

Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence

BY AHMED A. WHITE*

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* Visiting Assistant Professor, Northwestern University School of Law. J.D. 1994, Yale Law School; B.A. 1991, Southern University and A & M. The author would like to acknowledge the assistance of Professor John V. White and Ms. Elisabeth L. Olds.

I. INTRODUCTION: THE NATURE OF THE QUESTION

Liberal jurisprudence seldom gives much notice of its imminent decay, which typically either develops in the guise of prudent policy or is concealed by ignorance and intellectual neglect. In such insidious fashion, the popular crusade for “victims’ rights” has quietly attained troubling prominence among contemporary trends in law and policy. In the course of advancing such apparently reasonable ideas as victim-impact testimony, sex-offender registration, and victim restitution, victims’ rights has thrust upon contemporary jurisprudence and criminal justice irrational, illiberal doctrines disturbingly common to Nazi jurisprudence and consistent with the ideas of its chief legal ideologist, Carl Schmitt. Even more disturbingly, victims’ rights arguments share with Schmitt and his fellow Nazis a deep antipathy to rule of law and a penchant to cloak this antipathy in a specious claim to “perfect” or to be consistent with rule of law. On one level, the victims’ rights agenda contradicts rule of law head-on. But on another, it also threatens to pervert the critical thrust of rule of law by undermining both its facility to bind the contemporary criminal justice system and its jurisprudence to a minimum of rational norms, possibly shattering the construct’s capacity to insure a minimally progressive, liberal legal system.

The doubly destructive nature of victims’ rights upon liberal jurisprudence derives from the peculiar character of rule of law. No simple bundle of doctrines, rule of law is a complex construct with progressive, liberal tendencies that are accompanied by an inherent conceptual fragility. This fragility derives from the fact that, beneath the myth that it is a strictly formal and normatively sterile construct, rule of law contemplates an amalgamation of formal and quite substantive norms. These norms are at once the source of its progressive functions, yet intrinsically self-contradictory, at odds with social reality, and quite easily reduced to self-destructive perversion. Indeed, so conceptually unstable is rule of law that its coherence is sustainable only when viewed dialectically, that is, viewed as a construct which actively subordinates its more critical and contradictory tendencies to a relatively modest, straightforward, and most of all historically feasible agenda—that of restraining the worst excesses of political sovereignty and displacing arbitrary decisions with rule by general legal norms.

By virtue of such immersion in dialectic, rule of law remains, at best, poised on a knife’s edge between a facility for viable critique and a descent

into critical incoherence.¹ While surely reformist and constructive,² a dialectical construct of rule of law can neither completely negate rule of law's insurgent, contradictory norms, nor halt the steady stream of social conflicts that continuously threaten to alter modest criticisms into unrealistic and unmanageable mandates. In the hands of opportunists and irresponsible radicals, rule of law norms are easily relieved of the compromising tethers of dialectic and redeployed in an insolent, hyperbolic, and ultimately incoherent way, in total disregard of the existing limits of legal reform. Inasmuch as rule of law implies equality, for example, it may be converted into an historically untenable demand for *immediate and complete* equality—and thereby removed from the table of reasonable legal debate. As Schmitt's concoctions demonstrate, and as I shall show is the case with victims' rights, such tactics allow a reactionary destruction of rule of law to be rationalized (in the weakest sense of the word) in the name of better realizing rule of law's own imminent normative agenda.³

¹ This accommodating character is precisely what has allowed rule of law to maintain relevance, as well as critical thrust, throughout nearly a century of the welfare state—a facility that many conservative commentators had declared impossible. On this dynamic, see WOLFGANG FRIEDMANN, *THE STATE AND THE RULE OF LAW IN A MIXED ECONOMY* 71-72 (1971).

² A couple of mainstream examples of such constructive work are offered by Robert Burt and Peter Edelman. See Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). A sign of the state of debate, the Edelman piece contributed significantly to his disqualification, as a “radical leftist,” from nomination to the federal bench. See David Kairys, *Clinton's Judicial Retreat When Naming Judges, He Is Quick to Cave*, WASH. POST, Sept. 7, 1997, at C1.

³ Schmitt's general mode of argument is to call attention to the specter of crisis and the impotency of liberal norms as traditionally articulated (e.g., as rule of law) to prevail. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (Tracy B. Strong ed., Rutgers Univ. Press 1996) (n.d.); CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., Massachusetts Inst. Tech. Press 1985) (1923).

For similar, contemporary “critiques” of rule of law, see, for example, ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 52-76, 166-218 (1976). See also JEROME FRANK, *LAW AND THE MODERN MIND* (1985); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 69-71 (1987); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); John Henry Schlegel, *Notes Toward*

The necessary reliance of rule of law on the restraining force of dialectic, coupled with the tenuousness of the dialectical form, converges to amplify the negative impact of victims' rights. As I shall argue, victims' rights must overcome a blatant inconsistency with rule of law. This it accomplishes through a two-step assault on the construct: first, by confronting rule of law directly and second, by distorting rule of law's inner dialectical structure. In the first instance, victims' rights embraces ideas nearly identical to Schmitt's notions of the immutability of the "friend and enemy" relationship and his corresponding endorsement of a jurisprudence of "decisionism" founded on a readiness to acknowledge the "exception" to the norm, the extralegal "state of emergency," and the general subordination of law to politics. For victims' rights, as for Schmitt, each notion justifies the renunciation of normative, rule-oriented law. Indeed, the victims' rights movement allies itself, as I shall show, with policies which *specifically* parallel primary characteristics of Nazi law and criminal justice, including: the immutable or biological conception of criminality, the appeal to community and private justice, the erosion of the legal boundaries of criminal justice, and the penchant for retroactive, ad hoc, deeply politicized, and altogether extreme responses to crime.

In the second instance, the victims' rights agenda, like the philosophy of Schmitt,⁴ styles itself as a mode of perfecting rule of law by fulfilling its

an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 STAN. L. REV. 391 (1984).

William Scheuerman outlines the basic contours of neo-Schmittian discourse in the introduction to his recent text on rule of law. See WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 6-10 (1994).

Among the clearest examinations of this kind of "critique" is Marx's persistent analysis of various of his contemporary "radical" socialist thinkers. See KARL MARX, *THE POVERTY OF PHILOSOPHY* (C.P. Dutt & V. Chatto Padhyana eds., New York Int'l Publishers 1936) (1846). Similar efforts to expose the hidden, reactionary qualities of ostensibly radical critique resurface at various points in the history of social thought. See, e.g., Georg Lukács, *Frederich Nietzsche*, in *THE LUKÁCS READER* 246 (Arpad Kadarkay ed., 1995). For a liberal critique of such "critical" perspectives on rule of law, see ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990).

⁴ In fact, Schmitt's own critique of rule of law suggests an awareness of its dialectical structure. A Schmitt sympathizer describes this awareness as follows:

Schmitt came to the following conclusion about modern bourgeois politics. First, it is a system which rests on compromise; hence all of its solutions are in the end temporary, occasional, never decisive. Second, such

normative agenda and transcending its contradictions. Thus, in the midst of its headlong assault on rule of law, victims' rights dares to present itself as a corrective of rule of law's shortcomings, in an effort merely to "balance" the scales and achieve a higher grade of justice.

At the end of this encounter, it is the conceptual integrity and viability of rule of law that yield to the manifest irrationality of crime and to reckless demands in the name of victims, rather than the institutions to an ambitious or more balanced conception of rule of law. A construct which justifies its own destruction and which is deployed in a self-contradictory manner cannot be usefully coherent. As with Schmitt, victims' rights rhetoric about perfecting rule of law is revealed to be nothing but a subterfuge, a kind of "cloak and dagger" tactic. This deception is inevitable, for there is simply no hope for perfect reason, right, or justice—least of all for the victim—to be achieved within the traditional confines of the criminal justice system.

A detailed analysis of this complex, destructive relationship to rule of law forms the heart of my critique of victims' rights. In developing this topic, I undertake an essentially leftist defense of rule of law—an attitude almost wholly foreign to contemporary American legal thought. Rule of law arguments more typically surface to further right-wing, by modern definitions, reactionary causes.⁵ Conceding to this bias, the legal left in this country—legal realists and critical legal scholars especially—has systemati-

arrangements can never resolve the claims of equality inherent in democracy. By the universalism implicit in its claims for equality, democracy challenges the legitimacy of the political order, as liberal legitimacy rests on discussion and the compromise of shifting majority rules. Third, liberalism will tend to undermine the possibility of the political in that it wishes to substitute procedure for struggle. Thus, last, legitimacy and legality cannot be the same; indeed, they stand in contradiction with each other.

Tracy B. Strong, *Foreword* to SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 3, at xv. This perfecting ethic, I believe, accounts for Schmitt's and other Nazis' relentless juxtaposition of modernist and romantic ideals—as though the one contains the means of realizing the other. On this critique, see FRANZ L. NEUMANN, *BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM* 443-44 (Octagon 1963) (1944) [hereinafter NEUMANN, *BEHEMOTH*], and SCHEUERMAN, *supra* note 3.

⁵ See, e.g., ALBERT DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1982); FREDERICK A. VON HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* (Jeffery Sachs & Katherina Pistor eds., 1997).

cally delegitimized rule of law. For what it is worth, this reduction of rule of law from the revered legal substructure of capitalism and modernity's progressive (if historically restricted) missions to, instead, little more than the legal scapegoat for the worst shortcomings of the age is likely unwarranted and probably derives from a persistent unwillingness to see rule of law dialectically and in historically contingent terms.⁶ In no way does such a perspective serve any critical purpose with respect to victims' rights.

For a more judicious, historically grounded, and eventually more critical approach to rule of law, I reference the almost-forgotten German legal theorist, Franz L. Neumann. Neumann was a peripheral member of the Frankfurt School who, very much unlike his principal colleagues in that movement, spent his intellectual life attempting in various ways to defend rule of law, to expose its nexus to real history of his day, and to vindicate its progressive agenda.⁷ In Part II of this Article, I shall draw upon

⁶ Although this historical-dialectical perspective on rule of law is informed by Neumann, it is also evident to some degree in Francis Allen's analysis of contemporary criminal justice. See FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 7-13 (1996) [hereinafter ALLEN, *THE HABITS OF LEGALITY*]. On the characteristics of rule of law thought, see, for example, GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (1995); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era*, 62 U. COLO. L. REV. 599, 636 (1991). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

Indeed, Schmitt's unfortunate legacy surfaces here, too, in a "critical" insistence that law is strictly politics anyhow. See, e.g., Schlegel, *supra* note 3, at 411. For more critical scholarship on Schmitt's theory of the interplay between law and politics, see generally *Special Issue on Carl Schmitt*, 72 TELOS 1 (1987).

I regard the typical leftist attitude as more evasive, and therefore reactive, than critical. Indeed, existing liberal scholarship says next to nothing about the dire jurisprudential implications of victims' rights. This does not mean that the existing scholarship is totally inadequate, only that its critique is insufficiently jurisprudential. See, e.g., Robert P. Mosteller, Essay, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997); Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1985).

⁷ See generally SCHEUERMAN, *supra* note 3 (providing the most extensive discussion of Neumann's ideas in English print). On the history of the Frankfurt School, see, for example, MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950* (1973).

Neumann's ideas to assemble a theory of rule of law that captures the construct's rich, often progressive, normative implications, the practical need to configure these norms dialectically, and rule of law's resulting historical contingency and conceptual delicacy. With fair reliance on contemporary criminal justice scholar Francis Allen, among others, I show in Part III the rationalizing functions that rule of law has performed in the criminal justice context, as well as the inherent limits of these functions. For insights into the nature of Schmittian and Nazi jurisprudence, I rely in Part IV on a variety of sources, including Neumann and the contemporary scholar of that jurisprudence, Ingo Müller. Thus informed, I analyze the victims' rights movement and its agenda, and I confirm the dire implications of this relationship. Finally, in Part V, I offer a conclusion with a few words about the prospects of achieving a rational system of victims' rights while preserving the general viability of rule of law.

II. FRANZ L. NEUMANN AND RULE OF LAW: HISTORY, DIALECTIC, AND GENERAL NORMS

A meaningful definition of rule of law is quite elusive.⁸ Conventional, popular notions of rule of law are virtually worthless as bases for critical inquiry. Typically, such definitions forsake the construct's critical value by reducing rule of law to mere formality or positivity, or relatedly, to the simple ideology of capitalism.⁹ Alternatively, they tend toward mere dictionary-type operationalizations, which, because they grasp rule of law as a mere historical given and not as a concept with a dynamic practical life, are equally without critical potential.¹⁰ Because of a forthright concern

⁸ Despite rule of law's persistent currency in popular discourse, there is little consensus or accuracy concerning its meaning. On this lack of clarity, see Ian Shapiro, *Introduction* to *THE RULE OF LAW* 3 (Ian Shapiro ed., 1994).

⁹ See *supra* note 3 and accompanying text. Premised on a shallow economic determinism and associated with supposedly Marxist and critical, as well as anarchist and radical libertarian perspectives, this approach is quite meaningless. While doubtlessly true in the broadest sense, the vulgarity of such an attitude limits its grasp to the crude tautology that every legal or philosophical construct owes its basic form and substance to the historical development of capitalism, and further, its normative theoretical yield is limited to jurisprudential nihilism about the rule of law.

¹⁰ Typically, such definitions describe rule of law in terms of constitutionalism, separation of powers, the segregation of civil and political society and criminal and civil jurisdiction, the prohibition of retroactive and individualized law, and the requirement that law be promulgated in a general, formal, and universal form and

for legalizing the substantive norms of enlightenment and the political and ethical agenda of modernism and liberal capitalism—the persistent search for “reason” in law—the task of understanding rule of law is somewhat better accomplished by its enlightenment and classical liberal commentators, who are at least partially inclined to recognize rule of law’s diverse historical functions and the interface of its history and normativity and, therefore, to grasp the overall complexity of its meaning.¹¹

Nevertheless, even the classical approach towards rule of law typically fails to move decisively beyond an ambiguous, instrumental, and sometimes superficial approach to the meaning of the construct. The classical tradition finds itself unable to sever rule of law from the extraneous ambiguities of traditional natural law, on the one hand, or to resist the simplifying appeal of crude positivism or formalism, on the other. In general, the classical approach does not grasp the intricacy of the interface

that application be predictable and facially neutral. *See, e.g.*, CAMBRIDGE DICTIONARY OF PHILOSOPHY 699 (1995) (defining “rule of law”).

¹¹ *See, e.g.*, 2 JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JOHN STUART MILL, ON LIBERTY 15 (Gerald Dworkin ed., Cambridge Univ. Press 1989) (1859). Or, as Rousseau writes:

If we seek to define precisely the greatest good of all, the necessary goal of every system of legislation, we shall find that the main objectives are limited to two only: *liberty* and *equality*; liberty, because any form of particular subordination means that the body of the state loses some degree of strength; and equality because liberty cannot subsist without it.

JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 86-87 (Christopher Betts trans., Oxford Univ. Press 1994) (1762).

For Karl Marx, rule of law comprises the foundation on which political and civil society are separated and, therefore, the basis for the enumeration of property rights on which grounds the alienation of labor occurs. Nonetheless, this scheme represents “a big step forward. It may not be the last form of general human emancipation, but it is the last form of human emancipation within the prevailing scheme of things.” KARL MARX, *On the Jewish Question*, in EARLY WRITINGS 221 (Gregor Benton & Rodney Livingstone trans., Vintage 1975).

Significantly, the classical attitude toward rule of law introduces the literal, idealistic vision of rule of law—legal norms over exceptions and prerogatives—into the realities of history and society. Accordingly, this perspective is forced to abandon the myth of rule of law as pure formality or positivity and to acknowledge, instead, that the concept’s most essential purpose requires (1) that it have recognizable substantive implications and (2) that it is actually comprised of a composite of substantive and structural norms. This attitude is very clearly evident, for instance, in Rousseau’s and especially Mill’s efforts to read the liberal/enlightenment agenda into the rule of law. *See* MILL, *supra*, at 83-85.

between rule of law norms and their historical context.¹² Instead, among enlightenment thinkers, as well as more contemporary liberals, the attitude toward rule of law reduces to *a priori*, state of nature, and social contract arguments and religious or moral appeals to natural law.¹³ Among more contemporary scholars, similar tendencies appear. Austin, Hart, and even Kelsen embrace legal theories so positivist or formal, and altogether so abstract, as to be virtually sterile with respect to substantive norms and reductive of its historicity. Figures like Rawls and Dworkin respond with positions that are rich with substantive norms but are cabined in abstractions and equally devoid of rigorous historical grounding.¹⁴

Neumann, although he builds on the classical approach and especially upon Rousseau, sets forth a definition of rule of law which is at all points more firmly grounded in the complex historicity of the construct. Neumann regards rule of law as effectively being the secular descendant of natural law and replete with its general, progressive normativity from the outset.¹⁵ By relentlessly emphasizing the historical nexus of rule of law's essential norms, he arrives at the following key propositions: (1) that the normativity of rule of law is inherently both substantive and formal; (2) that generality is the key rule of law norm; (3) that, properly construed, rule of law is in practice fraught by instability and tension; and (4) that rule of law's coherence depends emphatically upon its dialectical structure and a necessary circumspection about its historical limits.¹⁶ These assertions, which eventually disclose the depth of the antagonism between victims' rights and rule of law, warrant explanation.

For Neumann, who was heavily influenced by Marx, rule of law is unintelligible outside of its social-historical context and has a functional

¹² See FRANZ L. NEUMANN, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22-26 (Herbert Marcuse ed., 1957) [hereinafter NEUMANN, *The Change in the Function of Law*].

¹³ Such tendencies are clearly evident in any survey of Hobbes, Locke, Kant, or Hegel, for instance. See generally HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949).

¹⁴ Compare H.L.A. HART, *THE CONCEPT OF LAW* (1997); and HANS KELSEN, *PURE THEORY OF LAW* (1990) (notwithstanding Kelsen's neo-Kantian normative positivism); with Ronald Dworkin, *Philosophy and the Critique of Law*, in *THE RULE OF LAW* 147-70 (Robert P. Wolf ed., 1971); and JOHN RAWLS, *A THEORY OF JUSTICE* 235-43 (1971).

¹⁵ See, e.g., FRANZ L. NEUMANN, *Types of Natural Law*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE*, *supra* note 12, at 69 [hereinafter NEUMANN, *Types of Natural Law*].

¹⁶ See *id.* at 69-70.

identity with capitalism. Yet, for Neumann the relationship between rule of law and capitalism is not one-way: "The inter-relationships of legal and social phenomenon cannot be contested. . . . [The idea that] law and the economic system stand in the relationship of form and content" is patently erroneous.¹⁷

Such an emphatically historical but nonmechanistic approach to rule of law makes clear from the outset that rule of law can be reduced to pure formality only in the mind and that any justifications of rule of law based on such abstract conjecture as the state of nature, the social contract, or God's will are false and unsupportable. For Neumann, rule of law developed, instead, in a close organic interaction with the greater institutions of capitalism. The institutions have structured each other. As a result, rule of law norms converge with, and are inseparable from, the rationalizing normative agenda of modernity and capitalism in general, reflecting, but never mechanically, its favor for formal equality, civil liberty, and so

¹⁷ FRANZ L. NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 16-17 (1986) [hereinafter NEUMANN, *RULE OF LAW*].

Indeed, critics of bourgeois thought from Marx to Georg Lukács to Ian Shapiro have consistently managed to uncover these substantive implications only thinly veiled by the "neutrality" of liberal politics and the liberal ethos. Indeed, Georg Lukács regards the assumption of interrelatedness as a centerpiece of liberal ideology. Lukács argued quite long ago that amongst the modern, bourgeois ideals of rule of law is the notion that "the formal equality and universality of the law (hence its rationality) was able at the same time to determine its content"—and further, that this *is* in fact an accurate, if often denied, supposition. GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* 107-08 (Rodney Livingstone trans., 1971) (1968). For Shapiro, "[a]t the heart of the liberal conception of rights in all its formulations is a pluralistic account of the good." IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 282 (1986). See generally NEUMANN, *RULE OF LAW*, *supra*, at 4-10.

Of course, the true relationship between rule of law and its social-historical agendas is never actually so simple. For instance, the Marxist jurist Evgeny Pashukanis stated that bourgeois law not only "exists only in antitheses: objective law-subjective law; public law-private law, and so on," but also tends to assume and reflect the dominant forms of capitalist relations, the commodity form, and legal relationships, a contractual form. EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 47-64 (1989). Pashukanis closely anticipates the distinctly Lukácian notion of ideology and of the ideology of rule of law as an organic interrelationship of social discourse and intercourse ("superstructure") with the substructure of capitalist production. See *id.*; see also Isaac Balbus, *Commodity Form and Legal Form: An Essay on the Relative Autonomy of Law*, 2 L. & SOC'Y 571 (1977).

forth.¹⁸ Throughout this still ongoing process, the most vacuous norms, even supposedly purely formal norms, attain complexity and substance which eventually penetrate the construct's innermost structure. In reality, then, rule of law norms are *inherently* determinate material norms, which are rational, substantive, and possessed not merely of an ideological function but also, under certain historical circumstances, revolutionary consequences.¹⁹

Following Rousseau, Neumann argues that it is the norm of generality and the reign of general legal norms which capture most clearly and effectively the rule of law's basic ambition to restrain irrational sovereignty. Unlike Rousseau and his ilk, though, Neumann's relentless and altogether more sophisticated attention to the construct's complex history uncovers its detailed, largely substantive agenda.²⁰ Also in contrast to Rousseau, Neumann's focus on the history of rule of law reveals its origins in natural law and its gradual secularization by virtue, mainly, of its functional association with capitalism and liberalism generally.²¹ Unlike Austin and other vulgar positivists and unlike Kelsen, Neumann insists that as a secular institution, rule of law nonetheless retains an endemic substantive normativity.

"By a general law, we understand . . . an abstract" rule of law.²² In this sense, generality merely reiterates the formal normativity of rule of law. But at the outset, even this abstracting character implies certain obviously substantive elements rooted in the functions and consequences of setting loose abstract, general law in the real world. "[F]irst, [general] law must be a rule which does not mention particular cases or individual persons but which is issued in advance to apply to all cases and all persons in the abstract; and second, it must be specific, as specific as possible in view of its general formulation."²³ Still closely following Rousseau, Neuman insists that the formal structure of general law contains "a minimum of substantive content" evident with its automatic preclusion of retroactive and individualized law and a guarantee of judicial independence.²⁴

¹⁸ See NEUMANN, *RULE OF LAW*, *supra* note 17, at 185-211.

¹⁹ See *id.* at 4-6, 25-45.

²⁰ Compare NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 33-37, with ROUSSEAU, *supra* note 11, at 80-82.

²¹ See NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 28-42.

²² NEUMANN, *RULE OF LAW*, *supra* note 17, at 213.

²³ FRANZ L. NEUMANN, *The Concept of Political Freedom*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE*, *supra* note 12, at 160, 165 [hereinafter NEUMANN, *The Concept of Political Freedom*].

²⁴ NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 29-30; see also ROUSSEAU, *supra* note 11, at 80-83. This notion of generality contemplates

For Neumann, generality is the specific successor to the religious or scholastic element of the old natural law in that generality lends to rule of law a self-legitimizing force.²⁵ Generality thereby validates law as a kind of reified abstraction, which immediately sets rule *of law* apart from rule *by law* and contemplates law which reigns apart from and (theoretically) over any subjective or other institutional sovereign. The result of such a system is a mandate for confining law to a closed system wherein *only* general legal norms are law.

Consequently, as evident for instance in the *Rights of Man*,²⁶ every activity not restricted by the general law is permissible. Under rule of law, the state may act only within the confines of law. Furthermore, only a political sovereign's general, legal commands, articulated with due specificity, are enforceable as rule of law; the remainder of the social and private realm acquires freedom from sovereignty. Neumann calls this result "juridical freedom," an ideal which is premised on the autonomous historical development of and which in turn legally secures the classic segregation of civil and political society.²⁷ As such, juridical freedom contemplates the realization of a broadly negative notion of freedom which, Neumann argues, had previously been the exclusive claim of traditional natural law.²⁸

Neumann argues that several more precise functions actually follow from and are meaningfully effectuated by the existence of a regime of

law which is general with respect to the legal subjects it impacts and the temporal duration of such prohibition and yet specific with respect to the categories of conduct so affected. See, e.g., ALLEN, *THE HABITS OF LEGALITY*, *supra* note 6, at 84.

²⁵ See NEUMANN, *RULE OF LAW*, *supra* note 17, at 212.

²⁶ THOMAS PAINE, *THE RIGHTS OF MAN* (Ernest Rhys ed., 1915) (1791).

²⁷ Cf. MONTESQUIEU, *THE SPIRIT OF LAWS* 155-56 (Anne M. Cohler et al. eds. & trans., 1989) (1748) ("[N]o one will be constrained to do things the law does not oblige him to do or be kept from doing things which the law permits him to do."). The relevant parts of Articles IV and V of the *Declaration of the Rights of Man and of the Citizen* read as follows:

Liberty consists in the power of doing whatever does not injure another . . . [its] limits are determinable only by the law . . . Law ought to prohibit only actions hurtful to society. What is not prohibited by the law should not be hindered; nor should anyone be compelled to do that which the law does not require.

DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN arts. IV, V (France 1789).

²⁸ See NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 23-26, 31-33. On this tendency, see, for example, RAWLS, *supra* note 14, at 240-41.

general law. To negative freedom there also correspond material norms, which include a moral or ethical, an economic, and a political/ideological function. Of these, Neumann regards the ethical function as the only one that is indigenous and therefore paramount to a discussion of rule of law as such.²⁹ Neumann writes:

From the simple proposition that there exists a presumption in favor of the individual's freedom there follows every [ideal] element of the liberal legal system: the permissibility of every act not expressly forbidden by law; the closed and self-consistent nature of the legal system; the inadmissibility of retroactive legislation; the separation of the judicial from the legislative function. . . . The liberal legal tradition rests, therefore, upon a very simple statement: individual rights may be interfered with by the state only if the state can prove its claim by reference to a general law which regulates an indeterminate number of future cases.³⁰

²⁹ "I should stress . . . that the moral function transcends both the economic and political contexts within which it operates. This is the legal value, the sole legal value, inherent in a system so structured. All other values realized in a legal system are introduced from outside, namely by power." NEUMANN, *The Concept of Political Freedom*, *supra* note 23, at 170. In Neumann's view, generality's success at reconciling this basic rule of law ideal-norm over exception and arbitrariness—with key aspects of its historical obligations is most evident on an economic plane. Through generality, the idea of norm over exception and arbitrariness can be reconciled organically with the basic requisites of capitalism. Generality accommodates the rule of law to the functional demands of market society. It does so, in particular, by lending its "disguising" ideological functions (e.g., the veiling of inequality) and its capacity to ensure the calculability and predictability essential to capitalist economic activity. *See* NEUMANN, *RULE OF LAW*, *supra* note 17, at 213.

³⁰ NEUMANN, *The Concept of Political Freedom*, *supra* note 23, at 165-66. Indeed, this very logic is evident, for instance, in the *Rights of Man*, article 1, which declares, "Men are born free and equal in rights," DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. I (France 1789), and in the *Declaration of Independence*, which declares, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights. . . . That to secure these rights, Governments are instituted among men," THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added). The difference is that the sovereignty of Neumann's rule of law, grounded in generality, is self-executing and self-legitimizing. *See* NEUMANN, *RULE OF LAW*, *supra* note 17, at 45-46.

The ethical, substantive function of general law itself operates on several levels. Beyond juridical freedom and security, rule of law tends to guarantee at least formal, legal equality. This follows first, in a way that is familiar to the earliest proponents of rule of law, from the semantics of general law. Before a regime of law which is worded generally and interpretable on its own terms, all persons stand on equal footing and are legal subjects to which the law is, in a formal sense at least, equally applicable.³¹ Neumann argues, however, that generality also implies a rather more serious ethic of equality, one which tends to transcend the limitations of semantic generality to what Anatole France once called the equal right to sleep beneath bridges.³² One of Neumann's struggles is reconciling formal equality with the substantial egalitarian implications that follow from it and yet, if given full reign, would destroy rule of law altogether. This tension may not be soluble by legal means, but it implies that social and legal institutions must somehow contribute to substantial equality. This logic suggests a kind of substantive democracy and real equality within the confines of rule of law, although not in the form of or in conflict with specific rule of law norms.³³

General law implies a preference for public law, in that the uniquely universal form and democratic sources of public law better accord with the universal and egalitarian pretenses of general law.³⁴ More generally, as Neumann appears to recognize, the rule of law's function in restraining the arbitrary, illiberal conduct of the sovereign is better accomplished when the sovereign is required to articulate its commands in the transparent language of public law and is not allowed to conceal its conduct behind the exercise of private rights.³⁵

³¹ See NEUMANN, *RULE OF LAW*, *supra* note 17, at 213; NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 42.

³² See ANATOLE FRANCE, *LE LYS ROUGE* 117-18 (Calmann-Levy ed., 1925).

³³ See NEUMANN, *BEHEMOTH*, *supra* note 4, at 443-44; NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 22-24; NEUMANN, *Types of Natural Law*, *supra* note 15, at 90; see also SCHEUERMAN, *supra* note 3, at 205-17.

³⁴ True private law, on the other hand, has no generality; it is merely law between the parties. See NEUMANN, *RULE OF LAW*, *supra* note 17, at 19-24. See also RAWLS, *supra* note 14, at 235-43, for his definition of rule of law.

³⁵ See NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 27-29; see also NEUMANN, *The Concept of Political Freedom*, *supra* note 23, at 164-67. The logic by which Neumann derives such norms is evident in NEUMANN, *RULE OF LAW*, *supra* note 17, at 41-44, where Neumann extracts "auxiliary liberties" from his basic concept of rule of law.

It is perhaps important to note that while Neumann's focus on the substantive implications of rule of law is grounded in the nexus of rule of law and history, such a historical focus tempers his vision of generality. Nowhere does Neumann equate a regime of general law with the actual perfection of social reason; to do so would require either a supreme ignorance of historical facts or a notion of reason gutted of meaning and, in the balance, violate his Marxian sensibilities. Neither does he recklessly construe rule of law in terms of its full substantive implications. Neumann's more cautious, historically sensitive aim is to relieve rule of law of immediate, overlapping sources of internal conflict and tension. The first of these is a conflict between the actual persistence of political sovereignty and the rule of law. The second is a normative tension encompassing the dual notion of law, the political and the material notion: the omnipresence of the political, the emergency, and the exception.³⁶

The theory of the rule of general laws has, of course, never been fully realized in any stage of the development of [even] competitive capitalism. Liberal society is not a rational one, and its economy is not planfully organized. Harmony and equilibrium are not, at any given moment, automatically restored. Measures of the sovereign and "general principles" are, at all stages, indispensable.³⁷

This perspective expresses an understanding of the relative (or perhaps normal) impossibility of achieving total reason under and through the law.³⁸

³⁶ See NEUMANN, *RULE OF LAW*, *supra* note 17, at 4-5, 25-45; see also NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 24-25; SCHEUERMAN, *supra* note 3, at 104 ("[Neumann] thinks there is a fundamental tension between the critical, unfulfilled universalistic idea of legal equality (and the derivative view that legal norms must be clear and general) and the deep social and economic inequalities generated by capitalism.").

³⁷ NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 41.

³⁸ Significantly, Neumann appears to grasp, in its insinuation of such radically substantive equality, the coexistence of generality's critical impulses with its inherent historical limitations. Even as a merely formal, semantic idea, generality can never be fully realized in the real world, no more than a capitalist society can be truly democratic. Indeed, formal, semantic equality partly contradicts substantive equality. See SCHEUERMAN, *supra* note 3, at 207-08.

And yet, does this dilemma reflect the weaknesses of Neumann's concept of generality or comment upon the intrinsic limitations of rule of law's coherence? Or, is this pervasive contradiction a reflection, *within Neumann's formulations and*

It also comprises an indirect acknowledgment that not only a historically sensitive but a dialectical attitude is essential to sustaining rule of law's coherence. In an undoubtedly rather conservative manner, which Neumann acknowledges, such vision of rule of law at least indirectly sanctions an imperfect, ultimately irrational social order. Yet, in a very progressive way, so construed, rule of law retains a meaningful critical thrust—meaningful, at least, to questions about the content and structure of law where, as is presently the case, the basic organizational contours of society are relatively fixed.³⁹

Here remains the key potential inherent weakness of rule of law. Rule of law's dependency on the conflict-suspending powers of dialectic,

rule of law itself, of the vestigial and to some degree inherent irrationality of modernity and capitalism and the powerlessness of law to fully overcome this condition? In the end, I believe that the latter, alternative propositions are undoubtedly true. Only a contingent legal norm precisely like Neumann's generality can effectively confront social reality with both critical and relevant weight. Therefore, I regard Neumann's qualified but persistent exaltation of generality as a concession to the limits of reason in the context of rule of law. For Neumann, it seems, generality is the centerpiece of a *maximally rational* rule of law.

In this sense, then, Neumann regards the structural norms of rule of law and generality, in particular, in the same dialectical and highly contingent fashion that Marx and many leftist liberals came to view the vanguard norms of capitalism: as concepts whose critical implications reached well beyond both their outermost ideological functions and their historical context. For Marx, the quintessentially liberal doctrines of property (e.g., the Lockean labor theory of property) and contract (e.g., the liberal ethic of fair exchange of equals) fail to conceal completely the fundamental contradictions within the very structure of capitalism: inequality, unequal exchange, and, even more so, the alienation of labor. This attitude, need it be said, is a central and consistent theme in Marx's theory. *See, e.g.,* KARL MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* (Prometheus 1988) (1844).

In a classic exercise of immanent critique, Marx demonstrates how the liberal conceptions of property and contract imply socialism and communism. The gradual acceptance of this kind of immanent critique of capitalism in more respectable liberal circles finally resulted in the likes of L.T. Hobhouse, for instance, highlighting liberalism's rampant potential for "destructive and revolutionary criticism" on the way to justifying the welfare-state. LEONARD T. HOBHOUSE, *LIBERALISM* 14 (Oxford 1981) (1911).

³⁹ Overall, this state of affairs represents, as Neumann ventures in one context, a reflection in law of "the ambivalent position of modern man." NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 39-40.

combined with its socially and self-critical tendencies as well as the relative institutional weakness of law, leaves it on a precarious ground. From this position the whole construct can be tragically distorted in the name of its own critical ambitions. In other words, dialectic stabilizes the construct, but has no capacity to actually solidify rule of law's social foundations. Rule of law remains at best a junior partner of the capitalist economy and often even its politics; it is relatively more malleable and always susceptible to their pressures. A realization of the threat posed by this chronic instability likely drew Neumann to recognize the tenuous nature of liberal society's support for rule of law and the real threat to rule of law where liberal society itself is questioned.⁴⁰ He clearly realizes that rule of law is inherently vulnerable to larger, especially political-economic, changes. When the chips are down, it is quite easy to repudiate rule of law not just for its manifest inconsistencies, but ostensibly in the guise of resolving these inconsistencies. In Neumann's view, an exploitation of this unavoidable character of rule of law and western jurisprudence generally is a major element of Schmitt's theory and a prerequisite of the formation of Nazi jurisprudence.⁴¹

III. RULE OF LAW AND THE RATIONALIZATION OF CRIMINAL JUSTICE

In the context of criminal justice there can be little question that rule of law performs an important progressive, rationalizing function.⁴² This fact

⁴⁰ See SCHEUERMAN, *supra* note 3, at 98.

⁴¹ Neumann's anxiety is shared by figures as ultimately disparate as Weber, von Hayek, and Ernst Bloch, as well as Georg Lukács and Evgeny Pashukanis, who in various ways forecast the demise of at least the classic, formal conception of rule of law. See SCHEUERMAN, *supra* note 3, at 97-107; see, e.g., LUKÁCS, *supra* note 17, at 108; PASHUKANIS, *supra* note 17, at 47-64.

⁴² Critics of reform, like Foucault, somewhat successfully identify the incompleteness of its agenda and the perverse tendency of reform in the penal context in particular. Yet, to comprise a relocation of state coercion, there can also be no doubt that the displacement of outright torture, corporeal punishment, arbitrary process, conviction by status, lynchings, and the like has improved the lot of criminals and accused persons, even if coercion and punishment remain the primary features of the criminal justice system. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON* 30-33 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978). On the rationalizing rule of rule of law in the criminal context, see generally SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* (1980).

underlies several important rule of law critiques of the criminal justice system, notably works by Allen and historian Samuel Walker.⁴³ Indeed, by the end of last century, as is evident in the famous case of *Yick Wo v. Hopkins*,⁴⁴ an essentially rule of law-based critique of the irrationality of criminal justice was already within the grasp of the United States Supreme Court.⁴⁵

Yet there is also little doubt that great, often illiberal social pressures continuously impact the content and structure of the criminal justice system and that these forces tend to undermine rule of law's rationalizing influence in the criminal context or to prevent such influence altogether. In the criminal justice context, reason prevails but rarely and hesitantly, and virtually never in any spontaneous way. Criminal justice is perhaps necessarily the most remote beneficiary of the broader liberalizing thrust of capitalism and modernity. The criminal justice system is traditionally the dispensary of contradictions arising from the failure of capitalism and modernity to rationalize society even by their own standards (as is evident with lingering poverty, race, and gender discrimination), and it serves to control conflicts which are arguably intrinsic to modern society (e.g., class conflict and social alienation generally).⁴⁶

A. *The (Normal) Irrationality of Crime and Criminal Justice*

It is fair to say that criminal justice is *inherently* irrational, illiberal, and always open to the reformist guidance of rule of law. The nature of the subject implies as much. So far as reason in the classical western tradition contemplates a democratic identity of interests (i.e., the harmonious convergence of "subject and object"), and putting aside any arguments as to the vulgar rationality of crime (e.g., that criminals plan or profit

⁴³ See generally ALLEN, THE HABITS OF LEGALITY, *supra* note 6; WALKER, *supra* note 42.

⁴⁴ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (recognizing unconstitutionality of de facto discriminatory laws).

⁴⁵ See *id.* at 366-69 (featuring a spirited argument, from rule of law principles, against arbitrary authority "without reason and without responsibility," as well as sovereign action which "acknowledges neither guidance nor restraint," and that "equal protection of the laws is a pledge of the protection of equal laws").

⁴⁶ For a pioneering study of this claim, see GEORG RUCHE & OTTO KIRSCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939). See also FRANCIS SNYDER & DOUGLAS HAY, LABOUR, LAW AND CRIME: A HISTORICAL PERSPECTIVE (1988); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRISIS IN AMERICA (1995).

financially from their actions), the criminal act, including all its causes, is by definition the antithesis of reason.⁴⁷ This irrationality manifests itself within the criminal justice process as a variety of indelible, often patently violent conflicts: the state versus the criminal, the criminal versus the state, and the criminal versus the victim. Equally peculiar about criminal justice in this regard is that its irrationality is relatively transparent and is not at all well-restrained or cloaked by the type of consensual, conflict-suppressing ideology common to economic or even political intercourse.⁴⁸ Rather, the legitimacy of the criminal justice system tends to be maintained by an appeal to archaic, irrational ideological assumptions.

Another reason for the relative importance of rule of law to the rationalization of criminal justice concerns the tripartite structure of the institution of crime. More consistently than any other area of law, modern criminal justice counterposes the interests of *three* discrete subjects: the defendant/criminal, the victim, and the state. It goes beyond the binary relationship of defendant and plaintiff, which is more typical of modern legal transactions. This characteristic of criminal justice compounds its inherent irrationality in several ways: first, by multiplying the number of conflicts intrinsic to the criminal context; second, by maintaining a connection to the subjectivity of victimhood, hence to the victim's passions

⁴⁷ I speak here about reason in the substantive, critical sense identifiable with Hegel and best articulated in Hegelian Marxism. See generally LUKÁCS, *supra* note 17; HERBERT MARCUSE, *REASON AND REVOLUTION* (1991). Inasmuch as these figures, like Hegel, demonstrate that the aspiration to reason has an *inherently* substantive, critical component, this notion of reason is actually universal. This means, of course, that crime is irrational in the social, and not biological or otherwise purely subjective, sense. Further, I distinguish my arguments here from those of James Q. Wilson to the effect that crime is actually "rational" in a purely self-interested sense. Cf. JAMES Q. WILSON, *THINKING ABOUT CRIME* (1985); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). I regard the notion of rationality as philosophically inconsistent; reason does not comport with social conflict. According to Allen, "[t]he legality ideal confronts its sternest test in the area of criminal justice" because, he argues, public passions and the power of the state converge on this point. ALLEN, *THE HABITS OF LEGALITY*, *supra* note 6, at 5-6.

⁴⁸ On typical modes of suppressing social conflict, see JURGEN HABERMAS, *LEGITIMATION CRISIS* (1973). See also BARRY HINDESS & PAUL Q. HIRST, *PRE-CAPITALIST MODES OF PRODUCTION* 44-45, 69-70 (1975); cf. PERRY ANDERSON, *PASSAGES FROM ANTIQUITY TO FEUDALISM* 147-53 (1974) (discussing conflict suppressing ideology common to feudal economies); OLIVER C. COX, *CASTE, CLASS AND RACE: A STUDY IN SOCIAL DYNAMICS* (1948).

and vengeance; and third, by introducing into a relationship which is still somewhat private the authority of the state. It is because of this tripartite structure that criminal justice resists both a clear categorization as either public or private law—a determination that is generally a centerpiece of rule of law—and the thorough purger of archaic practices and expectations.⁴⁹

B. The Rationalizing Functions of Rule of Law in the Criminal Context

Viewed alongside other failings of capitalism to produce on its promises to rationalize the world even by its own terms,⁵⁰ it is not at all surprising that while rule of law has gained rational compromises in the criminal context, it has been relatively powerless to resolve once and for all the fundamental irrationality of crime or to quench the causes of crime consistent with its own normative agenda (e.g., without descending to authoritarianism or totalitarianism or both). The archaic tendencies and irrational nature of crime, together with its extralegal origins, are impossible to completely defeat. Nevertheless, rule of law's facility to mandate meaningful compromise has proven quite significant.

Rule of law exerts a basic rationalizing influence with its insistence that crime be defined by law and law be construed as general norms. This mandate immediately implies a state monopoly of criminal justice and suggests that a private criminal regime is incapable of making or administering truly general law. This mandate also illustrates the limitation of criminal law to public law. By repressing the infusion of private rights, rule of law avoids the fusion of political and civil, as well as public and private rights which overlay the ancient spectacle of religiously/morally inspired criminal justice and the blood feud.⁵¹ Consequently—and this becomes most

⁴⁹ See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 168-88, 300-03 (1989).

⁵⁰ Of course certain irrational impulses are endemic to the history of capitalism and modernity. Although contradictory of its broadly egalitarian, normative agenda, fascism, statism, racism, sexism, and material inequality are obviously not actually inconsistent with capitalism. Indeed, they are vices perpetuated at many turns by the structural logic of capitalism. On the theoretical dimensions of this argument, a central theme of Frankfurt School Marxism, Marxist theories of race and imperialism, and Marxist feminism, see especially MAX HORKHEIMER & THEODOR ADORNO, *THE DIALECTIC OF ENLIGHTENMENT* (1972), a text that flirts with the outright repudiation of modernity as such.

⁵¹ See, e.g., STEPHEN SCHAFER, *THE VICTIM AND HIS CRIMINAL* 27-29 (1968) (describing, ambivalently, the decline of the victim and the concomitant rise of

important for present concerns—rule of law inherently represses the role of the victim, a would-be proponent of private right. Moreover, the formal, secular spirit of rule of law opposes any basis of criminal law on religious, ad hoc morality, or other grounds irreducible to general norms. Similarly, with its tendency to mandate a self-standing, closed, and definitive system, rule of law prohibits arbitrary, retroactive, unbounded, and extralegal punishment and implies a system of criminal justice based on separation of powers. In addition, the familiar dual rule of law principles *nulla poena sine lege* and *nullum crimen sine lege* prevail: no punishment without law and no crime without law.⁵² The structure of general law automatically prohibits bills of attainder and ex post facto laws and enforces separation of powers. Thus, according to rule of law, criminal law must be created by the legislature but administered by the executive and judiciary in accordance with strict rules isolating their respective functions. Further still, the impact of rule of law's substantive norms is evident with a general pressure not only for formal equality but also for mitigation of the inegalitarianism of criminal justice and deference to general principles of liberty and reason.⁵³

The specific content and structure of American criminal law and policy actually reflect a number of concessions to these erstwhile progressive

modern criminal justice in terms of the development "of the contractual *Gesellschaft* system [Tönnies], characterized by social interaction that is voluntary, secular, secondary, rationalistic, impersonal").

⁵² See *Hirota v. MacArthur*, 338 U.S. 197, 212 n.12 (1948) (Douglas, J., concurring) (describing *nullum crimen sine lege* as a principle of law).

⁵³ As I describe above, rule of law mandates more general substantive norms: reason, justice, and freedom. Applied to criminal justice, these norms yield rules closely akin to Cesare Beccaria's classic critique of pre-enlightenment criminal justice: the prohibition of torture, indefinite confinement, double jeopardy, and status crime. See CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Richard Bellamy ed. & Richard Davies trans., 1995) (1764). Modern authors share Beccaria's critique. See generally Wilfried Botke, "Rule of Law" or Due Process as a Common Feature of Criminal Process in Western Democratic Societies, 51 U. PITT. L. REV. 419 (1990); William M. Cohen, *Principles for Establishment of a Rule of Law Criminal Justice System*, 23 GA. J. INT'L & COMP. L. 269 (1993); WALKER, *supra* note 42, at 127-29.

All of these practices are inconsistent, as Beccaria argued, with the spirit of enlightenment and liberalism. See BECCARIA, *supra*. To paraphrase Foucault, the economy of punishment and authority has serious difficulty trading in the likes of torture and arbitrary punishment because they cannot be reduced to its logic; therefore, it does not. See FOUCAULT, *supra* note 42, at 16-31.

impulses. Most prominently, for present purposes at least, is the gradual displacement of the victim's standing in the criminal justice context. Such displacement is, as I have already suggested, quite necessary to a rule of law regime. Stated another way, the contemporary legal definition of crime focuses on its origins from within the public law: a crime is a wrong affecting the public to which the state has attached certain punishments and penalties and which it prosecutes in its own name.⁵⁴ As a consequence, a citizen may file a criminal complaint but is not entitled to initiate a private prosecution (at least with respect to a felony) or control its course by right (yet); to allow either violates a defendant's due process rights.⁵⁵ Likewise, any private cause of action by a victim against an offender is relegated to the civil tort law. Tort and criminal law are thereby firmly segregated into separate proceedings.

Various doctrines converge to realize the ideal of a closed, rule-based system of criminal justice implied by rule of law. These rules include the manichean, role-separating functions of separation of powers, including judicial independence and the prohibition of judicial or executive legislation of the criminal law as well as the prohibition of legislative execution and interpretation (i.e., no vague or ambiguous law). Also working to close off the boundaries of criminal justice are the sanctification of formality and process and the prohibition of retroactive, ex post facto crimes and bills of attainder;⁵⁶ the triumph of the *legal* conception of criminal culpability over factual or subjective notions;⁵⁷ and the requirements of certainty and lenity and the prohibition of vague and ambiguous prohibitions.⁵⁸ Also in this

⁵⁴ See 21 AM. JUR. 2D *Criminal Law* §§ 1, 5 (1981); see also BLACK'S LAW DICTIONARY 370-72 (6th ed. 1990).

⁵⁵ Private prosecutions violate the Due Process and Equal Protection Clauses. See *Ashe v. Swenson*, 397 U.S. 436 (1970); see also *People v. Benoit*, 575 N.Y.S.2d 750, 757 (Crim. Ct. 1991); *People v. Calderone*, 573 N.Y.S.2d 1005, 1009 (Crim. Ct. 1991). On the generally unconstitutional nature of private prosecutions, see John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511 (1994).

⁵⁶ On the significance of separation of powers in the criminal context, see, for example, *United States v. Lanier*, 73 F.3d 1380, 1389-94 (6th Cir. 1996), *opinion vacated by* 114 F.3d 84 (6th Cir. 1997). See also *United States v. Brown*, 381 U.S. 437, 441-46 (1965) (recognizing that the bill of attainder clause effectuates the "framers' belief" in separation of powers and the limits of each branch's respective competency); *Cummings v. Missouri*, 71 U.S. 277 (1866).

⁵⁷ See 21 AM. JUR. 2D *Criminal Law* §§ 1-13 (1981).

⁵⁸ On the requirement that criminal laws be reasonably certain, see, for example, *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952), and *Jordan v. De*

category are constitutional guarantees of notice and certainty,⁵⁹ as well as the rule that a crime is comprised of a set of essential elements—typically intent (*mens rea*) and act (*actus reus*)—elements, under the due process clause, the state must prove beyond reasonable doubt.⁶⁰

Related to these, in turn, is another set of rules which evidence, in more general terms, the concession of criminal justice to substantive rule of law norms. Most notably, due process in the criminal context is construed to require “fundamental fairness essential to the very concept of justice.”⁶¹ Equal protection implies that “no state can deprive particular persons or classes of persons of equal and impartial justice under the law.”⁶² Furthermore, the Eighth Amendment prohibition of cruel and unusual punishment creates substantive injunctions against archaic, torturous punishments.⁶³ Finally, in theory, only a legal conviction in accord with such requirements and with effective rights of appeal justifies punitive incarceration.⁶⁴ Indeed,

George, 341 U.S. 223 (1951). On vagueness, see, for example, *Smith v. Goguen*, 415 U.S. 566 (1974), *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), *Smith v. California*, 361 U.S. 147 (1959), *United States v. Carter*, 981 F.2d 645 (2d Cir. 1992), and *United States v. Doremus*, 888 F.2d 630 (9th Cir. 1989). On lenity, see, for example, *United States v. Bice-Bey*, 701 F.2d 1086 (4th Cir.), *cert. denied*, 464 U.S. 837 (1983), and *State v. Piazza*, 596 So. 2d 817 (La. 1992).

⁵⁹ Courts have determined that notice is an implicit aim of ex post facto and bill of attainder provisions. See, e.g., *United States v. Brady*, 88 F.3d 225, 228 (3d Cir. 1996); *United States v. Reese*, 71 F.3d 582, 585 (6th Cir. 1995); *Dufresne v. Baer*, 744 F.2d 1543, 1546 (11th Cir. 1984).

⁶⁰ See *Patterson v. New York*, 432 U.S. 197, 205-06 (1977); *People v. Pegenau*, 523 N.W.2d 325, 333 (Mich. 1994). On the necessity of satisfying the requisite elements of a crime for purposes of indictment, see, for example, *United States v. Martinez*, 981 F.2d 867 (6th Cir. 1992). See also *Matter of Hews*, 741 P.2d 983, 989 (Wash. 1987) (holding that a defendant must understand the elements of a crime to enter a valid guilty plea).

⁶¹ *Lisenba v. California*, 314 U.S. 219, 236 (1941).

⁶² *Ughbanks v. Arnston*, 208 U.S. 481, 487 (1907).

⁶³ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 170 (1976); *Alston v. DeBruyn*, 13 F.3d 1036 (1994) (involving indefinite confinement).

⁶⁴ On the limitation of punishment to criminal convictions, see, for example, *Maxwell v. Mason*, 668 F.2d 361 (8th Cir. 1981), *Reece v. Gragg*, 650 F.Supp. 1297 (D. Kan. 1986), *Kelly v. Brewer*, 378 F. Supp. 447 (S.D. Iowa 1974), and *State v. Thomas*, 550 So. 2d 1067 (Ala. 1989).

It is also worth noting that, where still applicable, fines have largely been formalized and, to a large degree, are not strictly fungible with conventional criminal sanctions. See *Tate v. Short*, 401 U.S. 395 (1971) (holding that a state may not automatically convert a fine to jail term solely because of a defendant's

we may say more generally still that with some notable exceptions (e.g., capital punishment),⁶⁵ what Foucault envisioned as a rearticulation of the economy of punishment has come to typify the modern system of criminal justice: quantifiable, temporal confinement (the prison) has largely replaced corporeal punishment, status crimes, preventative detention, enslavement, civil death, and so forth.⁶⁶ In this sense, and precisely as Neumann anticipated, the formal structure of rule of law has affected certain substantive norms.

Generality, then, can be seen to underlie the basic doctrines of American criminal law and procedure. This centrality is emphasized by that norm's implicit but repeated reference in major Supreme Court cases that comprise the Warren Court's (and early Burger Court's) progressive reformation of criminal justice. By this I mean that the most significant cases in such jurisprudence center around not only norms broadly identifiable with rule of law (e.g., due process), but also two themes directly implied by generality: equality and, broadly speaking, procedural uniformity.⁶⁷

indigence); 21 AM. JUR. 2D *Criminal Law* §§ 617, 618 (1981). The general rule is that incarceration may be warranted to punish as contempt the failure to pay a fine, not as an alternative to payment as such. *See Tate*, 401 U.S. at 400-01.

⁶⁵ Even in the context of capital punishment, a certain archaic economy prevails: death for death—but not for rape, theft, etc. *See generally Coker v. Georgia*, 433 U.S. 584 (1977).

⁶⁶ *See* FOUCAULT, *supra* note 42, at 7; *see also Hudson v. Palmer*, 468 U.S. 517, 522-24, *on remand*, 744 F.2d 22 (1984) (limits of civil death); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 (1972) (status crimes); *Scales v. United States*, 367 U.S. 203, *rehearing denied*, 366 U.S. 978 (1961) (status crimes); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (excessive corporeal contact); *Madewell v. Roberts*, 909 F.2d 1203, 1207 (8th Cir. 1990) (limits of forced labor); *Thompson v. Bond*, 421 F. Supp. 878, 884-85 (W.D. Miss. 1976) (limits of civil death). For a comprehensive description, if topically narrow, critique of such shame punishments, *see James Q. Whitman, What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L. J. 1055 (1998).

⁶⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963), for example, employed the principle of equality behind its mandate that states provide counsel to indigents. *See id.* at 344. Equality surfaced repeatedly in the opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), which temporarily suspended the application of the death penalty on the grounds that the institutions by which it was applied yielded discriminatory results. *See id.* at 242. *Griffin v. Illinois*, 351 U.S. 12 (1956), used the same norm to justify the extension of substantial rights of appeal to indigents. *See id.* at 17. Indeed, for these Courts, the constitutional doctrine of equal protection translated into a slew of rulings that tend to rationalize the criminal justice process. For

instance, in *Smith v. Bennett*, 365 U.S. 708, *on remand*, 109 N.W.2d 703 (Iowa 1961), barring the deprivation of indigents' rights to collateral federal appeals with nonwaivable filing fees, the Warren Court (per Justice Clark) declared that the "Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." *Id.* at 714; *see also* *Douglas v. California*, 372 U.S. 353, 356-57 (1963) (holding that equal protection requires provision of counsel to the indigent for one appeal of right). Also, in *Williams v. Illinois*, 399 U.S. 235 (1970), where the Court prohibited the use of imprisonment as punishment for the inability to pay a criminal fine, Chief Justice Berger wrote that the "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Id.* at 244; *see also* *Tate v. Short*, 401 U.S. 395 (1971). Both the Warren and Burger Courts averred to equal protection to invalidate unequal procedures for the civil commitment of criminal defendants (i.e., the use of civil commitment to accomplish a punitive, criminal function). *See* *Jackson v. Indiana*, 406 U.S. 715, 729-30 (1972); *Baxstrom v. Harold*, 383 U.S. 107, 115 (1966).

Generality also resonates as the requirement of specificity in the decision. This notion is illustrated by *Papachristou's* impeachment of status crimes (vagrancy and "common thief"), arbitrariness, and vagueness. *See Papachristou*, 405 U.S. at 156; *see also* *Edwards v. California*, 314 U.S. 160 (1941). Even more evident is the use of generality as the principle of uniformity. In *Mapp v. Ohio*, 367 U.S. 643 (1963), the quest for uniformity was translated as the exclusionary rule, whereby (ostensibly) *all* the fruit of the tainted tree is (theoretically) *per se* excludable. *See id.* at 657-58. The Court applied the same normative logic to *Miranda* and *Escobedo*, yielding their exclusionary (and also equalizing) thrust. *See id.* at 643; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). This idea resurfaced in *Malloy v. Hogan*, 378 U.S. 1 (1964), where uniformity underlies the extension of Fifth Amendment protections to defendants in state proceedings. *See id.* at 5-6.

In each of these cases, the invalidated rule contradicted generality and the broad holding gave the norm greater effect. Indeed, one overall thrust of the Warren Court was to make generally and equally applicable—to nationalize and strip of racial, class, and gender biases—already existing principles of law. In the words of Allen:

The history of the Warren Court may be taken as a case study of a court that for a season determined to employ its judicial resources in an effort to alter significantly the nature of American criminal justice in the interest of a *larger realization* of the constitutional ideal of liberty under the law.

Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, in *CIVIL LIBERTIES AND CIVIL RIGHTS* 29, 36 (Victor J. Stone ed., 1975) (emphasis added) [hereinafter *Allen, The Judicial Quest for Penal Justice*]; *see also* PAUL KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*

As a whole, rule of law plainly asserts certain progressive mandates on the structure and content of the criminal justice system. At the same time, neither legal doctrine nor the law itself can effectively and completely impose reason upon the structure and content of the entire criminal justice system—which, after all, is not mainly legal in its functional origins. This tenuous state of affairs is not lost upon Walker and Hall, who recognize that the positive impact of rule of law on criminal justice is rather fortuitous and that its history is replete with anti-rule of law tendencies, which were only recently, incompletely, and very tenuously brought to bay.⁶⁸

C. Compromise, Lingering Irrationality, and the Inherent Weakness of Dialectic

The criminal justice system reveals a failure to concede entirely to the rule of law. Instead, one finds that rule of law's progressive functions make

74-83, 162 (1970).

⁶⁸ Walker, for instance, writes:

A major theme in the history of American criminal justice is the tension between the rule of law and the passions of popular justice. The idea of rule of law implies fairness, equality, and consistency. But the history of the administration of justice is largely the story of arbitrary and capricious justice, often carried out in the name of community prejudice. The struggle for justice involves reconciling democratic principles, and all their pitfalls, with standards of fairness and equality.

WALKER, *supra* note 42, at 4. Similarly, the legal historian Kermit Hall observes an apparently persistent tendency in this country not to embrace too closely Beccaria's enlightenment/liberal rationalism (i.e., his classical, rational criminology). See HALL, *supra* note 49, at 170-71.

For Georg Rusche and Otto Kirschheimer, this tendency toward a certain cautious rationalization of the criminal justice system was swept along by the broader current of liberalism's defeat of the old absolutist order. For them, these rationalizing tendencies in the criminal justice context are therefore contingent on a fortuitous convergence of such policies with liberalism's economic and political agenda.

Until the beginning of the twentieth century, the bond between the protection of the material foundations of bourgeois society and an apparent equality and humaneness in the administration of criminal justice for all classes of society was never openly attacked. Everywhere the political opposition to absolutism condemned a criminal justice which did not seem to be governed by fixed rules, even where no definite objections were raised against its contents, such as the use of imprisonment.

RUCHE & KIRSCHHEIMER, *supra* note 46, at 73.

persistent concessions to the inherent irrationality of criminal justice. Simultaneously, the more insurgent implications of rule of law in the criminal context are restrained by its dialectical structure as evidenced by the infrequency of rule of law critiques of criminal justice. As the distinct limitations of Warren Court's jurisprudence suggest, rule of law never really demanded that much in the way of reforms.⁶⁹ Inevitably, the impact of rule of law on the criminal justice system has been modestly reformist and, notwithstanding reactionary rhetoric, generally tolerant of a system still irrational at its core and therefore relatively unaccommodating of the interests of criminals and criminal defendants.

The reality of the situation is obvious to any objective observer of contemporary developments in criminal justice. A recent book by Elliot Currie reiterates the argument that the nature of criminal justice in this country is shaped far more by politics—and often very dubious politics—than by any principles of reason or legality.⁷⁰ Indeed, Allen reveals that rule of law has never successfully mandated a criminal justice system that is rational in the sense that it is even nonfragmentary or free of tremendous police and prosecutorial discretion.⁷¹ Without broaching this subject, which cannot be discussed here, it is clear that even the height of the defendants' and convicts' rights movements (generally, the mid-1960s through the early 1980s) did not correct or even fundamentally alter the nature of the system. For example, conviction and incarceration rates remained consistently high;⁷² gross racial and class biases persisted in rates of

⁶⁹ See Allen, *The Judicial Quest for Penal Justice*, *supra* note 67.

⁷⁰ See ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 6-8 (1998).

At least one recent study appears to bear out Kirschheimer and Rusche's observation that the content of criminal justice (e.g., the severity of punishment) has nothing directly to do with the management of crime. See FRANKLIN ZIMRING & GORDON HAWKINS, *PRISON POPULATION AND CRIMINAL JUSTICE IN CALIFORNIA* (1992); see also RUCHE & KIRSCHHEIMER, *supra* note 46.

⁷¹ See ALLEN, *THE HABITS OF LEGALITY*, *supra* note 6, at 58-72.

⁷² A review of recent data and trends in incarceration rates quickly dispels any doubt about the state's "failure to respond" to crime. As of 1995, 5.4 million Americans—2.8 percent of the total population—were under correctional supervision, representing an increase of 2.4 million since 1985. See U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 1995, at 5-6 (1997). Indeed, *nine percent* of American males (28% of black males!) may expect to go to prison at least once within their lifetimes. See generally U.S. DEP'T OF JUSTICE, *LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON* (1997).

On conviction rates, see, for example, U.S. DEP'T OF JUSTICE, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, 1994, at 24-27 (1998). On the relative

victimization, prosecution, and enforcement;⁷³ such plainly archaic punishments as banishment, forced labor, and certain incidents of civil death (e.g., disenfranchisement) were never really repudiated;⁷⁴ and the overall conditions of confinement, although much improved over earlier horrors, never yielded the widespread availability of comfortable conditions conducive to rehabilitation or even non-recriminalization (except to the extent that offenders came from even more horrible environments on the outside), much less the mythical "country clubs" of the public imagination.⁷⁵

stability of both overall and violent crime rates over the past two decades, see, for example, U.S. DEP'T OF JUSTICE, CRIME VICTIMIZATION, 1973-95 (1997).

In their classic study of the origins of criminal policy, Georg Ruche and Otto Kirschheimer long ago (1939) concluded that the rate of criminality has little to do with the severity and extent of criminal sanction. See RUCHE & KIRSCHHEIMER, *supra* note 46.

⁷³ The limits of equal protection in the criminal justice context have been explored in many distinct contexts. See *Williams v. Illinois*, 399 U.S. 235, 243 (1970) (holding that equal protection does not require like treatment for like offenses); *United States v. Bassford*, 812 F.2d 16 (1st Cir. 1987); *United States v. Blitstein*, 626 F.2d 774 (10th Cir. 1980); see also *McClesky v. Kemp*, 481 U.S. 279, 292-97, *reh'g denied*, 482 U.S. 920 (1987) (deeming statistical evidence of race bias intrinsically inadequate as the basis for an equal protection claim vis-à-vis the application of criminal sentences).

On pervasive class biases in prosecution and incarceration, see, for example, JEFFREY REIMAN, *AND THE POOR GET PRISON: ECONOMIC BIAS IN AMERICAN CRIMINAL JUSTICE* (1996).

⁷⁴ See, e.g., *Cobb v. State*, 437 So. 2d 1218 (Miss. 1983) (evaluating the constitutionality of banishment). The Thirteenth Amendment specifically permits the enslavement of duly convicted persons. See *Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966); *Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963). There is no right, constitutional or contractual, to pay for prison labor. See, e.g., *Murray v. Mississippi Dept. of Corrections*, 911 F.2d 1167 (5th Cir. 1990); *Wendt v. Lynaugh*, 841 F.2d 619, 620-21 (5th Cir. 1988). Notably, it is well established that convicted persons may lose voting rights, which some might regard as too fundamental to lose at all. See *Richardson v. Ramirez*, 418 U.S. 24, 54-56, *on remand*, 528 P.2d 378 (1974).

⁷⁵ See JACK HENRY ABBOT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* (1982); PETER EARLY, *THE HOT HOUSE: LIFE INSIDE LEAVENWORTH PRISON* (1993); WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: SURVIVAL BEHIND BARS* (1992). Or, for those who require less anecdotal information, see HUMAN RIGHTS WATCH, *PRISON CONDITIONS IN THE UNITED STATES: A HUMAN RIGHTS WATCH REPORT* (1991). See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984)

Indeed, while we should not in any way discount the value of rule of law-oriented reforms, Foucault and others argue that, far from creating a criminal's or convict's paradise, "civilized," "enlightened" reforms play a role in legitimating and perpetuating the institution of crime as such and thereby legitimating its irrational social causes.⁷⁶ Suffice it to say the system which rule of law supports is not, then, a radical system. Neither is the system altogether reactionary. Rather, it is a set of compromises squarely within the liberal tradition and yet grounded on rule of law's rather tenuous foundation.

IV. VICTIMS' RIGHTS, NAZI AND (CARL) SCHMITTIAN THEMES, AND RULE OF LAW

Just as rule of law's rationalizing functions are nowhere more necessary than in the criminal justice context, the contemporary devastation of rule of law is nowhere more severe than in the criminal justice context⁷⁷ and the field of victims' rights in particular. In a wide variety of ways, the victims' rights agenda disregards, contradicts, and finally tends to destroy the efficacy of the construct as an organ of progressive jurisprudence. Such corrosiveness is magnified by a habit of confronting rule of law under the guise of exposing its immanent shortcomings. Victims' rights masks its antipathy to rule of law by styling itself as the perfection of rule of law's various norms. All along this path, victims' rights, lacking any jurisprudential mandate of its own, duplicates key elements of the theories of Schmitt and Nazi jurisprudence generally.⁷⁸

(involving privacy and property rights of incarcerated persons).

⁷⁶ See FOUCAULT, *supra* note 42; Drew Humphries & David Greenburg, *The Dialectics of Crime Control*, in CRIME AND CAPITALISM 209-54 (1993); Philip Jenkins, *Varieties of Enlightenment Criminology*, 24 BRIT. J. CRIMINOLOGY 112 (1984).

⁷⁷ Although space prohibits going into the details of the relationship between rule of law and recent developments in the criminal justice system generally, other studies speak well enough to the jurisprudential questionableness of these changes. See, e.g., ALLEN, *THE HABITS OF LEGALITY*, *supra* note 6; STEVEN R. DONZIGER ET AL., *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION BY THE NATIONAL CRIMINAL JUSTICE COMMISSION* (1996).

⁷⁸ Allen paints a picture of criminal justice devoid of rule of law that, he argues, might resemble not only Nazi justice, but also South African and (predominantly Stalinist era?) Soviet systems: "In all the most oppressive regimes of the present century, legality values, particularly in the areas of ordinary and political crimes, were not simply ignored but were, in fact, deliberately and systematically

What is victims' rights? To be sure, the victims' rights movement is quite nebulous and its ideas are scattered about without any outstanding congruity.⁷⁹ Indeed, any effort to define victims' rights as a contiguous idea runs squarely into the problem of distinguishing victims' rights from a broader, uniformly reactionary movement to transform the criminal justice system. Equally significant, the movement is entirely lacking any well-developed theory or jurisprudence from which its essential meaning could be gleaned⁸⁰—other than the hidden identity with Schmitt and Nazism that I propose.

In the absence of a clear definition, we must categorize the movement in order to identify a basic victims' rights agenda. This can be done by focusing on certain initiatives which, although they may not be entirely uniform, are nonetheless predominant and expressed with already enacted state and federal statutes, state constitutional provisions, a pending federal constitutional amendment, and a variety of other popular and scholarly ideas. From these common initiatives, a workable definition of the movement can be obtained. To the extent that this body has a primary theme, it is clearly a campaign to generally enhance the role of crime

destroyed." ALLEN, *THE HABITS OF LEGALITY*, *supra* note 6, at 97. I do not quarrel with this observation, but instead focus on the convergence with Nazi jurisprudence because their practice and theory were both extraordinarily well-developed.

⁷⁹ See, e.g., FRANK J. WEED, *CERTAINTY OF JUSTICE: REFORM IN THE CRIMINAL VICTIMS MOVEMENT* 143 (1995) ("The reform concept of victims' rights lacks a clear substance, a specific target, and a working program.").

⁸⁰ My review of the scholarly literature on victims' rights reveals a wholesale lack of sophistication among arguments in defense of victims' rights. Aside from the Schmittian and Nazi themes that I explore in depth, the main themes of such defenses appear to be limited to the following: a generalized theory of moral desert and retribution; an appeal to the past; a thin pluralism, counter-posing claims of victims versus "criminals"; and repeated appeals to common sense or the supposed, self-evident righteousness of victims' rights. The retributive notion appears to be predominant, if not grounded in modern jurisprudential ideals. See Leslie Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, in *TOWARD A CRITICAL VICTIMOLOGY* 195 (Ezzat A. Fattah ed., 1992) [hereinafter Sebba, *The Victim's Role in the Penal Process*].

Other justifications tend to be more vague. For law professor and victims' rights advocate Paul Cassell, the restoration of private criminal justice again contemplates a search for lost balance. See Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L.J. 1373, 1375-76 (1994) (appealing to balance). See generally Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPPERDINE L. REV. 63, 115-16 (1984) (presenting victims'

victims *within* the criminal justice system.⁸¹ The various practical dimensions of this campaign may be characterized in terms of demands for the following: (1) restitution, participation, and control of the criminal justice process; (2) protection; (3) vengeance; and (4) general political demands against the interests of defendants and offenders.⁸²

rights as, essentially, a positive right to protection); Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 4 (1984) (providing no particular reason for victims' rights except that they have "been forgotten"); Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29 (1984) (presenting an argument from emotions and history); Josephine Gittler, *Expanding the Role of Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117 (1984) (defending victims' rights as warranted by general considerations of fairness and history); Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 24-26 (framing victims' rights as a corrective to the "modern ideology of criminal justice," an argument from history); Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 69-70 (1984) (stating that victims' rights is necessary, *inter alia*, to alleviate the "dehumanizing" effect of criminal justice system on victims); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 7-9 (1984) (defending victims' rights on the theory that it has therapeutic effects for victims); William F. McDonald, *Toward a Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649-51 (1976) (presenting an argument from history); Karyn Ellen Polito, Note, *The Rights of Victims in the Criminal Justice System*, 16 NEW ENG. J. CRIM. & CIV. CONFINEMENT 241, 242 (1990) (appealing to "fair and equitable treatment"). Elsewhere, as we shall see, victims rights are justified on the basis of generalized claims for "justice."

Several scholars have cut against the grain to criticize victims' rights. Notable pieces include Whitman, *supra* note 66, and Lynn Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1984).

⁸¹ As I shall explain in the conclusion of this Article, it is not at all necessary that victims' rights operate within the criminal justice system as such. This point is recognized in the scholarship, though not typically embraced. *See, e.g.*, LESLIE SEBBA, *THIRD PARTY VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* (1996) [hereinafter SEBBA, *THIRD PARTY VICTIMS*].

⁸² *See, e.g.*, NATIONAL VICTIM CENTER, *THE 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS' RIGHTS LAWS* (1996) [hereinafter VICTIMS' RIGHTS SOURCEBOOK]. For an overview of the victims' rights movement, see Bruce Shapiro, *Victims and Vengeance: Why the Victims' Rights Amendment Is a Bad Idea*, NATION, Feb. 10, 1997, at 11. For an overview of the history of victims rights, see OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, *Crime Victims' Rights in America: An Historical Overview*, in

An analysis of the specifics of this agenda reveals its recurrent consistency with Schmittian and Nazi ideas concentrated around a comprehensive antithesis to rule of law. The many facets of this common attitude toward rule of law may be discussed within several broad, overlapping themes: (1) the attitude toward liberalism, formal, general rules, and the courts; (2) the concepts of guilt and criminality and the boundaries of criminal justice; (3) the view on private and community justice in the criminal context; (4) the perspective on vengeance and the nature of punishment; and (5) the perversion of rule of law's substantive norms.

A. The Rejection of Liberalism and Legal Generality and the Attack on the Courts

Schmitt's notorious demolition of rule of law is premised in one sense on a straightforward rejection of liberalism and general legal norms. For Schmitt, liberalism and enlightenment embody a political and ideological system whose inherent function is to distort and obscure manifest and immutable social conflicts beneath what he regards as an unfounded optimism about the prospects for achieving a rational social order.⁸³ In Schmitt's view, the essential mode of social being is the political, an irrational realm composed of "the most intense and extreme antagonism" and characterized by "friend and enemy" relationships.⁸⁴ Neumann characterizes this construct in the following way: "This is a doctrine of brute force in its most striking form, one that sets itself against every aspect and act of liberal democracy and against our whole traditional conception of the governance of law."⁸⁵ In Schmitt's view, this relationship is not only central, it trumps rule of law. For the enemy is

the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible. *These can neither be*

1998 National Crime Victims' Rights Week: April 19-25 (1998). For a comprehensive, although dated outline of existing victims' rights, see JAMES STARK & HOWARD W. GOLDSTEIN, *THE RIGHTS OF CRIME VICTIMS: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK* (1985). For another layperson's guide, see DEBRA J. WILSON, *THE COMPLETE BOOK OF VICTIMS' RIGHTS* (1995).

⁸³ See SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 3, at 69-79.

⁸⁴ *Id.* at 26 ("The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.").

⁸⁵ NEUMANN, *BEHEMOTH*, *supra* note 4, at 45.

*decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party.*⁸⁶

Inasmuch as rule of law is rational, its ethical content fundamentally consensual and liberal, its normative structure built around generality, and its function anti-political, rule of law legalizes and otherwise legitimates this blindness to the nature of social being, paralyzing and frustrating those forces which appreciate the true political nature of things.⁸⁷ Notably, Schmitt eagerly applied his normless theory directly to the purpose of criminal law: "Today everyone will recognize that the maxim 'No crime without punishment' takes priority over the maxim 'No punishment without law' as the higher and stronger legal truth."⁸⁸

As with its foremost jurist, the overall Nazi attitude toward rule of law is also characterized by a deep hostility toward liberalism and general legal norms. Aside from being recognized as a repository of Enlightenment values that impedes Nazism's irrational, opportunistic, and arbitrary designs, rule of law norms are also seen as particular expressions of an inability to appreciate the Nazi maxim that political power and conflict are central to social being. As Hitler informs us, "There is only one kind of law in the world, and that lies in one's own strength."⁸⁹ In the words of one Nazi jurist, "Almost all the principles, concepts, and distinctions of our law up to now are stamped with the Spirit of Enlightenment, and they therefore require reshaping on the basis of a new kind of thought and experience."⁹⁰ In general, it is quite clear that for Nazi jurisprudence, just as for Schmitt, the hostility toward liberalism is articulated as a systematic repudiation of rule of law norms in favor of an alternative jurisprudence of highly politicized, nonuniform, archaic, and ultimately ad hoc characteristics intellectualized in Schmitt's theory of legal decisionism.⁹¹

⁸⁶ SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 3, at 27 (emphasis added).

⁸⁷ *See id.*; *see also* SCHEUERMAN, *supra* note 3, at 15-24.

⁸⁸ INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 75 (1991) (quoting Schmitt).

⁸⁹ 2 *NAZISM: A DOCUMENTARY READER: STATE, ECONOMY, AND SOCIETY* (1984) [hereinafter *NAZISM: A DOCUMENTARY READER*] (quoting Adolf Hitler). *See generally* ADOLF HITLER, *MEIN KAMPF* (1939) (including extensive, mostly rambling vitriolic denunciations of liberalism, constitutionalism, intellectualism, and the like).

⁹⁰ MÜLLER, *supra* note 88, at 70-71 (quoting Professor Friedreich Schaffstein).

⁹¹ *See, e.g.*, MICHAEL BURLEIGH & WOLFGANG WIPPERMANN, *THE RACIAL STATE: GERMANY, 1933-1945*, at 172-82 (1991); OTIS C. MITCHELL, *HITLER'S NAZI STATE: THE YEARS OF DICTATORIAL RULE (1934-45)*, at 212 (1988);

The Nazis recognized the independent judiciary as a primary institutional foundation of rule of law. Therefore, with the intellectual support of Schmitt and other theorists, they proceeded fervently, in a disorganized way, to undermine the independence of the courts from the political arm of the state and, in general, to guarantee that the courts served the will of the state and not the law.⁹²

The similarity of victims' rights to Nazi jurisprudence begins with a virtually identical antipathy to liberalism and generality and extends to a hostile attitude toward judicial independence. Thus, on one level, the overall anti-liberal tendencies of victims' rights are direct and transparent. This is evidenced by a fairly consistent affiliation with the conservative agendas of police, prosecutors, and jailors, with an embrace of the politics of "law and order" and the "war on crime," generally, and the underlying notion that crime is of emergency proportions and requires extensive emergency remedies. Indeed, at least one analyst of the movement regards victims' rights as the unfortunate *slave* of conservative right-wing politics.⁹³

On another level, such sentiments are implied by deep hostility of victims' rights to the sanctity of the legal process and constitutional rule and by the frequency with which its supporters make historical appeals to the age of private prosecutions and "effective" justice and to the supposed security of the days before the Warren Court reforms.⁹⁴ This attitude extends to a critique of both the independence of the legal process and the independence of courts in particular. With disturbing frequency, and often little regard for the facts or jurisprudence in question, victims' rights disdain for judicial independence and "liberal" judges has manifest itself in concerted campaigns to remove unacceptable judges from office.⁹⁵ This

MÜLLER, *supra* note 88, at 68-81; NEUMANN, RULE OF LAW, *supra* note 17, at 286-98.

⁹² See generally RICHARD LAWRENCE MILLER, NAZI JUSTIZ: LAW OF THE HOLOCAUST (1995); MÜLLER, *supra* note 88; see also NEUMANN, BEHEMOTH, *supra* note 4, at 630-32.

⁹³ See ROBERT ELIAS, VICTIMS' RIGHTS: THE POLITICAL MANIPULATION OF CRIMINAL VICTIMS (1993).

⁹⁴ See, e.g., Eikenberry, *supra* note 80; Gittler, *supra* note 80; Hudson, *supra* note 80; McDonald, *supra* note 80.

⁹⁵ Such activities by victims' rights groups are focused on the issue of the death penalty and have resulted in the outright transformation of a number of states' judiciaries. See, e.g., Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions*, 72 N.Y.U. L. REV. 308 (1997); Gerald F. Uelman,

activity reached outlandish proportions with Congress's intervention, on behalf of victims, in the Oklahoma City bombing trial.⁹⁶

B. The Concepts of Guilt and Criminality and the Boundaries of Criminal Justice

Schmitt argues that the friend/enemy relationship "can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party."⁹⁷ As such, the essence of proper legal intercourse for him can only be political and not legal. For Schmitt and his fellow Nazis, such an attitude justified the politization of criminal law, its concepts and its functions. This was achieved in two steps: first, identifying the enemy by criminalizing racial, ethnic, and biological categories; and second, by dispensing with both the formality and the normative substance of rule of law in order to deal with such people.⁹⁸ In the criminal justice context specifically, according to Müller, such logic was effectuated with great proficiency:

A decisive characteristic of National Socialist theory was that emphasis was placed less on the act committed than on the "criminal personality." Legal scholars developed categories of "characteristic criminal types" for use in the rewriting of laws and decrees; these "types," which were determined by "simple and popular distinctions," came to play an ever greater role⁹⁹

Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization, 72 NOTRE DAME L. REV. 1133, 1135-44 (1997).

⁹⁶ In 1997, during the trial of Oklahoma City bomber, Timothy McVeigh, Congress and the President bowed to political pressure and changed the law to guarantee the rights of victims who might later testify in the penalty phase of that trial to attend the trial in chief. See Victim Allocation Clarification Act of 1997, 18 U.S.C. § 3510 (1997); see also H.R. REP. NO. 105-28 (1997) ("Recently the Committee has learned that, under the Federal Rules of Evidence, some federal trial judges may be able to exclude victims and witness' family members."); cf. *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997); *United States v. McVeigh*, 958 F. Supp. 512 (D. Colo. 1997) (discussing the Victim Allocation Clarification Act).

⁹⁷ NEUMANN, BEHEMOTH, *supra* note 4, at 456.

⁹⁸ See MÜLLER, *supra* note 88, at 68-81; DETLEV J. K. PEUKERT, *INSIDE NAZI GERMANY: CONFORMITY, OPPOSITION, AND RACISM IN EVERYDAY LIFE* 208-35 (Richard Deveson trans., 1987).

⁹⁹ MÜLLER, *supra* note 88, at 79.

A complementary theme of Nazi reforms in criminal justice was to restore an emphasis on the cognitive aspect of culpability, on *mens rea* and moral fault, to the relative exclusion of the objective definition of crime (*actus reus*). The logical conclusion of such an attitude is to expand an already broad view of criminality to include matters of consciousness, which the Nazis and many other oppressive regimes effectively used to persecute political dissidents and potential enemies and to make a wider net of their conception of criminality.¹⁰⁰ Finally, Neumann says, for the Nazis, "[n]othing is left of the principle of *nulla poena sine lege, nullem crimen sine lege* (no punishment without law and no crime without law)."¹⁰¹

Victims' rights shares these perspectives. For, in its own way, the victims' rights movement faithfully advances a parallel vision of the criminal, dominated by friend/enemy-like dualities: "normal vs. abnormal, member vs. outsider, predator vs. preyed-upon."¹⁰² Like the Nazis, victims' rights advances this perspective with certain policies which criminalize biological characteristics and which—as is the logical implication of such practice—extend criminal sanctions into everyday civil society.

Notwithstanding the likelihood that it is influenced by a climate of racism that pervades contemporary conceptions of crime,¹⁰³ we need not delve into the question of whether the victims' rights movement is affirmatively racist in order to demonstrate this concern. Rather, the resort to biological definitions of criminality is abundantly clear from the victims' rights movement's enthusiastic sponsorship of sex-offender community notification statutes—so-called Megan's Laws.¹⁰⁴ These statutes, which are partially mandated by federal law and apply in some degree in every state, require that a convicted sex offender, upon release or adjudication, (1) publicize his arrival in a community and/or (2) register with local law enforcement.¹⁰⁵ The underlying purposes of such laws are victim oriented:

¹⁰⁰ See Otto Kirschheimer, *Criminal Law in National Socialist Germany*, in *THE RULE OF LAW UNDER SEIGE* 172 (William E. Scheuerman ed., 1996).

¹⁰¹ NEUMANN, BEHEMOTH, *supra* note 4, at 454.

¹⁰² WEED, *supra* note 79, at 52.

¹⁰³ See ELIAS, *supra* note 93, at 10-11.

¹⁰⁴ See, e.g., N.J. STAT. ANN. §§ 2C:7-1 to -11 (West Supp. 1995).

¹⁰⁵ See, e.g., PETER FINN, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *Sex Offender Community Notification*, in *RESEARCH IN ACTION* (1997). Under penalty of diminution of certain funding, federal law now *requires* all states to develop such laws with respect to registration. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act, 42 U.S.C. § 14071 (1994 & Supp. I 1997).

Some 46 states and the federal government have registration programs, and

to provide past and potential victims with actual or constructive notification and public access to information about the sex offender.¹⁰⁶ First enacted in New Jersey as an "emergency" measure,¹⁰⁷ Megan's Laws are rationalized by courts and legislatures in two interlocking ways, each of which violates rule of law and matches the Nazi perspective on criminal justice: first, by reference to the supposed immutability or biological bases of criminality; and second, by manipulating the legal definition of the programs to demonstrate their ostensibly nonpunitive, "civil" nature.

In contemporary discourse, racial and biological explanations of social phenomenon, like crime, have renewed appeal.¹⁰⁸ Most assuredly, a notion of biological or otherwise immutable criminality, essentially indistinguishable from the Nazi approach to criminality, is a major assumption underlying Megan's Laws. Sex offenders must be subjected to such strictures because it is in their nature to commit sex crimes. The relevant federal law makes this point all too clearly: "The term 'sexually violent predator' means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent

approximately 15 states have community notification statutes. *See generally* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1294-95 (1996) (justifying such provisions).

In some cases, this idea is reduced to mandated pillory, as released convicts may be expected to plant signs at their residence and identify themselves to their neighbors either directly or through public media. *See, e.g.*, Jonathan Alter & Pat Wingert, *The Return of Shame*, NEWSWEEK, Feb. 6, 1995, at 21; Russell Mokhiber, *Crime the Shame of It All: Shaming Rituals Work in Japan—Why Not Here in America*, WASH. POST, Oct. 28, 1990, at C3.

¹⁰⁶ *See Community Notification of the Release of Sex Offenders*, VICTIMS' RIGHTS SOURCEBOOK, *supra* note 82, § 3.1. As this document indicates, there are differing degrees to which states attempt to implement these goals, with some states placing greater emphasis on actual notification. *See id.*

¹⁰⁷ *See E. B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir.), *reh'g denied*, 127 F.3d 298 (1997), *cert. denied*, 118 S. Ct. 1039 (1998).

¹⁰⁸ *See, e.g.*, Wray Herbert, *Politics of Biology*, U.S. NEWS & WORLD REP., Apr. 21, 1997; James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64; *cf.* RICHARD J. HERNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (emphasizing how intellectual capacity shapes American society). On the poverty of such arguments, *see, for example*, R.C. LEWONTIN ET AL., *NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE* (1985).

offenses.”¹⁰⁹ This notion is accompanied by faith in the development of a kind of public/private partnership to control sex offenders.¹¹⁰

Courts have generally used a nonpunitive, civil interpretation to ratify these laws. So characterized, Megan’s Laws fall outside the reach of ex post facto and the more stringent due process structures. As such, they may be applied not just indefinitely or for extended periods beyond the point when the original sentence would have expired, but retroactively.¹¹¹ These

¹⁰⁹ 42 U.S.C. § 14071(a)(3)(C) (1994 & Supp. I. 1997).

¹¹⁰ See, e.g., 42 PA. CONS. STAT. ANN. § 9791 (West Supp. 1998), cited in *Community Notification of the Release of Sex Offenders*, VICTIMS’ RIGHTS SOURCEBOOK, *supra* note 82, § 3.1 (putting the public on notice about such persons and protecting the “safety and general welfare . . . until effective treatment for sex offenders can be found or until we can put a policeman on every street corner”); see also *Russell v. Gregoire*, 124 F.3d 1079, 1090 (9th Cir. 1996) (Notification provision is regulatory and therefore constitutional because it “is tailored to help the community protect itself from sexual predators under the guidance of law enforcement.”).

For what it is worth—and it should not matter with regard to rule of law concerns—it is not at all clear that such assumptions about the supposedly very high rates of recidivism of sex offenders are valid. See, e.g., ALLEN V. BECK, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1983, 10 tbl. 8 (1983, rev’d 1997) (suggesting lower rates of recidivism among violent sex offenders relative to other felons); LAWRENCE A. GREENFELD, U.S. DEP’T OF JUSTICE, SEX OFFENSES AND OFFENDERS 25-27 (1997) (suggesting lower rates of recidivism among violent sex offenders relative to other felons).

¹¹¹ See, e.g., *Doe v. Pataki*, 120 F.3d 1263, 1284-85 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998); *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir.), *reh’g denied*, 127 F.3d 298 (1997), *cert. denied*, 118 S. Ct. 1039 (1998); *Neal v. Shimoda*, 131 F.3d 818, 825-27 (9th Cir. 1997); cf. *Artway v. Attorney Gen.*, 81 F.3d 1235, 1262-67 (3d Cir.), *reh’g denied*, 83 F.3d 594 (3d Cir. 1996). “Analyzing the registration provisions of Megan’s Law . . . we conclude that registration under Megan’s Law does not constitute ‘punishment’ under any measure of the term. Hence, it does not offend the Ex Post Facto, Double Jeopardy, or Bill of Attainder Clauses.” *Id.* at 1267. The *Artway* court also rejected claims that New Jersey’s Megan’s Law is unconstitutional because it is vague, violative of equal protection, and violative of due process. See *id.* at 1271.

Some courts have vacillated on the question of punitiveness, particularly as concerns retroactivity. See *State v. Delaughter*, 703 So. 2d 1364, 1370-71 (La. Ct. App. 1997). However, no jurisdiction has rejected the basic idea of Megan’s Law. See *Sex Offender Community Notification*, *supra* note 105, at 15-16. Moreover, *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997), which characterized as “civil” a policy of confining sex offenders, see *id.* at 2081-83, appears to have answered in the negative questions of punitiveness and retroactivity for all other such regimes.

statutes combine their biological or immutable conception of criminality with a merger of the civil and criminal realms and, implicitly, of civil and criminal sanctions. Thus, notwithstanding judicial rhetoric about the nonpunitive nature of regimes such as Megan's Law, these statutes violate the rule of law principle that civil society is to be a realm of negative freedom from the state. Further, the merger of the civil and criminal juxtaposes private and public authority over criminal affairs. By working outside the criminal justice context, however, as with lynchings and witch hunts, the authority of the state can only work to promote, and not restrain or displace, private violence in essentially criminal areas.¹¹² At the same time, the state evades the regulation of its conduct by rule of law, in this instance by disguising its conduct as civil.

A recent landmark Supreme Court case, much applauded by victims' rights advocates and quickly seized upon by lawmakers as an invitation to further sexual predator legislation,¹¹³ validated once and for all the abrogation of the civil/criminal distinction. The decision is *Kansas v. Hendricks*,¹¹⁴ where in 1997 the Court determined that even indefinite "civil" confinement of a person inclined to commit "future predatory acts of sexual violence" due to "mental abnormality" or "personality disorder" because they "generally have anti-social personality features which are unamenable to existing . . . treatment modalities"¹¹⁵ is constitutionally permissible. The Court held that such a sanction is (1) permissible on substantive due process grounds and (2) civil and not criminal, and therefore incapable of violating either the ex post facto or double jeopardy clauses.¹¹⁶ As the Court acknowledges, such a statute potentially applies to

¹¹² Already vigilantes have taken advantage of Megan's Law, in one instance to assault the wrong person. See *Sex-Offender Vigilantes*, NAT'L L.J., Jan. 23, 1995, at A10.

¹¹³ See Ken Dilanian, *Pennsylvania Sexual Predators Would Face Indefinite Terms Under GOP Bills*, PHILA. INQUIRER, Sept. 4, 1997, at B2; John Lantigua & Mark Silva, *New Curbs for Sex Predators: States Can Hold Them After Sentences, Justices Rule*, MIAMI HERALD, June 24, 1997, at 1A; Christi Parsons, *Law Aims to Jail Sex Predators for Life: Repeat Offenders Could be Committed After Sentence Served*, CHI. TRIB., Jan. 1, 1998, at 1.

¹¹⁴ *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997).

¹¹⁵ *Id.* at 2076 (using criteria from the Sexually Violent Predator Act, KAN. STAT. ANN. §§ 59-29(a)(01)-(02)).

¹¹⁶ See *id.* at 2086. Justice Breyer's dissent provides an analysis of other states' statutory sexual predator commitment regimes. See *id.* at 2095 (Breyer, J., dissenting).

persons not convicted of any charge and sets forth rather paltry procedures to determine an offender's status as a sexual predator.¹¹⁷

The similarity with Nazi justice is clear. For the *Hendricks* Court, as for Nazi courts, "the task of imposing drastic sanctions on asocial and handicapped individuals without proceeding through criminal trials was

¹¹⁷ Of course, the facts of the *Hendricks* case completely contradict a civil interpretation. Writing for a majority, Justice Thomas looked to colonial history to reach "an understanding of ordered liberty" and proceeded to set forth a hodge podge of reasons that the Court need not question the statute's weak notion of "mental abnormality" nor question too deeply Kansas's dubious denomination of the sanction as civil and not criminal. *See id.* at 2079-86. In overturning the statute, the Kansas Supreme Court averred directly to the statute's casual definition of mental illness. *See In re Hendricks*, 912 P.2d 129, 133-38, *cert. granted*, 518 U.S. 1004 (1996), *rev'd*, 117 S. Ct. 2072 (1997). In fact, the sole credible reason for extending the confinement of the *Hendricks* offender is one clearly within the exclusive purview of modern criminal law: detention without any real pretense of treating the offender for his dangerous propensities. The majority in this case, per Justice Thomas, placed a "heavy burden" on the petitioner to show that a court should disregard the mere denomination of a commitment regime as civil and not criminal. *See Hendricks*, 117 S. Ct. at 2082. Essentially, Justice Thomas's methodology in this regard is a rather random analysis of the distinction between civil and criminal and specifically between punitive and nonpunitive institutional commitment—disregarding that the State of Kansas clearly had no intention of doing anything but warehousing Hendricks on the theory that he is a permanent threat to society.

It is interesting to compare the reasoning in *Hendricks* to that of an earlier decision, *Specht v. Patterson*, 386 U.S. 605 (1967), where the Court unanimously invalidated a substantially similar law, which in its view made

one [proceeding] the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact. . . . The punishment under the Second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.

Id. at 608-09 (citations omitted). On all but the most technical level, it is impossible to distinguish this case from *Hendricks*. *Cf. Hudson v. United States*, 118 S. Ct. 488 (1997) (holding that monetary and disbarment sanctions represent civil penalties for purposes of the double jeopardy clause).

As Justice Kennedy appears to recognize in his concurring opinion, the majority ruling clearly expands the use of civil confinement to achieve criminal justice ends. *See Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring). True to form, though, Kennedy is careful to exempt Leroy Hendricks himself from this critique, hence his concurrence. *See id.* (Kennedy, J., concurring).

clearly not an unpleasant one for the judges concerned."¹¹⁸ Not only were the Nazis too keen to embrace biological conceptions of criminality, but it was likewise general practice for the Nazis to abrogate the distinctions between civil and criminal society in the course of effectuating their racist, inhumane dogma. Jews and other undesirables were, in effect, walking criminals required to register, restricted in their travel, and committed to ghettos before being shipped to concentration camps. Like sex offenders, their crime was to exist, and their prisons were themselves, their physical identity, and their very homes.¹¹⁹ Actions centered around such a merger of state and civil authority were a principal kind of violence under the Third Reich. In this sense, as with Megan's Laws in particular, the Nazi abrogation of the distinction between civil and criminal realms was functionally related to facilitating the cooperation of state and private parties in the extracriminal control of enemy groups.¹²⁰

C. *Private and Community Justice*

A curious thing about Nazi jurisprudence and fascism generally is the syncretic tendency to juxtapose archaic, romantic, often ostensibly private norms with conformist, authoritarian, and totalitarian norms. This convoluted ideology sparked endless, fruitless debates about whether Nazism represents the refutation or the fulfillment of modernism, liberalism, or capitalism.¹²¹ In the context of Schmitt's thought, this

¹¹⁸ MÜLLER, *supra* note 88, at 125.

¹¹⁹ On the legal and political mechanics of this process, see MILLER, *supra* note 92. At least one U.S. court did compare the public notification aspect of (the original) Megan's Law to Nazi practices with respect to Jews. *See Artway v. New Jersey*, 876 F. Supp. 666, 687 (D.N.J. 1995).

¹²⁰ Moreover, by the middle and latter days of the Third Reich, including within ostensibly pacified occupied territories, a certain measure of anarchy reigned. In such areas, the only supreme authorities with respect to the enforcement of state policies and rights were the political (and to some degree nonmilitary) organs of the state. At the same time, anarchy and fascist ideology bred private violence which the German state, primarily through the SS (police and security forces) and *Gestapo* (secret police), facilitated and otherwise exploited. See, for example, the various accounts in *THE GOOD OLD DAYS: THE HOLOCAUST AS SEEN BY ITS PERPETRATORS AND BYSTANDERS* (Ernest Klee et al. eds., 1991). *See also* DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1997) (discussing the executioners, participants, and victims of the holocaust).

¹²¹ As in Hitler's own polemics, as well as those of his ideological minions, a hyper-individualistic, anti-modern, vitalistic platform leads to the utter deprivation

characteristic underlies an extensive debate about the actual degree of Schmitt's Nazi tendencies.¹²² Scheuerman concludes that Schmitt's inability to come to terms with the "dilemma of legal indeterminacy" drove him to embrace Nazi doctrines and that this process reflects itself in inconsistencies in Schmitt's thought, which, in turn, inform the contemporary debate about his true politics. This unorthodox logic allows Nazi ideology to claim to represent the perfection of both individualism and community, of history and the future. However, the schizophrenic character of Nazi thought facilitates the destruction of the individual as well as whole communities serving not historical or utopian ideals so much as the present demands of power. Indeed, in the final analysis such patterns in Nazi thought appear to constitute the inevitable byproduct of a social order that deals with the imperfect, dialectical structure of modern society, not with ideas and faith in reason, but by attempting, by force, to obliterate such contradictions.¹²³ Thus, Nazi individualism and community represent perverse, archaic interpretations of these concepts, steeped in obvious racism and irrationalism, devoid of liberal universalism and legal generality, and adept at justifying force.

As demonstrated above, a major characteristic of Nazi criminal justice, particularly after its liberation from the civil/criminal distinction, the strictures of courts, and the legal conception of criminality as such, was to privatize and otherwise disperse the means of enforcement. A similar function inheres in the victims' rights agenda not only with respect to sex offender regimes but in victims' rights constitutional amendments in particular. These amendments, now enacted in about forty states and pending congressional action on the federal level,¹²⁴ are designed to expand

of individual freedom and the concomitant investiture of the state, as well as individuals, with quasi-state sovereignty and the *volk* with supreme existential authority. See, e.g., HITLER, *supra* note 89; ALFRED ROSENBERG, *THE MYTH OF THE TWENTIETH CENTURY* (1992). On the syncretic tendencies of fascist ideology generally, see STANLEY G. PAYNE, *FASCISM: COMPARISON AND DEFINITION* (1980).

¹²² On this debate, see William E. Scheuerman, *After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933-1936*, 19 CARDOZO L. REV. 1743 (1998).

¹²³ A classical study of this phenomenon is ERICH FROMM, *ESCAPE FROM FREEDOM* (1941), which explains the twentieth century affinity for authoritarianism and totalitarianism as the inevitable outgrowth of the selective frustration of individualism in modern society.

¹²⁴ See LeRoy L. Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 128 (1987); see also Note, *Passing the Victims' Rights Amendment: A Nation's*

the basic victims' rights agenda. Such expansions include the following prominent rights: to attend and observe the trial; to receive mandatory restitution; to receive a speedy trial; to be notified of developments in the case, including settlement, sentencing, and sentencing relief; to be notified of other victims' rights prerogatives; to receive certain communication with the prosecutor, including voicing objections to settlement, sentencing, and sentencing relief; to give victim-impact testimony; and to be afforded various amorphous incidents of "dignity" and "respect."¹²⁵ At the core of such rights, as victims' rights proponents freely admit, is an ambition to restore in some measure the institution of private prosecutions.¹²⁶

The privatizing logic of this campaign is particularly salient in its push for mandatory restitution. Contemplated in victims' rights amendments and

March Toward a More Perfect Union, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647 (1998). The relevant federal legislation, which died upon adjournment this fall of the 105th Congress, see S.J. Res. 6, 105th Cong. (1997), has been reintroduced by Senators Kyl and Feinstein, see S.J. Res. 3, 106th Cong. (1999).

¹²⁵ Article I, section 30 of the Texas Constitution is typical:

(a) A crime victim has the following rights:

- (1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and
- (2) the right to be reasonably protected from the accused throughout the criminal justice process.

(b) On the request of a crime victim, the crime victim has the following rights:

- (1) the right to notification of court proceedings;
- (2) the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial;
- (3) the right to confer with a representative of the prosecutor's office;
- (4) the right to restitution; and
- (5) the right to information about the conviction, sentence, imprisonment, and release of the accused.

TEX. CONST. art. I, § 30.

¹²⁶ See, e.g., Cassell, *supra* note 80, at 151 ("It is possible to envision a criminal justice system under which private prosecutors would be revived . . ."); Lamborn, *supra* note 124 (discussing various amendments proposing to increase victim "participation" in criminal proceedings); Gittler, *supra* note 80.

otherwise widely mandated by statute,¹²⁷ mandatory restitution folds the adjudication of criminality into the civil tort, making the state's prosecution the foil for private vindication of private rights. Indeed this can be restitution's only function because, of course, private civil tort has always been available apart from criminal liability and generally easier to prove. The ambition to use restitution to conflate the tort and criminal regimes is further evidenced by the ubiquitous veneration of pre-modern and pre-Warren Court criminal justice, of the institution of private prosecution as such,¹²⁸ and by an idealization of the renumeration tort law functions of the criminal law that accompanies the advocacy of restitution: "Under existing law, crime victims' rights are still too often overlooked. Even though the law provides the means to address the rights of victims, the law does not, however, provide for a means to *make victims whole*."¹²⁹

However rough the analogy to Nazism, in this privatizing aspect, restitution directly contradicts the norm of generality. Obviously, the criminal law cannot be administered in any general way, or even meaningfully written as such, if the victim is a legitimate party to the case, empowered to stamp his or her demands upon the way the law is applied and the various outcomes it yields.¹³⁰ Indeed, from the outset, such an

¹²⁷ On the various models for restitution, see SEBBA, *THIRD PARTY VICTIMS*, *supra* note 81, at 313-27. The issue of restitution has been addressed on the federal level, *see, e.g.*, 18 U.S.C. §§ 3663-3663A (1994) (providing for, and in some cases mandating, court-ordered restitution of victims by certain offenders); 42 U.S.C. § 10606 (1994) (enumerating statutory victims' rights, including the "right to restitution"), and on the state level, *see, e.g.*, CAL. CONST. art. I, § 28(b) (providing crime victims with "the right to restitution"); TEX. CONST. art. I, § 30 (providing crime victims with "the right to restitution"). *Cf.* 21 AM. JUR. 2D *Criminal Law* § 2 (1981) ("The crime is held to constitute an offense against the public pursued by the sovereign, whereas the tort is a private injury to be pursued by the injured party."). For recent case law declaring that certain penalties were civil in nature and therefore not violative of the double jeopardy clause, *see Hudson v. United States*, 118 S. Ct. 488 (1997), and *United States v. Ursery*, 116 S. Ct. 2135 (1996).

¹²⁸ *See Gittler, supra* note 80, at 150-63.

¹²⁹ H.R. REP. NO 104-16, at 4 (1995) (House Judiciary committee report on the Victim Restitution Act of 1995) (emphasis added).

¹³⁰ Both courts and amendment drafters have been careful to limit the impact of such rights. *See, e.g., Dix v. Shasta County*, 963 F.2d 1296, 1299-1301 (9th Cir. 1992) (holding that the California Victims' Bill of Rights does not create authentic, legally enforceable liberty interests in crime victims). Moreover, the test of most victims' rights amendments and statutes is whether it expressly limits the capacity of victims to enforce their rights against the state. Such restrictions are a source of some tension between law and order victims' rights supporters and their allies (*e.g.,*

ambition does more than put the defendant at a numerical advantage. It cuts against the integrity of criminal justice as distinct from civil law and therefore forecloses its functions as public general law. Such a privatization of criminal law functions insulates these functions from the rationalizing norms—generality, for instance—which rule of law imposes much more effectively in the public law context. As I anticipated earlier, the result is to deny rule of law the ability to regulate the conduct of the state. For in this context, the shift toward a more private regime does not merely deprive the defendant of certain benefits of rule of law, and not only serves the interests of victims, but makes easier the prosecutorial functions of the state—which, after all, retains its standing and prerogative.

Predictably, such an assault on the basic structure of rule of law in the criminal context also has a collateral effect on other rule of law norms. In particular, this follows because it is the nature of private right to facilitate the expression of private differences. In other words, because private rights are devoid of generality, arbitrary outcomes follow directly not merely from restitution, but also from a broad panoply of victims' initiatives premised on recentering the victim. These drastically different outcomes become *possible* and become, in effect, part of the criminal sanction. The only generality that can remain is what Neumann describes as false generality: a dangerous reliance on "spurious generality," on the mere *standards* of conduct which dominated the Third Reich's criminal law.¹³¹

The possibility of arbitrariness advanced by these facets of the victims' rights agenda exposes the fraudulence of both its commitment to the rights of individual crime victims and its democratic pretensions. As with the Nazi appeal to individualism and class equality, which were promptly stood on their heads,¹³² agreeable rhetoric about individualized justice belies the function of reprivatized criminal justice to restore fundamental *inequality*, not merely among offenders, but *among victims*. As has always been the case with private civil justice, the fruits of private prosecution naturally accrue to the powerful and wealthy and replace rule by legal norms with rule by exceptions.¹³³

prosecutors), on the one hand, and proponents of libertarian victims' rights, on the other.

¹³¹ See NEUMANN, *The Change in the Function of Law*, *supra* note 12, at 27-29.

¹³² See, e.g., NEUMANN, BEHEMOTH, *supra* note 4, at 42-43, 452.

¹³³ At least one authority has already chronicled the inegalitarian outcomes among victims that private prosecutions create. See Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665 (1997)

The complement of such attempts to reprivatize criminal justice is the ubiquitous appeal to community and to a community-based system of criminal justice, which has a definite similarity to Nazi practices. Within the context of victims' rights, this sentiment is generally evident in the ethic of solidarity among victims,¹³⁴ the authenticity of which at least one commentator has questioned.¹³⁵ More specifically, this attitude inheres in the outermost logic of Megan's Laws, which are premised, as I have anticipated, on developing the ability of communities to police themselves. Notably, as the approving language of a congressional report reveals (again in conformance with the Nazi practice), this focus on community can be traced back to the fixation with biological or otherwise immutable causes of criminality.

Sex offenders have a high likelihood of reoffending—in fact, they are nine times more likely to repeat their crimes than any other class of criminal. It is for this reason that so many communities feel unsafe as long as convicted sex offenders are in their midst, and why more and more communities are seeking to know of their whereabouts.¹³⁶

Or, in the words of one senator, "Society needs to know where these predators are at all times" in order that it might exercise its right of "self-defense."¹³⁷

Of course, the racial community was a centerpiece of Nazi ideology and the corollary of its mania to identify criminal types and enemy races and achieve racial purity. Indeed, the very nature of criminal sanction was construed in terms of whether a defendant was to remain within or to be ejected from the *volk*.¹³⁸ With respect to Jews especially, the first priority for the Nazis was to identify such persons (by their loose conceptions of criminality), and having done so, to initiate a campaign of repression that prominently featured a registration requirement, social ostracism, civil

(describing the practice of private funding of criminal prosecutions). On the history and impropriety of private prosecutions, see Bessler, *supra* note 55.

¹³⁴ See, e.g., GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995) (stating that the fundamental purpose of criminal trials as "communitarian" and to "stand by the victim").

¹³⁵ See Shapiro, *supra* note 82.

¹³⁶ H.R. REP. NO. 105-256, at 6-7 (1997) (House Judiciary Committee Report on the Jacob Wetterling Crimes Against Children Act).

¹³⁷ 142 CONG. REC. S3484-85 (daily ed. Apr. 17, 1996) (statement of Sen. Hutchison).

¹³⁸ See MÜLLER, *supra* note 88, at 77-78.

death, and politically and judicially sanctioned private or otherwise extra-legal violence. This action was invoked—particularly in the case of private violence—in the name of defending the community.¹³⁹

Such was the relationship between the Nazi notions of community and private right: the two converged to facilitate the inhumane, authoritarian ends of the state vis-à-vis its enemies. In the context of victims' rights the same basic function is served by empowering communities and private citizens and the same elements of rule of law—generality, formality, the segregation of civil and criminal society and public and private functions—are violated. The community of victims polices itself (for example, against sex offenders) and, without in any way limiting the criminal authority of the state, relieves the state of the practical and legal (including rule of law-oriented) burdens of exercising that authority.

D. Vengeance and the Nature of Punishment

The idea that the friend/enemy construct defines the social sphere works to legitimate irrational and intersocial violence. If identifiably “different” or “alien,” the enemy becomes subject to the most ruthless, often barbaric treatments. In Nazi criminal justice, this perspective converged with its dubious notions of criminality and the boundaries of the criminal realm to justify very broad definitions of criminality. With respect to Jews and leftists, especially, the persecution of such enemies was practiced in the spirit of revenge for the supposed exploitation of non-Jews by Jews and for communists' and socialists' supposed complicity with enemies of Germany. The overall Nazi attitude on criminal punishment was to demand “harshness” above all else. As one Nazi jurist proclaimed:

We have from the beginning emphasized that the National Socialist State knows no humanitarian scruples so far as the criminal is concerned. National Socialism stands in the position of a state of war against criminal elements. I can give you the assurance, gentlemen, that the National Socialist jurist is a fanatical exponent of the principle of reprisal, of intimidation.¹⁴⁰

Further, Neumann tells us, the idea of criminal types is rearticulated by the Nazis in terms of specific categories worthy of specific degrees of

¹³⁹ See MILLER, *supra* note 92, at 4.

¹⁴⁰ *Id.* at 51-52.

punishment: brutal criminal, state criminal, habitual offenders, and so forth.¹⁴¹

For victims' rights, a certain analogous attitude appears. Having largely embraced the notion of criminals as predators, the next step is to seize upon the idea of vengeance. Restitution and participation are but the more civilized aspects of this tendency which encompass the reactionary, vindictive attitude about the purposes of criminal justice in general and the expectations of certain victims in particular. Much of the popular voice of victims' rights is dominated by a fixation with revenge and vindication as the legitimate means and ends of criminal justice.¹⁴² As one of its most lucid and rigorous proponents confesses, the retributive ideal is intrinsic to victims' rights.¹⁴³

Another, perhaps more straightforward, example of the tendency of victims' rights to implement its tough demands on criminals is with its zealous support for habitual offender statutes. Here we find a more specific replication of Nazi criminal justice; it seems that Nazi criminal law relied extensively on such provisions.¹⁴⁴ Often propagated as "three-strikes and you're out" or codified as sentencing guidelines,¹⁴⁵ these provisions increase sentences on the basis of prior convictions or other conduct and are the logical extension of a belief in the immutable or otherwise permanent nature of criminality. The enemy appears here as "predator" or "career criminal" who may be identified by his or her pattern of criminality and who must be, beyond a certain point, removed from society permanently.¹⁴⁶ In contemporary usage, it should be noted, the results are of questionable practical effectiveness and notoriously absurd in many cases.¹⁴⁷

¹⁴¹ See NEUMANN, BEHEMOTH, *supra* note 4, at 457.

¹⁴² See, e.g., Sharon Brownlee et al., *The Place for Vengeance*, U.S. NEWS & WORLD REP., June 16, 1997, at 25; Dan McGraw, *When Is Forgiveness Unforgivable*, U.S. NEWS & WORLD REP., Feb. 9, 1998, at 7; Shapiro, *supra* note 82, at 11-12.

¹⁴³ See Sebba, *The Victim's Role in the Penal Process*, *supra* note 80.

¹⁴⁴ See MÜLLER, *supra* note 88, at 79-81.

¹⁴⁵ See, e.g., FEDERAL SENTENCING GUIDELINES § 4A1.3 (1992).

¹⁴⁶ See, e.g., JOHN CLARK ET AL., NATIONAL INST. OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 4-5 (1997).

¹⁴⁷ See Angie Cannon, "Three-Strikes" Laws, Aren't Affecting Crime, PHILA. INQUIRER, Sept. 10, 1996, at A3; Sam Walker, *Questions Surface Over Fairness, Cost of 3-Strikes Laws*, CHRISTIAN SCI. MONITOR, Nov. 18, 1994, at 3; Daniel B. Wood, *L.A. Police Lash Out Against 'Three-Strikes'*, CHRISTIAN SCI. MONITOR, Mar. 29, 1996, at 3. It appears that no matter how disproportionate, such provisions

Moreover, like the Nazis, who embraced archaic punishments like public pillory and the massive application of capital punishment,¹⁴⁸ victims' rights also associates itself with archaic punishments. Most notably, Megan's Laws in particular operate as a kind of public pillory. If not for any specific belief in such punishments, this penchant follows from the ubiquitous desire of victims to influence the *content* of criminal justice. For example, when a victim's relative has been murdered, the idea of capital punishment or even torture is but the natural end result of the notion that the victim has rights over the disposition of the case.

Perhaps the most pervasive example of the urge to control punishment is the promotion by victims' rights advocates of habitual offender statutes. The pretense of uniformity and predictability notwithstanding, such regimes continue the opposition to rule of law. Ironically, only in a limited sense are predictability and uniformity enhanced by minimum sentencing. Experience shows that what these practices actually do is give further affront to rule of law by relocating discretion and the source of arbitrariness in the process from judges, who are at least nominally impartial, to the extrajudicial offices of police prosecutors and—at least the proponents hope—victims.¹⁴⁹ It is left to these parties to decide the charge and therefore sentencing. This duty is accomplished by reference, in the case of prosecutors, to political pressures, and in the case of victims, to subjective, arbitrary factors. Indeed, so definite is this process that, even where reduced by statute to guidelines, minimum sentencing regimes specifically rest on arbitrary, victim-specific factors.¹⁵⁰

Quite similar in both purpose and effect are statutes that repeal pardon, parole, commutation, and other kinds of sentencing relief. The victims' rights movement and other anti-crime factions have embraced this agenda as "truth in sentencing." Again, a perverse result belies the rhetoric of uniformity.¹⁵¹ The effect is an almost wholly random—and often quite

are not unconstitutional. *See, e.g.,* Harmelin v. Michigan, 501 U.S. 957 (1991).

¹⁴⁸ *See* MICHAEL BURLEIGH & WOLFGANG WIPPERMANN, THE RACIAL STATE: GERMANY, 1933-1945, at 172-82 (1991); MÜLLER, *supra* note 88, at 68-81; NEUMANN, RULE OF LAW, *supra* note 17, at 293-98.

¹⁴⁹ *Cf.* ALLEN, THE HABITS OF LEGALITY, *supra* note 6, at 45 (discussing the notion of institutional "nullification" of rule of law).

¹⁵⁰ *See* LOIS G. FORER, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING (1994). *See also* the federal sentencing guidelines, 18 U.S.C. § 4A1.3, which repeatedly invoke victim-specific characteristics like age, official capacity, injury sustained, etc. *See* ALLEN, THE HABITS OF LEGALITY, *supra* note 6, at 35, 73-77.

¹⁵¹ We are told, for example, by the House of Representatives Judiciary Committee, in its report on the "Crimes Against Children and Elderly Persons

extraordinary—increase in expected periods of incarceration, applying with special arbitrariness to inmates who are affected retroactively.¹⁵² More ironically still, the inevitable overcrowding effect has generated unexpected results of the opposite kind: another revolving door, the sudden release by courts and wardens of some prisoners *en masse* to accommodate the need for bed space.¹⁵³ Of course, although pardon and parole are not liberty interests as such, for the time being these practices remain subject to due process and ex post facto restrictions on the manner of their application.¹⁵⁴

E. Perversion of Substantive Rule of Law Norms and the Delegation of Rule of Law

More generally, how is the destruction of rule of law justified by Nazis or victims' rights advocates? Notably, neither Schmitt nor the Nazis generally styled themselves as agents of the utter destruction of positive social ideals and norms as such. Even *Mein Kampf* extolls the universal triumph of the personality.¹⁵⁵ In their focus on liberalism and law, Schmitt

Increased Punishment Act," that "[o]nly a uniform approach which communicates society's intolerance for these heinous crimes will provide sufficient deterrence." H.R. REP. NO. 104-548, at 2 (1996).

¹⁵² It should be noted that such retroactivity is permissible only with respect to "procedural" aspects of the parole process—which, of course, can entail a great deal. See, e.g., *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), *on remand*, 56 F.3d 46 (9th Cir. 1995).

¹⁵³ See, e.g., Rena Singer, 'Musical Inmates,' *Desperate Prisons, Jail Overcrowding Has Hit Suburbia*, PHILA. INQUIRER, May 25, 1997, at B1.

¹⁵⁴ On the kind of liberty interests created by pardon and parole, see generally *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1 (1979), and *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The power to pardon is generally construed as the exclusive province of the executive branch, thus protected by separation of powers from legislative or judicial appropriation. Since the constitutional doctrine of separation of powers has not been extended to the states, the composition of the Nevada Board of Pardons is not subject to challenge under the doctrine. See *Bean v. State of Nevada*, 410 F. Supp. 963 (D. Nev. 1974), *aff'd*, 535 F.2d 542 (9th Cir. 1976). On the limitations imposed by the Ex Post Facto and Due Process Clauses on deprivations of parole related interests, see, for example, *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995), *cert. granted*, 517 U.S. 1219 (1996), *affirmed*, 117 S. Ct. 1148 (1997), and *Newbury v. Prisoner Review Board*, 791 F.2d 81 (7th Cir. 1986). See also Thomas J. Bamonte, *The Viability of Morrissey v. Brewer and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U. L.J. 121 (1993).

¹⁵⁵ See HITLER, *supra* note 89, at 660-72.

and other Nazis were careful to claim that they had come not to destroy but to perfect the law. In Neumann's view, "National Socialism takes advantage of the incompleteness of the liberal ideas of freedom and equality. It charges that freedom and equality are cloaks behind which exploitation is hidden."¹⁵⁶ In Schmitt, this attitude is particularly evident. His critique of liberalism in *The Concept of the Political* often references liberalism's supposed traitorship of its own ideals: individualism, liberty, rationality, and the promise of social wealth.¹⁵⁷ Here, too, Schmitt regards the redemption of the political as a prerequisite to the redemption of the state's historical virtues and of conservative ideals in general.¹⁵⁸ Indeed, the traditional jurisprudence of the German historical school, which came to some fruition in the Nazi era, is premised squarely on the idea of recapturing a legal order consistent with the spirit of the German people. This ambition is invariably articulated with a rather perverse appeal to the "true" virtues of law as such. This logic is evident in the words of the Nazi law professor, Ernst Huber:

Formal equality cannot be the deciding factor for the law-giver. Its place is taken by the material equality of *völkisch* law which grows out of the experience of the equality of a common *völkisch* nature. This new concept of equality enables us to distinguish in the legislative sphere as well the alien from our own character, the hostile from the loyal to the community, the subversive from the constructive forces, while the relativism of pervious formalistic philosophy would have required equal treatment of these elements.¹⁵⁹

As noted, the perversion of rule of law norms is attendant to restitution and minimum sentencing. This perverse logic also appears in proponents' characterization of victims' rights as a return to the historical essence of criminal justice. Indeed, far from incidental, the appeal to history is ubiquitous in victims' rights rhetoric, typifying both ground level and academic discourse.¹⁶⁰

More commonly appealed to in this justifying role, though, is the norm of equality, which in victims' rights rhetoric is framed in terms of

¹⁵⁶ NEUMANN, BEHEMOTH, *supra* note 4, at 452.

¹⁵⁷ See SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 3, at 69-77.

¹⁵⁸ See *id.* at 21-23; see also NEUMANN, BEHEMOTH, *supra* note 4, at 42 ("[For Schmitt,] equality is its [democracy's] substance, not liberty.").

¹⁵⁹ NAZISM: A DOCUMENTARY READER, *supra* note 89, at 477.

¹⁶⁰ See, e.g., Eikenberry, *supra* note 80; Gittler, *supra* note 80; Hudson, *supra* note 80; McDonald, *supra* note 80.

"balance" and "fairness." Such arguments are, in fact, ubiquitous, forming what writer and violent crime victim Bruce Shapiro calls "an article of faith" for the whole movement.¹⁶¹ One of many examples of this attitude appears in the watershed—and often quoted—1982 Report of the President's Task Force on Victims of Crime:

[Victims] discover instead that they will be treated as appendages of a system appallingly out of balance. They have learned that somewhere along the way the system has lost track of the simple truth that it is supposed to be fair and to protect those who obey the law while punishing those who break it.¹⁶²

In a 1996 speech announcing his support for a federal victims' rights amendment, President Clinton lent his voice to a common chorus when he said that such an amendment is necessary, in part, to right a system that "bends over backwards to protect those who may be innocent" while ignoring innocent victims.¹⁶³ With equal certainty, the demand for balance is rehearsed by legal scholars.¹⁶⁴ As one set of authors suggests, victims' rights is essential to overcoming the "tremendous weight accorded defendants' rights, in our criminal justice system."¹⁶⁵ Indeed, for most scholars who advocate victims' rights, historical and "balancing" arguments are lumped together, apparently to better underscore the supposed legitimacy of victims' rights.¹⁶⁶

¹⁶¹ Shapiro, *supra* note 82, at 13.

¹⁶² PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT at vi (1982).

¹⁶³ President's Remarks Announcing Support for a Constitutional Amendment on Victims' Rights, 32 WEEKLY COMP. PRES. DOC. 1134 (July 1, 1996).

¹⁶⁴ For law professor and victims' rights ideologist Paul Cassell, the restoration of private criminal justice again contemplates a search for lost balance. *See* Cassell, *supra* note 80, at 1379-82; *see also* Gittler, *supra* note 80; Hudson, *supra* note 80.

"Victim's rights acts and individual laws designed to protect victims seek to balance a system that has, in the past, focused *solely* on the rights of the accused." DEBRA J. WILSON, THE COMPLETE BOOK OF VICTIMS' RIGHTS at vi. (1995).

¹⁶⁵ Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, in EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 163-75 (1988).

¹⁶⁶ *See, e.g.,* Eikenberry, *supra* note 80, at 33 ("In colonial times, a person suspected of a crime was at the mercy of a system that was weighted heavily in favor of the Crown. Today, it is *victims* who are treated unfairly, whose interests and needs are likely to be ignored.").

Similar rhetoric surfaces in judicial opinions, of which *Payne v. Tennessee*,¹⁶⁷ the landmark Supreme Court case which overturned established precedent to remove any constitutional impediment to victim impact testimony, is a good example. Justice Rehnquist deemed the contrary precedent “unfair”;¹⁶⁸ Justice O’Connor concurred, insisting on effectuating “societal consensus”;¹⁶⁹ Justice Scalia also concurred, declaring the old rule an “injustice” upon the people;¹⁷⁰ and, finally, Justice Souter in his concurring opinion insisted on rectifying the “arbitrariness” of the old rule.¹⁷¹ Here, the perfection of the rule of law is contemplated by the supposed ability of victim impact testimony to rectify both the rule of law’s substantive and procedural shortfalls.¹⁷²

A close cousin of the appeal to balance and fairness is the argument that victims’ rights is mandated because it fulfills populist, democratic ideals. For instance, President Clinton proclaimed that “[w]hen someone is a victim, he or she should be at the center of the criminal justice process, not on the outside looking in. Participation in all forms of government is the essence of democracy”¹⁷³ For another commentator, the federal victims’ rights amendment is necessary to craft “a more perfect union.”¹⁷⁴ The National Governors’ Association wrapped up a similar sentiment in common sense jargon:

¹⁶⁷ *Payne v. Tennessee*, 501 U.S. 808 (1991).

¹⁶⁸ *Id.* at 826.

¹⁶⁹ *Id.* at 830 (O’Connor, J., concurring).

¹⁷⁰ *Id.* at 833 (Scalia, J., concurring).

¹⁷¹ *Id.* at 839 (Souter, J., concurring). The issue in *Payne* was the admissibility of such testimony at capital sentencing hearings. Compare *Booth v. Maryland*, 482 U.S. 496, 507-507 (1987) (prohibiting the state from introducing victim impact evidence at the sentencing phase of a capital prosecution because such evidence is irrelevant, prejudicial, and liable to create *more arbitrariness*), with *South Carolina v. Gathers*, 490 U.S. 805 (1989) (holding that the victim’s personal characteristics are irrelevant to sentencing).

¹⁷² With a somewhat varied logic, other courts have essentially dogmatized the formalist implications of the rule of law to justify victims’ rights—that is, misconstrued rule *of* law for rule *by* law. In cases like *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996), *aff’d in part, rev’d in part*, 120 F.3d 1263 (2d Cir. 1997), which validated New York’s Megan’s Law, this logic surfaces as blind deference to legislative sovereignty to confirm the nonpunitive—and therefore, civil—nature of the underlying policy.

¹⁷³ President’s Remarks Announcing Support for a Constitutional Amendment on Victims’ Rights, *supra* note 163.

¹⁷⁴ Note, *supra* note 124, at 648.

These rights are not outrageous or extreme. They are common sense, basic, and natural. The Governors recognize the need for constitutional guarantees, as do victims and potential victims of crimes. These rights give bereaved victims a chance to grieve as they struggle to overcome insuperable inner torment. They provide a way for our nation to heal itself through its strongest resource: its people.¹⁷⁵

The primary problem with such arguments about equality, balance, and populism is not any manifest falsity. However, it does strain credulity to think that somewhere between the present day and the birth of this country, criminal offenders and defendants somehow possessed an absolute surplus of rights, or that there existed in the pre-Warren Court days anything approaching a rational criminal justice system. Rather, the real problem with such arguments is that they function to circumvent the unresolved jurisprudential problems with the various victims' rights proposals. In other words, to say that the system is out of balance blithely and falsely assumes that it is supposed to achieve balance between parties, much less between victims and offenders, rather than conform to any jurisprudential mandates.

Probably a more perverse kind of argument, though, is the defense of victims' rights on the broadest substantive rule of law grounds: as the fulfillment of justice and freedom under the law. In a "sample speech" prepared by the Department of Justice's Office for Victims of Crime and designed for use during National Criminal Victims' Rights Week, we get the following argument:

Victim Justice: What do these two words mean in America in 1996? They mean, first and foremost, that victims of crime only want to be treated as well as the alleged and convicted offenders. They mean that victims should be treated with dignity, compassion and respect, not only by our justice system, but by all individuals with whom they have contact in the aftermath of crime.¹⁷⁶

¹⁷⁵ NATIONAL GOVERNORS ASS'N, POLICY POSITIONS, FEBRUARY 1998 (1998).

¹⁷⁶ OFFICE FOR VICTIMS OF CRIME, DEP'T OF JUSTICE, *Sample Speech*, in 1996 NATIONAL CRIME VICTIMS' RIGHTS WEEK RESOURCE GUIDE (1996); cf. OFFICE OF THE GOVERNOR, STATE OF DELAWARE, STATEMENT IN OBSERVANCE OF CRIME VICTIMS' RIGHTS WEEK (1997) ("[A] nation devoted to liberty and justice for all . . . must increase its efforts to promote, restore and expand victims' rights. . .").

As one victim exclaimed, given a scholarly forum, "JUSTICE FOR ALL . . . EVEN THE VICTIM." Betty Jane Spencer, *A Crime Victim's Views on a Constitutional Amendment for Victims*, 34 WAYNE L. REV. 1, 6 (1987).

Or even more revealingly, another pair of writers informs us that:

Justice is one of those words—like *love* or *happiness*—that's hard to define. But everyone knows what it means. Justice has to do with getting what one deserves. It has to do with the hope that in the long run good people will be rewarded and bad people will be punished. Among personal crime victims the belief in a just world is often translated into a wish for "satisfaction." Since they have been aggrieved, it is natural for victims to expect—on some level—that their grievances will be avenged. Anyone who has been injured by another has a normal desire to get even.¹⁷⁷

Such arguments typify the scholarship in support of victims' rights, where the appeal to justice is ubiquitous.¹⁷⁸ Indeed, the best that scholars who support victims' rights can do to define the meaning of justice in this context does no more than restate the above-quoted notion of justice as some type of revenge.¹⁷⁹

Justice is therefore no more than what victims' rights needs it to be: a backward notion of retribution. Significantly, this norm is imported into the vision of its legality and only emerges in a specious way from within the rule of law construct. The failure of rule of law in the criminal context to provide justice and equality is turned, in a way that Neumann specifically cautioned against, into a dubious demand for their true fulfillment. This demand can only be satisfied in an exogenous, extralegal, and thoroughly political way. In this respect, the appeal of victims' rights to justice and balance closely replicates Schmitt's demands for true freedom, equality, and legal determinacy.¹⁸⁰

In the end, these presumptions of legality and legitimacy are the most dangerous and most problematic aspect of the agenda of victims' rights from a rule of law standpoint. They exemplify rule of law's continuous vulnerability to self-destruction. For, unlike any straightforward assault, such presumptions employ rule of law norms to suppress the otherwise obvious fact that rule of law is inconsistent with victims' rights. Rule of

¹⁷⁷ MORTON BARD & DAWN SANGREY, *THE CRIME VICTIM'S BOOK* 103-04 (1979) (footnote omitted); see also ROBERT REIF, *THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY* 131-36 (1979).

¹⁷⁸ See, e.g., Eikenberry, *supra* note 80; Hudson, *supra* note 80, at 36-37; Note, *At Least Treat Us Like Criminals: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575 (1998).

¹⁷⁹ See, e.g., Sebba, *The Victim's Role in the Penal Process*, *supra* note 80.

¹⁸⁰ See NEUMANN, *BEHEMOTH*, *supra* note 4, at 443-44.

law is not repudiated but, instead, reduced to a grab bag of so many disparate norms which, with so many contrary functions, satisfy the needs of strictly political, nonjurisprudential arguments. In such a role, the construct can have no overall coherence. In fact, in as much as the appeals to such disjointed norms contradict the coherence of rule of law, such appeals work to actively undermine rule of law's very capacity for critical meaning. If, as is the case with victims' rights, justice or balance promote the destruction of generality or equality, or if a campaign for uniformity (as with minimum sentencing) is normatively self-contradictory (recreating discretion in the name of uniformity), then rule of law itself can be nothing more than the grist of a political struggle for power and vindication divorced at all points—most notably in the scholarship—from any questions of jurisprudential propriety. In the light of day, its norms become no more than proof of certain political views and its promoters reduced to raw political players. Here lies proof of the weakness of dialectic, the political vulnerability of rule of law in history, and the deeper threat posed by victims' rights to liberal jurisprudence.

V. CONCLUSION: IS THERE A WAY TO RECONCILE VICTIMS' RIGHTS AND RULE OF LAW?

This analysis suggests very clearly the fundamental poverty of the victims' rights agenda. It is apparent that, as articulated and in very many overlapping respects, victims' rights comprises a latter day fulfillment of the horrible ideas of Schmitt and the jurisprudential agenda of the Nazi state. On a very fundamental level, victims' rights is inconsistent and incompatible with a coherent model of liberal jurisprudence based on rule of law. It is an irrational, archaic, and ultimately unsupportable idea which seems to exemplify what Erich Fromm called an "escape from freedom": the willing rejection of bourgeois liberties because they are not and cannot be perfect within the prevailing social historical context.¹⁸¹

Yet, the present critique applies to victims' rights in its main aspects and as it actually exists—and in particular as an element of the criminal law—not to the concept of assisting victims on the most general level. Victims' rights' incompatibility with rule of law, in fact, appears to derive directly from the stubborn attempt to introduce itself into the criminal law and from the "war on crime" fetish to deal with all possible social problems criminally.¹⁸²

¹⁸¹ See FROMM, *supra* note 123.

¹⁸² On this fetish for criminalization, see ALLEN, *THE HABITS OF LEGALITY*, *supra* note 6, at 91.

The idea of aiding victims generally and apart from criminal justice is actually not difficult to justify in a manner consistent with rule of law. The past century of the welfare state has demonstrated the basic compatibility of rule of law with a social order that distorts the classically distinct relationships among civil, political, and legal society. This interaction exerts at least some pressure on the rule of law. Unlike victims' rights, though, these previous compromises have avoided a truly destructive challenge to rule of law and have stayed away from contexts like criminal justice with its inherently irrational, complex, and violent character. Moreover, the welfare state, unlike criminal justice, principally trades not in raw power and coercion, but in the more rational articles of fungible wealth. To the extent that its compromises have exposed rule of law to any threat, they were also wrested from entities like corporations, business classes, and even trade unions, which are all fundamentally more powerful and legally resilient than criminal defendants and offenders. While the welfare state accomplishes—albeit not without some problems—an increase in social equality and cohesion, victims' rights does just the opposite. Indeed, the key function of the traditional welfare state is to publicize, bureaucratize, and basically rationalize the costs of modern capitalist society. This function helps facilitate society's accommodation to rule of law by undermining the sources of private and communal power. The costs of compromising rule of law in this context are largely redeemed by advancing rule of law norms in other respects (e.g., in the interests of democracy)—a notion explored by a wide range of theorists, from liberals like Mill and Rawls to John Hart Ely to Neumann himself.¹⁸³

This state of affairs suggests that a reconceptualization of victims' rights as a mode of public social welfare, segregated from the criminal justice process, may present an opportunity to salvage the idea and preserve its consistency with rule of law. I merely propose, for the sake of future argument, the idea of victims' rights in the form of public assistance (e.g., reparations, free mental and physical health services, and so forth) divorced from criminal justice altogether.¹⁸⁴ For private vindication, there remains

¹⁸³ See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); SCHEUERMAN, *supra* note 3 (commenting on efforts by Neumann, Otto Kirschheimer, and Scheuerman himself to broach the optimal connection between rule of law and democracy).

¹⁸⁴ See SEBBA, *THIRD PARTY VICTIMS*, *supra* note 81, at 20-21, 331-36. Sebba invokes a distinction between, *inter alia*, "adversary-retribution" and "social defense-welfare" models of victims' rights, which, although they do not overlap my conception entirely, donate an awareness in the scholarship of the distinction.

the civil tort, but there is not a place for victims in the criminal justice process.

A related issue raised by this discussion concerns the appropriate function of rule of law generally in contemporary society. Not by accident do Schmitt and his fellow Nazis, like contemporary "critical" leftist scholars like Roberto Unger and the victims' rights movement, make rule of law accountable for the significant questions about the fate of reason in modern society.¹⁸⁵ Not only do Neumann and Allen warn against this, but, as Marx demonstrates, this is *the* way to simultaneously negate rule of law and ignore the real bases of social reason and its deprivation.¹⁸⁶ Such practice trades every possibility of maintaining a clear focus on the value of—and the distinction between—legal and political responses to questions of criminal justice for an unbounded, populist, eventually nihilistic perspective whose logic is not only irrational and illiberal but incipiently authoritarian.

In closing, it would be premature, unfair, and concede too much to the power of law to conclude that victims' rights, through its erosion of rule of law, will *cause* a Nazi-like or otherwise fascistic turn. As is widely recognized, the causes of such movements are complex, largely economic, and nonlegal. For all his attention to legal questions, even Neumann was concerned primarily with nonlegal causes in his attempts to explain the origins of Nazism.¹⁸⁷ But, it is clear that, as the specter of Nazism drove Neumann to emphasize the value of rule of law, so now must the prospect of criminal justice gutted by victims' rights inspire a renewed appreciation of the rule of law as the foundation of criminal justice and liberal jurisprudence generally. The jurisprudential kinship of Nazism and victims' rights is simply too thorough to ignore. It must at least be asked, what are the broader implications of a society that, as evidenced by the judicial ratification of Megan's Laws and other victims' rights initiatives,

¹⁸⁵ As I have noted, Schmitt's specific strategy is to unmask rule of law as a fraudulent pretense, unable to escape the fundamental irrationality of political life. Thus, his own fraud in pretending to reveal the irrationality of law is impossible to excuse. See, e.g., SCHMITT, *THE CONCEPT OF THE POLITICAL*, *supra* note 3, at 72-79.

¹⁸⁶ See Marx, *supra* note 11, at 221. In the same spirit, Lukács cautions against forcing the cause of reason in the wrong historical moment or institutional context: "The impossibility of comprehending and 'creating' the union of form and content concretely instead of as the basis for a purely formal calculus leads to the insoluble dilemma of freedom and necessity, of voluntarism and fatalism." LUKÁCS, *supra* note 17, at 134.

¹⁸⁷ See generally NEUMANN, *BEHEMOTH*, *supra* note 4.

recognizes no firm distinction at all between civil and criminal sanctions and convicts and free people? What are the broader implications of a casual attitude toward separation of powers or judicial independence? What might be the final results of a subjectified notion of guilt? Finally, what does it mean to do all of this without any concern for rule of law, if not to open the door to the lawlessness and raw power equations of fascist rule? The possibilities are too frightening to risk.

