TELEVISION, MELODRAMA, AND THE RISE OF THE VICTIMS' RIGHTS MOVEMENT

Elayne Rapping
In 1974, I saw a movie that sent chills down my spine. It was called *Death Wish* and it told the story of a mild-mannered liberal businessman whose wife and daughter were brutally raped and murdered by a group of dark-skinned, near subhuman thugs. His response to his grief was to become a self-styled vigilante, stalking the New York City streets in search of other muggers and rapists, all young, apparently deranged, and dark-skinned, and to shoot them down in cold blood. The audience cheered more loudly at each burst of vengeful gunfire, for, as Leonard Maltin, has rightly noted, the film was a masterpiece of “manipulation at its zenith.” It was also, I now see, the beginning of a slow but insidious trend in national consciousness and criminal justice policy away from the liberal policies of the Warren Court, with its concerns for the rights of defendants to be protected from possible abuses by the engines of the state, toward a far more reactionary (in the truest sense of that word), often even bloodthirsty, concern for the “rights” of “victims” to revenge and punishment of the most extreme kind. The trend is evident in a variety of ways and places, but it can be seen most dramatically in the rise of the increasingly influential Victims’ Rights Movement.

In this paper, I explore the genealogy of this movement’s rise to prominence, and argue that, while there were several contributing elements—the shift to the right in national political sensibilities and its impact on criminal legal procedures being among the most obvious—it has been television, and especially the coming of cameras in the courtroom and the rise of the televised trial as major media event, which has been most influential. For in transforming legal proceedings into dramatic spectacles, informed by the most melodramatic of pop culture genres and conventions, television has, not necessarily intentionally, given emotional aid to a movement which, like the so-called Right to Life movement, depends on sentimental, emotionally loaded images and narratives

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2. See *id*.
to influence our common understandings of and attitudes about criminal justice in ways which are more politically dangerous than they may seem.

As a genre film, of course, *Death Wish* was not new. The revenge-film genre has been around as long as Hollywood itself, and it has always incorporated themes and conventions informed by a recognizable set of assumptions about law and criminal justice. Thomas Schatz in his influential study of *Hollywood Genres* described genre films as "sociological events," "objectified mass dreams" which work "to solve, if only temporarily, the conflicts which have disturbed the community welfare." Crime and the fear of crime, especially violent crime, are certainly among the most emotionally loaded of those "disturb[ances] of community welfare." And revenge, as acted out in such genre films as *Death Wish* and *Dirty Harry*, has an obvious emotional appeal. It satisfies our desire for the kind of instant gratification that the slowly grinding wheels of actual justice rarely provide. As Carol Clover noted in her analysis of rape revenge movies, there is a far greater emotional charge to the endings of B movies like *I Spit on Your Grave*, in which the abused woman takes the law into her own hands and gleefully wreaks vengeance on her assailant, than in movies like *The Accused*, in which the resolution is a far less dramatically satisfying legal one.

William Ian Miller, in an interesting study of Clint Eastwood’s revenge films, describes revenge as "a style of doing justice" made necessary when the state cannot or will not take effective action against crime. "It is not just that popular culture invents the avenger, that it invents a more efficient style of justice for us, frustrated as we are by our fears, our anxieties, our perceptions of violence and crime," he writes.

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5. Id.
6. DIRTY HARRY (Warner Brothers 1971).
8. I SPIT ON YOUR GRAVE (Cinemagic Pictures 1983).
10. See generally id.
12. Id. at 199.
“Popular culture is also largely responsible for creating our image of the avenger’s straw men: the legal system... constructs images of a largely inept law and in turn constructs a view of society desperately in need of efficient and effective mechanisms of social control.”

Miller sees these films as out of keeping with current attitudes in the real world of criminal justice. In our legal system, he argues, revenge is associated largely with “the ineffable vulgarity of young lower-class males” and given little respect. “Revenge is not a publicly admissible motive” today, he argues. “Church, state and reason all line up against it.” “Retribution,” a related but far weaker concept, “can still be mentioned in polite company,” he believes, because it implies “a controlled, proportional” response to wrongdoing, and, since it is impersonal and administered by the state, involves no emotional tone. But the demand for revenge as a legal remedy is considered far too extreme for rational, civilized societies.

The recent textbook Media, Crime, and Criminal Justice—to my knowledge, one of the few available on the subject—seems to support Miller’s argument about the marginalization of revenge in current criminal justice discourse. The author begins his chapter on “Media and the Construction of Crime and Justice” by defining the concerns of criminal justice as “the opposing ideas of due process and crime control,” while making no mention at all of the concepts of punishment or retribution, much less revenge. Nonetheless, Miller argues, there is an emotional need in most of us for a more emotionally resonant way of doing justice, and the revenge genre fills that need. These films please us, he says,

13. Id. at 199–200. Thus, the genre typically reflects great hostility toward the concept of the presumption of innocence and no sympathy whatever for the insanity defense, under any circumstances. These are also characteristics of the Victims’ Rights Movement, as the trial of Colin Ferguson, in which the most passionate and vengeful Victim-impact statements were hurled at a defendant clearly incapable of understanding what was being said.
14. Id. at 162.
15. Id. at 161.
16. Id.
17. Id. at 162.
20. Id. at 1.
21. See generally Miller, supra note 11.
because they work as fantasies, satisfying that "repressed segment of us" that craves such gratifying emotional closure, no matter what the legal system says.\textsuperscript{22}

Miller's argument rests on the insightful assumption that revenge fantasies have traditionally reflected the subconscious need to gratify urges which civilized society represses.\textsuperscript{23} But I would argue that the repressed desires expressed in revenge-genre films are in fact less and less repressed; that, on the contrary, there is a quite dramatic return to the fashionability of the revenge model of justice in this country, engineered in great part by the growing influence of the Victims' Rights Movement, although it differs in important ways from Miller's generic model. For in the Victims' Rights Movement's model, revenge is no longer associated with the disreputable "vulgarity of young lower-class males,"\textsuperscript{24} but with the most respectable, middle- and upper-class segments of our population; those who see themselves as "victims," more often than not, of today's version of "vulgar, lower class youth"—usually poor inner-city blacks, the most demonized figures in media treatments of crime today. Indeed, it is this very model of revenge—the respectable, white middle-class citizen avenging himself on the vulgar, lower-class, dark-skinned youthful predator—that movies like \textit{Death Wish}\textsuperscript{25} and \textit{Dirty Harry}\textsuperscript{26} so ominously herald. And it is this model which televised trials more and more often present to an American public whose growing hunger for vengeance it feeds and nurtures.

Interestingly enough, in an "Unconcluding Postscript," to his essay, Miller himself acknowledges the possible return of the revenge model and attributes it, quite rightly, to the increased merging of popular culture convention and legal reality.\textsuperscript{27} Indeed, he describes \textit{Court TV} as the most seamless example of this merging of "the law of popular culture and the 'real' thing."\textsuperscript{28} For it is on \textit{Court TV} that law most dramatically and explicitly becomes entertainment. Nor is he particularly alarmed about this turn. "Popular culture sees revenge as a necessary supplement to the

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 165.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.} at 162.
\item \textsuperscript{25} \textit{DEATH WISH, supra} note 1.
\item \textsuperscript{26} \textit{DIRTY HARRY, supra} note 6.
\item \textsuperscript{27} \textit{See} Miller, \textit{supra} note 11, at 201.
\item \textsuperscript{28} \textit{Id.} at 200.
\end{itemize}
law," he writes, "and it might well be that popular culture is not wrong."\(^{29}\) I will argue that popular culture is indeed quite wrong. But I will be arguing against the grain of popular sentiment. For the popularity of Court TV, the endless legal chit-chat on twenty-four-hour news, on talk channels like CNBC and MSNBC, and on tabloid series like Cops\(^{30}\) and America's Most Wanted,\(^{31}\) indicates that more and more Americans share Miller's view.

I. A GENEALOGY OF VICTIMS' RIGHTS

Before turning to the ways in which TV has helped to create support for a model of criminal justice based more on revenge than rehabilitation or retribution, more on passion than reason, and more on concern for victims than for those whose life and liberty are threatened by the state, it will be useful to turn briefly to some of the legal and social factors that have given rise to these attitudes. For mass media never single-handedly creates trends in popular sentiment. Rather it works in tandem with other forces in the social and political environment to reflect and reinforce dominant sentiments and attitudes. In the case of Victims' Rights, however, television has played an especially important role, because, as a visual, dramatic medium, it has the power to forge larger-than-life, melodramatic images of human suffering and to elicit strong emotional responses which are in keeping with the rhetoric of Victims' Rights. In this, of course, it resembles Hollywood revenge films. The difference however—that television is dealing not with fantasies but with real human beings and real events that have real consequences for the individuals involved as well as society in general—makes its use of generic conventions a far more serious matter.

In an article entitled Victims and Vengeance: Why the Victims Rights Amendment Is a Bad Idea,\(^{32}\) Bruce Shapiro documents his contention that "In ... American politics today, victims of violent crime are accorded uniquely sanctified status."\(^{33}\) He quotes Democratic Attorney General Janet Reno's address to a Victims’ Rights Convention in which

\(^{29}\) Id. at 201.

\(^{30}\) Cops (Fox Network).

\(^{31}\) America's Most Wanted (Fox Network).


\(^{33}\) Id. at 11.
she attests to drawing "the most strength from victims, for they represent America to me: people who will not be put down, people who will not be defeated, people who will rise again and again and stand for what is right... You are my heroes and heroines," she gushes, "You are but little lower than the angels." Shapiro insists that "this is not just rhetoric" and he is right. In the 1996 elections, eight states added victims rights language to their constitutions, joining twenty-eight others; Carolyn McCarthy, the wife and mother of two of Colin Ferguson's victims, won a seat in Congress; the Justice Department doubled its victims assistance budget to $400 million; and President Clinton, speaking in the Rose Garden, added his support to the movement by insisting that "the only way to give victims equal and due consideration" would be to amend the Constitution of the United States. Thus, the powerful influence of a movement began as a small group of grass roots support and advocacy groups, but, in the past fifteen years, has ballooned into a major force of some 8,000 organizations, most of them funded by right wing groups and politicians. Shapiro refers to the movement, as a "vengeance-rights lobby," and indeed, many of its demands—for swifter executions and longer prison terms, for example—smack of the style of justice depicted and valorized in the revenge-genre movies Miller analyzes.

Of course there has been a trend toward harsher punishments and greater numbers of executions in this country for quite a while, and the trend is in keeping with the rightward drift of the nation around many issues, fueled in part by an increasing fear that society has become too permissive. But Victims' Rights advocates are among the major players in this trend and their success in recent years has been notable. Among the more important markers of this success was the Supreme Court ruling

34. Id.
35. Id.
37. See Shapiro, supra note 32, at 11-12.
38. Id. at 12.
39. See id.
40. Id. at 13.
41. See generally Miller, supra note 11.
in 1991, in *Payne v. Tennessee*, that victim-impact statements would be permitted in sentencing hearings in death penalty cases. Only a few years earlier, in *Booth v. Maryland*, the Court had narrowly defeated such a ruling. Nor was the 1991 decision unanimous. Justices Marshall, Stevens, and Blackmun dissented, and Stevens, in his strongly worded dissent, expressed particular alarm. Among his concerns was that such statements would tell juries that "some of the murdered dead were more equal than others—and that defendants who killed 'important' people were more deserving of execution." But more importantly, he noted, with concern, "the current popularity of capital punishment . . . the political appeal of arguments that assume that increasing the severity of sentences is the best cure for . . . crime, and the political strength of the 'victims' rights' movement." Given this turn in popular opinion he wrote, "I recognize that today's decision will be greeted with enthusiasm by a large number of . . . citizens."

Given the current popularity of capital punishment in a crime-ridden society, the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the "victims' rights" movement, I recognize that today's decision will be greeted with enthusiasm by a large number of concerned and thoughtful citizens. The great tragedy of the decision, however, is the danger that the "hydraulic pressure" of public opinion that Justice Holmes once described and that properly influences the deliberations of democratic legislatures—has played a role not only in the Court's decision to hear this case, and in its decision to

43. See id. at 827.
44. 482 U.S. 496 (1987).
45. See id. at 509.
46. See *Payne*, 501 U.S. at 844-67 (Marshall, Stevens, and Blackmun, JJ., dissenting).
47. See id.
48. See id. at 856-67 (Stevens, J., dissenting).
49. Id.
50. Id. at 867.
51. Id.
reach the constitutional question without pausing to consider af-
firming on the basis of the Tennessee Supreme Court's rationale,
but even in its resolution of the constitutional issue involved.
Today is a sad day for a great institution.52

Stevens was in the minority however,53 and these statements are now
a staple of death penalty sentencing hearings, whose impact, with the
advent of televised trials, reaches far beyond the twelve jurors to whom
they are immediately addressed.

Which brings me to the question of cameras in the courtroom, an-
other important decision made by the Supreme Court54 within the context
of social and political trends. Charles Nesson and Andrew Koblenz, in an
article entitled The Image of Justice,55 discuss the long winding path by
which the Supreme Court was persuaded in 1981, after long years of op-
posing such a measure, to allow the televising of criminal trials without
the defendant's consent.56 They argue that the Justices' decision was
based largely on the court's concern for "the appearance of justice"57
and its "preoccupation with judicial image."58 In the Madison Avenue
world of image," they argue, "true damage is done to the image of justice
and courts only if the specter of injustice strikes the public imagination
and is widely communicated."59 In recent years, of course, in part due to
a backlash against the Warren Court's decisions in matters of defendant's
rights and the sense that society has become overly permissive generally,
itis just such a specter of justice as ineffective, as "soft on crime," as
incapable of controlling street crime or punishing wrongdoers—the very
features of law as straw man which Miller notes as a staple of the re-
venge genre—that has more and more informed public discourse. Ac-
cording to Nesson and Koblenz, "Televising trials looked to some judges
like a possible counter to [such] charges against the judiciary," for "trials

52. See Payne, 501 U.S. at 867 (Stevens, J., dissenting).
53. See id. at 866-67.
56. See id. at 405-13.
57. Id. at 405.
58. Id.
59. Id.
show the justice system at its best." 60

But of course this assumption has not always proven true. In fact, in the early days of Court TV, the most high-profile trials, the ones that most caught public attention and engendered TV talk-show debate, were not particularly good examples of justice at work—at least in the eyes of the public. The first Menendez brothers trial and O.J. Simpson trial both tended to further inflame public outrage at a system in which people seemed literally to get away with murder. And because of this, judges and prosecutors had to learn to conduct their trials in ways that would produce the salutary results which the justices hoped for when they allowed the cameras in. For, as Steven Russell has noted, “In high profile criminal trials judicial concern is with what kind of story the camera will tell.... about the criminal justice system. Will it be a hegemonic narrative (‘system works’) or a subversive narrative (‘The system is broken’)?” 61 And most commentators agreed that the messages of the Menendez and Simpson trials were anything but hegemonic; in fact, they were exactly what the justices hoped to counter: subversive narratives which upheld the popular perception that the system was indeed broken.

After these trials, there was more and more apprehension on the part of judges and prosecutors about cameras in courtrooms. Judges, wary of the bad publicity Judge Lance Ito received for his lax handling of the Simpson case, became more and more concerned about their own appearance as tough, decorous presiders over justice. If Ito was the model of what not to do, Judge Matsche, who presided over the Oklahoma City bombing trial in which Timothy McVeigh was convicted of murder and sentenced to death, was heralded as a model of judicial authority and wisdom. 62 Media commentators could not say often enough how sad it was for the nation that this trial was not televised, for it did exactly what Nesson and Koblenz argue was called for, when cameras were allowed in: it showed the system working, justice being done, punishment being rendered, and “closure”—the buzzword of the Victims’ Rights Movement—being achieved. 63

60. Id. at 408-09.
Not surprisingly, the emotional heat of that courtroom was, according to those present, palpable. 64 Andrew Cohen, a Denver lawyer and journalist who was present at the McVeigh trial, described it as a masterpiece of legal management of dramatic effect:

One day it was one of the government's star witnesses, come to tell the eerie tale of McVeigh's bombing plans... next it might be one of the many sad survivors of the bombing, come to tell her tale of woe. And if it wasn't the witnesses themselves, it was the way prosecutors arranged their order. If the jurors appeared to be getting sleepy... a survivor whose testimony woke everyone up and got them good and sad [was brought on].... Lawyers are convinced they need drama and entertainment in an age when attention spans have been diminished by television.... 65

Cohen argues that the McVeigh trial, with its plethora of victims and tales of loss and suffering, bloodshed and gore, was a model of how such drama and entertainment could be most effectively provided. 66

In the wake of the McVeigh trial, judges and prosecutors have become more and more adept at using the techniques described by Cohen, and apparently to good effect. In March of 1999 the American Bar Association conducted a survey of public opinion about the workings of the justice system and found that indeed, in the last decade, Americans' opinions of the court system has risen significantly, while other institutions—especially the media and Congress—were deemed even more corrupt and ineffective than in previous years. 67 Their recommendation was that in order to further educate the public about the judicial system, and so further improve its public image, the Supreme Court, so long adamantly opposed to being televised, should now allow cameras into its own proceedings. 68

64. See id.
65. Id. at 15-16.
66. See Cohen, supra note 63.
67. See Linda Greenhouse, 47% in Poll View Legal System as Unfair to Poor, N.Y. Times, February 24, 1999, at A12.
68. See id.
II. THE POWER OF MELODRAMA

The power of televised trials to influence popular views of the justice system has thus been as successful as the justices hoped, but only after a period of trial and error in which judges and prosecutors learned to use television in ways that were most likely to produce hegemonic narratives in which the system was shown to work. And the role of victims in these made-for-TV spectacles has been particularly effective in creating this image, since audiences tend to empathize with feelings of victims and share their satisfaction in verdicts in which those convicted of victimizing innocent citizens are harshly punished. But even before the advent of televised trials, when the Victims' Rights Movement was just beginning, it recognized that television could be a powerful tool in pleading its cause, and found ways to make use of it. In fact, the ties between Victims' Rights and television date back to 1983, when a man named John Walsh—the father of a kidnapped child, who quickly became a prominent spokesperson for the movement—became the first of what is now a long line of celebrity victims, as I think of them, the most well known being the fathers of Ron Goldman and Polly Klaas, both of whom have logged a lot of air time, as viewers of TV news will be aware. In that year, Walsh's story was made into a docudrama, called Adam, which was so successful that in 1986 it was followed up by a sequel called Adam: His Song Continues. Two years later Walsh parlayed the success of these movies, in which the conventions of melodrama were used to instill pity (for the victims) and fear (of the monstrous predators) into media stardom by becoming the host of his own tabloid TV series, America's Most Wanted. The series, which featured reenactments of actual crimes followed by pleas to viewers to help catch the still-at-large perpetrators, was a success with audiences as well as the FBI, which worked with Walsh on the series and welcomed his help in catching alleged criminals.

But as Anna Williams explains in an article about the series, the format was not only sensational and melodramatic in form and style, it was explicitly oriented toward a view of crime as a family matter, for it in-

70. See id.
71. See id.
72. See id.
variably pitted victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children.\textsuperscript{73} Michael Linder, one of the series producers, explained the criteria for choosing cases for the series in an issue of \textit{TV Guide}: “A drug dealer who shoots another drug dealer is not as compelling as a child molester or murderer. . . . If a man brutalizes innocent children, that definitely adds points.”\textsuperscript{74} Such a hierarchy of victimization is a mainstay of the Victims’ Rights Movement, which plays upon notions of decent families besieged by violent amoral criminals.

When the series was renewed in 1995 after a brief absence, it had an even more programmatic focus on victims as a cohesive social grouping of good solid citizens and families, fighting the dark armies of antisocial predators. The former grouping of course included the assumed viewers, “we” out there in television land who—as is typical of the television announcer’s address to audiences—were assumed to be members of middle-class families among whose defining characteristics (along with the desire for, and money to afford, advertised commodities, of course), was fear of crime. To make this point dramatically clear, Walsh even added a subtitle to the new series: \textit{America Fights Back}.\textsuperscript{75} And America, in this case, included only those of us in the target audience of middle class family members fearful of crime. Thus the series constructed itself as a leading component of what was by then a growing national trend in media, in the courts, and in the growing Victims’ Rights Movement, dividing American society into two groups defined by their relationship to the criminal justice system: those who prey on others and those who “fight back.” Indeed it is arguable that television today—thanks to series like these, as well as televised trials and the commentary they engender, is informed by a fairly new and prominent, if not dominant, thematic: the division of society into criminals and crime fighters. We are all either cops or robbers today, and for those of us on the side of the angels, vengeance for crimes against “innocent victims” is our virtuous stock in trade.

Docudramas like the \textit{Adam} movies and tabloid TV series both employ the conventions of melodrama to engage viewers and elicit emotion and sympathy and a desire for harsh, vengeful punishment. The kidnap-

\textsuperscript{73} See id.
\textsuperscript{75} See Williams, supra note 69.
ping of little Adam Walsh, the rapes and murders of innocent women and children on Walsh’s *America’s Most Wanted*, these are the images and narratives that fuel the kind of testimony that so moved jurors in the McVeigh trial. And as more death penalty trials are televised, we are seeing more of the power of melodrama to sway the public to the views of Victims’ Rights advocates. Among other ominous trends is the increasing demand by victims to be present and witness the executions of those convicted of killing loved ones. On a recent local newscast, for example, I heard the mother of a murder victim say, with an intensity that was frightening, “I want to be there; I want to be in the front row when they kill that guy; I want to be the one to pull the toggle switch!”

This example is not atypical of what one hears in televised victim-impact statements. Emotion and passion are more and more present in courtroom proceedings and their impact on jurors and viewers cannot be denied. But is this kind of melodramatic, often hysterical utterance actually appropriate to the adjudication of legal matters? Are the revenge genre and its conventions actually preferable to the pre-1991 sentencing procedures? To answer that question we might look briefly at the genre of melodrama itself and the political imaginary it constructs. The dominant characteristic of melodrama, as has often been noted, is “excess.”

“The genre’s very existence,” writes Peter Brooks in his definitive study of melodrama, “is bound to [the] possibility, and necessity, of saying everything.”

76 John Cawelti describes the genre as creating a world of “moral fantasy”77 whose function is to show the essential rightness of the world order, an order which “bear[s] out the audience’s traditional patterns of right and wrong, good and evil.”78 Melodrama, according to Laurie Schulze, is “a preferred fictional context for addressing disturbing social materials” for these reasons.79 And Lynn Joyrich notes that its “popularity has historically coincided with times of intense social and

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ideological crisis," of which our own postmodern era, often called by its theorists "the age of crisis" is certainly one. According to Joyrich, melodrama, which creates a space for moral closure in a confusing world, acts as a soothing antidote to the anxiety engendered by such periods of history. It does this by first gratifying the desire for "immediate sensation" by portraying "behavior shocking to its time" and then offering "moral simplification, [and] reassuring fantasies," which act as cathartic agents of reassurance that the horror has been contained. This is certainly the pattern of death penalty sentencing hearings, in which shocking behavior and its impact on survivors is used to titillate, frighten, and enrage viewers, even as the final sentencing, especially if it is as harsh as the victims demand, offers a utopian fantasy of moral closure, in which the highly personalized resolution of one person's experience of victimization, through the court's revenge on a single perpetrator, suggests, disingenuously, that the larger problem of social violence itself has somehow been "solved."

Another important element of melodrama which many theorists have commented upon is "sentimentality," a term I believe gets at the heart of what is most frightening and dangerous about the movement for victims' rights and the media's complicity in furthering its goals. Sentimentality is generally understood to be a kind of false, excessive, insincere, and hypocritical form of emotion. It is what is meant by the term "crocodile tears," the often inappropriately excessive and insincere display of grief and sorrow, by those who presumably have some other motive or agenda that the display of grief serves to mask. Indeed, Jungian analyst Marie-Louise von Fraanz, in defining the distinction between the sentimentality of melodrama and true grief, notes, importantly, that "where there is sentimentality... there is also a certain amount of brutality." She uses the

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81. See id. at 233.

82. See generally Joyrich, supra note 81.

83. See id.

84. See id.

85. See id.

86. See generally Joyrich, supra note 80.

example of the Nazi general Goering who "could sign the death sentence for three hundred people but if one of his birds died then that fat old man would cry. . . . He is a classic example," she writes, for "Cold brutality is very often covered up by sentimentality." 88 I would certainly agree, for it is clear to me, having spent many hours studying tapes of victim-impact statements, that there is a great deal of cold brutality masked by sentimentality in the rhetoric and displays of grief of many of the spokespersons for victims and their "rights."

This is an insight which needs to be more fully considered by those whose honest concern for the suffering of victims leads them to support demands for such legal remedies as the Victims' Rights Amendment. Beneath the compelling emotion that informs the demands of victims, there is all too often an ugly and irrational cry for blood that smacks of mob violence and vigilante justice. And of course such emotions and their ability to fuel desperate, irrational actions are the very stuff of revenge-genre films like Death Wish, in which audiences cheer the cold-blooded murder of individuals for whom due process has become an annoying distraction from the true needs of society for immediate, harsh punishment.

Lauren Berlant has written brilliantly about the dangers of sentimentality in the legal and political spheres. 89 She labels the period we live in "an age of sentimental cultural politics," 90 in which rhetorics of utopian/traumatized feeling 91—which as we have seen are characteristic of the melodramatic imagination and its underlying assumptions—are dominant. 92 Berlant believes that:

[U]topian/traumatized subjectivity . . . has replaced rational subjectivity as the essential index of value for personhood and thus for society. Revelations of trauma, incitements to rescue, the reprivatization of victims as the ground of hope, and above all, the notion that feeling itself is the true self, the self that must be

89. See LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY (1997).
90. See id. at 4.
91. See id. at 1-3.
92. See id.
These, Berlant believes, are the marks of the politics of sentimentality. And they have led, according to Berlant, to a situation in which we are increasingly governed by policies based on an assumption of "the self-evidence and objectivity of painful feeling and the nation's duty to eradicate it." The danger here, says Berlant, is that questions of social inequity and social value, are now adjudicated in the register not of power, but of "sincere surplus feeling."

Berlant—whose focus is actually on the Right to Life Movement, but whose arguments apply equally well to the politics of victimology and Victims' Rights—argues that the political struggles in which sentimentiality is deployed most effectively are those which find "validity in those seemingly superpolitical moments when a 'clear' wrong—say, the spectacle of children violently exploited—produces a 'universal' response." These are struggles informed by "a politics of protection, reparation, rescue." They "claim a hardwired truth, a core of common sense" which is beyond ideology, beyond mediation, beyond contestation and "which seems to dissolve contradiction and dissent." The fantasy of reparation, the valorization of "surplus" or excess feeling, the tendency to substitute passion for reason in determining political and legal policy—all these of course are elements of the melodramatic imagination which television, in fiction, in docudrama, in tabloids, and now in trials, makes such effective use of. And as Berlant warns, a political movement based on such precepts must be viewed with grave suspicion. For when reason becomes overwhelmed by emotion, the rule of law itself is in danger of being usurped.

During the McVeigh trial I watched the nightly press conferences in which victims and survivors cried out for blood and what most struck and frightened me was that the most passionate of these people, the most—in their own minds—severely injured or bereft were also the most vociferously contemptuous and proudly ignorant of the Constitution and

93. **BERLANT, supra note 90 at 35**
94. **See BERLANT, supra note 89, at 35**
95. **See BERLANT, supra note 89, at 35-7.**
96. **BERLANT, supra note 89, at 37**
97. **Id.**
98. **BERLANT, supra note 89, at 37**
the law. Like the fictional heroes of revenge-genre films, they wanted swift and immediate reparation for their losses and they had no trust at all in the wimpish ways of a legal system, which they saw as run by devious, sleazy attorneys and inept or corrupt officials. And like those heroes, these passionately articulate and righteously indignant individuals were all too easy to sympathize with. Who could not empathize with the grandmother who took her two small boys to a day-care center and never saw them again, especially when, as is common in the Victims' Rights Movement (as it is in the Right to Life Movement), heart wrenching or horrifying images are deployed as the most powerful elements of the political argument? In the wake of the bombing, and then the trial, endless pictures of smiling children, only recently alive, along with carefully chosen images of a tiny shoe lying in the rubble or a tiny limb found lying far from the body it had only recently been part of, were shown on TV screens virtually twenty-four hours a day for several weeks. Such images do indeed seem to be "superpolitical," to use Berlant's terms. But they are deployed in the service of an agenda which is intensely political and ideological.

III. VICTIMS' RIGHTS AND LEGAL THEORY

Of course there are many prominent theoretical and legal defenders of the Victims' Rights Movement whose arguments are neither sentimental nor melodramatic, but based on a particular view of the criminal justice system and how it should operate in ways which are fair and balanced. Paul Gewirtz, and others associated with the storytelling trend in legal studies, are among the most persuasive in their support for the role of victims in trials. Gewirtz argues that the use of victim-impact statements corrects an imbalance in criminal proceedings which allow the victims to be doubly "silenced" by her or his murderer and then by the criminal justice system. For, he argues, in our current system the defendant alone has a legal spokesperson, or advocate, while the victim—whose injury is considered an injury to the state rather than a personal in-

99. See generally BERLANT, supra note 89 (explaining that various television melodramatic images are superpolitical in nature).

100. See id.

jury—is actually represented by no one. He rightly notes that "criminal trials have become a central moral arena for society," but he sees this arena as one in which the defendant is central because "[t]he main dynamic ... is to support the norms of socially acceptable behavior by defining otherness ... the twisted deviancy of Susan Smith, the apparently brazen evil of the Menendez brothers." Gewirtz believes that the true center of the trial should not be the defendant, but rather the victim, for, in his view, "The victim is the subject of the trial, so the victim's place as at least a character in the criminal trial's narrative is definitional."

In fact, the portrayal of the criminal trial as one in which the deviance or otherness of the criminal defendant holds center stage, and the moral issue revolves around determining the extent of this "deviancy" and punishing or repairing it, has, until recently, been quite accurate. Indeed, as Foucault most famously demonstrated (and as I have discussed elsewhere), it has been the tradition of liberal democracies to focus on the criminal as a deviant. In fact the situation Gewirtz describes and deplores is the very one which Foucault most definitively traced and elucidated in all his writings on crime and punishment, especially Discipline and Punish and "The Dangerous Individual." Crime, as Foucault saw it developing in the discursive turns of modern democratic thought, was for the most part a defect, or infection, of the body politic. "This deviation, this potential danger, this illness" was how he described

102. See id. at 137-138.
103. Id. at 151.
104. Id.
105. See id. at 139.
106. Id. at 149.
108. See MICHAEL FOUCALT, DISCIPLINE AND PUNISH (Alan Sheridan trans., 1977) (demonstrating the criminal as a deviant).
109. See id.
111. See generally Foucault, supra note 108 (discussing crime as a defect of society).
criminality,\textsuperscript{112} as it had been constructed within modern discourses. And because the criminal was now seen as a "pathologized subject,"\textsuperscript{113} he was, according to Foucault, discursively transformed from a figure of essential evil whose crimes were to be morally condemned and punished, to a subject of study for the new science of criminology to analyze and develop suitable correctional treatment.\textsuperscript{114} No more the harsh physical punishments of an earlier time, when moral terms such as "good" and "evil" defined the egregious acts which were the law's only concern. Now it was the diagnosis and treatment of "the little soul of the criminal" that were of concern.\textsuperscript{115} And for such a task, a "gentler way of punishment"\textsuperscript{116} in which "docile bodies"\textsuperscript{117}—disciplined from birth to internalize and conform to the norms of society or feel guilt for failure to do so—could be easily managed within a multipartite but smoothly integrated social system, was sufficient and effective.\textsuperscript{118}

Foucault's analysis has certainly been influential. And to a great extent his model of criminal justice in which the defendant as deviant, to be studied and controlled by mental health experts, is the main focus still has validity.\textsuperscript{119} But as he himself understood, shifts in social paradigms tend to overlap so that old belief systems and traditions tend to coexist, at least for a time, with new paradigms which arise to fit new eras and new ways of thinking, intellectually and morally.\textsuperscript{120}

I would argue that such is the case today, for we are living in an era in which dominant paradigms of belief and tradition of all kinds are increasingly up for grabs and new models and attitudes are arising to replace the old. The Victims' Rights Movement, and the complementary legal and political movements and trends that accompany it, in particular, are signs that in matters of crime and justice, Foucault's model is increasingly being displaced by a new paradigm of justice, a post-

\begin{itemize}
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id. at 277.
\item \textsuperscript{114} See id.
\item \textsuperscript{115} See generally id.
\item \textsuperscript{116} Foucault, supra note 108, at 104-31.
\item \textsuperscript{117} Id. at 135, 167
\item \textsuperscript{118} See generally Foucault, supra note 108 (explaining the integrated social system).
\item \textsuperscript{119} See id.
\item \textsuperscript{120} See id.
\end{itemize}
Foucaultian model more suited to our present era, which is far less marked by the traditions of liberal democracy and far more repressive and punishment-oriented in every arena, but especially that of criminal justice.

In fact, if we view the coming of the Victims' Rights Movement as part of a trend toward what Berlant calls an "age of sentimental politics" in which the rhetoric and assumptions of the melodramatic imaginary have become dominant political forces, it is far easier to describe the current legal turn in terms of the thinking of Emile Durkheim than Michel Foucault. For while Foucault saw punishment, especially brutal physical punishment, as a thing of the past, no longer necessary in the professionally managed social environment of liberal democracies, Durkheim believed that punishment, and its moral implications, were very much central to the functioning of modern societies. In fact, his theories of the social uses of punishment are very close indeed to the ways in which melodrama functions to provide reparation for suffering and moral closure to the vexed issues of the day. Punishment, according to Durkheim, "does not serve, or else only serves quite secondarily, in correcting the culpable or in intimidating possible followers...." Its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience. Thus, for Durkheim, punishment for moral wrongdoing must be central to any stable social order, for it serves to reassert the moral foundation upon which such societies stand. Punishment, for Durkheim, is a "form of moral action" which, at least in part, represents "the deeply felt beliefs of common people." "Laws and state actions," he says, express such beliefs. But even more importantly perhaps, they actually "seek to transform and

121. See BERLANT, supra note 89, at 4.
122. See generally id. (discussing melodramatic images).
123. See generally Foucault, supra note 108 (explaining punishment).
125. Id. at 62.
126. Id. at 63.
127. See id.
128. Id.
129. Id.
130. Id. at 63.
reshape [dominant moral beliefs] in accordance with a particular vision of society" which reflects the gradually shifting moral sensibilities of new generations. Durkheim's views on punishment then, which have not recently received the attention of Foucault's, seem to be very much in tune with the changing times in which we live, times in which vengeance, punishment and a very strong sense of moral outrage and self-righteousness are more and more in style in criminal justice circles.

IV. THE MANY USES OF MELODRAMA

I want to end this study by returning to the question of popular culture genres and their uses in circulating and reinforcing dominant views about criminal justice and institutional operations generally. For while it is true, as I have been arguing, that the Victims' Rights Movement has employed the conventions of melodrama to serve its own political ends, melodramatic conventions need not necessarily serve any particular political agenda, and, in fact, have as much power in portraying progressive, anti-hegemonic narratives as their opposite. This is an important point because it brings us back to the question of the media's role in defining and furthering political agendas. The media of course do not operate in a political or social vacuum and they do not, on their own, drive the engines that bring certain political ideologies to the fore while pushing others into the shadows. Rather, they tend to both reflect and reinforce dominant views and agendas in ways which are quite complex. Court TV and the other media paraphernalia by which criminal trials have become major cultural and ideological events do indeed seem to work most forcefully in furthering the agendas of Victims' Rights. But, as we have seen, the coming of cameras in the courtroom was the result not of network executives' efforts but of a political and juridical move on the part of those whose own interests were in preserving hegemonic beliefs in American institutions. Once the courts had allowed cameras in courtrooms, however, it was only a matter of time before media executives put it to profitable use, a use which tended—as the

131. Id.
132. See id.
133. See id.
134. By my own statistical analysis, 95% of criminal trials aired on Court TV from its inception through 1998 resulted in conviction.
135. See Nesson & Koblez, supra note 55 and accompanying text.
 justices hoped—to serve hegemonic ends.\textsuperscript{136}

But in earlier, more progressive eras, when progressive social movements had more influence on media producers than they do today, the conventions of melodrama, on rare but often important occasions, have been bent to the needs of surprisingly subversive, anti-hegemonic ideals, most notably in certain popular and influential docudramas. Whether or not melodrama is used in subversive or hegemonic ways, then, will depend on many factors, political as well as cultural and aesthetic. Court TV, which actually produces its own series of docudramas called \textit{Trial Story}\textsuperscript{137}—in which actual trial footage of dramatic or controversial trials is edited down to a one-hour narrative in which justice is seen to be done, or at least closure is achieved—can be counted on to produce its docudramas in ways which most often serve hegemony for reasons which involve the workings of the criminal justice system. For, as is well known, a very small percentage of cases ever actually go to trial. And of those that do go to trial and may be televised, over ninety percent result in convictions.\textsuperscript{138} This is because prosecutors tend to plead most cases out unless they feel they have a good chance of winning. Thus, it is far more likely that victims and their spokespersons will have starring roles in "Trial Story" segments, and that these stories will end with the hegemonic message that "the system does work" because criminals are punished severely, either with death or life with no parole, which in Court TV’s televised criminal trials are common sentences.

Network-produced docudrama, on the other hand, at least on occasion will show the defendant as sympathetic and heroic, and even push the envelope of hegemony a bit to the left.

To illustrate this point, and tease out some of its political implications, I want to briefly compare a particularly effective and dramatic segment of \textit{Trial Story} from 1995, \textit{Georgia v. Redding: A Rapist on Trial},\textsuperscript{139} with an equally effective docudrama made in 1984, also featuring the issue of violence against women, \textit{The Burning Bed}.\textsuperscript{140} \textit{The Burning Bed} is the story of a woman who, after seventeen years of brutal

\textsuperscript{136} The figures given in note 134 verify that Court TV serves to show.

\textsuperscript{137} In 1999 the title was changed to \textit{Crime Station}.


\textsuperscript{139} \textit{Trial Story: Georgia v. Redding} (Court TV, 1995).

\textsuperscript{140} \textit{The Burning Bed} (NBC television broadcast, 1984).
beatings by her husband, and a constant, consistently useless effort to find redress through the existing institutions of the state, set her husband's bed on fire, fled with her children, and was acquitted on the grounds of temporary insanity.\textsuperscript{141} This was of course the precedent-setting case in which the battered woman syndrome was introduced into legal proceedings.\textsuperscript{142} But it was also a precedent-setting case for network television, for it showed a woman murdering her husband and walking away free.\textsuperscript{143} The radically anti-hegemonic nature of this message to women, and to men, should not be minimized. The case, which I have written about elsewhere,\textsuperscript{144} was a result of long years of feminist organizing; and the movie, which drew huge audiences, did much to publicize the problem.

As this brief summary must make clear, there is quite a bit of melodrama in \textit{The Burning Bed}. But it is deployed in a way very different from the \textit{Trial Story}\textsuperscript{145} narration of a rape trial in which the two victims—one, a working-class single mother; the other, a feminist professor—were the primary prosecution witnesses. And the differences have much to do with the very different ways in which the issue of victimization is presented in each, and the very different approaches to the problem of violence against women and how it might be "cured." For while the \textit{Burning Bed}\textsuperscript{146} focuses on institutional failure, and on the plight of the victim herself in her efforts to free and empower herself,\textsuperscript{147} \textit{Georgia v. Redding} focuses, as is common in televised criminal trials, on suffering, punishment, and revenge.\textsuperscript{148} The women who were raped in this case were presented, at great length, retelling in tearful, emotional tones, the horrors of their experiences, while the defendant, an African American male, sat silently throughout, hardly the center of the proceeding which Gewirtz assumes the defendant to be.\textsuperscript{149} The goal of these women

\begin{itemize}
\item \textsuperscript{141.} \textit{See} id.
\item \textsuperscript{142.} \textit{See} id.
\item \textsuperscript{143.} \textit{See} id.
\item \textsuperscript{144.} \textit{See}, e.g., Elayne Rapping, \textit{The Movie of the Week: Narrative, Gender and Genre on Prime Time}, \textit{in Feminism, Media and Law} 143-56 (1997) (discussing \textit{The Burning Bed}).
\item \textsuperscript{145.} \textit{Trial Story, supra} note 142.
\item \textsuperscript{146.} \textit{The Burning Bed, supra} note 143.
\item \textsuperscript{147.} \textit{See} id.
\item \textsuperscript{148.} \textit{Trial Story, supra} note 142.
\item \textsuperscript{149.} \textit{See} Gewirtz, \textit{supra} note 101, at 137-138.
\end{itemize}
was to seek vengeance and punishment for what was done to them, and
to force the criminal justice system to act in their behalf in seeing that the
defendant received the harshest possible sentence.\textsuperscript{150} And, as is most
usual in these programs, they were, after years of single-minded pursu-
ance of this goal, successful.\textsuperscript{151}

Of course \textit{The Burning Bed} also featured emotional testimony from
the victim and her children.\textsuperscript{152} But in this case the perpetrator (who was
already dead) was not a major figure of concern.\textsuperscript{153} Rather, by making
the victim herself the defendant, and sanctioning her right to defend her-
sel and her children against further, possibly deadly, abuse, the movie
managed to put American society, rather than an individual evil man, on
trial.\textsuperscript{154} In fact, to its credit—and in dramatic contrast to the rape revenge
films Clover analyzes—the abuser in this movie is seen not as inhumanly
monstrous or alien to the human race, but as rather pathetic and desper-
ate, and as much a product of sexist socialization as his victim.\textsuperscript{155}

I bring up this comparison of two narratives of violence against
women in order to point out the ways in which the construction of melo-
dramatic narratives—what is put in and, more importantly, what is left
out—convey messages to viewers about what constitutes a social prob-
lem and how it may be remedied. The Victims’ Rights Movement, and
the televised trials and tabloid series that support it, present an image of
the social ills that most trouble us as inevitably and narrowly the concern
of criminal justice. They do not in any real sense allow for consideration
of the larger social forces and structures which would help us make sense
of crime by understanding its root causes and imagining possible reme-
dies beyond the emotional satisfaction of seeing a single defendant pun-
ished for a single act. But in viewing social issues from the narrow point
of view of a victim’s suffering and revenge, these media genres tend to
repress history and the contradictions it contains in ways which, accord-
ing to Frederic Jameson in his famous study of \textit{The Political Uncon-

\begin{footnotes}
\begin{enumerate}
\item[150.] \textit{Trial Story, supra note 142.}
\item[151.] \textit{See id.}
\item[152.] \textit{See The Burning Bed, supra note 143.}
\item[153.] \textit{See id.}
\item[154.] \textit{See id.}
\item[155.] \textit{See id.}
\end{enumerate}
\end{footnotes}
Inevitably repress the implicit utopian element present in all literary and media texts: the revolution that would have to take place if the repression did not occur.\textsuperscript{157}

Finally, as the \textit{Georgia v. Redding}\textsuperscript{158} case illustrates, where supporters of Victims' Rights worry that victims have no voice, allowing them to speak, at length and with great passion, creates the possibility of the opposite danger: the diminishing of the role of the defendant who, as in so many such cases, has few to speak for him and few, especially, who are as articulate and sympathetic as the victims and their supporters. And yet, in the wave of backlash against the Warren Court decisions, and the powerful presentations of victims through the media, it should not be forgotten that it is the defendant whose very life is on the line.

\textsuperscript{156} See generally Fredric Jameson, \textit{The Political Unconscious} (Cornell University Press, 1981) (discussing the problems with viewing a victim's suffering from a narrow perspective).

\textsuperscript{157} See id.

\textsuperscript{158} \textit{Trial Story}, supra note 142.