge of honor for the marginalized

¹⁷⁷ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623-24 (2000).

group; ironically, a way to *gain* social standing within their own ingroup by the very fact of being denigrated by the resented outgroup.¹⁷⁸

If this is the problem, what is the solution? Once again, a misdiagnosis of the source of the problem will lead to an inadequate – and even perverse – course of treatment. Someone who endorses a traditional view of punishment might think that victims in these communities simply have inadequate incentive to punish – that is, to cooperate with investigations and prosecutions. The answer from this perspective would be to simply increase police and penal resources geared towards enforcement and punishing.

The problem, though, is not a matter of inadequate incentives to punish, but inadequate levels of identification with the State. To remedy – or at least not worsen – *this* problem, the State should again relax its monopoly on punishment. But unlike in the section above, here the solution is manifestly not to relax it by allowing victims to engage in self-help. Doing so would exacerbate the sense of abandonment (and nonidentification) many victims in these communities already feel. Instead, the State should manufacture a punishment that can give the inner city victim the social standing she seeks. How? By changing the perceived agent of revenge.

When the punishment is by the State and the State alone, a victim in the inner city will not feel as vindicated as she could, both because she herself does not recognize the State as a legitimate representative of how much her community values her, but also because she knows that her offender – who is disproportionately likely to be a member of her own community¹⁷⁹ – is not likely to feel the sting of the punishment. But if punishment is executed by the State in explicit concert with respected, representative institutions within her own community, the victim should be more satisfied, and the offender more stung. This does not (should not, and cannot) mean leaving local institutions to their own devices. Rather, it means self-consciously designing punishment regimes that fairly and constitutionally delegate revenge while still keeping the State's thumb in the pie. In this way, the victims can get the relevant (locally-delivered) social status they demand from the punishment of their offenders, but by staying involved, the State also conveys the message that the larger society respects and wants to protect them, too.

Here, I will offer a few examples that begin to suggest the vast possibilities the State has at its disposal. One example comes from Philadelphia, and began over twenty years ago: Youth Aid Panels.¹⁸⁰ The principle behind them is this:

¹⁷⁸ See DAVID MATZA, *DELINQUENCY AND DRIFT* 40-41 (1964); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 357 (1997).

¹⁷⁹ See John J. DiIulio, Jr., *The Question of Black Crime*, 117 PUB. INT. 3, 7 (1994).

¹⁸⁰ For a fairly detailed account of the Youth Aid Panel program, see NINA W. CHERNOFF & BERNARDINE H. WATSON, *PUBLIC/PRIVATE VENTURES, AN INVESTIGATION OF PHILADELPHIA'S YOUTH AID PANEL: A COMMUNITY-BASED DIVERSITY PROGRAM FOR FIRST-TIME YOUTHFUL OFFENDERS* 1-6 (2000), available at www.ppv.org/ppv/publications/assets/61_publication.pdf.

instead of sending an offender to probation, the State sends an offender before a panel of local community residents. After this meeting, one of these local residents – all of whom are volunteers – is assigned to check up on the offender in the way a probation officer typically would. Thus, instead of parole being enforced by a member of the outgroup (perhaps a white suburbanite), a punishment which could be easily dismissed as irrelevant to the needs and experiences of the inner city, the offender is subjected to the very vivid, scornful face of representatives of his – and most likely, his victim's – own community. Consider this exchange from a panel for a boy who brought a knife to his school:

“You're smiling,” one panelist began. “It doesn't seem like getting arrested was a big deal to you.” Before answering, the boy's eyes searched the room for sympathy, but found only ten streetwise sets of cold stares. The smile gone, he mumbled an answer into his shirtsleeve. . . . [He] then made the biggest mistake you can make if you are sitting before a [Youth Aid Panel]: he started to blame others for what he had done. “Excuse me,” a panelist abruptly cut him off, “but I went to that school. I know that hallway, I live in this neighborhood, and I walk those streets every damn day. I don't have no knife. Most kids I know your age, including kids smaller than you, don't carry no knife. And you ain't the only kid that's got troubles. But you are the kid who brought a knife.”¹⁸¹

The Youth Aid Panel is modest: it applies to youthful, first-time offenders. But the promise behind it is tremendous, and indeed, has been replicated elsewhere.¹⁸² Although there has not been rigorous empirical examination of this point,¹⁸³ I would predict that victims should be more satisfied with a community volunteer supervising their offenders than they would be with a state-employed probation officer. Perhaps in neighborhoods with operating Youth Aid Panels, victims are more willing to cooperate and even report their crimes because they know their offender will have to face a fellow community resident who represents and understands the victim's interests in a way that a distrusted bureaucrat could not.

The second example is “community policing,” a phenomenon that got its biggest boost with President Clinton's announcement of substantial federal

¹⁸¹ John J. DiLulio Jr. & Beth Z. Palubinsky, *How Philadelphia Salvages Teen Criminals*, CITY J., Summer 1997, at 29, 31, available at www.city-journal.org/html/7_3_how_phila.html.

¹⁸² See, e.g., PATRICK GRIFFIN, U.S. DEP'T OF JUSTICE, DEVELOPING AND ADMINISTERING ACCOUNTABILITY-BASED SANCTIONS FOR JUVENILES 4-5 (Sept. 1999), available at <http://jabg.nttac.org/docs/sanctions.pdf>.

¹⁸³ The program has been investigated for more traditional markers of success, namely its effects on recidivism. Youths who are diverted into the program fare substantially better than controls in this regard. CHERNOFF & WATSON, *supra* note 180, at 7-8.

support in 1994.¹⁸⁴ Community policing encompasses a number of practices, all of which are united by “police engagement, collaboration, or partnership with private citizens.”¹⁸⁵ These practices go beyond replacing squad-car patrols with beat-walking. They also include consultation with citizens before developing police policies and routinely reporting back to the community with results,¹⁸⁶ seeking the aid of community members in identifying dangerous areas and individuals,¹⁸⁷ and designing enforcement regimes designed to preserve and rebuild the social capital of distressed neighborhoods.¹⁸⁸

In contrast, traditional police enforcement policies, consistent with traditional views of crime and punishment, tend to be hierarchical and centralized, with the center being outside the community. Again, not only does this traditional approach fail to solve what looks like a problem of lack of incentive to punish on the part of inner city residents, but it also has the perverse effect of worsening the alienation felt by inner-city minority neighborhoods.

Consider, for instance, typical drug-enforcement policies which concentrate on arresting low-level dealers, often called “buy-bust” enforcement. These dealers are typically young, African-American males concentrated in impoverished areas of the city. By arresting and convicting them, the State removes them from their families and virtually destroys their prospects for future employment.¹⁸⁹ Heavy reliance on buy-bust tactics not only weakens the social structures of the offenders’ homes and neighborhoods, but it also generates understandable resentment from family members and local residents left behind when offenders head off to prison.¹⁹⁰ Moreover, since the “costs” to sellers are higher when buy-busts are common (that is, sellers have a substantial risk of incarceration), the price of drugs must be higher to compensate for the sellers’ risks, thus making drug markets worth more (and more worth killing for), which further disrupts neighborhoods and breeds alienation and resentment.¹⁹¹

Now consider the potential for community policing strategies which, because they are seen as emerging from within the community itself, have the

¹⁸⁴ Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1596 (2002).

¹⁸⁵ *Id.* at 1598.

¹⁸⁶ *Id.* at 1598-99.

¹⁸⁷ *See* Meares, *supra* note 49, at 225.

¹⁸⁸ *Id.* at 221.

¹⁸⁹ *Id.* at 209.

¹⁹⁰ *See id.* at 210.

¹⁹¹ *See id.* at 221. Meares describes an alternative strategy of “reverse sting” which focus on arresting suburbanite buyers rather than drug dealers. She suggests that such stings may improve the stability of impoverished areas by moving the burden of law enforcement away from inner cities, disrupting the profitability of the drug trade, and encouraging cooperation between local residents and police. *Id.*

capacity to convey social standing to local victims. Rather than emphasizing “top-down,” hierarchical enforcement, they instead focus – though of course not exclusively – on respectful, consensual problem-solving techniques¹⁹² and foster a sense of connection and trust between police and the communities they patrol. These programs can be incredibly creative and powerful. Professor Meares has written extensively, for example, about Chicago’s innovative anti-gang loitering law,¹⁹³ which explicitly requires police to consult with church leaders, community activists, and other knowledgeable residents about where and against whom the ordinance could be enforced.¹⁹⁴ Meares has also described Chicago’s “prayer vigils,” which began in the spring of 1997, and have been repeated several times since. These vigils were spear-headed and facilitated by city police brass, and involved police officers and citizens joining together to temporarily take over the most prominent drug-dominated street corners to pray and sing, in groups of ten, for peace in the community. A general community picnic immediately followed and, in the longer term, routine meetings between police and church leaders took place. This provided further opportunities to build mutual trust and respect.¹⁹⁵

Chicago is not the only city that has pursued original community policing initiatives that explicitly enlist the aid of powerful members of inner-city neighborhoods (frequently, religious leaders). Boston had a dramatic reduction in homicides in the late 1990s, which Jenny Berrien and Christopher Winship argue was due in no small part to the police establishing the “Ten-Point Coalition,” an informal association with a group of inner-city ministers. In this remarkable relationship, Boston police gave the Coalition input into the disposition of particular offenders, and agreed to deal firmly with any police abuses identified by the Coalition. In return, the Coalition fed the police information, enabling them to arrest and control dangerous gang members.¹⁹⁶

As is always the case with creative solutions to old problems, all of these programs have been controversial. Chicago’s gang loitering ordinance, for instance, was overturned by the Supreme Court.¹⁹⁷ Moreover, even the very police officers involved in Chicago’s prayer vigils report feeling somewhat conflicted about the potential establishment issues the program raises.¹⁹⁸

¹⁹² Meares metaphorically calls this a “Quaker” as opposed to a “Puritan” approach. Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 410 (2000).

¹⁹³ See MUN. CODE OF CHI., ILL. § 8-4-015 (1992).

¹⁹⁴ Meares, *supra* note 49, at 225.

¹⁹⁵ Meares, *supra* note 184, at 1612-13.

¹⁹⁶ Jenny Berrien & Christopher Winship, *Should We Have Faith in the Churches? The Ten-Point Coalition’s Effect on Boston’s Youth Violence*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 222, 239-42 (Bernard E. Harcourt ed., 2003).

¹⁹⁷ *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) (holding that Chicago’s anti-gang loitering ordinances were unconstitutionally vague).

¹⁹⁸ See Meares, *supra* note 184, at 1627.

Nevertheless, Meares, Berrien, and Winship all agree that the most important result of these programs is the increased police legitimacy they breed in communities and populations that are marked by a profound distrust of and nonidentification with law enforcement.¹⁹⁹ Critically, the police have accomplished this “umbrella of legitimacy”²⁰⁰ by partially delegating enforcement to the community itself – in effect, breaking the complete state monopoly on law enforcement.

The advantage to community based programs is not just that they give victims social standing by delivering punishment through more representative institutions. Rather, ironically, the real payoff is in ultimately *reinforcing* the State’s monopoly on punishment. For all the reasons discussed in the first Part of this Article, the State is virtually always better off dominating criminal punishments. If the State stubbornly insists on exercising its monopoly in the face of widespread belief that it is not a legitimate agent of victims’ revenge, then the resentment this breeds will make it harder still in the long run to cabin the self-help impulses of its citizens. However, by carefully relaxing its short-term monopoly in certain circumstances, the State can eventually build up enough trust in its criminal justice regime to allow it to recapture its monopoly later.²⁰¹

This point generalizes beyond the inner cities to a post-Watergate, cynical U.S. population and, perhaps, to those western and southern individualists who are also more likely to resist delegation of revenge to the State. Community policing and enforcement strategies may not adequately address *these* groups in their refusal, relatively speaking, to delegate their revenge. But community policing does not tap out the State’s options for relaxing its monopoly while still retaining involvement and even control. Victim impact statements are another example of delegated revenge, as are restorative justice programs generally which allow victims to “face down” their offenders in a circumscribed setting.²⁰²

Moreover, the State doesn’t even have to relax its monopoly to satisfy victims’ complex desires for achieving social status through punishment. It can also carefully *allocate* its monopoly to ensure selection of the *appropriate* state agent. The social status theory of punishment suggests, for instance, that the increasing federalization of crimes and prosecutions is a risky move where citizens feel more connected to their states than to the nation as a whole. Consider again the D.C. Snipers case. People spoke out publicly against federal prosecution even though the jurors would have been selected from the same community as in a state prosecution, and the trial would take place

¹⁹⁹ Berrien & Winship, *supra* note 196, at 243; Meares, *supra* note 192, at 401.

²⁰⁰ Berrien & Winship, *supra* note 196, at 239.

²⁰¹ Cf. E.P. Hollander, *Conformity, Status, and Idiosyncrasy Credit*, 65 PSYCH. REV. 117, 124 (1958) (describing how early conformity to group expectancies increases status which, at a later stage, allows greater latitude for idiosyncratic behavior).

²⁰² Bilz & Darley, *supra* note 25, at 1249-50.

locally as well. Local citizens were murdered, the arguments went, and so the local courts were the most credible bodies to take jurisdiction.²⁰³ If this intuition globalizes, then the federal government's traditional role of taking on the bulk of "victimless" drug crimes and genuinely interstate crimes is fine, but to trample into more local domains invites contempt and possibly encroaching perceptions of illegitimacy.

CONCLUSION

The fact that we tend to delegate our revenge is no puzzle at all once we have a more subtle understanding of the functions of punishment than either standard economics or psychology usually offer. In short, revenge serves not just to indulge a desire to see a wrongdoer suffer. Instead, it is a part of the language of crime and punishment: crime sends a message and punishment answers it. But like all language, crime and punishment are fundamentally and importantly *social*. Who punishes, how, and why convey information about the social worth of both victim and offender. As such, in certain – indeed, most – circumstances, a victim will prefer that others do the punishing simply because that is the best way to show that others value the victim enough to expend scarce and costly punishment resources to protect him.

From the State's perspective, this desire for delegated revenge is a convenient one, given the undisputable costs associated with a system that relies on private retribution. However, the desire to delegate revenge is not unvarying; it differs across individuals, crimes, and sometimes even whole populations. A State that wishes to maximize citizens' willingness to delegate must be sophisticated in understanding when and why they occasionally refuse to do so.

A government that wishes to solidify its punishment monopoly shouldn't – or at least doesn't need to – waste its time trying to reduce the overall "retributiveness" of its population. Least of all should it try to impose its monopoly by fiat or brute force. Instead, it should expend effort trying to increase its perceived legitimacy and work on getting its population to identify themselves as citizens of the State first and foremost, and members of subgroups (clans, tribes, neighborhoods, regions, racial groups) second.

Consider Pakistan, which is in the painful throes of a transition from tribal rule to a more powerful central government.²⁰⁴ It is possible that Pakistan could succeed in making its citizens defer to its punishment monopoly by force. But just as probably, as the citizens of Pakistan (hopefully) begin to regard the State as effectively representing their interests – perhaps through indirect measures such as democratic politics, the provision of social services,

²⁰³ As Montgomery lawyer Steven VanGrack put it, "I'd be outraged if the feds took over this case. . . . Most of the people died here. I think most people want the local prosecutor to prosecute it." Morello & Shaver, *supra* note 71.

²⁰⁴ See Castetter, *supra* note 136, at 547-53.

or defending them in the international arena – citizens will begin to regard themselves more as “Pakistanis” than as members of particular tribes.

To achieve its ultimate goal of a state punishment monopoly more quickly and directly, Pakistan can also be more sensitive in how it interacts with the local tribal councils that currently enforce much of the criminal law. Again, the point is not that the central government of Pakistan should throw up its hands and defer to the tribal councils.²⁰⁵ But neither should it regard the local tribal councils as something to be completely squashed, as many activists would like.²⁰⁶ Instead, it should see them as something to be co-opted. And this, indeed, is what Pakistan seems to be doing. More and more, Pakistani state courts refuse to officially recognize the jurisdiction of the tribal councils in handling criminal disputes, but they *will* refer civil disputes to the councils, and even consult with the councils for advice on particularly complicated cases.²⁰⁷ As the central government begins to become increasingly regarded as respectful of local justice procedures (when it deserves such respect), people should be increasingly willing to delegate revenge to the State instead of their tribes. Indeed, they might even begin to demand it.

This analysis is not meant to imply that Pakistan’s transition will not be rocky, and occasionally perhaps even awful. The ambition of this Article instead is to argue that where delegated revenge fails, governments that wish to reestablish or strengthen their monopoly have resources for doing so – and few of them are profitably suggested by traditional economic or psychological theories of punishment.

²⁰⁵ Indeed, some of the most disgusting abuses of justice occurred when the central government failed to intervene in particularly atrocious council rulings. Perhaps most notoriously in recent years, it initially failed to intervene when a council ordered a boy’s sister to be gang-raped as a punishment for his offense. For an account, see Ian Fisher, *Account of Punjab Rape Tells of a Brutal Society*, N.Y. TIMES, July 17, 2002, at A3.

²⁰⁶ Castetter, *supra* note 136, at 569.

²⁰⁷ *Id.* at 558.