Victimisation, Moral Panics, and the Distortion of Criminal Justice Policy: A Review Essay of Ezzat Fattah's "Towards a Critical Victimology"

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Introduction

It is indisputable that the concerns and fears of victims of crime were, until the last decade or so, insufficiently acknowledged by the official justice system. Since about 1984 the position has changed rapidly and radically. Fattah believes that the pendulum has now swung too far, that the victim perspective has distorted many aspects of the criminal justice system, and that single-issue protagonists have hijacked much of the debate. His book, *Towards a Critical Victimology*,[1] is a collection of essays which in one way or another lend some support to this broad thesis.

The book contains virtually no mention of Australian material. In explicating and analysing its most important themes, therefore, I shall also weave in Australian illustrations of Fattah's points where appropriate. It will be seen that much the same kind of overreach of the victimisation "industry" has occurred in this country as in North America.

"Valence Issues" and "Position Issues"

Lynne Henderson (ch 4) tellingly asks: "Who could be anti-victim?" She argues: the symbolic strength of the term "victim's rights" overrides careful scrutiny. Fattah agrees; he calls this a "valence issue" — *one upon which there is broad consensus to the point of virtual unanimity*. Victims should receive enhanced protection and rights; so self-evident is this that there is, and can be, no credible opposition.

Thus it is that "position issues" — *how to structure those rights and relate them to competing values and other persons' rights* — become swamped; to debate them at all seems to be little more than churlish confrontation with the prevailing ideological and emotional consensus. Recognition that there must be choices between alternatives, in this as in all areas of social policy, has thus been weak and undeveloped.

Jenkins has made the same point in relation to the exponential growth in allegations of child sexual abuse in the UK, "the triumph of the abuse issue owed much to the lack of serious opposition".[2] In the early stages of moral panics, before they finally collapse under

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1 Macmillan, St Martin's Press, 1992 (ISBN 0-333-54222-3).

2 Jenkins, P, *Intimate Enemies: Moral Panics in Contemporary Great Britain* (1992) at 130.

the weight of their own exaggerations, anyone bold enough to challenge fixed positions or put forward alternatives is readily able to be represented as undermining the valence or consensus — almost literally an "outlaw". Fattah also deals with child sexual abuse — a particular example of criminal justice policy being distorted, he argues, by "missionary zeal" (p14).

Those who would focus on balance and equity within the whole criminal justice system thus become dialectically vulnerable. The charge against them is that they only care about offenders, not about victims; that they are soft on law and order. Yet as Mawby and Gill[3] have pointed out, and Fattah constantly emphasises, the law and order focus is based "on a zero-sum equation [falsely] alleging that in the interests of offenders' rights the interests of victims have been disregarded."

Fattah (p7 and see generally ch 1) gives a nice slant to this falsehood by correctly pointing out how intertwined are the relationships between victims and offenders:

> [D]ichotomising the victim/offender populations into good and evil, innocent and guilty ... is not only an oversimplification of a complex phenomenon but also a deliberate attempt to ignore ... the striking similarities, affinities and overlap between the two populations. In many respects, they are homogeneous and overlap to a large extent. The roles of victim and victimiser are neither static, assigned nor immutable. They are dynamic, revolving and interchangeable.

Yet media and political discourse is predominantly in terms of victims typically coming from different social backgrounds altogether from offenders. In other words, to some extent the victim perspective is being used to perpetuate social divisions and stereotypes — the victimised middle class/middle aged, on the one hand, and the predatory lower class/youth or young male offender, on the other. As Fattah points out, whilst some victim/offender pairs configure this way, the typical victim/offender situation is quite different — that of the disadvantaged preying upon the disadvantaged.

As long as the victim perspective is skewed towards the middle class, however, it is the foundation of all manner of oppressive criminal justice policies — policies which potentially will impact upon "them" — an outgroup — rather than "us" — worthy citizens who may be consumers, householders, members of service clubs or Neighbourhood Watch groups, and so on. Of course, a victim perspective which stressed social disadvantage, mutual to victims and offenders, would point in quite different directions, compelling commitment to the notion of smoothing down inequality and levelling up opportunity.

But this has not happened. The political power of the victims' movement can thus be seen to be yet another example of labelling theory at work — the conservative and privileged controlling society's reactions to crime or related social problems rather than addressing underlying issues of social structure.

Fattah points out that, hand in hand with the victims' movement, there have come pressures for the return of the death penalty, mandatory sentences, abolition of parole, abolition of the right to silence, more restrictive bail arrangements, shifts in the burden of proof, and calls for tougher treatment of juvenile offenders.

Western Australia is a case in point. During 1991/92 there was a media-induced moral panic about juvenile crime, beginning with a "Rally for Justice" against "juvenile predators" who were victimising ordinary citizens. There were relentless calls for tougher penalties,

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3 Mawby, R I and Gill, M L, *Crime Victims: Needs, Services and the Voluntary Sector* (1987) at 116.

some placards even calling for the hanging of the President of the Children's Court. This mirrors the "court vigilance" campaign conducted by victims' advocates in California (p9). In Western Australia the culmination of this campaign was the passage of the *Crime (Serious and Repeat Offenders) Sentencing Act* 1992, aimed at incapacitating recidivist juveniles.

Proper analysis of this legislation[4] demonstrates that it was most improbable that it would make any impact whatsoever upon the perceived problem. But such a perspective, however cogent, was irrelevant; the initiative had, in the name of reducing criminal victimisation, been captured by persons driven by a punitive law and order ethic. Scientific evaluation could be discarded altogether.

This last point gets one to the late Donald Cressey's essay, "Research Implications of Conflicting Conceptions of Victimology", reproduced here as chapter 2. This talk was originally delivered at Zagreb in 1985 at the 5th International Symposium on Victimology. Those were the days of maximal piety about the moral superiority of all victims to all offenders, the victims' movement had the feel of fundamentalist revivalism about it. Yet, to their immense discomfort, the scholar who amongst all delegates to the Symposium possessed the most astute sense of history and principle stood up and warned them of the softness and lack of intellectual rigour of the victims' movement.

What Cressey said was this. There are two aspects to victimology. One is "humanistic victimology". This is about "unfair human suffering." It possesses no research orientation but is concerned with agenda-setting as to how to characterise human problems. According to the characterisation imposed or adopted, various forms of action may follow. Thus, humanistic victimology is primarily propagandist and activist. As such, "it should be dropped from victimology, leaving humanists out in the cold. But they could readily find warmth in association with human rights groups and, for those engaged in practice, with social workers" (p70).

The second aspect is "scientific victimology". This "should depend upon the results of empirical research" for its value and status. The sorts of matter it should look to are evaluations of whether harsher penalties do work, whether changes in procedural safeguards enhance or erode the administration of justice, what modifications to the criminal justice system reduce the fear of crime, whether assistance for victims of crime is beneficial and if so how and in what ways, what are the true patterns of victimisation including differential risks, and so on. All these questions are in principle testable and measurable; empirical data thus could and should precede agenda-setting (in contrast to humanistic victimology where agenda-setting precedes and indeed substitutes for empirical data) and be integral to it.

This paper confronts head-on victimology as a "valence issue", quarantined from scientific and empirical analysis. In this respect, Cressey's essay was out of kilter with the revivalism of the mid-Eighties and well ahead of its time; and in re-printing it so prominently Fatah indicates his own view that its time has now come. Victimology must no longer be a simplistic "valence issue", but henceforth a "position issue" — or in Cressey's terms par of scientific criminology.

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4 White, R, "Tough laws for hard-core politicians." (1992) 17(2) *Alternative LJ* 58–60; Broadhurst, R G and Loh, N S N, "The Phantom of Deterrence: The *Crime (Serious and Repeat Offenders) Sentencing Act*" 26 *ANZ J Crim* (1993) at 251–271; Harding, R W (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (1993) passim.

Coping with Crime

Fattah (ch 1 at p44 and 46) makes the fundamental point that victimisation in the course of crime is not qualitatively different from many other kinds of misfortune. "What is often ignored in current debates on victims of crime is the fact that modern life is ... hazardous ... that the risk of criminal victimisation is but one of many risks to which people are daily and constantly exposed." Again, "victimisation by crime is not qualitatively different from other victimisation and loss incurred from crime is not qualitatively different from other losses".

Victimisation surveys confirm that citizens do see crime in precisely these ways. We know that crime reporting rates all around the world are below 50 per cent — though, of course, the precise figure varies with the crime. We also know that the main reasons for non-report are always predominantly the same: that the incident was too trivial or unimportant; that it was a private matter; or that the police could not do anything about it anyhow. The most recent published Australian survey, *Crime Victims in Western Australia*,[5] confirms this unchanging pattern.

In other words, citizens — reflecting Fattah's own analysis — allocate many crime-events to much the same categories as other life events like minor illnesses (where they do not bother to visit a doctor) or transportation strikes (where they must find a way of coping with inconvenience) or minor accidents at home or work, or blocked career opportunities. These things are simply social risks we must all endure; most citizens just want to get over the incident, move to the next stage of their lives, and leave the setback behind.

However, what elements of the victims' movement seem to desire above all is that they should not leave it behind. Because the incident is characterised as "crime" rather than generic social risk, the pressure is almost to cherish the experience, to absorb it into their value systems, to alter their life-styles and their attitudes on the basis of what has happened.

This attitude is epitomised by VOCAL, a Victorian victims' assistance organisation. One of its early newsletters (February 1984) laments that membership is so low "there being 83,957 victims out there", that is the number of persons recorded as having suffered personal thefts that particular year. Later, an annual meeting had only 49 people in attendance, "most of them familiar faces". The secretary was puzzled, "[t]he people that should have been there, the victims, were not present".[6]

It seems to escape such lobby groups entirely that most victims prefer to cope, to deal with their experience and move on, and that joining a punitive, ideologically-motivated, single-issue organisation does not strike them as a particularly productive way of trying to do so. Indeed, many surveys have shown that victims are often far less punitive than popular wisdom would have it.[7]

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5 Australian Bureau of Statistics, *Crime Victims in Western Australia: October 1991* (1992) at 5–7, Tables 2, 8 and 16. See also Australian Bureau of Statistics, *April 1993: Crime and Safety Australia* at 9–11 (1994).

6 *Vocal* Newsletter, June 1988.

7 Maguire, M, *Burglary in a Dwelling: The Offence, The Offender and The Victim* (1982); Hough, M and Mayhew, P, *The British Crime Survey: First Report* (1983); Chambers, G and Tombs, J, *The British Crime Survey: Scotland* (1984); Shapland, J, Wilmore, J and Duff, P, *Victims in the Criminal Justice System* (1985); Van Dijk, J J M, Mayhew, P and Killias, M, *Experiences of Crime across the World: Key Findings of the 1989 International Crime Survey* (1991).

The same phenomenon can also be observed at a more scholarly level. Even the doyen of victim survey theoreticians, Skogan,[8] at the end of a learned disquisition as to why people do not report crimes to the police, clearly indicates his assumption that *as comprehensive a level of reporting as possible is the optimum level.* Yet why this is so is never articulated. Why is public reporting preferable to private coping? How does it benefit the individual to switch from one mode to the other?

Henderson (p109–110) would say to Skogan and his ilk:

> Taking individual responsibility for the experience may help the victim to find meaning, because responsibility, if defined as the choosing or creating of one's own experiences, is related to meaning and autonomy in life ... *Unfortunately, for many crime victims American culture discourages this kind of personal responsibility and instead emphasises another kind of responsibility — "blame" and fault-finding.*

A decision not to report a crime is, for many victims, a first step in accepting responsibility as Henderson has defined it.

To this push towards blame and fault-finding can be added in Australia and the United States[9] the adoption of oppressive crime control programs. In Australia, for example, we find VOCS, a South Australian victims' support organisation, in its various newsletters opposing parole,[10] urging generally heavier sentences and greater use of imprisonment,[11] applauding an acquittal rate of 0.3 per cent in Japan as being indicative of a properly-functioning criminal justice system,[12] and opposing laws on the expungement of criminal records on the basis that it would enable "convicted criminals to deny that they have ever been convicted."[13]

Elias (p90) points out that "unleashing the state against criminals does not empower victims to pursue their interests" nor does it satisfy their need not to be victimised in the first place. However, unforgiving denunciation is integral to many of the policy demands of much of the victims' movement.

Missionary Zeal: the Case of Child Sexual Abuse

Fattah refers to numerous distortions brought about by the "current hype about sexual abuse of children". The one he chooses to highlight, in selecting for the volume Feher's article "Should Children Really be Seen and Not Heard?", is that of the special rules for interrogating children and presenting their evidence to court.

One of the best-documented cases (p267) relates to the charges brought in Jordan, Minnesota, in 1985. Ultimately, most of these charges were rejected, but only after enormous trauma had been inflicted upon parents and children who were separated from each other. An official report into the case noted that repetitive questioning techniques were used in ways which seriously undermined the reliability of subsequent testimony, that children who steadfastly refused to admit that there had been any abuse were separated from their

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8 Skogan, W G, "Reporting Crimes to the Police: The Status of World Research" (1984) 21 *J Res Crime Delinquency* at 113–137.

9 See eg, Elias, R, *The Politics of Victimization: Victims, Victimology and Human Rights* (1986) ch 3, passim and at 90 et seq.; Henderson, ch 4, at 113 et seq.

10 *Vocs News*, vol 4(6).

11 Ibid.

12 *Vocs News*, vol 6(6).

13 *Vocs News*, vol 8(2).

parents for several months during which further questioning continued, and that some of these children were told that their reunion with their parents would be expedited by an admission of their parents' abuse.

The case of Kelly Michaels in Maplewood, New Jersey, occurred at about the same time. Similar approaches to interrogation were evident; denials were construed as evasion, browbeating of children was normal, and the first time an allegation of mistreatment was wrenched from a child it was treated as gospel.[14] In addition, the use of so-called anatomically correct dolls was part of the interrogation technique of the children; as with answers to verbal questions, only identification of or poking at a sexual orifice was treated as a valid or true answer. Identification of other orifices or limbs or organs simply did not count.

Feher's article addresses the issue of children's evidence in a rather technical but cogent way. Drawing upon the psychological literature, he points out that there are three stages to memory: acquisition, retention and retrieval of information or experience. Each aspect of memory progressively improves as one grows towards adulthood. With regard to acquisition, children acquire and store less of their experiences than adults, "the less complete someone's memory is, the more susceptible that person is to suggestion" (p262). Also, children forget faster than adults, resulting in a lessening of the memory and "clearing the way for suggestive influences" (p262). Also, a child's susceptibility to suggestion is greater than an adult's, for they have more difficulty retrieving information from long-term memory. It is likely that they are "more prone to rely on new (retrievable) information in their reports" (p262), that is, they are more suggestible.

In this context, then, there are two due process problems with children's evidence. The first is the inherent reliability of that evidence; the second is *the need for the court to receive evidence as to how the children's evidence was in fact brought forward in the first place.* In other words, a crucial factor in assessing the weight of a child's evidence is how it was obtained; yet there is seldom proper evidence of this available to the court. Feher (p267) states, "[w]hat takes place in the interviews may be the most important issue in a sexual abuse trial. And yet the interviewing process is not always well-documented".

Feher suggests that courts should adopt an exclusionary rule in relation to all children's evidence unless predetermined standards, including documentation of all stages of interrogation, are met. This approach recognises that the problem is often not the child but adults whose "missionary zeal" is to label and convict an alleged child abuser.

Is this far-fetched, either generally or in the Australian context? The Cleveland Inquiry in the UK (a case rather superficially dealt with in this collection, see p18) certainly marked a sea-change in terms of how far the courts or anyone else can trust certain adults in this context. The best short analysis of the case is found in Jenkins.[15] On any view, the activists in that case *started from the assumption that sexual abuse was widespread, then looked for the evidence.* Denial was thus tantamount to affirmation; concern about one's child's health was in reality a sign of guilty feelings; all medical symptoms were explica-

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14 Rabinowitz, D, "From the Mouths of Babes to a Jail Cell" (1990) 280:1680 *Harper's Magazine* at 52–3. In late 1993 the New Jersey Supreme Court quashed Kelly Michaels' conviction because of its concern as to the manner of the interviews with the children and the consequent effects upon the reliability of their evidence. Kelly Michaels had to that point served six years in prison. See *Violence Update*, vol4(9) at 3 May 1994.

15 Above n2 at 133–149; see also Butler-Sloss, E, *Report of the Inquiry into Child Abuse in Cleveland* (Cm 412) (1988).

ble as emotional trauma induced by sexual abuse. The medical diagnostic test used — anal dilatation — was, incidentally, itself a gross form of child sexual abuse.[16]

In Australia, child sexual abuse has likewise become an area for ideological warfare and sexual politics. Goode[17] has cogently documented, by reference not only to political pressure and new legislation but also to individual cases of injustice against accused persons, the way in which "a child abuse and child sexual abuse industry has come into existence and acquired a momentum". A key issue has been the virtual abandonment of the presumption of innocence, an intent sometimes barely concealed by the activists. For example, the Victoria Child Sexual Assault Discussion Paper[18] asserts that "community education is required so that children will be believed immediately upon revealing sexual assault". Analysing the proposals, Goode comments: "Apparently, the ideal child sexual assault service does not have as an objective any inquiry whether or not the the alleged assault actually happened, or happened as reported ... The subject of the complaint is immediately designated as "the offender".[19]

Similar attitudes are found in South Australia. During the late 1980s the Department of Community Welfare brought the highest rate of child protection cases based upon sexual abuse in Australia. The starting point seems, once more, to have been that sexual abuse was widespread; thus allegations should prima facie be believed rather than disbelieved or simply treated with an open mind. The head of the Protection Unit stated, [in these cases] "the reality is that, as in rape cases, the defence tries to prove the victim is lying rather than that the accused is innocent". She added "[t]here are many reasons why prosecutions do not proceed or are not successful. *It does not mean the accused are innocent".*[20] This approach to sexual abuse allegations is, of course, a negation of the presumption of innocence.

In New South Wales, the Law Reform Task Force on Violence against Women and Children[21] was also driven by a presumption of guilt. One of the consultation papers, in discussing whether from the outset the interrogation of children should be videotaped, stated as a countervailing problem: "Children's interviews are seldom straightforward, *and the child may volunteer information which is detrimental to the case and cannot be excised.*"[22] On this basis, it was recommended that there should be a statutory prohibition against the admissibility of evidence of the interrogation process in subsequent court proceedings.

Of course, all this is symptomatic of the fact that sexual politics have driven some of the more prominent activists. As Goode reminds us, the Victorian Discussion Paper made no bones about this: "[T]he Paper adopts the position that child sexual assault is a gender issue and that this reflects the unequal power of men and women in society."[23]

In the early days of recognition of child sexual abuse, when under-reporting seemed clearly to be the pattern, the corrective cry was "believe the child". In the second stage, when the hunt was on, the cry was "believe the child, but only when she alleges sexual

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16 Above n2 at 139.

17 Goode, M, "The Politics of Child Sexual Abuse and the Role of the Criminal Law" (1989) 13(1) *Crim LJ* at 31–49.

18 Law Reform Commission of Victoria, *Discussion Paper No 12 — Sexual Offences Against Children* (1986).

19 Above n17 at 36.

20 Crisp, L, "The Child Abuse Backlash" *The Bulletin,* 27 September, 1988 (Sydney) (emphasis added).

21 1987 at 14.

22 Emphasis added.

23 Above n18 at 42.

abuse". At the third stage, when sexual politics drove the agenda, it became "persuade the child to make an allegation, ensure there is no evidence available which might cast some doubts upon the veracity of the allegation, believe the child yourself, and make sure that the courts also believe the child".

If further evidence is needed to show the relevance of this to the current Australian scene, the 1992 allegations of ritual sexual abuse against members of a religious sect known as The Children of God or The Family bear it out. To put it in perspective, Jenkins[24] has documented the creation of a moral panic in the UK during 1990/91. This panic was driven by a tiny number of people, aided by the press. One of the most notorious incidents occurred in the Orkney Islands, where the nine children of four families were removed in dawn raids upon allegations of ritual sexual abuse. The claims were quite bizarre. How did they gain any currency? Evidently, as a payback by the social services authorities against the families who had supported another family in an earlier unsuccessful Departmental allegation of non-ritual child abuse.

The Australian cases are hardly less crude. Clearly, there are profound value differences between members of The Family sect and the welfare authorities. Evidence has suggested that a small number of persons who have been the prime movers in the cases have profound ideological objections to the manner in which the sect educates and socialises its children. Allegations of ritual sexual abuse were based on not a skerrick of direct evidence but "in part from information from ex-members and in part from a variety of literature." (The literature evidently did not include Jenkins' book.) Court action thus apparently became a political tool, rather than a quest for justice. The collapse of the cases occurred only after the trauma of raids, separation and litigation.

Generally, Vinson[25] has shown that, properly interpreted, the increase in "substantiated" cases of child sexual abuse has been modest. (In bureaucratic parlance "substantiated" is a level of proof well short of beyond reasonable doubt or even balance of probabilities; it simply means sufficiently credible to merit some further investigation.) Thorpe[26] has shown the same for Western Australia. Each of these writers also identified the main abuse problem as being located in poverty and disadvantage. Yet for quite a long period the resources of Community Service Departments have continued to be diverted into sexual abuse. Naturally, when this occurs, the number of cases investigated thereby increases and, inevitably, so too do the numbers which are treated as in some sense substantiated. But in a real sense the prevalence of child sexual abuse becomes to some extent a bureaucratic artefact rather than an objective reality.

The ramifications of alleged or actual child sexual abuse have spread into everyday life. Fattah (p18) refers to the deprivation of young children of the physical expression of affection. He cites Elshtain who relates how many divorced or separated fathers express fears of holding or hugging their children lest a vindictive former spouse conjure up allegations of sexual abuse. She also explains how awareness programs aimed at alerting children to sexual abuse can foster mistrust of adults in general and family members in particular. Such programs, she says, "surely enhance the fears of children and perhaps inject a premature sexual content into their relations with adults".

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24 Above n2.

25 Vinson, T, "Child Abuse and the Media" (1987) 72 *Proceedings of the Institute of Criminology* at 26–54.

26 Thorpe, D, *Patterns of Child Protection and Service Delivery: Report of a Pilot Project* (1991), Research Report No 4, Crime Research Centre, University of Western Australia.

All this, and the distortions of justice, in the name of a valence issue — protecting children. Because it was a valence issue, much of the agenda was able to be captured by people with little or no concern for broad and timeless principles of justice. Only later did their own excesses open up the way for position issues to get a proper hearing.

Domestic Violence and Victimisation

This is another area where severe under-reporting had been the norm, where activists consequently and quite rightly gingered up public concern thus transforming it into a valence issue, but where the balance of justice is now under threat.

The women's movement in Australia established refuges (short-term crisis accommodation), skilfully tapped into funding, sensitised women to the notion that leaving the family home was something which could appropriately be required of a violent man rather than a distressed woman, and successfully lobbied for restraining orders to be available in all States. So far, admirable. To the extent that the victim perspective drove these changes, there could be no complaint, only praise.

However, there have been down-sides, more marked perhaps in the early days than later. I recall, for example, how at the 1985 National Conference on Domestic Violence it came through very strongly that the main activists, particularly refuge workers, were antagonistic towards men — all men, not just men proven to be violent. Part of their agenda was the termination of the relationship in question, rather than its possible repair or rehabilitation — a fact for which striking testmony was provided by both the Aboriginal and women from a non-English speaking background women at the conference, neither of which group shared this objective.

In those fairly early stages, there was no attempt or desire to ascertain what the woman as an individual preferred as an outcome to her violent situation; each was regarded as a potential recruit in the battle to correct supposed power imbalances between the sexes. Rock had observed the same thing in Canada:

> The thesis is unequivocal. Battered wives are not to be regarded as mere victims. They can be helped and explained only by women schooled in feminist ideas and practices. It is only in the frameworks supplied by feminism and the experience of women that they acquire their full meaning.[27]

For some women, time at a refuge thus became a form of secondary victimisation.

Consistent with this is the very low priority which women's official groups have continued to give to counselling violent men — a last resort for saving the relationship. This is readily understandable, of course, in that the initial hurdle was that of having domestic violence treated in the same way as any other assault — as a crime. Thus, arrest had been promoted as a first resort. However, evidence has now started to come through that arrest may be counterproductive, may in fact exacerbate the situation for the woman, particularly if her partner is unemployed.[28] A victim perspective which is primarily punitive can thus be seen sometimes to run contrary to the interests of the victim in the home.

In addition, there has been a very strong push to have ongoing previous victimisation treated as an exonerating factor in homicide. The vehicle for this has been the notion of

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27 Rock, P, *A View from the Shadows* (1986) at 219.

28 Sherman, L W, *Policing Domestic Violence: Experiments and Dilemmas* (1992).

the "battered woman syndrome" — described as a situation in which physical or psychological abuse can cause the victim to lose self-esteem, feel trapped, powerless and isolated, and eventually strike back in either a spontaneous or a calculated way. This notion finesses traditional (and it must be said, *male*) limits on either self-defence or provocation by removing the question of the reasonableness and proportionality of the defendant's behaviour from the *immediate* surrounding circumstances.

The defence has found its way into Australian law,[29] as well as into the law and administrative practice of some of the United States.[30] Recently, two State governors pardoned or prematurely paroled a total of 33 women convicted of killing their male partners, without any particular evidence that the killings arose out of the syndrome.[31] The basis was that, if there had been any such evidence, the conduct of the trials had been such that they would have been denied an opportunity to produce it.

The danger with this aspect of the victim perspective is that it seems to differentiate between acceptable and unacceptable occasions for lethal violence, creating potentially one law of murder for women and another for men; one law for women in ongoing relationships and another for women not in relationships. Paradoxically, the very success achieved in labelling a defence may also cut out from possible consideration less well-categorised victim experiences.[32]

Adult Rape and Sexual Assault

For an excessively long time, there were major deficiencies in the criminal justice system which urgently required fixing. Male police scepticism of rape reports was legion; court processes could be humiliating; convictions were exceptional; sentences might be derisory. Pressures to change these features came from women's refuge workers, criminologists, and official bodies such as Offices of Women's Interests.

With effective social mobilisation, the issue soon became a valence one. Thus, police rape squads started to be re-structured; sexual assault referral centres were progressively established, bringing dignity and privacy to the victim's first contact after the offence; the corroboration warning to juries was no longer to be mandatory; the relevance of a woman's previous sexual history was restricted so that humiliating cross-examination became exceptional; degrees of sexual assault were brought into legislation, increasing both guilty pleas and general conviction rates; and sentencing became anything but derisory. All this seemed to be a model of sensible, system-wide law reform.

But, as with other victims' perspectives, those with ideological agendas got hold of the issue and ran with it. Typical, perhaps, is the contribution of those who still exaggerate the extent of the problem. For example, Koss[33] argues that the true rate of rape in the United States is about 76 per 1000 women as opposed to 4.3 per 1000 shown up by the National Crime Survey. Reliance on the latter figure, she says, "blunts societal concern about the extent to which American women are victimised".

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29 Easteal, P, "Battered Woman Syndrome: What is 'Reasonable'?" (1992) 17 *Alt LJ* at 220–3.

30 "Clemency Drives Stepped Up for Battered Women Who Strike Back" (1991) 22(5) *Criminal Justice Newsletter* at 2–3.

31 Ibid.

32 Freckleton, I, "Battered Woman Syndrome" (1992) 17(1) *Alt LJ* at 39–41.

33 "Justice Department Crime Survey said to Understate Rape" (1990) 21(17) *Criminal Justice Newsletter* at 5.

How was Koss's own figure arrived at? It turns out to be derived from a nationwide survey of current female college students, 15 per cent of whom said that they had been raped at some time and another 12 per cent of whom described incidents which met legal definitions of attempted rape. The figures came down to 76 per 1000 for the previous year. Are these figures believable in the face of many national surveys showing much lower figures? Yes, it is said, *because only 5 per cent had actually reported the event.* Non-report is now, it seems, proof positive of the occurrence of rape — curious logic indeed.

Could these figures, even if they possessed any inherent validity, be projected nationally? Is Koss worried that, possibly, a sample of over-sensitised young women moving in peer-group situations where discussions of sexual politics and date rapes are daily currency[34] may not be reliable or typical? Not at all, it seems.

In Australia, a not dissimilar manifestation of talking up an issue is found in a report into sexual harassment of female postgraduate students at Sydney University.[35] "As sexual harassment commonly flows along power channels, the relationship of supervisor and postgraduate must be most carefully managed," it is said. The hypothesis is that authority-figure males are more likely to be exploitative than other persons, and facts tend to be interpreted in the light of this. Thus, the fact that by far the greatest number of allegations are made about fellow students — in relation to whom there is, presumably, no academic power channel along which victimisation may flow — is used somehow to support the conclusion that postgraduates "are especially vulnerable [to sexual harassment] because of their more personal relationship to staff".

The recently-highlighted phenomenon of "date-rape" illustrates a commitment to ideological ends. Estrich[36] has become one of the gurus in the area of "simple rape" (non-stranger, non-violent rape), of which date-rape is a prime example. Her book is an exemplar of how data from one argument can be switched across to another to try to support an unrelated set of propositions. Thus, within the category of simple rape she includes a variety of situations which are tantamount to stranger-rape, that is first time meetings where the social and sexual negative signals put out by the woman were anything but ambiguous. This amounts to special pleading; the outrage everyone feels about rapes which have no element whatsoever of miscued messages (a valence issue) is projected on to the socially and sociologically much more complex situations of alleged simple rape. Moreover, Estrich fails to take account of the possible fabrication of such incidents.[37]

Estrich repeats this technique in relation to rape-in-marriage. Violent violations by husbands who are living apart from wives and in relation to whom there is no ongoing relationship whatsoever (a valence issue) are slid across into the category of sexual intercourse between persons who have an ongoing relationship.

Fattah has also referred to proposed Canadian legislation introduced after the Supreme Court had struck down a "rape-shield" law as being contrary to the Charter of Rights. This law had purported to enact a blanket exclusion of evidence of previous sexual history except in a very narrow range of circumstances. Madam Justice McLachlin had said for the

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34 Roiphe, K, *The Morning After: Sex, Fear and Feminism on Campus* (1993) at 51–84.

35 Poiner, G, *Women as Postgraduates at the University of Sydney: A Report* (1989), Women's Research Unit, University of Sydney.

36 Estrich, S, *Real Rape: How the Legal System Victimizes Women Who Say No* (1987).

37 Above n34 at 39–42.

majority that the law "overshot the mark ... and ... renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence a fair trial".[38]

By way of riposte, the new legislation — developed very much with the input of feminists, particularly from sexual assault centres[39] — laid down that the criteria for deciding whether to admit previous history evidence should include "encouraging the reporting of sexual assault offences" — hardly a matter bearing upon guilt or innocence in the particular case. Also, the law in effect reversed the burden of proof by requiring that the accused person should prove that he had an honest and reasonable belief in consent, defined in turn as "a voluntary agreement to engage in the sexual activity in question".

This smacks of the language of commerce and contract rather than ordinary human relations, with all their ambiguities and untidiness. Each day there are estimated to be approximately 100 million acts of sexual intercourse in the world.[40] The Canadian formula would operate in such a way as to enable a significant proportion of those acts, perhaps amounting to several million a day, to be characterised on some view in such a way that the male partner would in a notional trial situation find himself in some difficulty in meeting the burden of proof of showing a precise meeting of the minds as to what was going to occur, when, where and how. As Roiphe puts it, "[t]he idea is that he speaks boyspeak, and she speaks girlspeak, and what comes out of all this verbal chaos is a lot of rape".[41] Such a law encourages women constantly to think of themselves as potential victims (a *dis*empowering posture in itself); and those who succumb to this temptation would become part of a process which potentially distorts justice and victimises some men.[42] There is a danger that a recent amendment to the rape law of Victoria, applauded by some commentators,[43] could produce a comparable impact.

A valence issue — reducing rape — has thus successfully been hijacked by a group concerned about making the ideological points that rape is "a microcosm of what passes for 'normal' sexual relations between men and women"[44] and that "all men are potential rapists".[45] As a matter of fact, they are not;[46] and activist programs based on the premise that they are in the end do no good for the administration of justice in relation to real victims of violent or predatory rape.

The Overreach of Victimisation: Protagonists Become Pawns

In 1992 a Nebraska a woman was charged with assault upon her four-month old foetus through her use of addictive drugs. The very same people who have driven, for example, the date-rape agenda or the child sexual abuse panic would be appalled by this. Clearly, the not-very-hidden agenda was that of the Pro-Life movement — protection of the foetus at

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38 *Seaboyer v R* (1991) 44 CCC (3rd) 321 at 395, 398.

39 Fine, S, "Sexual-Assault Bill Wins Approval" *The Globe and Mail,* 16 June 1992 (Toronto).

40 Harper's *Index,* September 1992.

41 Above n34.

42 Arndt, B, "When No Means Maybe..." *The Weekend Australian,* 7–8 August 1993, Review section 3–4.

43 McSherry, B, "No! (means no?)" (1993) 18(1) *Alt LJ* at 27–30.

44 Clark, L and Lewis, D, *Rape: The Price of Coercive Sexuality* (1977) at 30.

45 Brownmiller, S, *Against Our Will: Men, Women and Rape* (1975) at 15.

46 Broadhurst, R G and Maller, R A, *Sex Offending and Recidivism* (1991), Research Report No 3, Crime Research Centre, University of Western Australia; see Arndt, above n42.

all costs. The (bogus) valence issue is that the foetus was being victimised by the mother. Over-inflated and unharnessed, the victim perspective can lead in unpredictable directions.

In the United States, medical negligence litigation is a huge industry. Something of the order of $150 billion is spent annually on all aspects of negligence insurance, including medical. This is, in effect, the cost of compensating genuine victims plus those people who can persuade themselves, and the courts, that they also are victims. A child born deformed will, at least in middle-class circles, often have a negligence suit brought on its behalf against the obstetrician or the hospital. Frequently, it will be settled out of court — to avoid publicity, cost, time in preparation, and so on. The concept of an Act of God, the changes and chances of life, has got lost somewhere: someone must be blamed; someone must take on the mantle of victim, just as Henderson (ch 4) so tellingly identified in relation to the crime area. There are distinct signs of similar developments in Australia.[47]

In this country, during the mid to late 1980s, RSI (repetition strain injury) got a dream run drawing on the supposed victimisation of female clerical workers. Bammer and Martin[48] trace the dynamics of RSI as a social movement. It is a fascinating analysis, highlighting the role of activist groups, particularly women's health centres and trade unions. They correctly point out that RSI only became a "problem", requiring solution, after a social movement propelled it to that status. They also properly point out that this does not necessarily de-legitimise it. But when the social movement lost its energy so too did the RSI "problem" progressively drop off the social agenda, and the number of cases dramatically declined. This decline was not fully explicable by changed work practices. To that extent the problem was an artefact.

There is an element of this in many of the areas highlighted in this review essay — the need for a social movement to raise consciousness, and a recognition by lobbyists that the issue may lose its forward momentum unless they continue to push it along. Almost inexorably, therefore, as part of their internal dynamics, many of the items on the victimisation schedule will eventually overreach themselves.

The protagonists, who imagine that they are controlling the agenda, thus become pawns in a bigger game. Those feminists who, for example, want to reverse the burden of proof in rape allegations make it easier for governments to water it down in, say, terrorist cases or social security fraud charges (where women tend to be harshly treated by the courts)[49] or drug trafficking allegations.

Again, those who would exclude certain kinds of evidence, such as how a child's evidence in a sexual abuse case was obtained or whether (for certain narrow purposes) a woman has a particular kind of sexual experience or attitude, contribute to an ethos where a wider range of prosecution evidence may become admissible, for example, there may be less discretion to exclude evidence obtained in unfair or oppressive ways. Interestingly, there is already pressure for "propensity evidence" to be admissible against men charged with sexual offences; this evidence goes to character and is in this way indistinguishable from reputation evidence generally now excluded in relation to women victims.

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47 O'Dea, J, "Why Doctors are Avoiding Births" *Aust Fin R* (4 August 1993) at 17.

48 Bammer, G and Martin, B, "Repetition Strain Injury in Australia: Medical Knowledge, Social Movement and De Facto Partisanship" (1992) 39 *Social Problems* at 219–37.

49 Wilkie, M, *Women Social Security Offenders: Experiences of the Criminal Justice System in Western Australia* (1993), Research Report No 8, Crime Research Centre, University of Western Australia.

Penny Green has tellingly criticised the

> theoretically isolationist stand [of feminist criminology] — isolated in the sense that the interplay between class, gender, and race is a secondary concern when viewed via the patriarchical analysis — and the dangers it poses. The subject matter of feminist criminology has, it seems, been largely dictated by white, middle-class concerns, and by the theoretical and political perspectives, like patriarchy, "new realism", and post-modernism, which justify those concerns. The reality and criminalization of working class women's struggle does not fit comfortably with the victim status attributed to women in general by feminist criminology.[50]

Getting away from feminist victimisation perspectives, the lobby groups such as VOCS and VOCAL, pressing for harsher penalties in traditional crimes, re-focus crime control debates into these areas and thus divert attention from the "new" crimes such as corporate and entrepreneurial crime, environmental damage, occupational safety breaches and so on to which they, like everyone else, are potentially exposed. Elias also points out that the preoccupation with initiatives for victims of traditional crime further narrows "those victims to whom we devote our attention: *not* to lower class minorities, who are among the most victimised, but rather to the elderly and the victims of child, female and sexual abuse, who are not" (p92).

A Balanced Victimology

If the victim perspective has, as argued, distorted aspects of the criminal justice system, what should activist victimology be doing? It is incumbent upon a critic to address that question. The answers will encompass both matters which Cressey called "humanistic victimology" and those which are scientific and able to be evaluated.

First and foremost, it should be providing crisis support for crime victims. This usually will involve emotional and psychological support but may also encompass short-term financial assistance. In appropriate cases, compensation should be available — to restore the victim, as far as money can do so, to a position with life opportunities broadly equivalent to those before the crime-event.

Secondly, it should be providing information flow as to the conduct of any investigation, prosecutorial process, trial, disposition and release. This is something crime victims are entitled to receive directly, if they desire it.

Related to this is the need to ensure that victims are treated with dignity at all stages of the event — initial report, follow-up interviews, court processes. In other words, secondary victimisation through the indifference or insensitivity of the system must be avoided.

Thus it is that modern victims' charters, such as the United Nations model charter[51] spell out these matters in some detail. Their mark is that they are compassionate and ideologically neutral. When implemented, they also attract a reasonably high level of satisfaction and appreciation from victims.[52]

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50 Green, P, Review of "Feminist Perspectives in Criminology" Gelthorpe, L and Morris A (eds), (1993) 33(1) *Brit J Crim* at 112–113.

51 See paras 4, 6, 12–17; see also the South Australian Charter; and Fattah at 401–424.

52 Maguire, M and Corbett, C, *The Effects of Crime and the Work of Victims Support Schemes* (1987); Wilkie, M, Ferrante, A and Susilo, N, *The Experiences and Needs of Victims of Crime in Western Australia* (1992) Research Report No 7, Crime Research Centre, University of Western Australia.

Activist victimology should also address issues which will assist crime prevention and/or tend to minimise the impact of victimisation. Gun control, for example, is a "natural" issue in the USA and even in Australia; this is particularly so for women, who typically are not gun owners but who are either the victims of domestic violence themselves, or whose children are killed in an accident following misuse or carelessness, or who are left behind to mourn after a spontaneous decision to suicide. Yet this is not an issue one often hears raised by the victims' movement; indeed, even when identified it is sometimes played down.[53] More likely is it that there is pressure for the need for guns supposedly to defend oneself against "criminal predators". Fattah (p9) refers, for example, to the Bernard Goetz case where the "pre-emptive strike" of a gun user against youths who may or may not subsequently have proved to be criminal predators, far from attracting condemnation from victims' advocates, seemed to have stimulated their support for the spread of armed vigilante groups.

Similarly, victimology should support social crime prevention programs; schemes such as Bonnemaison in France should be a natural point of involvement for those coming at criminal justice from the victim perspective. Yet a more typical catch-cry is to support one's local Neighbourhood Watch — a scheme which, despite its merits, almost by definition labels strangers, young people, and persons of a race not normally resident in that particular area as potential offenders.

Such matters as victim/offender reconciliation programs should also form part of the activist agenda for victimology, not as an article of faith but to see whether they can be made to work and whether proper evaluation bears out the hope that they may do so (ch 10). Also, restitution programs should be explored, once more not as an article of faith but to see how they can be structured so as both to give some satisfaction to the victim and also so as not to perpetuate a deviancy amplification spiral by leaving the offender with obligations so beyond his capacity that he is tempted to commit further crime to meet them (ch 11).

Generally, scientific analysis of the evolving phenomenology of crime should be made with a view to increasing our understanding of the social circumstances of victimisation. Easteal[54] has, for example, documented violence between sexual intimates in a way which highlights the vulnerability of "new" Australians and Aborigines — findings with potential implications for social programs generally, not merely for victims.

There are many other matters to which one could refer — for example, the formation of support groups, or the propagation of factual material about crime-risks to counterbalance exaggerated fear of crime. Fattah's view is that the justification for any of them within the inventory of victims' rights and expectations is as follows: "In the new paradigm of criminal justice, the primary purpose of the criminal law would be to heal the injury, repair the harm, compensate the loss and prevent further victimisation" (p407).

Much of the change brought about in the name of protecting victims fails to meet this criterion; that is the distortion about which he is so concerned. In pursuing this theme, it is essential to grasp that he is not downgrading the quantum leaps which the victims' perspective has stimulated in our understanding of the sometimes skewed workings of various aspects

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53 Easteal, P, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993) at 183.
54 Ibid.

of the criminal justice system. His argument is simply that to replace one set of distortions with another does not constitute social progress.

Conclusion

Fattah's book raises many important questions which traverse national frontiers. As a collection of essays it is stimulating. The major drawback is that almost none of the chapters was specially commissioned. Consequently, there are some (chs 6, 7 and 9) which, interesting when first published, have been overtaken by more recent research. Fattah's own chapters (Prologue, 1, Epilogue) are of great interest. And the chapters by Elias, Henderson and Cressey (2, 3, 4) were, when written, leading-edge and remain so.

The book, then, is patchy in the way in which edited collections of pre-existing material often are. Some of the main substantive areas could have been explored with superior and more contemporary material and at less length. For all that, it is required reading, the most overt and critical challenge yet[55] to some of the received but now discomforting wisdoms about activist victimology.

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55 Though cf Elias, above n9.