

The Role of the Victim Within the Criminal Justice System: A Three-Tiered Concept

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I.

The social reality of the criminal justice system occurs on three levels. The first level is the system's attempt to prevent socially harmful actions by prohibiting them under the threat of punishment. The deterrent effect of the sanction of *threat* as such seems to derive from two different sources. First, the threatened sanction increases the costs to the actor. An individual who calculates rationally and egoistically will forego an action when the costs to him are higher than the expected benefits. This mechanism is at the core of the law and economics debate.¹ Second, the threat of punishment is also a means of communication to express that a certain action is morally reprehensible. An individual with normal socialization and internalization of social norms does not want to appear to be a despicable person, either to society or (above all) to himself. He will instinctively forego actions that are generally considered detestable without rationally reflecting on the costs and benefits of his choice.² As Professor Kahan has shown, in order to communicate moral reprehensibility, the threatened sanctions must express some form of contempt.³ Or, in other words, the

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1. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169 (1968), 169; Ernest van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 *Rutgers L.J.* 706 (1981); Richard Posner, *An Economic Theory of Criminal Law*, 85 *Colum. L. Rev.* 1193 (1985), 1193; Richard Posner, *Economic Analysis of Law* (4th ed. 1992); Hans Jochen Otto, *Generalprävention und externe Verhaltenskontrolle: Wandel vom soziologischen zum ökonomischen Paradigma in der nordamerikanischen Kriminologie* (1982); Viktor Vanberg, *Verbrechen, Strafe und Abschreckung* (1982); Petra Wittig, *Der rationale Verbrecher* (1993).

2. Michael Baurman, *Der Markt der Tugend* 283 (1996).

3. Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1

sanction must express appropriate censure, as Andrew von Hirsch in particular has examined and demonstrated in many publications.⁴

The fact that these connections correspond with intuitive convictions within society can be shown in their satirical mirroring by the German writer Bertolt Brecht in *The Rise and Fall of the City Mahagonny*. The main character, Jim Mahoney, who propagates anarchy as the means to human happiness, is sentenced to trivial punishments because of several offenses, but then he is sentenced to death due to his indigence.⁵ Brecht intended to unmask the total perversity of the bourgeois judiciary. To analogize the case to contemporary American circumstances, one could imagine, for example, the president of the United States being fined \$100 for the instigation of a bloody war, but then being sentenced to castration for staining the cocktail dress of an intern with his semen.

These absurd examples illustrate the second source of general deterrence, known in Germany as "positive general prevention," which works through moral convictions and the internalization of norms.⁶ This approach requires that the sanction expresses a sufficiently intense and proportionate blame. This is also central to the tendency of the criminal law to prevent social harm because the first channel, general deterrence within the framework of law

Buff. Crim. L. Rev. 5 (1997).

4. See, e.g., Andrew von Hirsch, *Censure and Sanctions* (1993) [hereinafter von Hirsch, *Censure and Sanctions*]; Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *Crime & Just.: An Annual Review of Research* 55 (1992); Andrew von Hirsch, *Strafmaß und Strafgerechtigkeit* (1991); Andrew von Hirsch, *The Politics of "Just Deserts"*, 32 *Can. J. Criminology* 397 (1990); Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1985) [hereinafter von Hirsch, *Past and Future Crimes*].

5. See Bertolt Brecht, *The Rise and Fall of the City of Mahagonny and The Seven Deadly Sins of the Petty Bourgeoisie* (John Willett & Ralph Manheim eds., W.H. Auden & Chester Kallman trans., 1996).

6. See *Positive Generalprävention: Kritische Analysen im deutsch-englischen Dialog* (Bernd Schünemann et al. eds., 1998); Günther Jakobs, *Strafrecht Allgemeiner Teil 1/4* (2d ed. 1991); Winfried Hassemer, *Einführung in die Grundlagen des Strafrechts* 324 (2d ed. 1990); Karl Schumann, *Positive Generalprävention* (1989).

and economics, has two fundamental gaps in its efficiency, which I can only mention briefly. First, the rate of sanctioning is objectively so low⁷ that according to a benefit-maximizing theory of decision making, a lot more offenses should be committed than actually are. Second, the economic theory fails in the numerous cases in which the offender feels sure that he will not be apprehended because even the threat of the death penalty does not constitute a real cost for the offense when combined with a zero risk of discovery.

This short and necessarily coarse analysis of the foundations of criminal law as a means to prevent social harms demonstrates, in my opinion, that two extremely radical concepts for the role of the victim are unworkable. The first radical solution would be to separate the criminal law entirely from the sphere of morals and to replace the prohibition of the socially harmful acts with the mere infliction of costs, similar to the infliction of taxes. This general idea of a parallel between criminal law and tax law in the theory of norms was propagated by Hans Kelsen and has been renewed recently in Germany in several books (i.e., in several *Habilitationsschriften*).⁸ But to abolish penal sanctions is to abolish the victim. Only the criminal law can communicate an absolute protection, whereas the duty to pay taxes or even tort damages communicates only the message that a certain conduct can be expensive.

The second radical conception of the role of the victim would reduce the criminal law to a form of tort liability, reducing the state's involvement merely to claiming compensation on behalf of the person harmed. This variation of abolitionism, advanced in Germany by Klaus

7. See Hans Göppinger et al., *Kriminologie* 152 (5th ed. 1997); Ulrich Eisenberg, *Kriminologie* §§ 16, 26 (4th ed. 1995); Hans-Jürgen Kerner, *Kriminalstatistik*, in *Kleines Kriminologisches Wörterbuch* 294 (Gunter Kaiser et al. eds., 1993).

8. Heinz Koriath, *Grundlagen strafrechtlicher Zurechnung* 163, 188, 232 (1994); Andreas Hoyer, *Strafrechtsdogmatik nach Armin Kaufmann* 42 (1997); Carsten Heidemann, *Die Norm als Tatsache: Zur Normentheorie Hans Kelsens* (1997).

Lüderssen,⁹ also amounts to the abolition of the victim in the specific sense of the criminal law. Tort law, unlike criminal law, does not communicate the message that socially harmful conduct must be omitted, but rather conveys the much more modest message that certain behavior, such as the harming of another citizen, must lead to a financial compensation.¹⁰ This again leads back to economic theory.

II.

To abolish the victim by abolishing a genuine criminal law does not accomplish the task of preventing social harm. The role of the victim in criminal legislation, therefore, will also be that of the subject of the social harm. The concept of social harm, which was developed during the Enlightenment period, and which still dominates the terminology in the Anglo-American discussion, is problematic.¹¹ In Germany, the concept has been developed further into the notion of *Rechtsgut* (common good):¹² destruction of or damage to the common good constitutes social harm. The victim is the subject of the common good. The distinction of who is the victim is central both to the legislature's work and to the courts' interpretation of unclear phrasing in statutes.¹³ At the center of the German

9. Klaus Lüderssen, *Abschaffen des Strafens?* 259 (1995).

10. Herein lies a certain parallel to the unfair-advantage theory. See Wojciech Sadurski, *Giving Desert Its Due* (1985); Jeffrie G. Murphy, *Retribution, Justice and Therapy* (1979); Herbert Morris, *Persons and Punishments*, 53 *The Monist* 475 (1968).

11. See, e.g., Martin Wasik, *Crime Seriousness and the Offender-Victim Relationship in Sentencing*, in *Fundamentals of Sentencing Theory* 103 (Andrew Ashworth & Martin Wasik eds., 1998); von Hirsch, *Censure and Sanctions*, *supra* note 4, § 29; von Hirsch, *Past or Future Crimes*, *supra* note 4, at 64; Andrew Ashworth, *Principles of Criminal Law* 19 (1991).

12. See, e.g., Karl Lackner & Kristian Kühl, *Strafgesetzbuch*, vor § 13 Rn. 4 (23d ed. 1999); Claus Roxin, *Strafrecht Allgemeiner Teil* § 2 Rn. 1 (3d ed. 1997); Adolf Schönke et al., *Strafgesetzbuch*, vor § 13 Rn. 9 (25th ed. 1997); Hans-Heinrich Jescheck, *Strafrecht Allgemeiner Teil* 256 (5th ed. 1996).

13. For the importance of an intrasystematic definition of legal good for the interpretation of statutes, see Erich Schwinge, *Teleologische Begriffsbildung im Strafrecht: Ein Beitrag zur strafrechtlichen Methodenlehre* (1930). For the

discussion lies the distinction between offenses against the individual and the collective common good on the one hand,¹⁴ and injurious offenses and endangerment on the other.¹⁵ Legal scholars from Frankfurt University claim that all common good has to serve the protection of individuals and has to have a functional relationship to individuals.¹⁶ Consequently, they assess norms establishing crimes against the environment as being illegitimate and demand that they be excluded from the criminal law.¹⁷ In my opinion, this thesis is entirely wrong (especially for crimes against the environment) because, on the contrary, it is important to protect ecological resources from living individuals in the interest of future generations.¹⁸ Instead I want to propose a rule of doubt: The offense descriptions in criminal law in doubtful cases must be interpreted in a manner that protect individuals.

distinction between a critical and an intrasystematic definition of legal good, see Winfried Hassemer, 1 *Alternativ-Kommentar zum StGB*, vor § 1 Rn. 259 (1990) [hereinafter Hassemer, *Alternativ-Kommentar*]; Winfried Hassemer, *Theorie und Soziologie des Verbrechens* 17 (1973).

14. See Roxin, *supra* note 12, § 2 Rn. 9; Schönke et al., *supra* note 12, vor § 13 Rn. 9; Jescheck et al., *supra* note 12, at 259; Hassemer, *Alternativ-Kommentar*, *supra* note 13, Rn. 269.

15. See Johannes Wessels & Werner Beulke, *Strafrecht Allgemeiner Teil*, Rn. 25 (28th ed. 1999); Frank Zieschang, *Die Gefährdungsdelikte* (1998); Lackner & Köhl, *supra* note 12, vor § 13 Rn. 32; Roxin, *supra* note 12, § 10 Rn. 122; Schönke et al., *supra* note 12, vor § 13 Rn. 129; Jescheck, *supra* note 12, at 263; Eva Graul, *Abstrakte Gefährdungsdelikte und Präsumtionen im Strafrecht* (1991).

16. Winfried Hassemer, *Kennzeichen und Krisen des modernen Strafrechts*, 1992 ZRP 378, 383; Hassemer, *Alternativ-Kommenar*, *supra* note 13, vor § 1 Rn. 274; Olaf Hohmann, *Das Rechtsgut der Umweltdelikte* 53 (1991) [hereinafter Hohmann, *Das Rechtsgut*]; Olaf Hohmann, *Von den Konsequenzen einer personalen Rechtsgutsbestimmung im Umweltstrafrecht*, 1992 GA 76, 77 [hereinafter Hohmann, *Von den Konsequenzen*]; Wolfgang Naucke, *Schwerpunktverlagerungem im Strafrecht*, 1993 KritV 135, 154.

17. Hassemer, *supra* note 16, at 383; Winfried Hassemer, *Produktverantwortung im modernen Strafrecht* 3 (1994); Felix Herzog, *Gesellschaftliche Unsicherheit und strafrechtliche Daseinsvorsorge* 141, 147 (1991); Hohmann, *Das Rechtsgut*, *supra* note 16, at 196; Hohmann, *Von den Konsequenzen*, *supra* note 16, at 80.

18. See Bernd Schünemann, *Principles of Criminal Legislation in Postmodern Society: The Case of Environmental Law*, 1 *Buff. Crim. L. Rev.* 175 (1997); Bernd Schünemann, *Zur Dogmatik und Kriminalpolitik des Umweltstrafrechts*, in *Festschrift für Otto Triffterer* 437 (1996).

If an offense against individual rights harms no individual common good, but only creates a significant risk that the future development might lead to such harm, special reasons are required to deem the dangerous conduct criminal. This leads to the development of a theory about the legitimacy of abstract endangerment offenses, which I cannot detail here.¹⁹ One should not, however, confuse this theory with the protection of collective common good as the scholars from Frankfurt University do.

As the victim is the subject of the common good, in many cases, he has the right to dispose of the common good. Traditionally, this concerns the justification of the victim's consent to the injury, which precludes punishment.²⁰ This traditional perspective is, however, too narrow in cases in which the criminal event consists of an interaction between offender and victim (the so-called *Beziehungsdelikte* (relationship offenses)).²¹ For such offenses, I proposed more than twenty years ago to apply a rule of interpretation which today is usually called *Viktimodogmatik*.²² An instructive example is a fraud by which, according to the German Criminal Code, the offender commits an error that makes the victim harm himself financially, thus giving the offender a financial

19. But see Bernd Schünemann, *Kritische Anmerkungen zur geistigen Situation der deutschen Strafrechtswissenschaft*, 1995 GA 201, 210.

20. See, e.g., Roxin, *supra* note 12, § 13; Jescheck, *supra* note 12, at 373; Wessels & Beulke, *supra* note 15, Rn. 370; Schönke et al., *supra* note 12, vor § 32 Rn. 33; Lackner & Kühl, *supra* note 12, vor § 32 Rn. 10.

21. For further citations, see Raimund Hassemer, *Schutzbedürftigkeit des Opfers und Strafrechtsdogmatik* 54 (1981).

22. See Bernd Schünemann, *Der strafrechtliche Schutz von Privatgeheimnissen*, 90 ZStW 11 (1978); Bernd Schünemann, *Einige vorläufige Bemerkungen zur Bedeutung des viktimologischen Ansatzes in der Strafrechtsdogmatik*, in *Das Verbrechenopfer in der Strafrechtspflege: Psychologische, kriminologische, strafrechtliche und strafverfahrensrechtliche Aspekte* 407 (Hans Joachim Schneider ed., 3d ed. 1982); Bernd Schünemann, *Die Zukunft der Viktimo-Dogmatik: Die viktimologische Maxime als regulatives Prinzip zur Tatbestandseinschränkung* 357 (1984). For an English language introduction to this victim-based approach to substantive criminal law, see Bernd Schünemann, *The Future of the Victimological Approach to the Interpretation of Criminal Law*, in *Victimology in Comparative Perspective* 150 (K. Miyazawa & M. Ohya eds., 4th ed. 1986).

advantage. The commission of an error (the central component of fraud) is traditionally assumed when the victim has doubts as to whether the facts given by the offender are true.²³ However, the principles of necessity and appropriateness, both of which are necessary components of the criminal law's focus on preventing social harms, require that no punishment be imposed when the victim has caused the social harm by consciously disregarding his own interest. In a case of fraud, the victim does not deserve protection by the criminal law when the victim recognizes that the offender's claims could be false and thus, is not truly misled.²⁴

I do not have room to explain the interpretation rule of the *Viktimodogmatik* with further examples. If legal reasoning is not to be one-sided, in my opinion, it must consider the role of the victim both as a subject of the common good and as someone who can abandon the common good by himself and who, thus, should not be protected by the criminal law. When interpreting the law, one must therefore conclude that punishment can be limited by the behavior of the victim.

In response to recent criticism of *Viktimodogmatik*,²⁵ it is necessary to point out that this doctrine stems not only from the constitutional principle that criminalization must be both necessary and appropriate but also from the simple logic of the conditions behind deterrent efficiency. If the

23. Schönke et al., supra note 12, § 263 Rn. 40; Lackner & Kühl, supra note 12; Reinhart Maurach et al., 1 Strafrecht Besonderer Teil 443 (8th ed. 1995); 2 Johannes Wessels & Thomas Hillenkamp, Strafrecht Besonderer Teil, Rn. 510 (21st ed. 1999).

24. See supra note 23. See also Hassemer, supra note 21, at 127; Knut Amelung, Irrtum und Zweifel des Getäuschten beim Betrug, 1977 GA 1; Günther Arzt, Viktimologie und Strafrecht, 1984 Monatsschrift für Kriminologie 105; Volker Krey, 2 Strafrecht Besonderer Teil, Rn. 373 (10th ed. 1995).

25. See Thomas Hillenkamp, Vorsatztat und Opferverhalten (1981); Thomas Hillenkamp, Der Einfluss des Opferverhaltens auf die dogmatische Beurteilung der Tat: Einige Bemerkungen zum Verhältnis zwischen Viktimologie und Dogmatik (1983); Roxin, supra note 12, § 14 Rn. 19; Lackner & Kühl, supra note 12, vor § 13, Rn. 4a; Hans-Ludwig Günther, Das viktimodogmatische Prinzip aus anderer Perspektive: Opferschutz statt Entkriminalisierung, in Festschrift für Lenckner 69 (Albin Eser & Ulrike Schittenhelm eds., 1998).

social harm results from conduct by the victim which disregards his own interests, then, in fact, the victim, not the offender, must be deterred from behaving in a socially harmful way. And this deterrence of the victim can be best achieved by denying him the protection of the criminal law if he disregards his own interests. However, this principle is only appropriate for relationship offenses, not for violent offenses.

III.

In most cases, the role of the criminal justice system in preventing social harm is limited to the use of legal threat for the purpose of general deterrence that I have just analyzed. If this deterrence is efficient, a crime will not be committed and there will be no need for further involvement by the criminal justice system. If, however, general deterrence fails and a crime is committed, the offender must be apprehended and found guilty, which is not only the necessary precondition for sanctioning but also an autonomous instrument of prevention, the second purpose of the criminal justice system. On the one hand, the process as such is, according to the famous phrase by Feeley,²⁶ frequently the punishment itself. On the other hand, the public trial and the moral disapproval aspects of the criminal justice system affirm and reinforce the moral foundation of the criminal law by the mechanism of positive general prevention.

What role should the victim have with respect to this second purpose? The question is whether the victim should be acknowledged as a subject in the trial (i.e., as a party). In the origins of criminal law, the victim and the prosecution were identical. In all legal systems, however, the historical development has led to the establishment of an official prosecution, while the victim's role has been reduced to that of a witness. Nonetheless, the victim has retained certain partial rights as private prosecutor in both

26. See Malcolm M. Feeley, *The Process Is the Punishment* (1979).

the common law and continental European legal systems.²⁷ And a few decades ago, the general development not only stopped, but, in fact, was reversed as the procedural rights of victims were reinforced both in the United States²⁸ and in Germany. Ever since the passage of the German Law for the Protection of Victims (*Opferschutzgesetz*) in 1986,²⁹ all victims of criminal insults (*Beleidigung*),³⁰ bodily injuries, deprivation of liberty, and sexual offenses can appear in court as ancillary private prosecutors³¹. For this purpose, victims have extensive rights to read the files, to participate in the trial, and to consult a lawyer.³² The German Bill for the Protection of Witnesses and for the Improvement of the Protection of Victims (*Gesetz zum Schutz von Zeugen und zur Verbesserung des Opferschutzes*),³³ which was passed recently, extended the application of these principles further. In fact, proposals for legislation drafted by legal scholars even advocate the extension of the right to read case files and to consult a lawyer.³⁴

These tendencies aim to make the victim a party in the criminal trial. I am curious as to what scholars in the United States think of this notion and want to add the following to explain the structure of the German criminal trial: As there is no adversarial system in Germany, but

27. See Markus Dirk Dubber, *The Victim in American Penal Law: An Introductory Overview*, 3 *Buff. Crim. L. Rev.* 3 (1999); §§ 374-394 StPO [German criminal procedure statute].

28. See Dubber, *supra* note 27, at 16-27.

29. *Opferschutzgesetz* of Dec. 12, 1986, BGBl. I 2496.

30. §185 StGB [German Penal Code].

31. § 395 StPO

32. §§ 406(e)-(g) StPO.

33. *Gesetz zum Schutz von Zeugen und zur Verbesserung des Opferschutzes* of Apr. 30, 1998, BGBl. I 820.

34. See Sven Thomas, *Der Zeugenbeistand im Strafprozess*, 1982 *NStZ* 489; Christoph Krehl, *Der Schutz von Zeugen im Strafverfahren*, 1982 *GA* 555, 562; Jürgen Baumann, *Alternativ-Entwurf Wiedergutmachung (AE-WGM): Entwurf eines Arbeitskreises deutscher, österreichischer und schweizerischer Strafrechtslehrer (Arbeitskreis AE)* (1996); Thomas Weigend, *Empfehlen sich gesetzliche Änderungen, um Zeugen und andere nicht beschuldigte Personen im Strafprozessrecht besser vor Nachteilen zu bewahren?* *Gutachten C für den 62. (1998) Deutschen Juristentag* 122.

rather an inquisitorial system with a purely adversarial façade, in a strict sense there are no parties at all, and both prosecutor and judge theoretically seek objective truth without being opponents of the defendant.³⁵ In reality, however, the German prosecutor almost always appears as the party opposing the defendant and his counsel.³⁶ And because the German judge serves the additional function of the jury and also examines the witnesses on the basis of his familiarity with the files of the prosecution (and thus takes the role of the American prosecutor as well), he is, in fact, the all-powerful opposing party who must find the defendant guilty or not guilty and then sentence him if necessary.³⁷ As the defendant already is in a nearly hopeless position of inferiority due to the distribution of roles in the trial, it seems to me almost absurd to set up the victim as another opposing party. For this conclusion, it is important, but not crucial, that each new instance gain an independent position and influence with respect to the outcome, even if the actor (i.e., the victim) merely repeats arguments made by another actor (i.e., the prosecutor) in the process. Even more important is the consequence that the testimony of the victim is transformed from a statement of knowledge into the declaration of a party, strategically constructed after the victim has reviewed the case file and consulted a lawyer. As a result, all credibility that the testimony might have had is lost, as modern

35. See Claus Roxin, *Strafverfahrensrecht* § 17 Rn. 5, § 10 Rn. 9 (25th ed. 1998); Otfried Ranft, *Strafprozessrecht* Rn. 203 (2d ed. 1995); Löwe-Rosenberg-Jürgen Reiss, *Strafprozessrecht* § 160 Rn. 47 (2d ed. 1989); Karl Peters, *Strafprozess* § 23(II)(2)(a) (4th ed. 1985).

36. See Bernd Schünemann, *Daten und Hypothesen zum Rollenspiel zwischen Richter und Staatsanwalt bei der Strafzumessung*, in *Kriminologische Forschung in den 80er Jahren* 265 (Günther Kaiser et al. eds., 1988); Bernd Schünemann, *Absprachen im Strafverfahren?*, Gutachten B zum 58. (1990) Deutschen Juristentag 51 n.110 [hereinafter Schünemann, *Gutachten*]; Hans-Heiner Kühne, *Strafprozeßlehre* § 5 Rn. 62 (4th ed. 1992).

37. See § 244 II StPO; Schünemann, *Gutachten*, supra note 36, at 48; Bernd Schünemann, *Der Richter als manipulierter Dritter? Zur empirischen Bestätigung von Perseveranz- und Schulter-schlußeffekt*, in *Verfahrensgerechtigkeit* 215 (Gunter Bierbrauer et al. eds., 1995).

psychological research makes clear.³⁸

I am aware that this critical assessment of the party's testimony is contrary to the tradition in the United States, which never had any qualms about making the defendant take an oath or testify as a witness in his own case. In this regard, however, I think the German Code of Procedure is preferable: It assumes a significant difference between the declaration of a party on the one hand, and the testimony of a witness on the other, because no one can be expected to respect the duty to reveal the truth in his own case, even when false testimony is penalized.³⁹ The conduct of President Bill Clinton provides empirical evidence that the declarations of a party—as in the German Code of Procedure—can only be qualified as a formal step in the proceedings but not as statements of knowledge that have to be given truthfully. The declarations of the defendant are backed by the presumption of innocence and the principle of *in dubio pro reo* (beyond a reasonable doubt). Thus, defendants are not required to disprove the charges against them; on the contrary, prosecutors must prove beyond a reasonable doubt that the not-guilty plea is disingenuous.

In sum, the victim should not be assigned the role of a party or even a quasi-party in the criminal trial. This holds, of course, if, and only if, we have a traditional criminal trial, that is, a process aiming at the imposition of criminal punishment in the narrow sense. The situation changes suddenly and thoroughly when one ponders replacing punishment with restitution and reconciliation, both of which have to be defined and effected in collaboration with the victim. The victim naturally

38. See, e.g., *Redlich aber falsch* (Stefan Barton ed., 1995); *Zum Beweiswert von Personenidentifizierungen 12* (Dieter Meurer & Siegfried Ludwig Sporer eds., 1990); *Die Beeinflußbarkeit von Zeugenaussagen* (Siegfried Ludwig Sporer & Dieter Meurer eds., 1994); Bernd Schünemann, *Der deutsche Strafprozeß im Spannungsfeld von Zeugenschutz und materieller Wahrheit*, 1998 StV 391.

39. See 3 BGHSt [Decisions of the German Supreme Court, Criminal Matters] 149, 152; Theodor Kleinknecht & Lutz Meyer Goßner, *Strafprozeßordnung* § 136 Rn. 18 (44th ed. 1999); Roxin, *supra* note 35, § 25 Rn. 3; *Karlsruher Kommentar-Karlheinz Boujong* § 136 Rn. 20 (3d ed. 1993); Reiss, *supra* note 35, § 136 Rn. 41.

assumes the position of a party in a process that aims at restitution. The prerequisites for the replacement of punishment with restitution are, however, not a matter of procedure but of substantive criminal law. I will discuss this issue further when talking about the third purpose of the victim's role in the criminal justice system. At the procedural level (the second tier), it suffices to point out that general concern with incorporating the victim as a party at trial can only be dispelled if the course of the proceedings raises doubts about the prosecution's commitment to the case. For example, according to the German Code of Procedure,⁴⁰ the prosecution can intend to drop charges but can be compelled by the victim to indict the defendant. In such exceptional cases, the victim in effect controls the prosecutor's charging decision. The victim thus becomes the equivalent of an additional prosecutor. Normally, however, the situation is different and the role of the victim as an additional prosecutor must be rejected. The result, however, is totally different when the traditional criminal trial is transformed into a specific process of restitution: In such a process, the victim naturally is a party and thus, can claim, with good reason, an autonomous procedural position.

IV.

Now I have arrived at the third and most important purpose, which has completely dominated the discussion internationally, especially in Germany, during the last years: the complete or partial replacement of punishment with restitution. Whereas German legal scholars have developed far-reaching models for a specific offender-victim mediation, which should supersede both punishment and the traditional criminal trial,⁴¹ the legislature has, in § 46a

40. See §§ 170-175 StPO.

41. See Klaus Sessar, *Schadenswiedergutmachung in einer künftigen Kriminalpolitik*, in *Kriminologie, Psychiatrie, Strafrecht: Festschrift für Leferenz zum 70. Geburtstag* 145 (Heinz Leferenz et al., eds., 1983); Detlef Frehsee, *Schadenswiedergutmachung als Instrument strafrechtlicher Sozialkontrolle* 197

of the German Penal Code only created a means to mitigate the sentence when the offender has made full or partial restitution to the victim and/or has paid financial compensation. This mitigation can even go so far as to refrain from imposing punishment at all if the sentence contemplated is less than one year of imprisonment. The problems with interpreting this norm as well as the offender-victim mediation have been discussed in an extensive body of literature⁴² that I will not analyze here. Instead, I want to go back to some fundamental issues. The critics of offender-victim mediation point to the fact that civil law already obliges the offender to compensate the victim and that the fulfillment of this independent legal obligation should not limit criminal liability in the area of criminal law.⁴³ Behind this argument lies the imperative not to weaken the positive, general preventive effects of the criminal law by letting the offender count on an easy way out through mere financial compensation. According to the notion behind the principle *nullum crimen sine lege* (no crime without law), the offender ideally must anticipate the consequences of his conduct in advance in order to perform a cost-benefit analysis. United States sentencing guidelines have made this notion almost a reality. When the offender can calculate that in the most unfavorable course of events, he need only restore the advantages he gained—provided he is convicted and sentenced (an

(1987); Baumann, *supra* note 34; Dieter Rössner, *Strafrechtsfolgen ohne Übelszufügung?*, 1992 *NStZ* 409; Täter-Opfer-Ausgleich auf dem Weg zur bundesweiten Anwendung (Hans-Jürgen Kerner et al. eds., 1994).

42. See, e.g., Uwe Brauns, *Die Wiedergutmachung der Folgen der Straftat durch den Täter: Ein Beitrag zur Neubewertung eines Strafzumessungsfaktors de lege lata und de lege ferenda* 298 (1996); Michael Kilchling, *Aktuelle Perspektiven für Täter-Opfer-Ausgleich und Wiedergutmachung im Erwachsenenstrafrecht*, 1996 *NStZ* 309; Susanne Walther, *Täter-Opfer-Ausgleich: Vermittler im Zeugenstand*, 1997 *ZRP* 395; Lackner & Kühl, *supra* note 12, § 46a Rn. 1; Bernd-Dieter Meier, *Konstruktive Tatverarbeitung im Strafrecht: Bestandsaufnahme und Reformperspektiven*, 1999 *GA* 1.

43. Hans Joachim Hirsch, *Zur Stellung des Verletzten im Straf- und Strafverfahrensrecht*, in *Gedächtnisschrift für Armin Kaufmann* 699, 706 (1989); Hans Joachim Hirsch, *Wiedergutmachung des Schadens im Rahmen des materiellen Strafrechts*, 102 *ZStW* 534 (1990).

outcome that he will not seriously anticipate)—then, according to the principles of rational choice, he may actually be pushed toward the commission of the offense. Also, relying on the principle that the sanction must communicate the moral reprehensibility of the conduct, the preventive effects of positive general prevention are threatened when the only consequence is financial compensation, which belongs, at its core, to the civil law and communicates no moral contempt.

There is another counter-argument that is hard to refute: That offender-victim mediation is antisocial and violates the principle of equality. A large portion of those offenders belonging to the lower classes are not in a position to pay financial compensation and, therefore, cannot even seriously participate in the process; whereas for the affluent, white-collar criminal, offender-victim mediation creates another avenue to allow the offender to escape the net of the criminal justice system.

The proponents of restitution have, of course, responded to this critique with a wide array of counter-arguments, which I cannot analyze here in detail.⁴⁴ In my opinion, it cannot be disputed that to introduce restitution into the criminal law and to replace criminal punishment either wholly or partially creates paradoxes that can only be dispelled if the range of application for offender-victim mediation is very limited. If restitution is to be more than civil law compensation for damages, (which would not be a sufficient substitute for punishment) restitution must provide a means for real atonement. Atonement means that the offender makes a counter-sacrifice beyond the payment of the kind of compensation that tort law requires. This result could be effected if, for example, the offender uses money that has been securely hidden from the authorities or transferred abroad, or if the offender, in a trial for criminal insult,⁴⁵ does not merely regret the

44. See, e.g., Heinz Schöch, *Empfehlen sich Änderungen und Ergänzungen bei den strafrechtlichen Sanktionen ohne Freiheitsentzug? Gutachten C für den 59. 1992 Deutschen Juristentag* 66.

45. See §§ 185-189 StGB and § 374(1) Nr. 2 StPO (assigning victims the

incident, but also humbles himself verbally and thereby restores the victim's reputation. Thus, it is possible to take the edge off the criticism of offender-victim mediation but only with the result that this remedy has a very limited range of application. Thus, genuine atonement is possible only for a small proportion of offenses, mostly in cases with aggravating circumstances that can be compensated through offender-victim mediation. If someone, for example, plans and carries out an insidious fraud by transferring the gain to the Bahamas, thus securing it against civil liability, he demonstrates such considerable criminal intent that he deserves especially severe punishment. If he brings the money back and uses it to compensate the victim of the fraud, the atonement counterbalances the increased criminal intent but does not justify exemption from punishment. This notion can be illustrated by pointing to the simple calculation the offender might otherwise make before committing the offense: "Either my crime remains undetected, in which case the money is forever safe in the Bahamas, or I will be convicted, and then I have to get the money back and restore it to the victim so I can be free from punishment—thus, it is perfectly rational at least to attempt the fraud!"

In sum, complete or partial replacement of punishment with offender-victim mediation based on general prevention, can only be justified in two circumstances: first, in the cases of genuine atonement, which have only a relatively small range of application and frequently will only compensate special aggravating circumstances; and second; where the conduct actually should have been decriminalized and the conflict assigned solely to the civil courts in the specific form of financial compensation actively pursued by the state.

V.

My thoughts about the role of the victim, which have

reflected the foundations of criminal law, all have led to the conclusion that the three purposes I have examined stand on feet of clay. In substantive criminal law, the position of the victim as the subject of the protected common good can be a Trojan horse, as the *Viktimodogmatik* shows. In procedural criminal law, the victim's position can be designed as an autonomous prosecutorial party, only under exceptional circumstances, as long as the trial is about genuine penal sanctions. The situation is different when one switches from sanctioning to offender-victim mediation, but this approach is only legitimate if the time is ripe for decriminalization. For those acts that cause a degree of social harm and thus require the general preventive effects of traditional criminal law, restitution can be taken into account only as a form of atonement that compensates a victim only for a specific aggravating circumstance of the offense.

In sum, I have endeavored to examine critically the contemporary tendencies to equate the victim's position at trial with the role of a party and to establish offender-victim mediation on a wide front in the criminal law. The concept of criminal policy, which guides my considerations, is, however, by no means reactionary: I am open to the decriminalization of certain less severe crimes—though the specific crimes need to be specified. This decriminalization could be made acceptable to the public under Lüderssen's proposition for a victim's restitution scheme organized by the state.⁴⁶ Basically, the sharp either-or distinction between criminal and civil law should be softened and an intermediate area should be created for borderline cases, thus incorporating the sanctions of civil law into the official process of procedural enforcement. The American concepts of corporate crime—which partially abolishes the criminal liability of the managers⁴⁷—and punitive damages,⁴⁸

46. See supra note 11.

47. See Kathleen F. Brickey, *Corporate Criminal Liability* 31 (2d ed. 1992).

48. See Edward J. Kionka, *Torts* 250 (2d ed. 1993); Jerry J. Philipps, *Products Liability in a Nutshell* 76 (4th ed. 1993); Richard L. Blatt et al., *Punitive Damages: A State by State Guide to Law and Practice* (1991).

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suggest that such intermediate forms are very promising instruments for the prevention of social harms.⁴⁹ I will be curious to hear, at this symposium in Buffalo, which intermediate forms with respect to the role of the victim already exist in the United States or are at least perceived to be acceptable solutions for the future.

49. See also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *Yale L.J.* 1795 (1992).