Articles

Criminal Code Design and Sentencing: A Response to Joshua Kleinfeld's Theory of Criminal Victimization

By ANDREW HEMMING*

I. Introduction

IN THE MAY 2013 edition of the Stanford Law Review, Joshua Kleinfeld, then an Assistant Professor at Northwestern University Law School, argued that the observed practice that criminal sentences reflected the characteristics of the victim had been overlooked by scholars in the criminal law community.[1] Kleinfeld claimed that criminal law scholars had offered no theory to explain such sentencing variations, and that therefore the pattern "had been missed or misunderstood empirically."[2] Kleinfeld further asserted that "the dominant view" of criminal law scholars, like Professor Michael Moore, is that "victim characteristics don't figure in the calculus of blame."[3] This response contends that Kleinfeld has set up a straw hypothesis or to use Andreski's apt phrase "an equivalent of sorcery."[4] Far from being missed, sentencing variations are embedded in judicial sentencing of convicted criminals. Within the ambit of a specific crime, the characteristics of the defendant and the victim have always been factors in the balancing exercise of determining the final sentence. Were it otherwise, there would be no variation in the "tariff" handed down. Absent these variations, there would be de facto mandatory standardized sentencing for every crime in the criminal codes across America. Cir-

* Senior Lecturer in Law, University of Southern Queensland, Australia.

1. Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1090 (2013).

2. *Id.* at 1087.

3. *Id.* at 1089–91.

4. STANISLAV ANDRESKI, SOCIAL SCIENCES AS SORCERY 10 (photo. reprint 1973) (1972).

cumstances of aggravation and mitigation are part and parcel of sentencing guidelines regularly included in criminal legislation by the legislature as a reflection of community expectations. The essential problem with Kleinfeld's theory of criminal victimization is that it confuses two requirements: namely, (1) the prosecution's task of proving the elements of the offense, and (2) the sentencing task. A more fruitful line of inquiry and a more complex question would be to ask whether the nature of the crime impacts the jury's decision to return a guilty verdict, rather than focus on the severity of the sentence.

Kleinfeld's criminal victimization theory is first based on the assertion that, for criminal law theory, "there is a prominent view under which, given an otherwise fixed actus reus and mens rea, the victim's characteristics should have no bearing on how wrong a crime is or what punishment it merits."[5] To support that there is this prominent view—that victims' characteristics are irrelevant[6]—Kleinfeld cites to professor Michael Moore's observation that "victims should and must be ignored if you are claiming to be doing retributive theory."[7] Kleinfeld suggests that Moore's assumption that the victim's characteristics are irrelevant to the calculus of blame "is typical of the field" of criminal law and that "mainstream criminal thought has not traditionally looked upon the position of the victim as the sort of thing that needs a theory."[8] Kleinfeld then claims "that victims might be 'integrate[d] . . . into the justification for punishment.'"[9]

Related to this unaddressed proposition is the theory of victimology, which is the notion that a crime must be viewed as "an interaction" between the criminal and the victim.[10] Kleinfeld argues that "[t]he dominant view in criminal law does not look at crime in that way, and indeed lacks the theoretical resources to look at crime in that

5. Kleinfeld, *supra* note 1, at 1089.

6. *Id.*

7. *Id.* (quoting Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999)). Moore's observations and statements, which Kleinfeld relies on to support his theory that this viewpoint is a dominant theoretical view in criminal law, were made in an article that responded to another Professor's article. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999). Kleinfeld however noted that Moore's same article does add that "victims are naturally taken up in the criminal norms themselves: there can't be a murder unless someone is killed. But [Moore] saw no role for [victims] beyond that." Kleinfeld, *supra* note 1, at 1089 (footnote omitted).

8. Kleinfeld, *supra* note 1, at 1090.

9. *Id.* (quoting George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52 (1999)).

10. Cornelius Prittwitz, *The Resurrection of the Victim in Penal Theory*, 3 BUFF. CRIM. L. REV. 109, 112 (1999).

way."[11] As explained below, such an argument misunderstands the distinction between the elements of the crime and the sentencing process.[12]

Attempting to inject the victim and defendant's interactions into the defendant's particular charge(s) is a specious argument. It is self-evident that there will always be a victim for a crime to have occurred. A defendant who pleads not guilty puts the burden on the prosecution to prove the offense[13] and its elements while also negating any raised defenses. The victim's actions may play a major role in a murder charge if self-defense or provocation are issues raised at trial, just as the characteristics of the defendant may be significant if insanity or diminished responsibility defenses are raised. But it is a fallacy of composition to suggest that criminal law should, as a matter of course, regard the victim of a crime as a major player at level with the defendant.

Kleinfeld states that his article is a critique of the dominant theoretical view, founded upon his concept entitled victimization.[14] Victimization is "the idea that the moral status of a wrongful act turns in part on the degree to which the wrong's victim is vulnerable or innocent, and the wrongdoer preys upon that vulnerability or innocence."[15] Kleinfeld's basic claim is that "the criminal system is drenched in concern for the vulnerability or innocence of victims," but "[t]o the extent criminal theory has denied [this claim], it has misdescribed the criminal law, or mistaken the moral situation, or both."[16]

Kleinfeld relies heavily on Michael Moore's statements as being representative of the dominant theoretical view in criminal law.[17] However, Moore referred to a *retributive theory* of punishment,[18] which broadly asserts that only those who commit a deliberate wrongdoing deserve punishment and that this is the sole justification for punish-

11. Kleinfeld, *supra* note 1, at 1091.

12. *See infra* Part II.

13. The spelling of the terms "offense" and "defense" vary depending on the variety of English used by a country. "Defense" and "offense" are the preferred spelling in the United States while "defence" and "offence" are used in English varieties outside of the United States. For uniformity, "defense" and "offense" are used in this article.

14. Kleinfeld, *supra* note 1, at 1092.

15. *Id.*

16. *Id.*

17. *Id.* at 1089–90, 1100.

18. Moore, *supra* note 7.

ment.[19] Retributivism is a major theory of punishment, but it does not reflect the goal of criminal law *per se*. Criminal law theorists do not deny that criminal codes are "drenched' with offenses and enhancements that increase the criminal penalty under circumstances of aggravation typically related to the victim's characteristics (e.g., minor, elder, or mentally impaired). Aggravated offenses are part and parcel of any criminal code. To suggest otherwise is disingenuous. Indeed, as Markus Dubber has pointed out, "[c]onsideration of the victim and [the victim's] interests permeates the general part of American criminal law."[20]

However, criminal law treats the victim as a participant—not a party—in an adversarial criminal trial. There is a triangulation of interests between the victim, the accused represented by a defense lawyer, and the community represented by a state prosecutor. The overarching objective is a fair trial where the accused is presumed innocent until proved guilty, and the prosecution is required to present the evidence fairly and to the standard of proof of beyond a reasonable doubt. But the fairness of a trial is compromised when measures to protect the victim's interests exceed participation in a trial or when supplementary procedures treat the victim as a party, the fairness of a trial is compromised.

To rebut the Kleinfeld's claim and to understand the position of criminal law scholars in the United States, it is necessary to look at the history and purpose of the Model Penal Code of 1962.

II. The History and Purpose of the Model Penal Code

There is a general academic consensus that, prior to the Model Penal Code, "substantive criminal law . . . was often archaic, inconsistent, unfair, and unprincipled."[21] As Robinson and Dubber point out, the analytic structure of the Model Penal Code may be summarized by three questions:

19. *Id.* at 66. *See also* Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 CRIM. JUST. ETHICS 13–14 (1997).

20. Markus D. Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 10 (1999).

21. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L REV. 943, 947 (1999) (citing Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV 1097, 1100–01 (1952)); Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 157, 157 (2003); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 322–23 (2007).

> First, does the actor's conduct constitute a crime? The code defines the contours of the law's prohibitions (and, where duties to act are created, the law commands) . . . .
>
> Second, even if the actor's conduct does constitute a crime, are there special reasons why that conduct ought not be considered wrongful in this instance, under these facts? Article 3 of the Model Penal Code answers this question through the use of justification defenses. These defenses concede the violation of a prohibitory norm, but offer a countervailing justificatory norm that undercuts the propriety of liability on the special facts of the current situation.
>
> Finally, even if the actor's conduct is a crime and is wrongful (unjustified), should the actor be held blameworthy for it? Is he or she deserving of criminal liability and punishment? This question is answered primarily by the excuse defenses and culpability requirements in [A]rticles 2 and 4 of the code. For example, wrongful conduct by an actor who is at the time insane or under duress or involuntarily intoxicated may not be sufficiently blameworthy to merit the condemnation of criminal conviction.[22]

For present purposes, in addressing Kleinfeld's earlier assertion—that for criminal law theorists "given an otherwise fixed actus reus and mens rea, the victim's characteristics should have no bearing on how wrong a crime is or what punishment it merits"[23]—it is necessary to examine the three-part structure of the Model Penal Code, commencing with the elements of the charged offense.

One of the Model Penal Code's objectives was to simplify and rationalize common law offense definitions.[24] Under the Model Penal Code, an offense consists of physical and fault elements.[25] Physical elements can be conduct, a result of conduct, or a related circumstance.[26] The Model Penal Code specifies four fault elements: purposely, knowingly, recklessly or negligently.[27] The Model Penal Code was an exhaustive attempt to match, in a seemingly binary geometric pattern, a physical element with a requisite fault element.[28] This design sought to remove the confusion as to the mens rea of a given

22. Robinson & Dubber, *supra* note 21, at 331.

23. Kleinfeld, *supra* note 1, at 1089.

24. Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 682 (1983).

25. *See generally* Robinson & Dubber, *supra* note 21, at 334.

26. *See generally id.*

27. MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1984).

28. ANDREW HEMMING, CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA 2–3 (Oxford Univ. Press 2015). The Australian Model Criminal Code is based on the American Model Penal Code. Arlie Loughnan, *'The Very Foundations of Any System of Criminal Justice': Criminal Responsibility in the Australian Model Criminal Code*, 6 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY, no. 3, 2017, at 9, 11.

offense, within common law, by breaking down a criminal offense into objective elements with a specified mental state.[29] This breakdown was a radical change. The division of the amorphous term mens rea into just four defined mental states both simplified the law and gave the legislature, rather than the judiciary, control over criminal law. However, setting out offense elements is but the first step in ascribing criminal liability.

Further, under Article 3, the Model Penal Code states that justification—such as necessity, execution of public duty, and self-protection—is an affirmative defense.[30] Even if the conduct is unjustified under Article 3, there remains the final step under the excuse defenses in Article 2 (such as mistake, intoxication, or duress)[31] or the responsibility defenses in Article 4 (such as mental disease or defect excluding responsibility).[32]

The point here is that criminal law, as well exampled by the Model Penal Code, is governed by a process of ascribing criminal responsibility to an actor. The artificial injection of the victim's characteristics into this process, as advocated by Kleinfeld, misunderstands and misrepresents the nature of criminal law. For example, the victim's characteristics are wholly irrelevant if the actor is found insane.[33] By contrast with the excuse of duress, the actor is claiming to be a victim because he or she was coerced into engaging in criminal conduct.[34]

As Dubber has observed, "[v]ictim behavior often determines the availability of a justification or excuse defense,"[35] and cites examples of domestic abuse cases where the question is whether the true victim is the deceased man or the accused woman suffering from battered woman syndrome.[36] Once it is understood that the victim is a participant rather than a party in an adversarial criminal trial, whose level of

29. Robinson & Dubber, *supra* note 21, at 335.

30. MODEL PENAL CODE §§ 3.01–3.04 (AM. LAW INST. 1984).

31. *Id.* §§ 2.04, 2.08, 2.09.

32. *Id.* § 4.01.

33. This follows because a person is not criminally responsible for an act if the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or capacity to control the person's actions, or of capacity to know that the person ought not do the act. *See, e.g.*, *Criminal Code Act 1899* (Qld) s 27(1) (Austl.).

34. Under the defense of duress, a person will not be criminally responsible for an act or omission done under compulsion or duress; that is, as a result of threats of harm made by another. *See, e.g.*, *id.* s 31.

35. Dubber, *supra* note 20, at 10.

36. *Id.* at 10–11.

participation varies depending on the circumstances of the case, it can be seen why Kleinfeld's theory of criminal victimization is wholly misplaced.

Kleinfeld's theory of criminal victimization is reminiscent of Andreski's classic text likening the social sciences to a form of academic witchcraft.[37] Andreski argued that "much of what passes as scientific study of human [behavior] boils down to an equivalent of sorcery."[38] He was particularly severe on "[p]retentious and nebulous verbosity, interminable repetition of platitudes and disguised propaganda."[39] The sorcery inherent in the theory of criminal victimization is the impermissible and inherently misconceived attempt to inject the victim's characteristics into the elements of an offense, or to use Kleinfeld's misleading phrase "an otherwise fixed actus reus and mens rea."[40]

When a victim dies in shocking circumstances, the case can lead to a change in the law. Public opinion can impact the availability of partial defenses to murder, such as provocation and diminished responsibility, for defendants charged with a particularly heinous crime. This can lead to abolition or a tightening of these defenses. For example, three Australian jurisdictions (Tasmania, Victoria,[41] and Western Australia) and New Zealand recently abolished the partial defense of provocation.[42] The case that triggered the abolition of the partial defense of provocation in New Zealand involved defendant Clayton Weatherston, who claimed he was provoked into stabbing his girlfriend, Sophie Elliott, 216 times.[43] Weatherston pleaded guilty to manslaughter but the jury found him guilty of murder.[44] Although Weatherston failed in his attempt to invoke the partial defense of

37. ANDRESKI, *supra* note 4, at 10.

38. *Id.*

39. *Id.* at 11.

40. Kleinfeld, *supra* note 1, at 1089.

41. *Crimes (Homicide) Act 2005* (Vic) s 1(a)(i) (Austl.). The case that triggered the abolition of the partial defense of homicide in Victoria was *R v Ramage* [2004] VSC 508 (Austl.), where the defendant successfully used the partial defense of provocation in circumstances where he killed his wife after she told him she was leaving the marriage and received an eleven-year sentence for manslaughter.

42. The abolished partial defense of provocation, if successful, had been used to reduce murder to manslaughter on the basis that, while the defendant had the intention to kill, he or she was provoked by the victim. *Crimes Act 1958* (Vic) s 3B (Austl.).

43. John Hartevelt, *Clayton Weatherston Guilty of Sophie Elliott's Murder*, STUFF (July 26, 2009, 9:45 AM), http://www.stuff.co.nz/national/crime/2662904/Clayton-Weatherston-guilty-of-Sophie-Elliotts-murder [https://perma.cc/B8KH-NN7T].

44. *Weatherston Found Guilty of Murder*, STUFF (Aug. 3, 2009, 12:57 PM), http://www.stuff.co.nz/nelson-mail/news/2663181/Weatherston-found-guilty-of-murder [https://perma.cc/72EQ-HKVK].

provocation, his attempt and its very presence on the statute book created such an adverse reaction in the community that it was subsequently abolished.[45] Queensland has retained the partial defense of provocation, but has reversed the onus of proof, placing a legal burden on the defendant.[46]

Similarly, in the United Kingdom, the government also changed the laws for the diminished responsibility defense.[47] The amendments to the defense occurred after the prosecution accepted Anthony Joseph's plea of diminished responsibility when he killed a complete stranger on a bus.[48] Previously, the defense required that a person's mental responsibility must be substantially impaired but did not specify in what respects this must be so.[49] Subsequently, the amendments do not permit the diminished responsibility defense to succeed when the defendant's mental condition makes no difference to his or her behavior.[50] In other words, the defense will not apply when the defendant would have killed the victim regardless of the defendant's medical condition.

45. Crimes (Provocation Repeal) Amendment Act 2009, s 5 (N.Z.). Weatherston was sentenced to a non-parole period of 18 years. Sophie Elliott's body was so badly mutilated that the family were advised not to view the body for the funeral. Debbie Porteous & Jarrod Booker, *Weatherston's Remorse 'Nonsense' – Elliott's Dad*, N.Z. HERALD (Sept. 15, 2009, 2:25 PM), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10597361 [https://perma.cc/P7TN-BKTQ].

46. *Criminal Code Act 1899* (Qld) s 304(7) (Austl.) (stating "On a charge of murder, it is for the [defense] to prove that the person charged is, under this section, liable to be convicted of manslaughter only."). Most defenses, except insanity and diminished responsibility, merely require the defendant to satisfy an evidential burden to allow the judge to put the defense to the jury, which the prosecution must then negate beyond reasonable doubt. However, where there is a legal burden placed on the defense, the defendant must satisfy the jury on the balance of probabilities (i.e., at least 51%) that the defendant was insane or suffering from diminished responsibility at the time the act was committed. HEMMING, *supra* note 28, at 270, 277. See, for example, *Criminal Code Act 1899* (Qld) s 26 (Austl.) which deals with the presumption of sanity and states: "Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved." Similarly, *Criminal Code Act 1899* (Qld) s 304A(2) (Austl.) deals with diminished responsibility and states: 'On a charge of murder, it shall be for the [defense] to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only."

47. Louise Kennefick, *Introducing a New Diminished Responsibility Defence for England and Wales*, 74 MOD. L. REV. 750, 751 (2011).

48. Coroners and Justice Act 2009, c. 25, § 52 (Eng.); Andrew Hemming, *It's Time to Abolish Diminished Responsibility, the Coach and Horses' Defence Through Criminal Responsibility for Murder*, 10 U. NOTRE DAME AUSTL. L. REV. 1, 4 n.8 (2008).

49. Ministry of Justice, Circular 2010/13, Partial Defenses to Murder; Loss of Control and Diminished Responsibility; and Infanticide; Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009, 2010, ¶ 9 (Eng.).

50. *Id.* ¶ 8.

Criminal law can and does distinguish offenses based on the characteristics of both the crime and the victim. This occurs when legislatures adopt circumstances of aggravation or utilize sub-classifications or subsections within the generic type of a particular offense.[51] This distinction, must of course, pertain to the actual offense with which the defendant is charged. Also, legislatures regularly allow for various offenses to result in alternative verdicts (such as murder and manslaughter), with the actual outcome depending on the prosecution's ability to prove an offense's elements beyond a reasonable doubt.[52]

Once the charges have been determined and a guilty verdict returned by the tribunal of fact, the second phase of sentencing commences.[53] Sentencing reflects the characteristics of the crime itself and those of the victims.[54] Again, legislatures regularly mandate a minimum level of punishment, and issue guidelines to their respective judiciaries, which are designed to assist consistency in sentencing and to reflect community expectations.[55] Sentencing legislation often details circumstances of aggravation and mitigation that a sentencing judge is obliged to take into account.[56] This process is entirely separate from the phase where the elements of the offense are established.[57]

51. *See infra* Part III.

52. *See, e.g.*, *Criminal Code Act 1899* (Qld) s 303 (Austl.) [hereinafter *Criminal Code Act* (Qld)] (stating that "[a] person who unlawfully kills another under such circumstances as not to constitute murder is guilty of *manslaughter*"). The alternative verdict provision for murder or manslaughter is found in section 576, entitled "Indictment containing count of murder or manslaughter," of the *Criminal Code Act* (Qld).

53. MIRKO BAGARIC & RICHARD EDNEY, SENTENCING IN AUSTRALIA 93 (Thomson Reuters 3d ed. 2016).

54. *See, e.g.*, *Criminal Code Act* (Qld) s 411(1)–(2). "Any person who commits the crime of robbery is liable to imprisonment for 14 years. [ ] If the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with 1 or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, the offender wounds or uses any other personal violence to any person, the offender is liable to imprisonment for life." *Id.* Section 188 of the *Criminal Code Act* of Australia's Northern Territory provides an example more specifically related to the victim's characteristics. *Criminal Code Act 1983* (NT) s 188 (Austl.) [hereinafter *Criminal Code Act* (NT)]. The baseline punishment for assault imprisonment is for one year, but if the victim's characteristics fall within section 188(2) (such as the person assaulted being female or under sixteen years of age), then liability to imprisonment rises to five years. *Id.*

55. *See, e.g.*, *Maximum Penalties*, QUEENSL. SENT'G ADVISORY COUNCIL, http://www.sentencingcouncil.qld.gov.au/about-sentencing/maximum-sentences (last updated Aug. 3, 2018) [https://perma.cc/BPR8-XY7L].

56. *See, e.g.*, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (Austl.).

57. *See, e.g.*, *Criminal Code Act Compilation Act 1913* (WA) s 326 (Austl.) (increasing the penalty from fourteen years in s 325 to twenty years for aggravated sexual penetration without consent of the victim).

The severity of punishment will depend on the circumstances of the crime, and it can reflect the community's outrage in response to a terrible crime. A theory of criminal victimization is not required to explain this. For example, there is the case of British serviceman Lee Rigby.[58] Rigby was run over by two Muslim assailants with a car and then was hacked to death in broad daylight.[59] The perpetrators claimed they acted on the will of Allah.[60] One assailant was sentenced to a whole-life prison term, while the other was sentenced to life with a minimum of forty-five years.[61] The presiding judge, Justice Sweeney, described the killing as a "bloodbath" and "sickening and pitiless."[62] In her victim impact statement, Rigby's widow said that their three-year-old son would "grow up and see images of his dad that no son should have to endure."[63]

The sentences for Rigby's killers reflected the community's extreme outrage at the fact that: (1) the victim was completely innocent and chosen solely because he was in military uniform; and (2) the attackers attempted to behead the victim as retaliation for the British military's presence in Islamic countries.[64] The murder went to the heart of society's affection and pride in its military and society's revulsion at the brutal premeditated manner in which the innocent victim

58. Lucy Rodgers & Salim Qurashi, *Lee Rigby Murder: Map and Timeline*, BBC NEWS (Feb. 26, 2014), http://www.bbc.com/news/uk-25298580 [https://perma.cc/7MGY-SFBT].

59. Katrin Bennhold, *2 Found Guilty in Grisly Killing of British Soldier*, N.Y. TIMES (Dec. 19, 2013), https://www.nytimes.com/2013/12/20/world/europe/2-found-guilty-in-killing-of-british-soldier.html [https://perma.cc/2Z27-4DUV].

60. Josh Halliday, *Lee Rigby Trial: Accused's Claim to be a Soldier of Allah 'No Defence for Murder'*, GUARDIAN (Dec. 17, 2013, 2:14 PM), https://www.theguardian.com/uk-news/2013/dec/17/lee-rigby-trial-accused-no-defense [https://perma.cc/6X44-GJ7E].

61. Henry Chu, *Killers of British Soldier in London Sentenced, One to Life in Prison*, L.A. TIMES (Feb. 26, 2014), http://articles.latimes.com/2014/feb/26/world/la-fg-wn-britain-soldier-slain-sentencing-20140226 [https://perma.cc/B6XE-ET5V].

62. Jacquelin Magnay, *'Betrayers of Islam' Abuse Judge*, AUSTRALIAN (Feb. 28, 2014, 12:00 AM), https://www.theaustralian.com.au/news/world/betrayers-of-islam-abuse-judge/news-story/46f57d66aeeab0efe03117bd20ab83a9?sv=525953f70e1455b328e0a5b917a68d6f [https://perma.cc/5RZZ-KCZQ].

63. David Brown, *Family Thankful for 'Right' Penalty*, AUSTRALIAN (Feb. 28, 2014, 12:00 AM), http://www.theaustralian.com.au/news/world/family-thankful-for-right-penalty/news-story/9e3dd7e38a95a44034e5007940a713c8?sv=479945da0d7df6d0eea62c3143136cee [https://perma.cc/YY7J-YL7F].

64. Chris Greenwood, Rebecca Evans & Martin Robinson, *Fiancée and Estranged Wife of Soldier Lee Rigby Flee Murder Trial in Tears as Jury is Shown CCTV Footage of Moment 'Muslim Converts Ran Him Down Before Almost Decapitating Him with Meat Cleaver and Knives'*, DAILY MAIL (Nov. 29, 2013, 5:52 AM), http://www.dailymail.co.uk/news/article-2515493/Soldier-Lee-Rigby-murdered-mutilated-decapitated-Woolwich-attack-court-hears.html [https://perma.cc/SR9T-A5A8].

was killed, which explains why the sentence was so severe. The victim personified innocence while his attackers personified evil. The impact of this juxtaposition can go so far as to divide a nation, as the case of Alfred Dreyfus demonstrates.[65] Dreyfus was falsely accused of passing military secrets to the Germans and framed by a military court, an action that was covered up by the French army until the publication of Emile Zola's famous letter J'accuse.[66] This case divided the Third French Republic from 1894 until its resolution in 1906.[67]

Then again, do we really need a theory of criminal victimization to explain and understand that a defendant charged with killing multiple victims compared to one victim are treated differently at the sentencing stage even though the actus reus and mens rea for each separate murder was the same?[68] Two cases on either side of the Atlantic involving multiple murders illustrate the point that the sheer number of victims mandates a whole life sentence to protect society from the possibility of their ever being released. Dennis Nilsen in England received a "whole life" order meaning there is no possibility of parole.[69] Jeffrey Dahmer in the United States received life terms.[70]

65. *Dreyfus Affair: French History*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/event/Dreyfus-affair [https://perma.cc/6F73-K5TU]. Alfred Dreyfus, who was Jewish, was a French army captain "who had been convicted of treason for allegedly selling military secrets to the Germans in December 1894." *Id.* As evidence emerged that Dreyfus was innocent and the real culprit was another French officer, Ferdinand Walsin-Esterhazy, France was split into two camps: the anti-Dreyfusards who thought it was an attempt by the nation's enemies to discredit the army, and the Dreyfusards who saw the case as one of the freedom of the individual subordinated to national security. *Id.*

66. *J'accuse: Letter by Zola*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Jaccuse [https://perma.cc/4YEF-BQP9]. Emile Zola published an open letter to the President of the French Republic in the newspaper *L'Aurore* on January 13, 1898, which blamed the army for covering up its mistaken conviction of Dreyfus. *Id.*

67. Elizabeth Nix, *What Was the Dreyfus Affair?*, HISTORY (Jan. 14, 2015), https://www.history.com/news/ask-history/what-was-the-dreyfus-affair [https://perma.cc/5X93-CYXY] ("In 1899, Dreyfus was court-martialed for a second time and found guilty. Although he was pardoned days later by the French president, it [was not] until 1906 that Dreyfus officially was exonerated and reinstated in the army.").

68. Criminal Codes routinely mandate a more severe sentence for the murder of a police officer or prison warder and for multiple murderers. *See, e.g.*, *Criminal Code Act 1899* (Qld) s 305(2), (4) (Austl.) (extending the minimum non-parole period for murder to twenty-five years for the killing of a police officer and to thirty years for multiple murders). In the United States, those states that retain the death penalty allow a defendant convicted of first degree murder to be sentenced to death under specified aggravating circumstances, such as when the victim is a peace officer, a firefighter, a witness to a crime who was intentionally killed to prevent him or her testifying, or "was intentionally killed because of his or her race, color, religion, nationality, or country of origin." CAL. PENAL CODE § 190.2(a)(7)–(10), (16) (2000).

69. Neil Tweedie, *Nilsen Describes How He Murdered His First Victim*, TELEGRAPH (Nov. 10, 2006, 12:01 AM), https://www.telegraph.co.uk/news/uknews/1533738/Nilsen-de

Similarly, Ian Brady and Myra Hindley, described as the "Moor Murderers," also received life sentences in 1966 and were described by the trial judge as "two sadistic killers of the utmost depravity."[71]

III. Dismantling the Hypothesis For Circumstances of Aggravation

The father of codification, Jeremy Bentham, observed that the concept of a criminal code is one of having "no blank spaces," thereby minimizing the role of common law and judicial interpretation.[72] The United States of America and Australia, along with many other countries in the world, utilize criminal codes to express their criminal law.

"Australia has a very disparate mosaic of criminal laws with nine criminal jurisdictions."[73] Unlike Canada, which has a single criminal code,[74] Australia's criminal laws are generally territory or state-based.[75]

To show that the characteristics of both the crime and the victim are built into portions of criminal codes that establish the elements of the offense, Australian and American examples are used. Australia's Northern Territory *Criminal Code* section 213, which deals with unlawful entry into buildings, is an example of how a legislature grades offenses by virtue of circumstances of aggravation.[76] The construction of section 213 is built upon the base offense in subsection 213(1) which states that "[a]ny person who unlawfully enters a building with intent to commit any [offense] therein is guilty of an [offense]."[77] Subsequent subsections then escalate the penalty according to whether: (a)

scribes-how-he-murdered-his-first-victim.html [https://perma.cc/9UAY-SWU8]. Nilsen is a serial killer and necrophiliac who murdered fifteen young men in a series of killings committed between 1978 and 1983 in London, England. *Id.*

70. *Dahmer Offers No Excuses*, J. TIMES (Feb. 8, 1993), http://journaltimes.com/news/national/dahmer-offers-no-excuses/article_f49dcffb-6964-53c5-b025-372229a0994b.html [https://perma.cc/J7CQ-5RJT]. Dahmer was an American serial killer and sex offender, who murdered and dismembered seventeen men and boys between 1978 and 1991. *Id.*

71. KAY CARMICHAEL, SIN AND FORGIVENESS: NEW RESPONSES IN A CHANGING WORLD 2 (Leslie J. Francis et al. eds., 2003). Brady and Hindley murdered five children in England. *Id.*

72. JEREMY BENTHAM, OF LAWS IN GENERAL 246 (H.L.A. Hart ed., 1970).

73. HEMMING, *supra* note 28, at 1.

74. The Criminal Code, 1892, R.S.C. 1895 c. C-46, s 2; Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91(27) (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.).

75. *State and Territory Government*, AUSTRALIAN GOV'T, https://www.australia.gov.au/about-government/how-government-works/state-and-territory-government [https://perma.cc/SK8M-53QZ].

76. *Criminal Code Act 1983* (NT) s 213 (Austl.).

77. *See id.* s 213(1).

the person intended to commit a simple offense or a crime; (b) the building was a dwelling house and occupied at the time; and (c) the offense took place at night and the person was armed.[78] Thus, once the prosecution has proved the necessary intention under section 213(1), the physical circumstances surrounding the crime determine the relevant subsection under which the defendant should be charged.[79]

Similarly, the Illinois Criminal Code of 2012 has an equivalent offense related to home invasion. Under section 19–6(a) of Illinois' Criminal Code of 2012, the base offense of home invasion is committed when a person knowingly enters the dwelling place of another without authority and knows that one or more persons is present.[80] Next, the statute defines six circumstances of aggravation, including being armed with a dangerous weapon, intentionally causing injury, using of force, discharging a firearm that causes harm or death, and committing major sex offenses against any person(s) within that dwelling place.[81] Then, section 5/19–6(c) sets out the sentencing consequences of each aggravating circumstance, which equate to additions to the term of imprisonment.[82]

Thus, Kleinfeld's hypothesis collapses at the first hurdle. If the actus reus and mens rea are fixed under section 213(1) of Australia's *Criminal Code Act* (NT), then sections 213(2)–(6) specifically cover the circumstances of the offense. If the actus reus changes between each subsection, by virtue of the differing circumstances, then the actus reus is not fixed. Either way, it is incorrect to say that the victim's characteristics are irrelevant for criminal law theorists.[83]

However, if one continues to object in that the victim's characteristics are implicit rather than explicit under section 213 of Australia's *Criminal Code Act* (NT) above, then section 188 on assault provides a fuller example:

> (1) Any person who unlawfully assaults another is guilty of an [offense] and, if no greater punishment is provided, is liable to imprisonment for one year.
> (2) If the person assaulted:
> (a) suffers harm;
> (b) is a female and the offender is a male;
> (c) is under the age of 16 years and the offender is an adult;

78. *See id.* s 213(2)–(6).
79. *Id.*
80. 720 ILL. COMP. STAT. 5/19(a) (2012).
81. *See id.* 5/19–6(a)(1)–(6).
82. *See id.* 5/19–6(c).
83. Kleinfeld, *supra* note 1, at 1089.

> (d) is unable because of infirmity, age, physique, situation or other disability effectually to defend himself or to retaliate;
> (e) is a member of the Legislative Assembly, the House of Representatives or the Senate and the assault is committed because of such membership;
> (f) is assisting a public sector employee in carrying out the public sector employee's duties;
> (fa) is assisting a justice of the peace in carrying out the justice's functions;
> (g) is engaged in the lawful service of any court document or in the lawful execution of any process against any property or in making a lawful distress;
> (h) has done an act in the execution of any duty imposed on him by law and the assault is committed because of such act;
> (j) is assaulted in pursuance of any unlawful conspiracy;
> (k) is indecently assaulted; or
> (m) is threatened with a firearm or other dangerous or offensive weapon,
>
> the offender is guilty of [a crime] and is liable to imprisonment for 5 years [or, upon being found guilty summarily, to imprisonment for 2 years].
>
> (3) If the person assaulted is:
> (a) indecently assaulted; and
> (b) under the age of 16 years,
>
> it is not a [defense] to a charge of [the crime defined by] subsection (1) that the person assaulted consented to the act constituting the [crime].[84]

As with section 213, section 188 is founded on the base offense in section 188(1).[85] Then, subsections 188(2)(a)–(m) provide an extensive list of the various characteristics of the victim, which trigger a potential five-year term of imprisonment as opposed to the basal offense of one year.[86] The legislature specifically addressed prevalent assault situations. Under section 188(2)(b), the additional penalty is operational if the victim is a female and the offender is a male, and, under section 188(2)(c), a similar penalty applies if the victim is under the age of sixteen years and the offender is an adult.[87] Thus, the victim's characteristics are explicitly accounted for within the criminal code structures.

To drive the point home, a search of the phrase "circumstances of aggravation" in the Western Australia's *Criminal Code* reveals that it is defined five times, depending on the coverage of the particular part

84. *Criminal Code Act 1983* (NT) s 188 (Austl.).

85. *See id.* s 188(1).

86. *See id.* s 188(2)(a)–(m), 188(1).

87. *See id.* s 188(2)(b)–(c).

of the Code.[88] For example, section 221(1) under the chapter dealing with assaults and violence to the person states:

> (1) [C]ircumstances of aggravation means circumstances in which—
>
> (a) the offender is in a family and domestic relationship with the victim of the [offense]; or
>
> (b) a child was present when the [offense] was committed; or
>
> (c) the conduct of the offender in committing the [offense] constituted a breach of an order . . . made or registered under the Restraining Orders Act 1997 or to which that Act applies; or
>
> (d) the victim is of or over the age of 60 years.[89]

The legal implications of a person falling within the definition of section 221(1) above can be illustrated by section 297(3), which increases the prison term from ten to fourteen years for persons convicted of grievous bodily harm.[90] Furthermore, under section 297(5)(a)(i), the circumstances of aggravation increase criminal liability and also mandates a minimum of seventy-five percent of the specified term of imprisonment where the conduct constitutes an aggravated home burglary.[91] In effect, a double penalty is being imposed by the legislature.

Then, the chapter covering sexual offenses in the *Criminal Code Act Compilation Act* (WA) again defines circumstances of aggravation, without limiting the definition expressed in section 221, in section 319(1):

> (a) at or immediately before or immediately after the commission of the [offense] —
>
> (i) the offender is armed with any dangerous or offensive weapon or instrument or pretends to be so armed; or
>
> (ii) the offender is in company with another person or persons; or
>
> (iii) the offender does bodily harm to any person; or
>
> (iv) the offender does an act which is likely seriously and substantially to degrade or humiliate the victim; or
>
> (v) the offender threatens to kill the victim; or
>
> (b) the victim is of or over the age of 13 years and under the age of 16 years.[92]

The legal implications of a person falling within the definition of section 319(1) above are illustrated by section 324(1), which increases

88. *Criminal Code Act Compilation Act 1913* (WA) ss 221(1), 319(1), 333(D)(1), 391, 400(1) (Austl.) [hereinafter *Criminal Code Act Compilation Act* (WA)].

89. *See id.* pt V ch XXVI s 221(1) (emphasis omitted).

90. *See id.* pt V ch XXIX s 297(3).

91. *See id.* pt V ch XXIX s 297(5)(a)(i).

92. *See id.* pt V ch XXXI s 319(1).

the liability of imprisonment for a person convicted of aggravated indecent assault from five to seven years.[93] Furthermore, under section 324(3), at least seventy-five percent of the term specified in section 324(1) must be imposed if "the [offense] is committed by an adult offender in the course of conduct that constitutes an aggravated home burglary."[94] Consequently, as with grievous bodily harm, the legislature has imposed a double penalty on a convicted offender under section 324(1) where the conduct constitutes aggravated home burglary.[95] Contrary to Kleinfeld's hypothesis, this pattern of blame and punishment has not been overlooked, denied, or misdescribed.

Similar legislation is found in the Illinois Criminal Code. Section 12–2 distinguishes two separate categories of aggravated assault: (a) offenses based on the location of the conduct; and (b) offenses based on the status of the victim.[96] The locations, listed in section 12–2(a), include a public way, public property, a public place of accommodation or amusement, and a sports venue.[97] Under section 12–2(b), the fault element is knowledge.[98] Further, aggravated assault is committed where the person assaulted comes under any one of an extensive list of categories, which among others include: a person with a physical disability; a person sixty years of age or older; a teacher or school employee on school grounds; a park district employee upon park grounds; a peace officer, community policing volunteer, fireman, private security officer, emergency management worker, emergency medical technician, or utility worker; a correctional institution employee; an employee of the State of Illinois; a transit employee; and a sports official.[99] Where applicable, provided the victim is performing his or her official duties when assaulted, knowledge of that status by the perpetrator of the assault converts the offense into aggravated assault.[100]

The same code architecture is evident under section 10–1 of the Illinois Criminal Code of 2012, which deals with kidnapping.[101] Section 10–1(a) sets out the elements of the offense as a person know-

93. *See id.* pt V ch XXXI s 324(1).

94. *See id.* pt V ch XXXI s 324(3).

95. This follows through the combined effect of sections 324(1) and 324(3) of the *Criminal Code Act Compilation Act* (WA).

96. 720 ILL. COMP. STAT. 5/12–2.

97. *See id.* 5/12-2(a) (listing locations that an offender might be expected to seek a victim).

98. *See id.* 5/12-2(b).

99. *See id.* 5/12-2(b)(1)–(9).

100. *Id.*

101. *See id.* 5/10-1.

ingly and secretly confining another against his or her will.[102] Section 10–2(a) covers the circumstances of aggravated kidnapping, such as kidnapping with intent to obtain ransom, taking as his or her victim a child under thirteen years of age, inflicting great bodily harm upon the victim, concealing his or her identity, or arming oneself with a dangerous weapon.[103] The corollary is section 10(2)(b), which sets out the sentence for the specified aggravated kidnapping, and essentially involves additions to a Class X felony for kidnapping ranging from fifteen years to a term of natural life.[104]

This formula of setting out the basal offense and then specifying the factors listing the aggravated offense is repeated in sections 5/11–1.20 and 5/11–1.30, which deals with major sex offenses.[105] Under section 5/11–1.20(a)(1)–(4), the base offense of criminal sexual assault is defined as where a person commits an act of sexual penetration and uses force or the threat of force, knows the victim is unable to give knowing consent, is a family member, or holds a position of trust in relation to the victim.[106] Then, for aggravated criminal sexual assault, section 5/11–1.30(a)(1)–(10) sets out a list of factors that constitute aggravated criminal sexual assault, ranging from the use of a deadly weapon to causing bodily harm to the victim.[107]

Consequently, it can fairly be said that the criminal law is littered or drenched with examples of concern for the vulnerable victim. Diverging from Kleinfeld's claims, this article argues that the concern for the victim is *explicit* within criminal law. To suggest that mainstream criminal law is in denial as to the vulnerability or innocence of victims and—in so doing—has misconstrued the criminal law,[108] simply ignores the abundant evidence to the contrary across criminal jurisdictions which share a common law heritage.

Thus far, this rejoinder has focused on the construction of offenses and circumstances of aggravation. In the next section, the focus will shift to the sentencing phase, and the manner in which legislatures have graded the seriousness of offenses and prescribed guidelines for sentencing within a range.

102. *See id.* 5/10-1(a).

103. *See id.* 5/10-2(a)(1)–(8).

104. *See id.* 5/10-2(b).

105. *See id.* 5/11-1.20, 5/11-1.30.

106. *See id.* 5/11-1.20(a)(1)–(4).

107. *See id.* 5/11-1.30(a)(1)–(10). For present purposes, subsections 5/11-1.30(a)(5)–(6) are particularly relevant and list out factors where the victim is sixty years of age or older or is a person with a physical disability. *Id.*

108. Kleinfeld, *supra* note 1, at 1092.

IV. Dismantling the Hypothesis For Sentencing

As noted above, criminal codes and acts in Australia and America, as elsewhere in the world, have graded the penalty for an offense depending on the specific circumstances surrounding a particular crime.[109] Kleinfeld commenced his article with the example of Raymond Tibbetts who killed his wife and an elderly, physically impaired man.[110] The jury sentenced Tibbetts to death for only the elder man's murder.[111] As a result, beginning the dismantling of Kleinfeld's hypothesis it seems appropriate to commence with the offense of murder.[112]

Under section 305(1) of the *Criminal Code* (Qld) and section 181(2) of the *Corrective Services Act 2006* (Qld), a person convicted of murder faces three possible baseline sentences: (a) if they killed more than one person or had previously been convicted of murder, the minimum parole period is 30 years' imprisonment; (b) if they killed a police officer, the minimum parole period is 25 years' imprisonment; and (c) if (a) and (b) do not apply, the minimum parole period is 20 years' imprisonment.[113]

Similarly, under section 157(1) of the *Criminal Code* (NT) and section 53A(1) of the *Sentencing Act 1995* (NT), a person convicted of murder faces a standard non-parole period of twenty years,[114] or, if any of the circumstances listed in section 53A(3) apply, a non-parole period of twenty-five years:

> (a) the victim's occupation was police officer, emergency services worker, correctional services officer, judicial officer, health professional, teacher, community worker or other occupation involving the performance of a public function or the provision of a community service and the act or omission that caused the victim's death occurred while the victim was carrying out the duties of his or her occupation or for a reason otherwise connected with his or her occupation;
> (b) the act or omission that caused the victim's death was part of a course of conduct by the offender that included conduct, either

109. *See supra* Part III.

110. Kleinfeld, *supra* note 1, at 1088–89.

111. State v. Tibbets, 749 N.E.2d 226, 237–39 (Ohio 2001).

112. Australia has no death penalty for murder. The last man hanged in Australia, Ronald Ryan, went to the scaffold in 1967. *Last Man Hanged: 50 Years in Australia Without an Execution*, BBC NEWS (Feb. 2, 2017), http://www.bbc.com/news/world-australia-38837092 [https://perma.cc/WQT5-YGFK].

113. *Criminal Code Act 1899* (Qld) s 305(1) (Austl.); *Corrective Services Act 2006* (Qld) s 181(2) (Austl.).

114. *Criminal Code Act 1983* (NT) s 157(1) (Austl.); *Sentencing Act* (*1995*) (NT) 53A(1) (Austl.) [hereinafter *Sentencing Act* (NT)].

> before or after the victim's death, that would have constituted a sexual [offense] against the victim;
> (c) the victim was under 18 years of age at the time of the act or omission that caused the victim's death;
> (d) if the offender is being sentenced for 2 or more convictions for unlawful homicide;
> (e) if the offender is being sentenced for one conviction for murder and one or more other unlawful homicides are being taken into account;
> (f) at the time the offender was convicted of the [offense], the offender had one or more previous convictions for unlawful homicide.[115]

The victim's occupation, age and gender are all specifically identified as factors meriting additional punishment. Additionally, subsections 53A(4) and 53A(5) go further in allowing the sentencing judge to either fix a longer non-parole period or refuse to set a non-parole period at all:

> (4) The sentencing court may fix a non-parole period that is longer than a non-parole period referred to in subsection (1)(a) or (b) if satisfied that, because of any objective or subjective factors affecting the relative seriousness of the [offense], a longer non-parole period is warranted.
> (5) The sentencing court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the [offense] is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.[116]

Taking the case of British soldier Lee Rigby[117] as an example of a crime at the most serious end of the sentencing scale, a sentencing judge would have recourse if a similar crime were committed in the Northern Territory to either the relative seriousness of the offense in subsection (4), or a term of imprisonment for the term of the offender's natural life in subsection (5).[118] These subsections are designed to give the sentencing court maximum flexibility because they are couched in general terms to facilitate sentencing flexibility.[119] The phrases "objective or subjective factors affecting the relative seriousness of the [offense]", and "the [offense] is so extreme the community interest in retribution, punishment, protection and deterrence can only be met" by a life sentence, clearly reflect the characteristics of

115. *Sentencing Act* (NT) s 53A(3).
116. *Sentencing Act* (NT) s 53A(4)–(5).
117. Bennhold, *supra* note 59.
118. *Sentencing Act* (NT) s 53A(4)–(5).
119. *Id.*

the perpetrator and the victim, and the nature of the crime.[120] A theory of criminal victimization is not necessary to label a serial killer of women as falling within a whole-life sentence. The community instinctively understands that a "Jack the Ripper" or a "Hannibal Lecter" type character is so dangerous and preys on such vulnerable members of society as to require permanent, life-long incarceration.[121]

Murder and manslaughter are alternative verdicts. There are two types of manslaughter: voluntary manslaughter and involuntary manslaughter.[122] The absence of the element of intent is the key distinction between voluntary and involuntary manslaughter.[123] Voluntary manslaughter occurs where the person intends to kill but where there is a partial defense to murder such as provocation or diminished responsibility.[124] Involuntary manslaughter occurs where there is an unlawful and dangerous act or gross criminal negligence.[125] The point being that there is a link between the level of criminal responsibility and sentencing, which is reflected in both the mental element, the existence of a defense and the vulnerability of the victim. In this sense, criminal law theory does explain sentencing variations.

Take the hypothetical example of a mother charged with killing her healthy new born child. Depending on the circumstances of the case, the prosecution may charge her with murder or manslaughter.[126] This will involve an assessment of her mental state at the time of the baby's death.[127] On the one hand, society understands that a new mother may be suffering from postnatal depression or be otherwise mentally impaired, while on the other hand a baby is defenseless and killing a baby is a heinous breach of trust between mother and baby.[128] If the circumstances reveal that the mother callously and

120. *Id.*

121. Jack the Ripper was the name given to an unidentified serial killer of prostitutes in Whitechapel, London in 1888. Ben Johnson, *Jack the Ripper*, HISTORIC UK, https://www.historic-uk.com/HistoryUK/HistoryofEngland/Jack-the-Ripper/ [https://perma.cc/ZP5S-QW5E]. Hannibal Lecter is a cannibalistic serial killer character created by novelist Thomas Harris. THOMAS HARRIS, SILENCE OF THE LAMBS 4 (1988).

122. HEMMING, *supra* note 28, at 137.

123. *Id.*

124. *Id.*

125. *Id.*

126. Subject to legislative exceptions, the fault element for murder is intention, while the fault element for manslaughter is recklessness or criminal negligence. *Id.*

127. A person may have the necessary fault element for murder, but the charge may be reduced to manslaughter if the person is suffering from diminished responsibility at the time of the killing. *Id.*

128. Charging a person with a specific form of homicide offense is both a subjective and objective exercise, which depends on a balancing act based on the mental state of the

cold-bloodedly dumped the baby in an exposed and isolated site knowing that the chances of the baby being found alive were virtually zero while fully intending to continue her social life as though the baby had never existed, then society would rightly condemn such an act as being a heinous murder. Upon conviction, depending on the American state in which the killing occurred, the jury could recommend the death penalty.[129]

In contrast, if the mother had a long history of mental illness, had suffered from documented severe postnatal depression, or had been neglected by social services and poorly supported by her family, then the circumstances would be so obviously different from the first example such that society would expect the prosecution to take an entirely different approach to the second mother's level of criminal responsibility.

Both babies were killed, but the criminal law does not treat the deaths as equivalent for two reasons. First, there is a ladder of criminal responsibility or an index of mens rea that encompasses the mental element. At the top is intention, followed by knowledge, recklessness, and negligence.[130] Murder requires the fault element of intention.[131] This is clearly evident in the first example, but less so in the second example. To illustrate, in a situation where a medication caused a baby's death, it could be unclear whether the mother understood exactly what she was giving the baby. Here, the prosecution might rely on inferences: Statements by the mother that she wanted to kill the baby would evidence that the administration of the wrong medication was not an accident. Even assuming the prosecution could prove this beyond reasonable doubt, the second reason why the criminal law does not treat the deaths of the two babies as equivalent is that the

person (subjective) and the circumstantial evidence (objective). In this sense, the police and prosecutor, in determining the actual charge, act on behalf of society or the community. *Id.*

129. With regard to death penalty cases, the victims' rights movement gained traction in that a victim impact statement does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Payne v. Tennessee, 501 U.S. 808 (1991). However, courts held that "the punishment phase of a criminal trial is not a memorial service for the victim", in finding that a seventeen minute video montage of photographs depicting the victim's life set to music was wrongly admitted as victim-character evidence because it was more prejudicial than probative. Salazar v. State, 90 S.W.3d 330, 335–36 (Tex. Crim. App. 2002).

130. HEMMING, *supra* note 28, at 2.

131. *See* Andrew Hemming, *In Search of a Model Code Provision for Murder in Australia*, 34 CRIM. L.J. 81, 81 (2010). This is the case in all Australian jurisdictions except New South Wales which also allows the fault element of reckless indifference to human life. *Crimes Act 1900* (NSW) s 18(1)(a) (Austl.).

outcome of each case is determined by the circumstances that pertained at the time the offense was committed.[132]

The second part of sheeting home (to fix the responsibility for) criminal responsibility is rooted in the absence of defenses or excuses. On the facts in the second example, there is clear evidence of mental illness that goes to the mental state of the mother. Possible defenses include diminished responsibility (reduces murder to manslaughter if successful) or "irresistible impulse" (acquittal if successful). If the outcome were a manslaughter conviction based on the partial defense of diminished responsibility, then sentencing would take place in an altogether different context from the first example.

Thus, there is a criminal law theory rooted in criminal responsibility to explain sentencing variations even where the victim is identical, a healthy new born child, and does not rely on different characteristics of the victim. The focus here is not upon the victim, but upon the perpetrator's actions, mental state, and possible defenses. Kleinfeld's hypothesis is flawed because it is partial, overlooks the continuum of the criminal law, and overlooks that sentencing does not occur in a vacuum.[133] Sentencing is the end-product of a criminal law process in which checks and balances have long been embedded both in the criminal law and in the law of evidence. It should not be forgotten that the context is an adversarial battle between a well-resourced government against an individual.

The criminal law commences from the proposition that everyone is equal before the law. This means that, at least in theory, everyone: (1) is assumed innocent until proved guilty; (2) has the right to a fair trial; and (3) has equal treatment before the law. However, once the defendant's trial begins, everything depends on the circumstances of the case and the nature of the government's evidence. Each case is different and will be decided on its own facts. A focus on the characteristics of the victim is artificial because the issue is one of guilt, excuse, or innocence, which are all issues encompassed by criminal law theory.

132. In the Griffith Code states of Queensland and Western Australia [offenses] "are defined by reference to conduct and circumstances, which may sometimes include the existence of a specific state of mind. If the elements of an [offense] are proved, the [offense] has been committed unless the accused is relieved of criminal responsibility." Andrew Hemming, *The Patel Trials: Further Evidence of the Need to Reform the Griffith Codes*, 38 CRIM. L.J. 218, 220 n.16 (2014) (citing to email from Hon. Justice Henry George Fryberg to author (Mar. 18, 2014)) (on file with author).

133. Kleinfeld, *supra* note 1, at 1089–91.

Having examined an identical victim, it is now necessary to turn to address Kleinfeld's hypothesis in the context of variations in the victim's characteristics. Staying with a child victim, to illustrate, this section will compare the killing of a healthy baby and a baby born with significant deformities, as well as a poor life expectation. If one takes the example of a mother with a history of mental illness and adds to the factual matrix a victim born with significant deformities, then the case for compassionate treatment of the offender further strengthens.

In this sense, one can agree with Kleinfeld that, at least for the sentencing task, the outcome is an interaction between the characteristics of the offender and the victim. But not for the reason that Kleinfeld contends because his hypothesis misunderstands the distinction between the elements of the crime and the sentencing process.[134] To expound this distinction it is helpful to examine sentencing legislation in two States of Australia (Queensland and Western Australia), which provide aggravating and mitigating factors in sentencing.

In Queensland, sections 9(2)(a) to (q) of the *Penalties and Sentences Act 1992* (Qld) lists a myriad of factors that a court must consider in sentencing an offender.[135] These factors *inter alia* include the maximum and minimum penalty prescribed; the seriousness of the offense; the offender's character, age and intellectual capacity; the presence of any aggravating or mitigating factor concerning the offender; and the amount of assistance given to law enforcement agencies.[136]

In Western Australia, sentencing factors are less extensive and are summarily listed in sections 6(2)(a)–(d) of the *Sentencing Act 1995* (WA).[137] The main focus is upon aggravating factors in section (7) and mitigating factors in section (8), which are both left open under the rubric "in the court's opinion."[138]

The difference between circumstances of aggravation and aggravating factors are discussed in *Wade v The Queen*.[139] The former are defined in the *Criminal Code Act Compilation Act* (WA), and are to be distinguished from aggravating factors under the *Sentencing Act 1995*

134. *Id.*

135. *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)–(q) (Austl.).

136. *See id.*

137. *Sentencing Act 1995* (WA) s 6(2)(a)–(d) (Austl.).

138. *See id.* ss 7(1), 8(1).

139. *Wade v The Queen* (2001) WASCA 252 ¶¶ 37–45 (Court of Appeal) (Austl.).

(WA).[140] A circumstance of aggravation is always an aggravating factor, but the reverse is not always true.

> The seriousness of an [offense] must be determined by taking into account, among other things, the circumstances of the commission of the [offense] and any aggravating factors: *Sentencing Act 1995* s 6(2). Aggravating factors are defined in s 7 . . . .
>
> Section 7 makes a distinction between factors and circumstances. The reference to circumstances is a reference to the provisions of the *Criminal Code*.
>
> Aggravating factors under the *Sentencing Act* are to be distinguished from circumstances of aggravation under the *Criminal Code*.
>
> The *Criminal Code* defines circumstances of aggravation: "The term 'CIRCUMSTANCE OF AGGRAVATION' means and includes any circumstance by reason whereof an offender is liable to a greater punishment than that to which he would be liable if the [offense] were committed without the existence of that circumstance."
>
> . . . .
>
> . . . . A circumstance of aggravation is always an aggravating factor. An aggravating factor is not always a circumstance of aggravation.
>
> The difference is highlighted within the *Sentencing Act 1995* s 7(3). Under the *Sentencing Act* the responsibility for determining aggravating factors is that of the court, in reality the sentencing judicial authority. Under the *Criminal Code* the responsibility for determining whether circumstances of aggravation are proved, in the absence of a plea to that effect, is that of the jury. The word "liable" in the definition of circumstances of aggravation means liable on conviction of indictment.[141]

The above passage from *Wade* was reaffirmed in *Zimmerman v. The State of Western Australia*, where Pullin JA stated that "[i]t is the jury who must find whether or not a circumstance of aggravation exists, whereas it is for the sentencing judge to form an opinion about whether there are aggravating factors which increase the culpability of the offender."[142]

Undermining Kleinfeld's hypothesis, *Wade* and *Zimmerman* highlight two conclusions: (1) a statutorily specified circumstance of aggravation is a matter for the jury; and (2) the balancing process in sentencing between aggravating and mitigating factors is a matter for the sentencing judge.[143] The first conclusion for circumstances of ag-

140. *Criminal Code Act Compilation Act* (WA) ss 221(1), 319(1), 338D(1), 391, 400(1) (Austl.); *Sentencing Act 1995* (WA) s 7 (Austl.).

141. *Wade v The Queen* (2001) WASCA 252 ¶¶ 37–45.

142. *Zimmerman v Western Australia* (2009) WASCA 211 ¶ 60 (Court of Appeal) (Austl.).

143. *See Wade v The Queen* (2001) WASCA 252 ¶ 45; *Zimmerman v Western Australia* (2009) WASCA 211 ¶ 60.

gravation disposes of Kleinfeld's argument that the criminal law does not acknowledge whether the particular crime is "an interaction" between the criminal and the victim.[144] The second conclusion related to sentencing negates Kleinfeld's argument in that sentencing legislation does acknowledge that the sentence imposed is "an interaction" between the criminal and the victim.[145]

Furthermore, the primary facts of a case can extend beyond the mere elements of the offense (the actus reus and mens rea), which may increase or decrease the culpability of the offender. Criminal law has long recognized that aggravating or mitigating factors have an impact on the offender's punishment and extent. An example of such specific recognition can be found in the judgment in *Marker v The Queen:*

> The primary facts . . . extending beyond the elements of the [offense], may be either aggravating factors which, in the Court's opinion, increase the culpability of the offender: *Sentencing Act* s 7(1), or mitigating factors which, in the Court's opinion, decrease the culpability of the offender or the extent to which he or she should be punished: *Sentencing Act* s 8(1). Aggravating factors must be proved by the Crown beyond reasonable doubt. Mitigating factors must be established by the offender on the balance of probabilities: *Langridge v The Queen* (1996) 17 WAR 346; *R v Olbrich* (1999) 199 CLR 270. Shortly put, what is stated from either side of the bar table may be accepted unless challenged. If challenged, it will be for the Crown to prove any aggravating circumstance upon which it wishes to rely, beyond reasonable doubt, and for the offender to prove any mitigating circumstance upon which he or she wishes to rely, on the balance of probabilities.[146]

A similar point was made in *Elyard v The Queen*:

> Terms such as "aggravating factors" and "mitigating factors", have a long history of use in this area of the law. Depending on context, usage may vary, but one common intention is to identify those circumstances which may tend to place a particular [offense] towards the upper or lower ends of a range of moral culpability.[147]

An offender is likely to sit on a spectrum of a particular offense range, from minor to those considered to be the "worst type" of circumstances related to the particular offense. An example of the worst kind of sexual offending can be found in *R v. C*, where the offender was the victim's father.[148] The father began raping the daughter when

144. Kleinfeld, *supra* note 1, at 1091.

145. *Id.*

146. *Marker v The Queen* (2002) WASCA 282 ¶ 22 (Supreme Court) (Austl.).

147. *Elyard v The Queen* (2006) NSWCCA 43 ¶ 4 (Court of Criminal Appeal) (Austl.).

148. *R v C* (2005) 151 A Crim R 570, 571 ¶ 1 (Supreme Court) (Austl.).

she was eight years old and impregnated her when she was 15 years old.[149] The father attempted an unsuccessful abortion by punching and hitting his daughter in the stomach and then inserting a wire into her vagina, endangering the life of his daughter and her unborn child.[150] In dismissing the appeal against the sentence, the judge observed that the appellant's actions were remarkable for their brutality, violence, and degradation of his daughter:

> This criminal behaviour represents an appalling breach of the trust a daughter places in her father, a breach among the most serious it is possible to imagine. The sentencing judge expressed the view that the offending required a sentence to reflect the outrage felt by the community at such behaviour. In his view, it should be reflected by way of both general and personal deterrence. It is not possible to disagree with that view.[151]

Another example of the worst kinds of criminal offenses is dangerous driving that causes the death of another. To illustrate, in *R v. Priestley*, the respondent drove while intoxicated and unlicensed, struck a cyclist, and, not only did not stop, but also dragged the cyclist attached to his truck for around six kilometers.[152] The truck dragging the victim was a significant cause of the victim's death.[153] The Court of Appeal increased the sentence from four to six years on the basis of three aggravating factors: (1) either he was so drunk that he did not know what had occurred or he did not wish to stop because he knew that he was committing the offenses of drunk driving and driving while not licensed to drive; (2) he did not render assistance to the victim when he stopped, but instead fled; and (3) he had previous drunk driving convictions.[154]

In light of the above judicial observations as to (1) the primary facts extending beyond the elements of the offense, (2) the long history of use of "aggravating" and "mitigating" factors, and (3) the spectrum of offending within a particular offense, Kleinfeld's suggestion that Moore's assumption that the victim's characteristics are irrelevant to the calculus of blame "is typical of the field" appears unfounded.[155]

149. *Id.* at 572–73 ¶ 20.

150. *Id.* at 573 ¶ 19.

151. *Id.* at 573–74 ¶ 20.

152. *R v Priestley* (2002) 137 A Crim R 289 ¶ 5 (Supreme Court) (Austl.).

153. *Id.* at ¶ 6.

154. *Id.* at ¶ 29, ¶¶ 14–15.

155. Kleinfeld, *supra* note 1, at 1090.

V. Dismantling the Hypothesis For Children and the Mentally Impaired

Kleinfeld zeroes in on crimes against children, the elderly, and the physically or mentally impaired being treated as worse than similar crimes against ordinarily situated adults as a basic assumption of American criminal law, which he considers to be "a mistake; just because something is intuitive does not make it obvious."[156] Kleinfeld further argues that the concept of victimization has explanatory and intuitive power because the common characteristic of these three groups is vulnerability and innocence.[157] For example, in the case of sexual crimes against children, Kleinfeld contends that the concept of victimization has greater explanatory power than the concept of consent.[158] "[V]ictimization is an analog concept[;] a person can be *more or less* vulnerable or innocent, and consequently *more or less* victimized. And of course, children are more innocent and vulnerable when they are younger."[159]

However, it is a one-dimensional approach to treat the criminal law dealing with sexual offenses as solely relying on the factors that vitiate consent, thereby failing to explain statutory rape schemes that distinguish between non-forcible sex with a young child or a midrange teenager and adult forcible rape.[160] Such an approach overlooks the availability of defenses. In the case of adult forcible rape, the issue is often whether the defendant was mistaken as to whether the complainant was consenting.[161] In the case of teenagers and young children, the availability of the defense of mistake of fact is regularly either placed on the footing that the defendant is faced with proving his or her mistake on the balance of probabilities, or the defense of

156. *Id.* at 1118.

157. *Id.* at 1118–22.

158. *Id.* at 1122.

159. *Id.* at 1122 (emphasis in original).

160. Statutory rape is different to rape in "that the only deciding factor between legal sexual activity and statutory rape is age." Consent "does not need to be involved in the sexual contact for statutory rape to have occurred." *What is Statutory Rape?*, AGE OF CONSENT, https://www.ageofconsent.net/what-is-statutory-rape [https://perma.cc/8CYK-HGJ6].

161. In rape cases, the defendant often admits sexual intercourse occurred but claims it was consensual. Thus, the case may turn on whether the defendant mistakenly believed the complainant was mistaken utilizing the mistake of fact defense. Some Australian jurisdictions like the Northern Territory have sought to narrow the defense of mistake of fact in relation to rape by defining recklessness as including "not giving any thought to whether or not the other person is consenting to the sexual intercourse." *See Criminal Code Act 1983* (NT) s 193(4A) (Austl.).

mistake of fact is entirely precluded.[162] Some examples from the Queensland and the Western Australian Criminal Codes will suffice to illustrate this distinction.

The Queensland and Western Australia criminal codes contain similar sections dealing with children and people with mental impairments who are incapable of giving consent.[163] Both codes treat sexual offenses against children or persons with a mental impaired, where the accused is the guardian, carer or lineal relative of the person, as circumstances of aggravation.[164] Consequently these offenses carry a higher custodial sentence.[165] Another significant feature in the case of minors is that mistake of fact does not apply where the child is under twelve (Queensland) or thirteen (Western Australia) or in the case of incest or lineal relatives.[166]

No defense is available—making it effectively strict liability—if the child is under twelve (Queensland) or thirteen years of age (Western Australia).[167] If the child is between twelve and fifteen (Queensland) or between thirteen and fifteen years of age (Western Australia), then the defense that the accused was under an honest and reasonable mistake that the child was over sixteen years of age is available, but the onus of proof is upon the accused person on the balance of probabilities.[168] In Western Australia, if the child is over sixteen and under eighteen years of age, the defense of mistake of fact does not apply if the child was under the care, supervision or authority of the accused.[169]

As previously mentioned, both codes also identify sexual offenses against persons with mental impairments.[170] The key issue here is

162. *See, e.g.*, *Criminal Code Act 1899* (Qld) ss 215(5), 229 (Austl.) [hereinafter *Criminal Code Act* (Qld)].

163. *See, e.g.*, *Criminal Code Act* (Qld) ss 215, 216; *Criminal Code Act Compilation Act 1913* (WA) ss 321, 330 (Austl.) [hereinafter *Criminal Code Act Compilation Act* (WA).

164. *See, e.g.*, *Criminal Code Act* (Qld) ss 216(3), 216(3A); *Criminal Code Act Compilation Act* (WA) ss 330(7)(b), 330(8)(b).

165. *See, e.g.*, *Criminal Code Act* (Qld) ss 216(3), 216(3A); *Criminal Code Act Compilation Act* (WA) ss 330(7)(b), 330(8)(b).

166. *See Criminal Code Act* (Qld) ss 210(4), 229; *Criminal Code Act Compilation Act* (WA) ss 320, 331, 329(2).

167. *See, e.g.*, *Criminal Code Act* (Qld) ss 208(2)(a), 215(3); *Criminal Code Act Compilation Act* (WA) s 320.

168. *See, e.g.*, *Criminal Code Act* (Qld) s 215(5) ("If the [offense] is alleged to have been committed in respect of a child of or above the age of 12 years, it is a [defense] to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years."); *Criminal Code Act Compilation Act* (WA) s 321(9).

169. *See Criminal Code Act Compilation Act* (WA) s 322(6).

170. *See Criminal Code Act* (Qld) s 216; *Criminal Code Act Compilation Act* (WA) s 330.

whether the accused believed on reasonable grounds that the person was not impaired, or whether the accused knew the person was impaired.[171]

This demonstrates that both the Queensland and Western Australian criminal codes recognize the vulnerability and innocence of the victim in precluding the availability of the defense of mistake of fact or of requiring the accused person to prove he or she was reasonably mistaken. Thus, the Kleinfeld hypothesis that the criminal law overlooks the interaction between the criminal and the victim is erroneous in the case of sexual crimes against children and persons with a mental impairment, two of the most vulnerable and innocent groups in society.

VI. Conclusion

A Criminal Code is not a philosophical tract in criminology or an extended statement of a particular penal theory. Codification has been defined as "the setting out in one statute of all the law affecting a particular topic whether it is to be found in statutes or in common law."[172] This is consistent with Ashworth's expectation that a Criminal Code should be "an authoritative statement of the major [offenses] [which under a code] would be more accessible and more comprehensible, and there would be greater consistency in terminology and greater certainty in the scope of [offenses]."[173]

If a Criminal Code is an authoritative statement by the legislature of the major offenses, is it necessary for criminal law scholars to develop a theory to explain, for example, the relativity between a basal offense such as common assault and defined circumstances of aggravation under which the elements of common assault are committed? Are these circumstances not self-evident? On a broader scale, the famous second sentence of the United States Declaration of Independence states: "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain

171. *See Criminal Code Act* (Qld) s 208(4)(a) (dealing with a defense to unlawful sodomy with an impaired person, and requires the accused person to prove on the balance of probabilities that he or she believed on reasonable grounds that the alleged victim was not a person with an impairment of the mind).

172. Justice Ronan Keane, Address at Thirtieth Anniversary of the Law Reform Commission of Ireland: 30 Years of Law Reform 1975–2005 (June 23, 2005).

173. Andrew Ashworth, *Interpreting Criminal Statutes: A Crisis of Legality?*, 107 LAW Q. REV. 419, 420 (1991).

unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness . . . ."[174]

Kleinfeld's critique of criminal scholarship is that despite Criminal Codes being heavily populated with circumstances of aggravation, the presence of aggravating and mitigating factors in sentencing legislation, and the exclusion of certain defenses against the most vulnerable and innocent groups in society, mainstream criminal thought has purportedly overlooked the need to offer a theory for the criminal law's response to victim characteristics.[175] To fill this alleged "gap," Kleinfeld offers a theory of victimization, which posits the notion that crime must be viewed as "an interaction" between the criminal and the victim.[176]

This rejoinder has sought to dismantle Kleinfeld's hypothesis at a variety of levels because the circumstances of the crime are embedded in the criminal law. First, it is banal to refer to "an interaction" between the criminal and the victim because every crime (ignoring the misnamed "victimless" crimes) requires an offender and a victim. Second, it is misconceived as every crime is comprised of physical and mental elements (the *actus reus* and the *mens rea*), which are independent of the characteristics of the offender and the victim. Third, it is inaccurate as the criminal law takes into account circumstances of aggravation and precludes the operation of certain defenses against the most vulnerable and innocent groups in society. Fourth, it is simply wrong, given the presence of aggravating and mitigating factors in sentencing legislation.

Thus, contrary to Kleinfeld's hypothesis, the criminal law and Criminal Codes have not missed or misunderstood empirically the pattern of blame and punishment, where the characteristics of the offender and the victim vary and the circumstances of the offense differ. Kleinfeld appears to have clamped onto Moore's assumption that the victim's characteristics are irrelevant to the calculus of blame as being "typical of the field," and then shoehorned his theory of victimization into the alleged "gap" created by this supposedly dominant view. There is no basis for Kleinfeld's assertion that Moore's view is representative of criminal law scholars, or that a theory is required to explain the self-evident truth that the outcome of a criminal case will depend on all the circumstances.

174. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
175. Kleinfeld, *supra* note 1, at 1089–91.
176. *Id.* at 1090–92.