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Typed name: Prof. Jennifer Hochschild (Chair)

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Typed name: Prof. Steven Pinker

Signature _____

Typed name: Prof. Jon Hanson (HLS)

Signature _____

Typed name: Prof. David Rosenberg (HLS)

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Essays in Political Science, Psychology, and Law

A dissertation presented

by

Francis Xavier Shen

to

The Committee of Higher Degrees in Social Policy

in partial fulfillment of the requirements
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in the subject of
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Professor Jennifer Hochschild (Chair) Francis Xavier Shen

Essays in Political Science, Psychology, and Law

The essay "Intersectionality in the Statehouse: Race, gender, and rape law reform" employs an intersectionality approach to study the interplay of race and gender in contemporary statehouse efforts to improve the laws governing rape and sexual assault. Drawing on a newly created database of all state legislators and all rape and sexual assault bills proposed in 2007, the paper offers empirical support for the claim that gender alone cannot explain the politics of rape law reform. Race must also be accounted for. Employing logit and binomial count models, the paper finds that while female state legislators are much more likely than men to propose rape law reform bills, African-American female legislators diverge from this gender pattern. This is the result, I argue, of legislators' awareness of historical and contemporary racial disparities in the criminal justice system. Latina legislators do not exhibit similar patterns, and in fact are more supportive of some types of sex crime bills. The results of the study contribute to our understanding of intersectionality in American state politics, as well as to rape law scholarship that has too often overlooked race in its gender-based analyses of rape law reform.

The essay "Racialized Retrenchment: The Politics of Crime Victim Compensation Programs in the United States" explores the politics of crime victim compensation programs. Since Pierson (1994) introduced the concept, the politics of retrenchment has been central to evaluations of the American welfare state. Crime victim compensation, since its inception in California in 1965 and through its subsequent expansion to all fifty states, has undergone unique retrenchment. While the programs were initially funded by

general taxpayer revenues, the Reagan revolution introduced a new paradigm: maintain benefit levels to victims, but shift funding responsibility from taxpayers to convicted criminals. Because offenders are disproportionately black, I argue in this paper that victim compensation underwent "racialized retrenchment." As a result, the new politics of victim compensation presents legislators, especially minority legislators, with a tension: crime victims are disproportionately minority, and would therefore benefit from expanded victim compensation programs, but to increase program benefits requires placing additional punishments on offenders, also disproportionately minority.

The paper explores this tension through an historical and contemporary empirical analysis. Using Event History Analysis and Bayesian Model Averaging approaches, I find that diffusion of compensation programs was guided by state fiscal capacity and the percentage of black residents in the state. Turning to the 2007 legislative session, I examine all compensation fund bills proposed and find that minority legislators are less likely to be sponsors. Based on these results, I suggest that the future of victim compensation, and perhaps other similar welfare policies, can best be understood through a racialized retrenchment lens.

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I owe a similar intellectual debt to Steve Pinker, who opened my eyes to an entirely new understanding of psychology, the social sciences, and interactions between the two. Having never met him, and with little background in psychology, I initially walked into Steve's office expecting a short five minute conversation. An hour later, I walked out with a committee member, a new research agenda, and an immense respect for Steve's intellectual creativity. It is not an overstatement to say that Steve changed how I think about the way the world works. His emphasis on analytic precision, from experimental design to sentence construction, has made me a better scholar and writer. His commitment to his students, amidst many competing demands on his time, is a model I hope to someday emulate.

I ended up in Steve's office thanks to David Rosenberg, the Harvard Law professor who gave me hope that HLS could do more than prepare corporate lawyers. In our first year torts class, I jotted down not only notes, but also notable quotes from Prof. Rosenberg. Talking about the standard, doctrinal-focused law course, Prof. Rosenberg told us, "If you think you're learning doctrine in these courses, you're out of your mind. You're being spoonfed diluted water. You're really out of your mind if you think you're learning to read doctrine, let alone read cases." Rosenberg's classes (of which I took another as a 2L) were different. He challenged us: "You should rebel. You're being intellectually killed." Prof. Rosenberg's emphasis on functionalism as a guiding principle for understanding and crafting the law has been enormously influential. It permeates not only my research on mass torts, but also my understanding of the law more generally. Prof. Rosenberg once told us, "Your research isn't in this library. It's in the world of science," and he pushed me in this dissertation to engage in that world outside of the library.

Jon Hanson also pushed me to think beyond the walls of HLS. In his corporations class during my 2L year, and through his supervision of my 3L paper, Prof. Hanson exposed me to the insights of social psychology and their implications for the law. Prof. Hanson, too, changed the way that I understand not only corporations and torts, but the operation of the law generally. Most importantly, he has challenged me to examine my own assumptions and biases – my own impulse toward disposition. His example of blending personal passion with scholarly work is one that I have tried to follow. He has taught me that reflecting on the law involves reflecting on our own relationship to it. This

lesson is seen in the dissertation, but will be remembered long after the dissertation is forgotten.

In addition to the committee, I owe thanks to many in the Harvard Department of Government and Department of Social Policy. Pam Metz, from my first steps on campus in 2001 all the way through the final binding of this document, has provided support and guidance in Social Policy. Each semester, I managed to forget some form or deadline. Pam was there to help me remember and navigate the system. In the same way, I owe a great debt of thanks to Thom Wall who did the same in the Government Department. Whether it was setting up teaching appointments, coordinating with the law school, or getting in touch with professors, Thom was always there to help. The collective support of Pam and Thom was no more evident than on the day of my defense – when I had (of course!) forgotten to obtain the Dissertation Acceptance Certificate. A rushed email the morning-of was met by both Pam and Thom with an immediate and supportive response. From start to finish, they made it possible for me to graduate.

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Two of my years working on this dissertation were spent as a resident tutor at Kirkland House, and I owe many thanks to the Kirkland House Masters, Drs. Tom and Verena Conley, as well as my fellow tutors, students, and Kirkland staff. Conversations with Bob, study breaks, and time on the Intramural fields were welcome distractions. I spent the remainder of my time living with two members of my graduate cohort who deserve special thanks. Doug Kriner and Liam Schwartz listened to me talk through this project from its inception, read drafts of chapters, and provided incredibly important feedback. Sophia Beal also deserves special praise for her constant support throughout the final stages of the project, and her willingness to read and edit every chapter. It is a better dissertation because of her.

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Finally, and most importantly, I recognize that I could not have accomplished any of this without God's love, and the gifts that God has bestowed upon me. It is my hope that in some small way this dissertation may advance God's plan and honor His gifts of creation. I humbly offer the work *Ad Majorem Dei Gloriam.*

Intersectionality in the Statehouse: Race, gender, and rape law reform

> "No single event ticks off America's political schizophrenia with greater certainty than the case of a black man accused of raping a white woman. ... Racism and sexism and the fight against both converge at the point of interracial rape, the baffling crossroads of an authentic, peculiarly American dilemma."
>
> – Susan Brownmiller (1975) [1]

Based on the National Criminal Victimization Survey, the Bureau of Justice Statistics (BJS) estimated that in 2005 there were 160,270 individuals who committed single-offender rape or sexual assault in the United States. 93% percent of these victims were female, and 98% of the offenders were male. For a host of reasons to be discussed in more detail later in this paper, a large majority of these offenders will never serve time for their crime. The Senate Judiciary Committee estimated that "98% of the victims of rape never see their attacker caught, tried and imprisoned."[2]

With this empirical backdrop in mind, consider the following thought experiment. Seeing this lack of successful prosecution, a group of concerned legal scholars works with local district attorneys to develop a policy proposal. A state legislator is presented with this proposal. For the sake of the thought experiment, assume that it's guaranteed that enacting the recommended policy will produce a 25% increase in successful prosecutions of rape / sexual assault. If enacted, the law would thus force 2,000 male rapists in the legislator's state to do time for an act that previously they would have gotten away with. Should the legislator propose such legislation? For many the answer to

[1] Page 210. Brownmiller, Susan. 1975. *Against Our Will.* New York: Fawcett Columbine.
[2] The Response To Rape: Detours On The Road To Equal Justice. Report prepared by the Majority Staff of the Senate Judiciary Committee, May 1993.

this question is an easy "Yes!" and the mystery is why such policy proposals have not been passed.

But should we be so quick to expect legislators to offer such enthusiastic support for the proposed policy to improve prosecution? Not, I suggest, if we consider the intersection of race and gender in the statehouse. To illustrate my point, let's add a few additional statistics to the thought experiment. Based on BJS statistics, approximately 29% of the sexual assault single-offenders are black and 53% are white (with the rest "Other" or unknown).[3] A number of researchers have found evidence that in the criminal justice system, black defendants accused of sexual assault are more likely to be incarcerated and will receive harsher sentences (see Pokorak 2006 for summary). Returning to the thought experiment, imagine that a second group of legal scholars meets with public defenders to analyze the policy recommendation. They agree that 2,000 more rapists would go to prison. But based on empirical evidence (e.g. Blumstein 1980, 1993), they estimate that (given the current legal system) the policy will lead to 25% greater prosecution of black defendants, as compared to whites. Combining that with the disproportionate percentage of black offenders to begin with, enacting the policy will significantly exacerbate already growing racial disparities in incarceration rates. Should this new evidence change the legislator's decision about bill sponsorship?

Regardless of whether or not a legislator would ultimately choose to propose this bill, the crux of my argument is that for concerned legislators, gender and race considerations will be in tension in their policymaking behavior. The Brownmiller quote at the front of this article was addressing interracial rape specifically, but I contend more

[3] These are averages from 2000-2005. The BJS calculates these figures based on reports of the "perceived race of the offender" as provided by victims through the national survey.

generally that race and gender are intertwined when America confronts rape. I argue that given America's racial and gender history, we should understand rape law reform – in particular the laws governing prosecution of rape – through an intersectionality lens. Intersectionality produces splintered politics, cross-cutting alliances, and challenges to cross-identity coalitions.

Although not labeled as such, intersectionality can be seen as having existed at the center of the rape law reform movement for many years. In the book credited with starting the modern rape law reform movement (*Against Our Will*), Susan Brownmiller (1975, 254) reflected on her own experience: "the shock to liberals in 1971 when the women's movement first began to discuss rape was profound. I remember the looks of incredulity and the charge, 'Why *you're* on the side of the prosecution,' as if that were *per se* evidence of racism and reaction."

Intersectional analysis can appreciate this tension because it "changes the relationship between the categories of investigation from one that is determined *a priori* to one of empirical investigation." (Hancock 2007a, 67). Here I refuse to assume *a priori* any particular relationship between Brownmiller's or legislators' dual commitments to race and gender equality. I turn to empirical investigation to explore these cross-cutting politics. Taking advantage of a new database on individual state legislators and their constituencies, I am able to go beyond a simplistic gender vs. race dichotomy to explore more nuanced complexities.

The investigation is organized into six sections. In Section I, I explore the gender and race dimensions of rape law reform. I first discuss how rape law reformers still seek

improved laws to allow for more successful prosecution of sexual assault.[4] For over thirty years legal and policy scholars have lamented the state of rape laws in the United States. Legal scholars Ilene Seidman and Susan Vickers' (2005, 470) observed that "sadly, it now appears that by any available measure, the [rape law] reforms have had no significant substantive impact. No major scholar in the area of rape law and rape reform has argued that these reforms have produced significant results. Perhaps most disheartening is that trial, appellate and state supreme courts are still arguing over the same old ground: the meaning of consent, degrees of force, the victim's role as an active or passive participant in the event, and the victim's privacy." This failure occurs at many stages in the criminal justice process and "most rape scholars believe that, in large measure, these travesties of justice have been due to rules of law, fashioned by male judges over the centuries, that promote victim blaming."[5]

Having laid out the concerns of rape law reformers, I then complicate the analysis by reviewing several bodies of literature concerned with racial disparities in the criminal justice system. Because black offenders, and in particular young black men, are incarcerated at much higher rates than whites (Blumstein 1980, 1993; Mauer 2006), policies that might exacerbate existing racial incarceration disparities may be suspect. Specifically in the context of rape, cultural history and modern empirical investigation

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[4] I focus in this paper solely on the issue of successful prosecutions. I do not consider other important outcomes such as overall incidence rates. For summaries of the movement, both failures and successes, see: Bevacqua, Maria. 2000. *Rape on the public agenda: Feminism and the politics of sexual assault.* Boston: Northeastern University Press. In addition, see: Campbell, Rebecca and Sharon M. Wasco. "Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions," Journal of Interpersonal Violence 2005 20: 127-131. Koss, Mary P. (2005). "Empirically Enhanced Reflections on 20 Years of Rape Research," Journal of Interpersonal Violence, Vol. 20, No. 1, 100-107. Abbey, Antonia, "Lessons Learned and Unanswered Questions About Sexual Assault Perpetration," Journal of Interpersonal Violence 2005 20: 39-42. Mathews, Nancy. 1994. *Confronting rape: The feminist anti-rape movement and the state.* London: Routledge.

[5] Bryden, David P. and Sonja Lengnick. 1997. Rape in the Criminal Justice System. The Journal of Criminal Law & Criminology. 87 (4): 1194-1384.at 1196

suggest that black men raping white women receive harsher treatment at multiple stages within the criminal justice system (LaFree 1989, Spohn 1994, Walsh 1987). Because of these biases in the criminal system, I argue that "improving prosecution of rape" may be linked in policymakers' minds to worsening conditions for African-American men, particularly young black males.

In Section II I introduce the state politics framework I use for my intersectionality analysis. Most analysis of rape laws has been carried out in legal and policy literatures. As a result, there is not satisfactory recognition of the *state politics* that has, and continues to, shape these rape laws. To date, political scientists have been virtually silent on the political explanations for the course of these legal reforms.[6] The few thorough empirical pieces have examined the effects of rape law reform, not the factors that led to the creation of the laws.[7] This paper attempts to correct this deficit by conducting a rigorous, empirical analysis of the politics of contemporary rape law reform in the fifty states. I introduce contemporary rape law reform by presenting a newly constructed database of state legislation on rape and sexual assault.

In Section III, drawing on existing political science literatures, I explore the relationship between gender, race, and policy differences in the statehouse. I propose a new, politics centered theory of rape law reform. I include in this theory consideration of

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[6] In political science journals, the most relevant pieces are all both dated and small in number: Horney, Julie & Spohn, Cassia. 1991. "Rape Law Reform and Instrumental Change in Six Urban Jurisdictions," *Law & Society Review*, Vol. 25, No. 1, pp. 117-154. Ronald J. Berger; Patricia Searles; W. Lawrence Neuman. 1988. "The Dimensions of Rape Reform Legislation," *Law & Society Review*, Vol. 22, No. 2, pp. 329-358. David L. Protess; Donna R. Leff; Stephen C. Brooks; Margaret T. Gordon . 1985. "Uncovering Rape: The Watchdog Press and the Limits of Agenda Setting," *The Public Opinion Quarterly*, Vol. 49, No. 1, pp. 19-37.

[7] The two most extensive empirical studies are: Mebane, Walter R., Jr. & Stacy Futter. 2001. "The Effects of Rape Law Reform on Rape Case Processing," Berkeley Women's Law Journal, 16 Berkeley Women's L.J. 72. and Baron, Larry & Murray A. Straus. 1989. Four theories of rape in American society: A state-level analysis. New Haven: Yale University Press.

identity, political, and demographic factors that may affect the way a legislator approaches rape law reform. Extending a now well-established literature recognizing the distinct legislative agendas of female legislators (Thomas 1994; Welch and Thomas 2001; Dodson and Carroll 1991; Carroll 2001), I develop the hypothesis that not only do women gravitate toward different policy arenas, they also differ from their male colleagues in the types of responses they propose *within* those policy domains. Because of cross-cutting politics, however, I also develop a hypothesis that minority legislators will be less likely to give the prosecutor's office more power, even in the area of rape and sexual assault.

In Section IV, I detail the data and methods used to test these hypotheses. While previous scholarship in gender and race statehouse politics has relied on relatively small samples of individual legislators, this paper examines every state legislator, in all states, in 2007. The legislative data is integrated with another original database comprised of every State House or State Senate bill (N=952) proposed in 2007 that relates to sex crimes. In addition, I control for competing identity claims, political context, and characteristics of the legislative district. The more inclusive empirical model is not only useful for analytically isolating the effects of gender/race, but also for policymakers trying to understand where the interests of prosecutors overlap with partisan and demographic interests. The analysis seeks to understand what types of sex crimes legislation overlap with a large number of interests that coalesce in the statehouse.

In Section V, I discuss the results of my analysis. Employing logit and negative binomial count models, analysis of this data find intersectionality theory holds great explanatory power in the context of rape law reform. Although gender is significantly and

positively related to proposing sex crime bills of every type, when I examine the intersection of race and gender I find that African-American female legislators are unique. For instance, while 32% of female legislators were in the three groups most likely to propose a punishment/penalty sex crime bill, only 1.2% of black female legislators were in these groups. Fully *86%* of black female legislators were in the three groups least likely to propose a punishment/penalty bill. Divergent findings such as this suggest that legislators with dual commitments are aware of the potentially detrimental effects of some of these laws on their minority constituents.

The paper concludes in Section VI with a discussion of the policy implications of these findings, as well as the most promising lines of related future research for gender scholars in political science. The findings provide rigorous empirical confirmation of the distinctive agenda setting behavior of female state legislators, but challenge the essentialization of the gender category. Considering "female legislators" as a whole overlooks the very different policy agendas of black female legislators in the context of rape law reform. For researchers and theorists studying rape outside of political science, the paper serves as an important corrective by emphasizing the importance of variation across individual legislators. "Politics" is not a monolith, but varies significantly by gender, race, and partisanship.

I. Rape Law Reform: Gender and Race Perspectives

Over the past two decades, political scientists have become increasingly aware of the importance of examining the intersectionality of gender, race, and other relevant identities (Hancock 2007a, 2007b). The theory "to date has emphasized intra-category

diversity—that is, the tremendous variation within categories such as 'Blackness' or 'womanhood'" (Hancock 2007a, 66). In the context of rape, intersectionality has been central in the "seminal articles of critical race feminists who forcefully outline the ramifications of a legal system mired in the unitary approach for women of color who are victims of sexual assault, domestic violence, and employment discrimination" (Hancock 2007a, 71). In this paper I build on and contribute to this literature by examining the intersection of race and gender not as manifested in individual victims, but in the state level politicians who are in a position to propose legislation to address victims' concerns.

Intersectionality theory rests on the premise that one's identity cannot be easily compartmentalized. Because "intersectionality emerges out of earlier ... "constructivist efforts in asserting first and foremost that reality is historically and socially constructed," (Hancock 2007a, 74), and because individuals must navigate society, the theory posits that individuals cannot easily shed their identities. For minority women, "systems of race, gender, and class domination converge," making it impossible to escape the intersectionality of one's reality.[8]

In the political realm specifically, Crenshaw (1991, 1252) argues that the experience of competing identity tensions is unique: "The need to split one's political energies between two sometimes opposing groups is a dimension of intersectional disempowerment that men of color and white women seldom confront." As a result of focusing overwhelming on minority women, Hancock (2007a, 71) notes that the theory has had to "avoid the conclusion that intersectionality is simply a body of research concerning women of color." I agree with Hancock's (2007b) assertion that intersectionality is useful for understanding causal complexity in the policy process.

[8] Crenshaw (1991), 1246.

Specifically in the case of rape law reform, better understanding the intersectionality of race and gender provide us with a more accurate understanding of the complexities of rape law reform. To see why, I now present two sides of a debate over the efficacy of changing laws to put more rapists in jail.

I.A. The Case for Rape Law Reform

Since the publication of Susan Brownmiller's *Against Our Will*, an enormous amount of rape law reform has been undertaken at both the federal and state levels. Since the early 1970s, "state and federal legislatures have enacted rape shield laws, provided for privileged protection of rape counseling records, repealed marital rape exceptions, eliminated evidentiary corroboration requirements and cautionary instructions regarding the absence of corroboration, and abolished the statutory 'reasonable mistake of fact' defense."

Amongst legal scholars of rape, however, there is a majority opinion that these laws have not had their desired effects.[9] The statistical reality suggests that at multiple stages after the assault, offenders are able to escape punishment. Based on the most recent (2006) data from the National Crime Victimization Survey, as well as estimates of other research reported in Bryden and Lengnick, of 100 offenders (74 of whom sexually assaulted someone they knew), 58 will not have the incident reported to begin with. Of the remaining 42, 20 will be questioned by the police and released. Another 4 will be

[9] Summarizing the legal academy's research on this subject, Simon (1999, 514) observes that "the consensus is that overall, the primary beneficiaries of rape law reform have been women who are raped by strangers. Prosecutors continue to distinguish cases of "real" rape from "simple" rape, pursuing what they consider more serious stranger rape cases. In addition, the probability of conviction for sexual assault cases remains lower than for nonsexual assault cases. Punishment of offenders convicted of sexual assault in the postreform era appears to be less severe than in the pre-reform era. There appears to be a slight de-crease in prison sentences and a substantial increase in commitments to sex offender treatment programs. ... The rape law reform movement has had little or no impact on victims of nonstranger rape and sexual assault."

arrested, but not charged. Of the 18 remaining offenders, 7 will have their case dropped. This leaves 11 offenders who face criminal sanctions, only 7 of whom will face jail time.

There is no lack of legal scholarship on each of these stages. One line of argument suggests that while legal rules have changed, a "rape culture" in society remains.[10] According to this line of argument, criminal justice officials don't follow the new statutes or interpret them in such as a way that nullifies their effects.[11] Empirical scholarship from social psychology offers wide support for the continued prevalence of "rape myths".[12] Levenson and D'Amora (2007) are the most recent scholars to point out that "sex offender policies are often created on the basis of myths" rather than sound scientific evidence.[13] In addition to these arguments about culture and beliefs, legal scholarship suggests that the reforms simply haven't gone far enough.[14] In a long review essay that included 598 footnotes, Bryden and Lengnick (1997) summarize the general concerns of these scholars:

> To begin, the case attrition rate in rape cases is shockingly high, and very few rapists are convicted of the crime. Victims often do not report the

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[10] Buchwald, Emile, Fletcher, Pamela R., & Marth Roth, eds. 2005. *Transforming a Rape Culture*. Revised Ed. Minneapolis, MN: Milkweed.

[11] Davis (1999, 514-5) presents a commonly made argument that "the rape-law impact studies suggest that many criminal justice officials continue to operate on the basis of traditional assumptions, and that they do not always comply with the statutes. Decisions regarding sexual assault cases are still subject to a great deal of discretion, and the reforms do not necessarily affect the internal operations of the criminal justice system. For example, evidentiary reforms involving the victim's past sexual conduct contain loopholes that limit the admissibility of evidence regarding the complainant's past sexual conduct for some purposes (e.g., to prove the victim's consent) but continue to allow this evidence for other purposes (e.g., to challenge the victim's credibility or to show another possible source of semen). And when evidence of the victim's past sexual conduct is admitted, juries continue to use it to mitigate the defendant's culpability."

[12] See, e.g. Burt M. "Cultural myths and supports for rape," J Pers Soc Psychol. 1980; 38(2):217-230. Lonsway KA, Fitzgerald LF. "Rape myths: in review," Psychol Women Q. 1994; 18:133-164. Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. Davis L. Rev. 1013, 1055 (1991). Sawyer, Robin G.; Thompson, Estina E.; Chicorelli, Anne Marie. "Rape Myth Acceptance Among Intercollegiate Student Athletes: A Preliminary Examination," *American Journal of Health Studies*, Vol. 18 Issue 1.

[13] Levenson, Jill S. & D'Amora, David. 2007. "Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?" *Criminal Justice Policy Review*, Vol. 18, No. 2, 168-199.

[14] A useful summary appears in Seidman & Vickers, supra note 1. See also: *Unwanted Sex: The Culture of Intimidation and the Failure of Law* by Stephen J. Schulhofer.

> rape, largely because they fear overbearing, hostile police, and - should a trial ensue - vicious attacks on their character. ... If the rape victim's conduct prior to the crime violated traditional sex-role norms, police commonly disbelieve her report or blame her for the rape. ... Afraid that losing cases will look bad on their records, prosecutors are excessively reluctant to prosecute acquaintance rapists. When they do prosecute, the system puts the victim rather than the defendant on trial. Juries, motivated by the same biases as other participants in the system, often blame the victim and acquit the rapist.[15]

Empirical research carried out by criminologists, sociologists, and psychologists supports many of these claims. A body of research has investigated how prosecutors' decisions are affected by both offender and victim characteristics, and that prosecutors develop conceptual shorthands to process the cases that come before them (see Spohn, et. al. 2001).

A series of studies by political scientist Cassia Spohn provide insight on the details of prosecutorial decisionmaking. First, prosecutors must decide what, if any, charges to bring. The screening process involves a number of options. A prosecutor "can reduce the charge to a misdemeanor, file different (i.e., more serious, less serious, or additional) charges than what is indicated on the arrest affidavit, or file charges identical to those on the arrest affidavit." (Spohn, et. al. 2001, 212). The prosecutor can also choose not to charge.

Examining data on all cases cleared by arrest in Miami in 1997 (N=140 Spohn, Beichner, and Davis-Frenzel 2001) found that charges were dropped in about one-third of the cases. Examining the prosecutors' notes in closeout memorandums allowed them to explore why charges were dropped. One significant reason was the victim's implicit decision not to go forward, as in a large number of cases, "the decision to reject charges

[15] 1195-6.

could be traced to the victim's failure to appear for a pre-file interview, the victim's refusal to cooperate in the prosecution of the case, or the victim's admission that the charges were fabricated" (Spohn, et. al. 2001, 228).

When the researchers (Spohn, et. al. 2001, 229) spoke with prosecutors about going forward with sexual batter cases, all of the prosecutors "mentioned the strength of evidence in the case and the credibility of the victim." It should be noted that this is what prosecutors are bound to do by their own code of professional ethics. In the American Bar Association's Model Rules of Professional Conduct, the Special Responsibilities of a Prosecutor (Rule 3.8) include a prosecutor's duty to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause" and "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[16] When prosecuting a sexual assault, just as with any other crime, the victim is a witness, not a party to the case. Thus, the prosecutor has a duty, as with all witnesses, to evaluate their credibility. Prosecutors are bound by their own ethical code not to automatically believe witnesses.

There is evidence, however, that prosecutors may tend to base their evaluations of certain rape victim-witnesses on factors that may not necessarily correlate with credibility. Spohn and Holleran (2001) examined cases in Kansas City (N=259) and Philadelphia (N=267), and found that the victim's character was more salient in acquaintance rape cases, as compared to stranger rape cases.

Even if prosecutors are acting in good faith, sexual assault cases may reach different outcomes from other types of cases. Myers and LaFree (1982), for instance,

[16] ABA Model Rules of Professional Conduct. Rule 3.8(a)(d). Online: http://www.abanet.org/cpr/mrpc/mrpc_toc.html

found that sexual assault cases weren't processed differently from other felony cases, but that the evidentiary challenges in sexual assault cases were more difficult to overcome. This is not news to rape law reformers, whose answer would be: change the evidentiary bar. Evidentiary rules on rape have been amended in the past. One concrete example of change is dropping the requirement for corroboration. Rape prosecution used to be guided by "special corroboration rules mandating that prosecutors produce evidence that verified the victim's testimony." These corroboration rules "were considered necessary because of the concern that women would deliberately lie about rape in order to explain premarital intercourse, infidelity, pregnancy, or disease, or would retaliate against an ex-lover or some other man" (Simon 1999, 512). Corroboration rules have now been dropped from the books in all states.

Prosecutors may also consider the potential reactions of jurors and judges "downstream" (Frohman 1991). If prosecutors believe that jurors will question the credibility of their victim-witness, then they will see a reduced chance of conviction, and consequently may be less likely to continue prosecuting the case. Commenting on this downstream mentality, Frohman (1991, 214) argues that "prosecutors are actively looking for 'holes' or problems that will make the victim's version of 'what happened' unbelievable or not convincing beyond a reasonable doubt." If laws were changed to modify downstream behavior improving the chances for conviction, prosecutors would likely drop fewer charges.

But why should we expect victim-witness credibility to be any more of an issue in rape cases than other types of cases? For over three decades, psychologists have been studying the uniqueness of blame attribution within the context of rape and sexual

assault. Since Martha Burt's (1980) development of the "rape myth acceptance scale" (RMAS), a proliferation of social psychology research has explored beliefs in "rape myths".[17] The term rape myth refers not to a single belief, but to a related collection of myths that "include the belief that a rape victim wanted or deserved to be victimized and the belief that a victim is at fault if she is raped."[18] Researchers have explored the way that stereotypes about gender and race, as well as social psychological motivations to maintain certain views of the world, affect blame attribution.[19]

A commonly held, but mistaken belief is about victim-offender relationship. Although many believe that the majority of rapes are committed by strangers, in fact, most rapes are committed by someone known by the victim. In a 2000 survey conducted by the U.S. Department of Justice, female victims of completed rape in 2- and 4-year colleges/universities were asked about their attacker. Thirty-five percent of the rapes were committed by classmates, 34% by a friend, 24% by a boyfriend or ex-boyfriend, 2% by an acquaintance, and only 4% by someone else.[20]

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[17] An alternative scale was developed later by Gilmartin-Zena. Gilmartin-Zena, P. 1989. "Attitudes about rape myths: Are women's studies students different?" *Free Inquiry in Creative Sociology*, 17, 65-72.

[18] Buhi, Eric R. (2005). Reliability Reporting Practices in Rape Myth Research , By:, Journal of School Health, Vol. 75, Issue 2. See also: Lanier, Cynthia A., Elliott, Marc N., Martin, David W., Kapadia, Asha . (1998). "Evaluation Of An Intervention to Change Attitudes Toward Date Rape," Journal of American College Health, Vol. 46, Issue 4. Holcomb, Derek R., Savage, Michael P., Seehafer, Roger, Waalkes, Deanna M. (2002). "A Mixed-Gender Date Rape Prevention Intervention Targeting Freshmen College Athletes," *College Student Journal*, Vol. 36, Issue 2.

[19] See, e.g. Caron, Sandra L., Carter, D. Bruce., (1997). "The Relationships Among Sex Role Orientation, Egalitarianism, Attitudes Toward Sexuality, and Attitudes Toward Violence Against Women," *Journal of Social Psychology*, Oct97, Vol. 137, Issue 5. George, William H., Martínez, Lorraine J. (2002). "Victim Blaming In Rape: Effects Of Victim And Perpetrator Race, Type Of Rape, And Participant Racism," Psychology of Women Quarterly, Summer 2002, Vol. 26, Issue 2. Cathaleene Jones & Elliot Aronson, Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim, 26 J. Personality & Soc. Psychol. 415, 416-17 (1973). Cowan, Gloria, Campbell, Robin R. (1995). "Rape Causal Attitudes Among Adolescents," *Journal of Sex Research*, Vol. 32, Issue 2. Quinones, Barbara; Phares, Vicky. (1999). "Beliefs and attitudes about sexual aggression," Psychology of Women Quarterly, Sep99, Vol. 23 Issue 3.

[20] Survey, Dec. 2000. "Victim-offender relationship between college women and their offenders in rape victimizations committed by single offenders." Administered by: U.S. Department of Justice; Method:

These beliefs about victim blame affect policy as "belief in rape myths leads to a strict definition of rape and denies the reality of many actual rapes, which makes it difficult to prosecute rapists and support victims. Rape victims are often victimized twice--once from the actual assault and a second time when they encounter negative, judgmental attitudes from the police, courts, and family and friends."[21] As argued by Madigan and Gamble (1991), "there is a new, more disturbing twist to rape if one becomes aware that women who report rape are again raped by a system composed of well-intentioned people who are nevertheless blinded by the myths of centuries."[22] For advocates of rape law reform, the law must go farther to acknowledge and combat the operation of these myths in the legal system.

I.B. Race and Rape

For rape law reformers, the body of research just reviewed provides multiple compelling reasons to strengthen prosecution of sexual assault. But to move forward with a rape reform agenda requires moving through a legal system that cannot be separated from race. Review of cultural history and modern empirical evidence reveals that race plays an important role in both societal and legal treatment of rape. I review (1) the cultural history of rape and race in the United States, (2) the racial disparity in incarceration, and (3) empirical evidence of the role of race in the prosecution of sexual assault. Findings in each section provide legislators with reasons to be cautious about how rape law reforms are crafted.

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telephone; Universe: U.S. Women college students attending 2 or 4 year colleges or universities; Sample size: 4446.

[21] Simon, Leonore M. J. (1999). "Sex Offender Legislation and the Antitherapeutic Effects on Victims," *41 Ariz. L. Rev. 485 at 505.*

[22] Lee Madigan & Nancy C. Gamble, The Second Rape: Society's Continued Betrayal of the Victim (1991). p. 3.

I.B.1. Interracial Rape

It is nearly impossible to understand the history of rape laws in the United States without reference to interracial rape. Those making the laws, white males, were concerned with protecting white women against black males. Black women were not initially protected at all. Historically, "raping a black woman was not a crime for the majority of this Nation's history."[23] Instead, criminal sanctions have been heavily aimed at black males.

In 1937, economist Gunnar Myrdal embarked on a landmark study of the United States to investigate the "American Dilemma": how the country could embrace high ideals of freedom and equality, while at the same time allow so much racial discrimination.[24] Myrdal identified what he labeled the "white man's theory of color caste" and argued that white men developed a "rank order of discrimination" based on race purity. [25] At the top of the list was the limit on interracial sex: "no intermarriage and sexual intercourse involving white women" (Myrdal 1944, 60).[26]

Rape of a white woman by a black man represented a complete violation of the race purity and miscegenation principles. While these views were held most prominently by Southerners, Myrdal (1944, 57) found that "even a liberal-minded Northerner of cosmopolitan culture ... [would], in nine cases out of ten, express a definite feeling

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[23] Pokorak at 8.
[24] Myrdal, Gunnar. 1944. An American Dilemma: The Negro Problem And Modern Democracy.
[25] Myrdal, p. 58.
[26] Rape may be imbued too with greater cultural meaning. Myrdal cites W. F. Cash's The Mind of the South, in which Cash observed what he called "the Southern rape complex" after the Civil War. This complex led Southerners to believe that "any assertion of any kind on the part of the Negro constituted in a perfectly real manner an attack on the Southern woman." Cash went on to suggest that what Southerners "saw, more or less consciously, in the conditions of Reconstruction was a passage toward a condition for her as degrading, in their view, as the rape itself." Quote appears in Myrdal (1944), p. 1356, and the original is page 116 in Cash's (1941) book.

against amalgamation." Myrdal's perception was later supported by opinion polling: in 1958 only 4% of Americans approved of marriages between blacks and whites.[27]

Myrdal's broader argument, and one that is relevant here, is that white men had to somehow negotiate their great fear of black-on-white rape with their supposed beliefs in general equality. To bridge this divide, white men developed myths about the beastly nature of black men. African-American males were depicted as beasts ravishing white women. As described by Gunning (1996), "for many white supremacists, the stereotype of the black male as sexual beast functioned as an externalized symbol of social chaos against all whites, regardless of class".[28] It was not uncommon for whites to turn to lynching suspected black rapists, but there is much debate as to how to properly define lynching.[29] Gunning's study of literature around the turn of the century finds that the lynching story is more complicated than simple accounts sometimes make it out to be. Nevertheless, the basic characters appear: "the black rapist, the white rape victim, the white avenger, and the black woman as prostitute."[30]

When racism intersected with sexism, the results were not always predictable. Sommerville's (2004) careful study of the 19th century American South starts by noting how neither of two extreme "myths" can be wholly accurate:

> The 'rape myth', one of the hallmarks of a distinctive southern society, has thus bequeathed to us two potent and enduring assumptions. The first is that white southerners throughout their entire history have been

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[27] Gallup Poll. Online: http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx

[28] Gunning, Sandra. 1996. *Race, rape, and lynching: The red record of American literature, 1890-1912.* New York: Oxford University Press. Page 6.

[29] Christopher Waldrep. 2000. "War of Words: The Controversy over the Definition of Lynching, 1899-1940," *The Journal of Southern History*, Vol. 66, No. 1. (Feb., 2000), pp. 75-100. W. Fitzhugh Brundage. 1993. *Lynching in the New South : Georgia and Virginia, 1880-1930.* Urbana : University of Illinois Press. Tolnay, Stewart Emory and E.M. Beck. 1995. *A festival of violence : an analysis of Southern lynchings, 1882-1930.* Urbana : University of Illinois Press, c1995.

[30] Gunning, p. 11.

> preoccupied (some would say obsessed) with black male sexuality. A related and concomitant assumption is that black men and slaves never raped white women at all and, hence, claims that they did were based on fear, not reality. These twin assumptions have book-ended us into a largely unexamined debate about rape and race in the South. Once we acknowledge that neither position is tenable, we are free to engage in an in-depth study of how race, class, and gender interacted in local settings when charges of black-on-white rape were aired.[31]

One of Sommerville's striking findings is that white men did not universally accept the word of white women accusing black males of rape. Indeed, by making such an accusation white women were upsetting other power dynamics, as they were calling into question the ability of the slave's master to maintain order. Sommerville also finds that local practices found ways to mitigate the harsh sentences prescribed for African-American males convicted of rape.

While attitudes have changed dramatically, with 74% of Americans now approving of interracial marriage, interracial rape has continued to draw the attention of scholars in sociology and criminology. At the center of the debate are explaining the statistical pattern of interracial rape (Table 1.1). Because the statistics are the "perceived race" of the offender, as reported by self-identified victims through telephone surveys on the National Criminal Victimization Survey, the numbers themselves are not stable. Over the period 1996-2005, the percentage of blacks ranges from 18.1 in 2000 to 48.5 in 2005. Excluding the outlier 2005 (for which I could find no explanation), white victims were sexually assaulted by black men in 7-15% of incidents. Given that blacks comprise approximately 12-13% of the nation's population, these aggregate statistics seem not to

[31] Sommerville, Diane Miller. 2004. *Race and Rape in the Nineteenth-Century South.* Chapel Hill: University of North Carolina Press. Page 3.

suggest disproportionality. The racial disproportionality evident in the table is actually related to black women, who comprise 15-22% of all sexual assault victims.[32]

Nevertheless, empirical research has been most concerned with the black male / white female trope. Initially, "following Eldreidge Cleaver's depiction of interracial rape as an insurrectionary act, several observers have suggested that black-on-white rape is a calculated response by blacks to their economic and political oppression by white men. ... From this view, the source of blacks' motivations to rape white women lies in their economic deprivation vis-à-vis whites."[33] Starting with O'Brien (1987), however, a consensus developed that *intra*racial rape actually occurs more than we would expect once we take into account the starting population distributions. O'Brien (1987), employed Blau's (1977) macrostructural theory of interrace relationships to the case, and argued that we should actually expect higher levels of interracial crime given "the number of blacks and whites in the population of the United States and in the population of offenders." O'Brien (1987, 819) uses this illustrative example: "assume there are 10% blacks and 90% whites in a population of 1,000; then, if there are 10 black-white marriages, 10% [10/100] of the blacks would be intermarried, while only 1.1% [10/900] of the whites would be." A similar analysis, he suggested, could explain interracial rape rates.

[32] Though other data suggest that in terms of victimization, there are not significant modern disparities between White, Black, and Latino populations, though Native American women experience a much higher rate of sexual assault. White females are victimized by rape at a rate of 3.1 per 1,000 (persons 12 and over), and Black females at a rate of 3.7 (Rennison 2001).

[33] South and Felson (1990, 71). Citing Curtis (1975), Cleaver (1968), LaFree (1982) and Wilbanks (1985). LaFree, Gary D. 1982. Male power and female victimization: Toward a theory of interracial rape. *American Journal of Sociology.* 88: 311-28. Cleaver, Eldrdigde. 1968. *Soul on Ice.* Dell-Delta / Ramparts. Curtis, Lynn A. 1975. *Violence, race, and culture.* Heath. Wilbanks, William. 1985. Is violent crime intraracial? *Crime and Delinquency* 31: 117-28.

O'Brien's argument has been confirmed in subsequent analyses. South and Felson's (1990, 87) analysis of 1,396 rapes reported in the National Crime Survey found that "the probability that a white woman is raped by a black rather than a white offender, and the probability that a black rapist selects a white rather than a black victim, are both strongly influenced by the relative sizes and spatial distributions of the black and white populations." Koch's (1995) analysis of the National Crime Survey data from 1977-88 similarly found no evidence that black rapists "prefer" white victims. Although this empirical reality – that rape victims are not 'selected' on the basis of their race – has become accepted in the academy, the image of the black offender and white victim may still have an effect on the formulation of criminal laws.

Table 1.1. Rape & Sexual Assault Offenders, by race of victim and race of offender, 1996-2005

			Percentage of crimes by perceived race of offender			
Year	Victim Group	Number	White Offender	Black Offender	Other Offender	Race not known
'05	Total	160,270	32.8	48.5	15.4*	3.2*
	White victim	111,490	44.5	33.6	19.6*	2.3*
	Black victim	36,620	0.0*	100	0.0*	0.0*
'04	Total	184,390	49.4	26.9	16*	7.7*
	White victim	139,900	65.1	8.3*	16.4*	10.1*
	Black victim	39,300	0*	89.8	10.2*	0.0*
'03	Total	169,340	47.9	24.4	22.4	5.3*
	White victim	131,030	57.9	15.5*	19.8*	6.8*
	Black victim	24,010	0.0*	87.9*	12.1*	0.0*
'02	Total	202,670	55.8	35.8	8.4*	0.0*
	White victim	134,140	76	13.1*	10.9*	0.0*
	Black victim	59,490	14.2*	85.8	0.0*	0.0*
'01	Total	226,390	60.3	22.5	12.3*	4.9*
	White victim	183,160	71.3	17.1	8.4*	3.2*
	Black victim	29,980	13.4*	65.5*	10.1*	11*
'00	Total	238,670	69.1	18.1	7.9*	4.9*
	White victim	199,360	81.5	7*	5.6*	5.8*
	Black victim	33,780	7*	79.7	13.3*	0.0 *

'99	Total	357,900	61.6	20.7	8.8	9
	White victim	274,020	79.4	7.3*	6.3*	6.9*
	Black victim	67,890	0.0*	79.3	4.6*	16.1*
'98	Total	279,510	64.3	19.7	14	2*
	White victim	225,330	77.2	9.9*	10.4*	2.5*
	Black victim	47,430	7.2*	68.9	23.9*	0.0*
'97	Total	288,190	62.8	20.8	15.6	0.8*
	White victim	234,800	74.8	8*	16.2	1*
	Black victim	43,890	0.0*	93.7	6.3*	0*
'96	Total	275,500	69.9	20	7.4*	2.7*
	White victim	216,710	82.2	8.8*	6.9*	2.1*
	Black victim	44,890	13.5*	80.2	6.3*	0*

Notes: Data is from annual "Criminal Victimization in the United States" reports published by the Bureau of Justice Statistics, based on data from the National Criminal Victimization Survey.

I.B.2. Racial disparities in incarceration

There are longstanding racial disparities in incarceration rates, and debates about the extent to which racism and concerns about interracial rape account for these disparities. Looking first at the empirical background, in 1980 the overall incarceration rate per 100,000 was 124 nationally, with a rate of 233 for men and 755 for males aged 20-29 (Blumstein 1980). The rates for blacks were roughly 7 times higher across the board: 493/100,000 overall, 1,012 for black males, and 3,068 for black males in their twenties. Black males in their twenties, then, faced "an incarceration rate that [was] twenty-five times that of the population" (Blumstein 1980, 1260). Blumstein (1993) conducted a follow-up study a decade later. While there was a significant change for drug-related offenses (where racial disparities became even worse), for other crimes the relative rates looked roughly the same.

From the early 1980s to the mid-1990s, the number of African-Americans incarcerated has grown considerably, and the black-white disparity has consequently increased as well (Yates and Fording 2005). In their annual report on "Prison and Jail Inmates at Midyear," the Bureau of Justice Statistics reported in 2007 that (based on data collected in 2006), "black men were incarcerated at 6.5 times the rate of white men" (Sabol, et. al. 2007, 9).[34] It is striking that in 2006, 11.7% of all black men in their twenties were in jail. If we account for the number of young black men on parole or on probation, that percentage may rise to over 25% (Mauer 2006). While not as dramatic, Hispanic disparities also exist. Hispanics have consistently accounted for 14-15% of the

[34] In its methodology section, the data sources are explained: "Bureau of Justice Statistics (BJS), with the U.S. Census Bureau as its collection agent, obtains midyear and yearend counts of prisoners from the departments of corrections in the 50 States and from the Federal Bureau of Prisons." (10).

incarcerated population (Gilliard and Beck 1997), and their incarceration rates are presently 2.5-3 times higher than comparable white populations (Sabol, et. al. 2007). The causes of racial incarceration disparities, especially the white-black gap, have been explored at length elsewhere (Mauer 2006, Miller 1996), and are beyond the scope of this paper.[35] But Blumstein's (1980, 1993) estimates suggest that in case of rape and sexual assault, arrest rates account for only 75% of the explanation. In other words, somewhere in the process from arrest to incarceration, another 25% of the racial disparity is introduced.

The salient point for the analysis in this paper is that legislators with this population – African-Americans generally and young black males in particular – as important constituencies should be sensitive to proposals that suggest somehow giving prosecutors more tools to go after accused and suspected defendants. State-level analysis by Yates and Fording (2005) suggests that legislators are aware of the racial consequences of their state's criminal justice system. Yates and Fording (2005) conducted state-level regression analysis of the relationship between state partisanship, imprisonment rates, and black-white incarceration disparities. They included in their model state-level measures of the change in percentage African-American and female legislators in the state. Looking at the period 1977-1995, their analysis found that "imprisonment has escalated in environments in which conservative political elites are prevalent" and these conservative state environments "operate to disproportionately

[35] A great percentage (at least 80% by Blumstein's (1980) estimation) of incarceration can be explained by arrest rates. But this simply begs the question about disparities in arrests, formulation of laws, and social control (Garland 1990). Garland, David. 1990. Punishment and Modern Society: A Study in Social Theory. Chicago: Chicago University Press. D'Alessio and Stolzenberg's (2003) analysis of data from the National Incident-Based Reporting System (NIBRS) suggests that, compared to a baseline based on the victim reports of offender race, the higher arrest rates for blacks are indeed due to higher rates of involvement in the underlying crimes.

amplify the imprisonment rates of blacks" (1118). They found too, however, that the percentage of female and black legislators was inversely related to incarceration rates. Might these same legislators find themselves hesitant to back rape reform legislation if one of the potential consequences is a contribution to the incarceration race disparity?

I.B.3. Race, prosecution, and sentencing for rape

In addition to incarceration, research has also uncovered evidence of racial disparities in the handling of sexual assault cases. Historically there is little debating Myrdal's (1944, 550) observation that "for offenses which involve any actual or potential danger to whites," blacks were "punished more severely than whites".[36] But do we see similar inequalities today?

Studies of several individual jurisdictions have found that "sexual assaults of white women by black men are treated more harshly than other sexual assaults" (Spohn and Spears 1996, 649).[37] LaFree (1980) examined the case of 881 individuals charged with forcible sexual offenses in a large Midwestern city from 1970-1975. Controlling for evidentiary and confounding factors, LaFree's (1980, 852) "findings suggest, rather conclusively, that black men accused of sexually assaulting white women receive more serous sanctions than other sexual assault suspects". Myers and LaFree (1982) examined a cohort of felony defendants in Indiana in the early 1970s and conducted empirical analysis comparing sexual assault prosecutions with other violent and property crimes. Looking to see if the contextual determinants of outcomes (going to trial, sentencing)

[36] Blacks were also more likely to receive the death penalty. Crocker (2000, 696-7), notes that "the Baldus study of the interrelationship between race and the death penalty in Georgia in the 1970s concluded that a black person who killed a white person was seven times more likely to be sentenced to death than a white person who killed a black person."

[37] The authors cite the research of LaFree (1989), Spohn (1994), and Walsh (1987). Race and prosecutorial discretion is also summarized concisely in Harvard Law Review. 1988. Race And The Prosecutor's Charging Decision. 101 Harv. L. Rev. 1520.

were different for sexual assault crimes, for the most part they found that contextual variables were not significant predictors. There found, however, that "a single contextual factor, racial composition, had a significant effect. Imprisonment was more likely where the defendant was black and the victim white" (Myers and LaFree 1982, 1294).

Walsh (1987) examined sentencing of sexual assault offenders in an Ohio county. His finding is instructive. The mean sentences for black versus white offenders was not significant, nor was the mean sentence when comparing black versus white victims. *But*, when the two were considered together, Walsh found that sentencing was significantly more severe for black-on-white sexual assault, as compared to black-on-black sexual assault. Spohn's (1994) analysis of violent felony offenders in Detroit similarly found that black-on-white rape saw the highest likelihood of incarceration, greater than black-on-black or white-on-white comparisons.

These studies were framed as tests of the "sexual stratification hypothesis". The hypothesis posits that "individuals in positions of power both determine the (race-specific) rules of sexual access and attempt to ensure that these rules are enforced." As a corollary, "because sexual assaults of white women by black men threaten the power of the dominant group (i.e. white men), they are punished more harshly than other types of sexual assault, especially assaults of black women by black men" (Spohn and Spears 1996, 653).

To be sure, there is some evidence suggesting no racial differences (Steen, Engen, and Gainey 2005). Kramer and Steffensmeir (1993) found that with sentencing guidelines in place in Pennsylvania, race factored little into sentencing decisions. But the same standards, because they "systematically link severe sentences to offenses most committed

by blacks (e.g., robbery) and/or to prior record which may reflect past police and court processing decisions for which blacks may be particularly vulnerable" (373-374). Race may have entered the equation before, and in much more complex ways. Using a random sample of cases from 1974-1980 in Detroit Recorder's Court, Spohn and Spears examined 1,152 cases of rape and sexual assault. Including controls for evidentiary strength (e.g. existence of physical evidence) and a number of potentially confounding factors (e.g. risk-taking behavior on the part of the victim that might affect sentencing), this analysis generally failed to find evidence that black-white rape led to higher incarceration rates.[38] The authors found that "in fact, blacks charged with sexually assaulting whites were *more* likely than either of the two other groups to have all charges dismissed before trial" (Spohn and Spears 1996, 673). Like Kramer and Steffensmeir, the authors suggested that police and prosecutors be more willing to take risks on black offender / white victim cases, and move forward.

How can we synthesize these sometimes contradictory findings? Pratt's (1998) meta-analysis of studies examining the effects of rape on sentencing decisions concluded that race was not significantly related to sentencing decisions, but he noted that methodological differences plagued the field.[39] Contextual factors such as the victim-offender relationship and the victim's behavior affect how the case is viewed. Race also plays a different role in different stages of case processing.[40] Taken together, the

[38] They did, however, find that "blacks who sexually assaulted whites received over four years more than white who sexually assaulted white and over three years more than blacks who sexually assaulted other blacks" (674).

[39] Pratt noted too that "Empirical research has given support to the arguments that race does not play a role (the differential involvement perspective); plays a direct role (the direct-impact perspective); and/ or an indirect role (the interactionist perspective) in the sentencing process." (520)

[40] Wooldredge and Thistlethwaite (2004) examined "case processing for 2,948 males arrested for misdemeanor assaults on intimates in Hamilton County (Cincinnati), Ohio". They looked at the cases from the stage of formal charging, through prosecution, conviction, and sentencing. When they controlled for

conclusion seems to be that race plays a role in prosecuting and sentencing, but that it is "misleading and oversimplistic to assume that criminal justice officials view all sexual assaults involving black men and white women as more serious than other types of sexual assaults" (Spohn and Spears 1996, 677). However complicated, though, it is clear that for legislators concerned with racial disparities, laws related to the prosecution of rape pose special concerns.

II. Sex Crimes and Contemporary State House Responses

How do these motivations for and hesitations about rape law reform play out in contemporary state legislatures? To answer this question we must first understand the current climate for sex crime legislation in the states. In this section I introduce my new legislative database and then discuss existing scholarly explanations for the trends we see.

II.A. Sex Crimes Legislative Database

America's state legislators have sexual assault front and center on their agendas. Popular pieces of legislation, seen in multiple states, are bills that restrict sex offender residential locations, require reporting / notification of sex offender whereabouts, and increasing penalties for sex crimes against minors. Foucault's argument that "punishment has become an economy of suspended rights" seems an apt description of the approach

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socio-economic status, at both the individual and neighborhood level, they found that Black male defendants actually fared better at all stages. They also found that "earlier case processing decisions consistently favor defendants with lower SES but later decisions consistently favor defendants with higher SES" (442). In other words, you're more likely to have your charges dropped if you're poorer (perhaps because the charges were shaky to begin with), but if charges are brought, being poor will hurt you in terms of prosecution and sentencing.

most state legislators are presently taking with regards to sexual assault and rape.[41] Castration and the death penalty are even back on the table.[42]

Indeed, when it comes to sex offenders, the word "obsessed" may not be an overstatement. Not only are sex offenders being kept at a safe distance from schools, some proposals would keep them away from amusement parks, carnivals, ice cream trucks, and libraries.[43] These proposals, however, are tame compared to some more drastic measures. Consider these examples:

- State Senators in Louisiana proposed that sex offenders should be prohibited "from wearing a mask, hood or disguise during holiday events and from distributing candy or other gifts on Halloween to persons under eighteen years of age."[44]
- In Ohio, two state Senators proposed that all sex offenders who owned cars must have "sex offender license plates" and that these license plates must have a "distinctive pink background color."[45] The pink-plate bill failed, but the thought has returned in 2007 with a new color: fluorescent green. Said one of the 2007 bill's sponsors, "The fluorescent-green license plate will make the most egregious sex offenders easily identifiable."[46]

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[41] Foucault, Michael. Translated by Alan Sheridan. 1977. *Discipline & Punish: The birth of the prison.* New York: Random House. Page 11. Though

[42] Louisiana SB 3 (2006) proposed the "the administration of medroxyprogesterone acetate to or voluntary castration of persons convicted of a crime which classifies the convicted person as a 'sex offender.'" Two examples of the death penalty for certain rape cases are Alabama HB 335 (2007) and Mississippi HB 495 (2006).

[43] Florida SB 1624 (2006).

[44] Louisiana SB 254. The bill did not come out of the Committee on Judiciary.

[45] Ohio SB 229 (2005).

[46] State Rep. Michael DeBose. Quoted in "State wants special car plates for sex offenders," Reuters, Mar 1, 2007.

- A group of Florida state representatives, not satisfied that the sex offender reporting requirements were stringent enough, proposed a bill that would redefine "the terms 'permanent residence' and 'temporary residence' in order to reduce the number of consecutive days and days in the aggregate which constitute the residence of a sexual predator."[47]
- In Vermont's 2006 session, a state Senate bill proposed "to permit law enforcement to arrest without a warrant a person who is suspected of violating the sex offender registration requirements."[48]
- In Illinois, a legislator has proposed that rather than 500 feet, sex offenders should be required to be at least 2,000 feet away from schools or day care centers.[49] Not to be outdone, another Illinois legislator proposed legislation that a convicted sex offender assigned to a polling place in a school or library should have to vote early or absentee.[50]
- A series of proposals in different states have proposed to limit sex offender access to public Internet facilities in libraries, but a bill proposed in 2007 by State Representative Ken Zebrowski in New York went further, proposing to ban convicted sex offenders from any access to the Internet. The justification for the bill went as follow: "Registered Sex Offenders should not be allowed open access to possible victims by having access to the Internet. By not allowing Registered

[47] *Carnival/circus*: Illinois HB 163 / HB 156 (2007); *Ice cream truck:* New York S00438 (2007); *Library*: Florida HB 339 (2006).
[48] Vermont SB 184 (2006).
[49] HB 248 (2007) proposed by Jack Franks: "Increases from within 500 feet to within 2,000 feet, the distance from which a child sex offender may not loiter or reside from a school, playground, child care institution, day care center, part day child care facility, any other facility providing programs or services exclusively directed toward persons under 18 years of age, or a victim of a sex offense who is under 21 years of age."
[50] Illinois SB 417 (2007), proposed by State Senator Kirk W. Dillard.

Sex Offenders to have internet service in their homes and by blocking them from having "Internet access service" we are building yet another wall of defense against offenders."[51]

While these anecdotes are suggestive, in order to truly understand the contemporary response to sexual assault and rape, we need more systematic analysis. To gain a comprehensive, national perspective, I constructed a database of every bill proposed in 2007 state legislatures relating to rape, sexual assault, and sex crimes. The database of bill proposals was constructed through online collection of state legislative documents. At each site, I conducted two searches of bills currently before the state legislature: one search used the term "rape" and the other search used the term "sex".[52] These two terms are likely to appear in any piece of legislation having to do with rape or sexual assault.[53] The search was conducted for both House and Senate bills in all 50 states and the District of Columbia.

It is important to note that the database is comprised of *proposed* bills, not enacted legislation.[54] This is in keeping with Haynie (2001), and follows a long political science tradition of examining bill proposals as a way to understand how the legislative

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[51] New York Bill A06153 (2007). Online: http://assembly.state.ny.us/leg/?bn=A06153.

[52] I included bills that made small, but very important changes. For instance, in Tennessee, HB 1432 / SB 809 changed language in a rape statue from "requires" rather than "permits". This one word change packs a lot of punch. The proposed legislation was, "Requires rather than permits the records custodian of domestic violence shelters and rape crisis centers to keep records confidential unless the individual consents to release or there is a court-approved subpoena for the records."

[53] As a search strategy, using the single words returns more results than would more restrictive searches such as "sexual assault" or "date rape".

[54] House or Senate Resolutions, appropriations bills, and memorials were all excluded from the database. Appropriation bills were not legislation in the conventional sense, as they introduced no new policies and simply provided amounts for spending line by line. These bills were not sponsored by individuals (but rather were brought to the floor by the Appropriations Committee). In addition, bills solely related to domestic violence or stalking (and not including any type of sexual assault) were not included in the database. Bills offering only technical, non-substantive changes were also not included in the database. I filtered out bills that were not directly related to the regulation of rape or sexual assault. Examples of these bills include abortion bills, where language such as "except in the case of rape or incest" was part of the text of the bill.

agenda is set (e.g. Arnold 1990). As Haynie writes, "bill introductions are important because, unlike roll-call votes, they detail what representatives actually add to the policy agenda."[55] My database allows us to understand what is being added to the rape policy agenda by today's state legislators and who is proposing these additions. My search methods produced a database of 952 unique bills.[56] For each of these bills, I coded all sponsors and co-sponsors of the legislation.

The task of coding required systematically categorizing bills. Unlike coding of positive valence or media bias, coding in this study was objective and straightforward. A study of earlier rape law reforms identified four categories of the rape law reform movement: "definition of the offense, evidentiary rules, statutory age offenses, and penalties."[57] Analysis of contemporary bills in the statehouse suggests that seven categories are most prominent: sex offenders, child sexual assault, penalties, victims of sexual assault, and prosecution of non-child sexual assault.[58]

This final category, prosecution of non-child sexual assault, is the most relevant for the present paper. The distinction between child and non-child bills is important because, as argued elsewhere in the dissertation ["Rape, Myth, and the Dispositionist Impulse"], there is a bias toward both media and legislative coverage of child rape even though it is statistically much less common. According to the most recent Bureau of Justice Statistics data, almost 85% of rape victims are over age 18. Yet in a separate

[55] Haynie (2001), p. 25
[56] In addition, I coded 454 bills from the 2005 and 2006 sessions as additional robustness check on the distribution of the types of legislation proposed.
[57] Berger, et. al. (1995), page 225.
[58] Although not analyzed separately in this paper, bills were also found to cover statute of limitations for sexual assault, state cooperation with federal authorities in human trafficking, awareness programs and study groups.

media analysis, I found that contemporary media places nearly 35% of their coverage on victims younger than 15.

I coded broadly for any piece of legislation that could logically improve prosecution. By definition, bills dealing with sex offenders already in the system (i.e. already past the prosecution stage) and bills dealing exclusively with children will not improve adult prosecution. Examples of bills that improve prosecution are Hawaii Senate Bill 1661, which changed the definition of "strong compulsion" to include the use or attempt to use a controlled substance to overcome a person. Another example is Alabama House Bill 262, which would do away with the so-called "clothes defense" as it relates to sexual contact. When a single bill covered more than one of these subject areas, I coded it a 1 in each category. Multiple subject bills were not uncommon, e.g. bills dealing both with sex offenders and child-rape. Thus, the percentages across these categories sums to greater than 100%.

Admittedly, because my database does not trace each bill through the legislative process, I cannot answer important questions about legislation success rates. Legislators may be proposing sex crime bills without an expectation of successful passage. Even if one is not willing to commit to bill passage, or if factors beyond the legislator's control mitigate the bill to die in committee, the choice to attach one's name to a piece of new legislation signals the legislator's priorities. Put another way, even if the legislator is engaging in symbolic politics, they have chosen to make sex crime laws one of their symbols.

What types of sex crime bills are state legislators currently proposing? The answer, in short, is sex offender and child rapist bills. Table 1.2 summarizes and Figure

1.1 presents graphically the focus of proposed legislation in 2007. While 62% of legislation was concerned with sex offenders, and another 27% concerned with child rapists, only 4% (39 of 952 bills) directly addressed the needs of prosecutors trying to secure convictions. For comparison, I also constructed a sample of bills from 2006. I constructed the 2006 sample in a similar way to the 2007 sample. If the web site allowed for searching by subject heading, I found the relevant subject headings, e.g. Sexual Crimes. If there was only a full text search option available, I conducted two searches of bills currently before the state legislature: one search used the term "rape" and the other search used the term "sex". Every state's legislative search engine was visited, producing a 2006 sample of 454 bills.

Analysis of the 2006 sample suggests that there is year-to-year variation, but that prosecution remains a relatively low priority. In the 2006 sample, the percentage of bills concerned with improving prosecution was 7% (Table 1.2, Figure 1.1). While this was greater than the 2007 percentage, there were still seven times more sex offender bills and three times more child rape bills proposed in the 2006 sample.

Rape law reformers such as Simon (1999, 533) have repeatedly called "for policy makers and legislators to focus less on current sex offender legislation targeting strangers and more on laws to protect women and children from the people they know." Initial analysis of the legislative database reveals that the recommendations of these advocates are not being carried out by most state legislators.

Figure 1.1. Bills proposed in state legislatures in 2007 (N=952 bills) and 2006 (N= 454 bills) relating to sex crimes, graphed by subject area

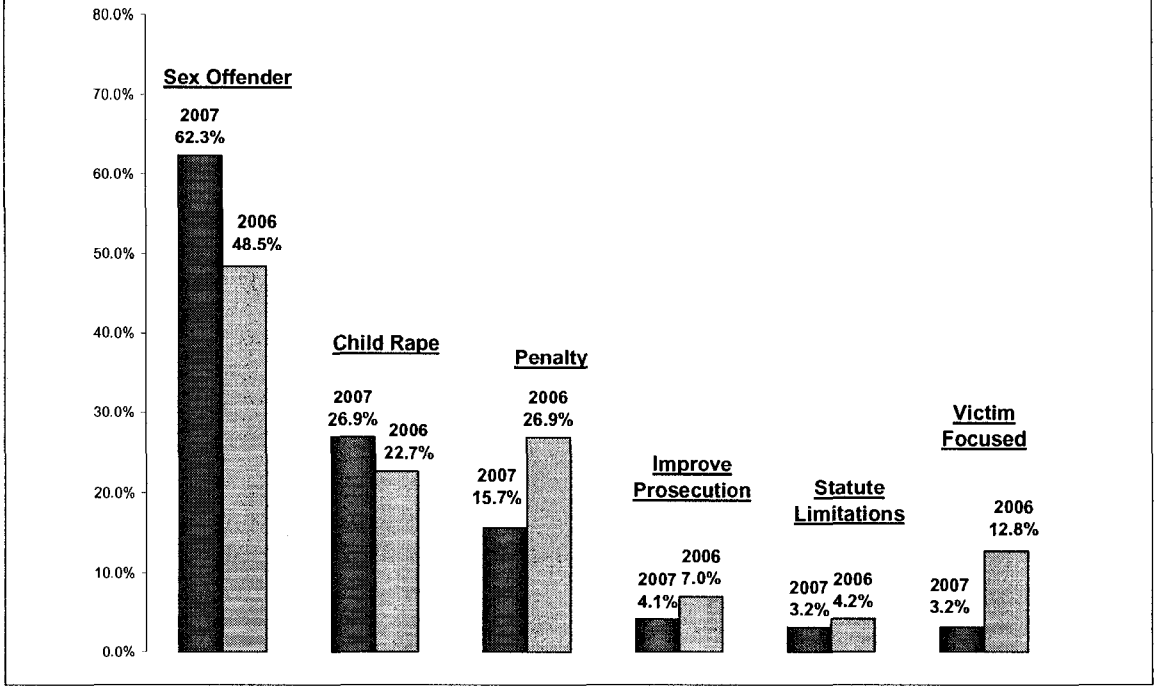

Table 1.2. Summary of Rape and Sexual Assault Legislation Database

	2007 – All		2006 - Sample	
Category	**Number**	**%**	**Number**	**%**
Sex Offender	593	62.3%	220	48.5%
Child Rape	256	26.9%	103	22.7%
Penalty	149	15.7%	122	26.9%
Improve Non-Child Prosecution	39	4.1%	32	7.0%
Victim Focused	64	3.2%	58	12.8%
TOTAL	952		454	

NOTES: This table presents the number of sex crime bills proposed in state legislatures (both houses) for all states in 2007 and a smaller, comparative sample for 2006. Only the 2007 data is used in the analysis discussed in the paper. Percentages add up to more than 100% because many bills included provisions in multiple categories.

It should be noted, though, that while infrequent, innovative proposals have been seen in statehouses in recent legislative sessions. In New Mexico in 2007, Democrat Representative Rhonda King sponsored legislation that clarified the issue of consent in the New Mexico criminal rape statute. The legislation was necessary because although the New Mexico legislature "in 1975 ... rewrote the sex crime laws to delete lack of consent as an element ... In 2006, a Supreme Court committee rewrote the jury instructions for sex crimes to make lack of consent an element of force or coercion, thus resurrecting the "promiscuity defense" in New Mexico."[59] The 2007 bill clarifies "that the Legislature's intent has not changed since 1975, and that criminal trials should be focused on the perpetrator's actions and intent, not the victim's." This episode illustrates how the same issues (e.g. consent) that were central to the 1970s wave of reform remain in play thirty years later.

In the 2005-06 legislative session in Massachusetts, a gender-mixed group of legislators proposed a "bill of rights for victims of rape and sexual assault."[60] The legislation, which proposed a $2,000 fine for violations of the rights, included the "right to have any allegation of rape or sexual assault investigated and adjudicated by the appropriate criminal and civil authorities of the jurisdiction in which the crime occurred, in obtaining, securing, and maintaining evidence, including a medical examination."[61] In the 2007 session, a bill was proposed to provide for emergency funding to rape victims for housing.[62]

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[59] Fiscal Impact Analysis of Bill 880, page 1. Online: http://legis.state.nm.us/Sessions/07%20Regular/firs/HB0880.pdf

[60] Massachusetts SB 974, with primary sponsors Michael R. Knapik, Sarah B. Coughlin, Brian A. Joyce, and Kathi-Anne Reinstein.

[61] SB 974(f) (2006).

[62] Massachusetts HB 630 (2007).

In Alabama, a group of legislators addressed the situation where defendants pointed to the victim's wearing of certain clothing as evidence that there could not have been sexual contact (because the clothes prevented it). The legislators' new bill "would further define the term "sexual contact" by providing that sexual contact would occur even if a person had an article of clothing on his or her body that would prevent the actual touching of the sexual or other intimate parts of the person."[63] These examples make clear that, although much less frequent than legislation on sex offenders, some legislators have been in step with legal academics and policy advocates for rape law reform. The question for analysis is why is this the exception and not the rule?

II.B. Existing Explanations

Legal scholarship argues that "as long as the public focus is on the stranger sex criminal, prevention of the majority of sex offense cases is probably not undertaken," but they offer few explanations for why public and legislator focus fails to propose laws that would generate more widespread improvements in rape law effectiveness (Simon 1999, 522). The implicit assumption in most legal scholarship is that legislators have bought into "rape myths" and as a consequence "legislation is rooted in and reinforces the myth of the crazed rapist" (Wells and Motley 2001, 130).

Beyond the rape myth argument, the other bodies of scholarship attempting to explain legislator behavior are sociology literatures employing a "moral panic" or "risk society" framework. As developed by British sociologists Jock Young (1971) and Stanley Cohen (1972), moral panics are distinguished by five prominent features: "1. Something

[63] Alabama House Bill HB262, proposed in 2007 session by Representatives Barton, Ison, Gaston, Ward, Boothe, Allen, McClurkin, Clouse, Wren, McLaughlin, Love and Gordon.

or someone is defined as a threat to values or interest. 2. This threat is depicted in an easily recognizable form by the media. 3. There is a rapid build-up of public concern. 4. There is a response from authorities or opinion-makers. 5. The panic recedes or results in social changes."[64] Over the past thirty years, a subfield of sociology has developed research to consider what constitutes moral panics, and why they develop.[65] At the same time, a growing literature in sociology has recognized the role of risk management and fear in modern society. Beck (1992) first developed the concept of a "risk society".[66] In this view, "modernization increases risks and makes people more rather than less conscious of being at risk."[67]

Moral panic theory attempts to explain why policies don't end up working. As argued by Chiricos' (1996, 103) in a study of moral panics and violent crime, "the point of a moral panic is 'not that there's nothing there' but that societal responses are 'fundamentally inappropriate.'"[68] Critcher's (2003) study of the rise and fall of the pedophilia issue in Britain (covering the period 1990-2001) confirms this view. Looking at public discourse and media portrayals, Critcher concludes in the case study that, "pedophilia fulfilled virtually every criterion in the ideal type of a moral panic: a newly

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[64] Thompson (1998), p. 8. Citing Cohen (1972) and Young (1971). Thompson, Kennth. *Moral panics.* London: Routledge. Cohen, S. 1972. *Folk devils and moral panics.* St. Albans: Paladin.. Young, Jock. 1971. "The role of the policy as amplifiers of deviance," in S. Cohen, ed. *Images of Deviance.* Harmondsworth: Penguin.

[65] See, e.g. Critcher, Chas. 2006. *Critical readings: Moral panics and the media.* Maidenhead: Open University Press. Critcher, Chas. 2003. *Moral panics and the media.* Buckingham: Open University Press. American sociologists have emphasized the role of social movements and interest groups in spurring and building moral panics. British sociologists have tended to emphasize "society-wide cultural and social structural explanations." Thompason (1998), p. 19. See: Goode, E. and Ben-Yehuda. 1994. *Moral panics: The social construction of deviance.* Oxford: Blackwell. Erich Goode; Nachman Ben-Yehuda. Moral Panics: Culture, Politics, and Social Construction Annual Review of Sociology, Vol. 20. (1994), pp. 149-171. For a review: Erich Goode. Review: No Need to Panic? A Bumper Crop of Books on Moral Panics. Sociological Forum, Vol. 15, No. 3. (Sep., 2000), pp. 543-552.

[66] Beck, U. 1992. *Risk Society.* Trans. M. Ritter. London: Sage.

[67] Thompson (1998), p. 22.

[68] Citing Cohen (1972), page 204.

discovered problem of identifiable folk devils threatening moral order, with consensus among media, pressure groups and politicians ...". But the effects of this moral panic, like others, were to distort and distract from the real issues. In Critcher's words, "in vilifying, pursuing, and incarcerating 'known' paedophiles, we maintain an illusion of effective action. Moral panics distort our capacity for understanding, even when they recognize a genuine problem."[69]

How well does moral panic theory explain state legislative response to rape and sexual assault? Philip Jenkins (1998), studying historical and modern state legislation on child sex crimes, makes the case that the theory is quite useful.[70] The 1990s saw the return of sex offenders on the state agenda, and "today's sex crime panic is as fierce as that of the late 1940s."[71] In 1994, the first "Megan's Law" was passed in New Jersey, following the rape and strangulation in 1994 of Megan Kanka. These laws laid the groundwork for public notification of nearby sex offenders. The rise of the word "predator," as well as concerns about the use of the Internet by sex offenders, became prevalent. Once again, high-profile child sex abuse stories, combined with public outcry, political consensus, and government response reinforced one another to produce a furor.[72]

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[69] Critcher (2003), pp. 116-117.

[70] Jenkins also provides important historical perspective. Jenkins reminds us that the sex offender laws of today are very similar to the sex psychopath laws passed in the progressive era between 1937 and 1957. Looking at the older set of laws, Jenkins found that "once the initial furor passed, numerous cases demonstrated the absurd or unjust effects of the laws." Jenkins speculates that "the downfall of earlier laws suggests that contemporary sex predator statutes are likely to meet a comparable fate and to achieve a similarly malodorous historical reputation." Jenkins argues that, "originating in the Progressive Era, the imagery of the malignant sex fiend reached new heights in the decade after World War II, only to be succeeded by a liberal model over the next quarter century. More recently, the pendulum has swung back to the predator model; sex offenders are now viewed as being little removed from the worst multiple killers and torturers." Jenkins (1998), p. 2, 12.

[71] Jenkins (1998), p. 190

[72] Jenkins also notes, however, that modern sex crime legislation on child sexual abuse has not been cyclical, but seems here to stay: "the cycle has been broken in the modern era, when child abuse has become part of our enduing cultural landscape, a metanarrative with the potential for explaining all social and personal ills." Jenkins (1998), p. 232.

Jones' work, like most of the moral panic literature, paints in broad strokes without careful consideration of individual legislator behavior. Thus, we are left to wonder: What role do state legislators play in this moral panic framework? Are all legislators panicking? Do some resist? Jenkins is not clear, but hints at an ideological dimension to the response, as "politically, the twin dangers of pedophilia and child pornography provided powerful ammunition for conservative interests, who could focus public concern about child endangerment on these forms of stranger danger, the outside menace, rather than the subversive doctrine of mass intrafamilial abuse."[73] In analyzing the rise of sex psychopath statutes, Jenkins also suggests that, "social and demographic trends created constituencies with a powerful interest in demanding official protection from the perceived menace."[74]

While these intuitions are useful starting points, they mistakenly suggest a single political elite: "in moral panics, we have a circuit of communication between the mass media, claims makers and the political elite. If enough of these decide there is an issue and that action is required, a moral panic becomes possible."[75] Variation across states, and variation within legislatures across individuals, is missing from this account. State politics analysis can fill this gap and provide more analytical precision.

Shifting analysis of sex crime legislation to the level of the individual state legislator also allows us to examine the intersectionality thesis proposed earlier. The

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[73] Jenkins (1998), p. 163

[74] Jenkins (1998), p. 71. Race and gender are also discussed in the literature. Esther Madriz (1997) argues that fear is produced not by objective crime realities, but through a gendered and racialized process of discourse construction. Relying on in-depth interviews of women who recount how they live with fear of crime, Madriz argues that, "the fear that 'something bad can happen to them' teaches women at a very early age what 'their place' is; who is expected to be strong and who weak; who should be protected and who should protect; what type of clothes women should wear and what type of activities they should or should not engage in. If these clear, gendered rules of behavior are not strictly followed, women get the blame for their own victimization, because good women are supposed to 'know better.'" Madriz (1997), p. 41

[75] Critcher (2003), p. 138.

intersectional tensions, in particular those posed by the law's historical treatment of black men accused of rape, have not been fully appreciated. An illustrative example is found in the analysis of Lynne Henderson, cited by Wells and Motley:

> [A] primary impediment to recognition that rape is a real and frequent crime [is the] unspoken "rule" of male innocence and female guilt in law ... men are entitled to act on their sexual passions, which are viewed as difficult and sometimes impossible to control; this belief also says that women should know this and avoid stimulating them if they do not wish to have sexual intercourse ... . The male innocence/female guilt story is inapplicable only in the case of heterosexual relations and rape involving black men and white women, where the story is reversed: the theme in this context becomes male guilt and female innocence both in law and in culture. But otherwise, the defining story for interpreting rape in law and fact is that of male innocence/female guilt.[76]

Like many others, Henderson acknowledges that the story she's telling is not applicable to the black male / white female scenario, but then quickly returns to the "defining story". In the remainder of this paper, I attempt to redefine this story with an emphasis on the intersection of gender *and* race as they intersect in state legislators' consideration of rape and sexual assault policy.

III. Intersectionalilty in the Statehouse

While the moral panic and rape myth literatures explain much in terms of the broad strokes of rape law reform, they fail to adequately account for the nuances of the political system. In particular, they leave no room for consideration of the potentially competing race and gender claims that rape law reform may place on individuals with dual commitments. Drawing on state politics literatures that have examined identity and

[76] Wells and Motley (2001, 151) citing: Lynne Henderson, Rape & Responsibility, 11 L. & Phil. 127, 128 (1992)

constituent response, in this section I attempt to build a legislator-centered theory of the rape law reform process.

My approach, an empirical one grounded in state politics and legislative studies, models both race and gender as dichotomous variables in multivariate regressions. This approach has been criticized by some intersectionality scholars. Simien (2007, 264) contends that "far too often, political scientists have treated race and gender as separate, dichotomous variables in regression models that employ either/or versus both/and identity categorizations." The result, suggests Simien, is that "political science as a discipline historically has had limited relevance and prescriptive utility for individuals and groups that confront interlocking systems of oppression, as it has largely ignored the intersection (or interaction) of race, class, and gender in American politics." While agreeing with the claim that "race" and "gender" (separately and interacting with one another) cannot be fully captured in a regression model, I believe my analytic strategy holds much merit. In particular, what I sacrifice in depth I gain in breadth. I cannot speak in detail about a particular legislator's experience of identity, but I can say at least something (however crudely measured) about *every* state legislator in the United States. By providing a national perspective, my analysis is not a substitute for methodologies, but instead provides a complement to them.

A prerequisite for a theory of intersectionality is identifying the interests that might potentially be in tension with one another. Defining an identity-based interest / commitment has been a central concern of both the gender and race politics literatures.[77]

[77] Reviewing possible evaluative criteria, Thomas (1994, 132-133) identifies three alternatives: "an ideological one ...; [one] based on what the people who are being represented expect from the representatives they elect; [or a measure] relative to the goals that women officeholders hold for themselves."

Barnello and Bratton (2002) provide a succinct summary of these various definitions and note that "women's issues have been defined in a variety of ways across the extant literature, although common threads do exist."[78] Osborn (2004) similarly notes that "one major problem with these studies that find women have different issue priority in the legislature is that they do not use a consistent definition of what constitutes a 'women's issue'."[79]

In race politics, scholars have attempted to connect state legislator behavior with a particular race interest. There is a robust literature suggesting that black state legislators will promote "the black interest."[80] As summarized by Haynie (2001, 19), "the combined existing literature exploring black political participation, group identity, and legislative representation provides a strong theoretical basis for the expectation that African American legislators will behave as race men and women by advancing a race-based legislative agenda and providing substantive representation for black interests."[81] Scholarship has only recently begun to examine the intersection of race and gender in the statehouse. Racial and gender identity presents a paradox for state legislators, as they

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[78] "Women's issues have been defined in a variety of ways across the extant literature, although common threads do exist. For example, Bratton and Haynie (1999) used a relatively narrow definition, considering measures as "women's issue" measures if they may "decrease gender discrimination or alleviate the effects of such discrimination and those that are intended to improve the socioeconomic status of women" (p. 664). Using the same approach, Bratton (2002) noted that the categorization of women's issues "generally involved three overlapping categories: measures that addressed the health concerns of women; measures that addressed the social, educational, and economic status of women; and measures that addressed the political and personal freedom of women" (139). Similarly, Reingold (2000) coded a category of women's interest to include measures that "in an immediate and direct way, are about women exclusively (e.g., abortion, sex discrimination) or almost exclusively (e.g., domestic violence or breast cancer)". Swers (2002) defined women's issues somewhat more broadly, as "bills that are particularly salient to women because they seek to achieve equality for women; they address women's special needs, such as women's health concerns or child care issues; or they confront issues with which women have traditionally been concerned in their role as caregivers, such as education or the protection of children". This definition would potentially include, for instance, general education measures, whereas the other two definitions would not."

[79] Page 39.

[80] See Haynie (2001), p. 16 for a summary.

[81] In Haynie's study, black interests are defined as "support for legislation and policies favoring social welfare, economic redistribution, and civil rights issues." Haynie (2001), p. 24

must "balance the expectation that they will carry the banner for women's and minority issues with their obligation to represent all people in their constituencies" (Haynie 2001).[82] Barret's (1995) survey of 108 African-American female legislators (all Democrats), sitting in 33 state legislatures provided some initial insight about policy preferences, but as late as 2001, Barrett (193) observed that "no study to date has examined the potentially unique policy position of African American women."

Recent scholarship has started to address Barrett's (1995, 224-5) query: "Do the priorities of African American female politicians as women conflict with their priorities as blacks, or do the two merge into a special position?" (Hawkesworth 2003; Fraga, et. al. 2005). Orey, Adams, and Harris-Clark (2006) examined the 1988-1989 and 1998-1999 legislative sessions in Mississippi to test for differences in bill sponsorship and success between African-American male and female legislators. They find that "black interest" and "women interest" bills were more likely to be introduced by black women than black men, and by both black men and women, relative to their non-black counterparts. For the reasons discussed in the first part of the paper, it's not clear how they would have handled sex crime bills, as "bills that were interpreted by the authors to be detrimental to blacks' or women's interests were not included in the analysis" (Orey, et. al. 2006, 108).

Examining political support for black female candidates, Philpot and Walton (2007, 59) find that "for black women, race and gender do not operate separately from one another. By the nature of where they lie at the intersection of race and gender, black women experience a political reality separate from that of white women and black men."

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[82] Haynie (2001), p. 8. Quoting Carroll, Susan J. 1991. Ed. *Women, Black, and Hispanic State Elected Leaders*. New Brunswick, N.J.: Eagleton Institute of Politics. Haynie theorized that there were three strategies for black state legislators: (1) "persist as race representatives"; (2) "deracialize their legislative agendas in order to appeal to a more diverse audience"; or (3) adopt a "middle-ground approach" between the two extremes. Haynie (2001), pp. 9-10.

Here, too, however, it's not *a priori* clear how black female candidates will approach rape prosecution bills. In his study, Haynie (2001, 128) leaves it to a footnote to explain that, "although it is true that women legislators sometimes face similar dilemmas, the pressures to focus on women's issues seems not to be as great for them as the pressures for African Americans to focus on black interests." Expectations are made more complex when we recall that legislators are not simply individuals formulating policy opinions – they are also constituent representatives and competitors in the electoral arena. A comprehensive model of rape law reform must account for each of these separate interests.

III.A. Theory Building

In order to examine the effects of gender and race on policymaking in the area of sex crimes legislation, we must properly account for a host of confounding variables which might affect agenda setting in the context of rape law reform. In this section I develop gender and race hypotheses, and then add three additional categories that might plausibly affect legislator decision-making: partisanship and politics; race and age; ideology; and district demographics.

III.A.1. Gender

First carried out in the 1960s and 1970s, there exists a growing body of research on the effects of gender in state legislator behavior.[83] There is much evidence to suggest that female legislators in the statehouse make a difference for policy enactment. Swers (2001) provides a concise summary, finding that the "evidence demonstrates that women serving in the state legislatures exhibit unique policy priorities, particularly in the area of

[83] The field has expanded noticeably in the last decade. Writing in 1994, Sue Thomas still found that "the literature of political science and gender politics provides only a small amount of guidance about how to study the impact of women in office" (3).

women's issues."[84] Similarly, Swers (1998, 445) finds that "while ideology is the strongest predictor of voting on women's issues, congresswomen are more likely to vote for women's issue bills than are their male colleagues even when one controls for ideological, partisan, and district factors."

The literature on women in state legislatures has found that, "men and women legislators perceive issues differently and approach problem solving and decision making differently (Kathlene 1989), women representatives introduce and pass more legislation dealing with issues relating to women (Thomas 1991), and women were more likely to support feminist positions (Carroll 1984; Saint-Germain 1989). Compared to twenty years ago, however, gender differences have gotten smaller (Thomas and Welch 1991)."[85] As summarized in Kathlene's (1995) study of the Colorado legislature, there are two "hypotheses arising from gendered attitudes and behavior within the context of legislative policymaking: ... (1) Women will formulate policy because they will see a problem as affecting many people and groups ... [and] (2) Women will conceptualize some policy issues in different terms."[86] Kathlene's analysis of proposed bills from the 1989 Colorado legislature finds that women's solutions were "contextual, multifaceted,

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[84] Michele Swers. 2001. "Understanding the Policy Impact of Electing Women: Evidence from Research on Congress and State Legislatures," *PS: Political Science and Politics*, Vol. 34, No. 2. (Jun., 2001), pp. 217-220. Swers is reviewing work by Berkman & O'Connor (1993), Dodson & Carroll (1991), Dolan & Ford (1995), Saint-Germain (1989) and Thomas (1994): Saint-Germain, Michelle A. 1989. "Does their difference make a difference? The impact of women on public policy in the Arizona legislature," *Social Science Quarterly*, 70: 956-968. Thomas, Sue. 1994. *How Women Legislate*. New York: Oxford University Press. Berkman, Michael B. & Robert E. O'Connor. 1993. "Do women legislators matter?" *American Politics Research*, Vol. 21, No. 1, 102-124. Dodson, Debra L. & Susan Carroll. 1991. *Reshaping the agenda; Women in state legislatures.* New Brunswick: Center for American Women and Politics. Rutgers: The State University of New Jersey. Dolan, Kathleen & Ford, Lynn. 1995. "Women in the state legislatures," *American Politics Quarterly*, 23: 96-108. See also: Bratton and Haynie 1999; Barnello and Bratton 2002.

[85] Brace and Jewett (1995), page 655-656.

[86] Kathlene, Lyn. 1995. "Alternative views of crime: Legislative policymaking in gendered terms," *The Journal of Politics*, 57 (3), 696-723.

and long-term," while men "emphasized individual responsibility."[87] Thomas (1994) also found that women had distinctive policy interests, focusing more on issues related to women and children. More recently, based on 530 responses to a mailed survey to state legislators in 24 states, Poggione (2004) finds that even when controlling for relevant demographic variables, "women legislators do have more liberal preferences on welfare policy than their male counterparts."[88]

These gender politics findings suggest that women should be acutely aware of the need for rape law reform, and should be (relative to men) more aggressive in proposing solutions. It is less clear, however, if women will gravitate more toward improving prosecution than their male counterparts. Although women tend to support "women's issues to a greater extent than do men" and they give "these issues a higher priority than men do" (Thomas and Welch's 1991, 454), women may be more concerned with child welfare and victim issues, and may devote less attention to convictions. Women's commitments to justice may also make them more concerned about the potential racial pitfalls of more prosecutorial power. The empirical analysis can test these competing expectations.

III.A.2. Race

Based on the many racial concerns discussed in part one, minority legislators tend to be less likely to propose sex crime bills, and in particular bills that focus on rape prosecution. In addition, minority legislators may be suspicious of "law and order" policies. An embedded survey experiment by Peffley and Hurwitz (2002, 67), for instance, found that "whites' support for 'get tough' crime policies contains a strong

[87] Kathlene (1995), p. 721.
[88] Sarah Poggione. 2004. "Exploring Gender Differences in State Legislators' Policy Preferences," *Political Research Quarterly*, Vol. 57, No. 2. (Jun., 2004), pp. 305-314. P. 310.

racial component" and that "support for punitive crime measures appears to be strongly rooted in beliefs about blacks, particularly reactions to black criminals."

Moving beyond the black-white dichotomy, Hispanic legislators may also face competing commitments.[89] On one hand, although "relatively little research has been conducted on the sexual assault experiences of Hispanics," (Sorenson and Siegel 1997, 212), it appears that Hispanic reactions to rape and sexual assault roughly mirror those of whites (Sorenson and Siegel 2002). On the other hand, the Hispanic experience (predominantly the Hispanic male experience) in the criminal justice system mirrors that of blacks. Demuth and Steffensmeier (2004) provide data on Hispanic sentencing outcomes. In an analysis of data from the State Court Processing Statistics (SCPS) program of the Bureau of Justice Statistics for the years 1990, 1992, 1994, and 1996, the authors find that "in general, Hispanic defendants were sentenced more similarly to black defendants than white defendants. Both black and Hispanic defendants tended to receive harsher sentences than white defendants" (1008).

DeMuth (2004) finds that at pre-trial stages, Hispanics experience large disparities. Using the same dataset, DeMuth (2004, 899) found that "Hispanics are the defendant group most likely to be detained pending case disposition; whites are the least likely to be detained and blacks are in the middle. This pattern of racial and ethnic differences is most pronounced in drug cases, with Hispanics being the group most likely to be detained." Spohn, Gruhl, and Welch (1987) also found discrimination against Hispanic and black defendants in pre-trial decisions to reject or dismiss charges against defendants in Los Angeles. Given these disparate experiences, we might expect Latino

[89] Reynoso, Julissa. 2004. Perspectives on Intersections of Race, Ethnicity, Gender, and other Grounds: Latinas at the Margins. 7 Harv. Latino L. Rev. 63. Harvard Latino Law Review.

legislators to be more cautious about rape policy and Latina legislators to experience similar tensions as their African-American female counterparts.

Scholarship on Asian attitudes toward rape suggests that they are more conservative and more accepting of "rape myths" than other racial groups (Pomeroy, et. al. 2005; Kennedy and Gorzalka 2002). Parallel data about Asian outcomes in the criminal justice system are not available, but if we presume their outcomes to mirror those of whites, then we would not expect Asians to diverge from white legislator positions on sexual assault bills.

III.A.3. Partisanship and politics.

A large body of research suggests partisan differences on issues of law and order (Erskine 1974; Jacobs and Carmichael 2001). As Jacobs and Carmichael (2001, 65) note, "Instead of highlighting social arrangements that close off law abiding alternatives for the poor, conservatives see reprehensible individual choices as the primary explanation for street crime." In the context of rape law reform, Republicans can be expected to promote sex offender legislation as part of a law-and-order policy agenda. But it is not clear if they will also promote improved prosecution of rape and sexual assault. On one hand, law and order politicians favoring increased incarceration should seek out more individuals to place behind bars. On the other hand, if Republicans are more susceptible to "rape myths" and attribute blame to the woman victim, then they will see less need for improved legal intervention. The empirical model will test these competing explanations by including individual partisanship measures.

In addition to partisanship, statehouse legislators are constrained by their political setting. Legislators with less seniority may not feel that their first pieces of legislation

should address fundamental reform. Or, it could be that newer members of the chamber feel more emboldened to reform. Similarly, legislators must be aware of the electoral safety of their seat. If their last race was very close, they may feel more pressure to stick to 'safe' pieces of legislation, or to promote legislation that will win them the largest possible number of voters the next election cycle. Such pressures would likely make them less inclined to go out on their own and wrestle with the difficult issue of rape prosecution. These expectations will be tested in the model by including measures of chamber seniority and the percentage of votes received in the most recent election.

III.A.4. Age & Ideology

Legislator age serves as a proxy for ideological beliefs about blame attribution and rape. Rape myth studies have consistently found that acceptance of rape myths is related to adherence to traditional gender roles (Lonsway and Fitzgerald 1994). As attitudes toward gender roles are correlated with age (Brewster and Padavic 2000), the expectation is that older members of legislatures will be less likely to propose bills related to strengthening rape prosecution.

Ideology. While ideology about rape and sexual assault issues cannot be directly measured given available data at the state legislative district level, several variables can be used as proxies. First, I include two military measures – a measure of whether the individual legislator served in the armed forces and a measure of the percentage of district residents in the military. An extensive literature in political science has identified opinion differences between civil society and the military.[90] These differences may play

[90] See: Feaver, Peter D. Richard H. Kohn, eds. *Soldiers and Civilians: The Civil-Military Gap and American National Security.* Cambridge, MA: MIT Press. Feaver, Peter D. and Christopher Gelpi. 2004. *Choosing Your Battles: American Civil-Military Relations and the Use of Force.* Princeton: Princeton

out in the construction of rape laws. Specifically, higher percentages of military constituents and military experience may both be correlated with a law-and-order ideology, and therefore will be positively correlated with promotion of sex crime laws. In addition, I include a measure of the rural population to capture cultural differences between the urban core and the rural parts of each state. Data from the Department of Justice (2005) finds that the urban rate of rape (1.5 / 1,000) was more than double the rural rate of .7. Urban legislators thus have constituencies more likely to be victims of sexual assault, and may be greater proponents of sex crime legislation.

III.A.5. Legislative district demographics.

As representatives of their constituents, state legislators should be acutely aware of the demographics of their legislative districts. I considered a broad spectrum of measures which may likely be related to the formulation of rape laws.[91] First, I include a measure of the percentage of district residents who are females, age 13-34. This is the group at the highest risk of sexual assault victimization, and therefore there may be greater constituent pressure for rape law reform. Second, I also include median family income and unemployment rate, as measures to capture the class standing and economic health of the district. Both measures are consistently included in analyses of Congressional behavior. Higher socio-economic standing has been linked to greater rejection of rape myths, and therefore in this context I expect both education and income measures to be positively correlated with rape prosecution bills.

University Press. Feaver, Peter D. 2003. *Armed Servants: Agency, Oversight, and Civil-Military Relations.* Cambridge, MA: Harvard University Press.

[91] The substantive results reported later were not sensitive to the particular operationalization of these demographic variables. Using a measure of college completion instead of median family income, for instance, did not change findings related to the gender of the legislator.

IV. Data & Analytic Model

Building on the theory just presented, in this section I develop an analytic model to empirically test my claims. While earlier studies of gender politics in the statehouse were "for the most part unsystematic," (Thomas 1994, 9) today's studies are increasingly employing more rigorous methods. Whether it is Congress or the statehouse, the new standard is analysis of individual legislators, with controls for legislative district characteristics and political context (Swers 1998; Haynie 2001; Haynie and Bratton 1999; Bratton 2006; Swain 1993; Richardson, Russell, and Cooper 2004; Vega and Firestone 1995; Welch 1985). Demographic controls vary across the models, but typically include measures of the district's wealth, race, and ideological compositions.[92] Including these demographics is important in modeling rape law legislation because race, gender, and class may operate not only through an individual legislator's identity, but also through the collective identities of the legislator's constituents. These district level measures account for constituent identity.

To date, the primary limitation of gender and race statehouse studies has been its limited scope due to data availability. As noted by Malcolm Jewell (1982, 645), "students of state legislatures find it difficult or impossible to obtain data that are readily available at the congressional level." As a consequence, existing studies of legislator identity and policy agendas have been quite limited in the number of states included for analysis.[93]

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[92] Haynie (2001), for instance, includes measures of urbanness, percentage black in the district (logged), whether the district is majority black, and presence on relevant committee.

[93] For instance, Thomas and Welch (1991) relied on a 1988 mailed survey to lower houses in twelve states: Arizona, California, Georgia, Illinois, Iowa, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, Vermont, and Washington. Reingold (2000) focused on Arizona and California. Osborn (2004) looks only at the lower chambers of four states: Colorado, Washington, Arkansas, and Wisconsin.

Haynie (2001) focuses only on the "lower house of five state legislatures: Arkansas, Illinois, Maryland, New Jersey, and North Carolina."[94] Bratton (2006) has conducted similar analysis of Latino state legislators, focusing on seven states: Arizona, California, Colorado, Florida, Illinois, New Mexico, and Texas.

Selection criteria for states included in these studies has varied, and has generally been pragmatic rather than systematic. Adams (2007) examined the lower houses in Mississippi, Maryland, and Georgia. But her selection method exhibits selection on the independent variable: "The lower houses of the Mississippi, Maryland and Georgia state legislatures were chosen for this study because in 2001, they each had relatively high percentages of African American and African American female state legislators." The more common challenge is simply one of resources. Thomas (1994, 43), for instance, was limited to twelve states "because of time and money constraints."

To date, the trade-off in the current literature has been one between breadth and depth. In-depth single-state studies of Arizona (Richardson, Russell, and Cooper 2004) and Hawaii (Mezey 1978), for instance, leave open questions of generalizability. Where a national scope is employed, the comprehensiveness of the data has generally been sacrificed. Fraga, et. al.'s (2005) study of Latina legislators utilized 2004 survey data from the National Latina/o State Legislator Survey (NLSLS), making it national. But the Fraga, et. al. study did not include data on non-Latino/a legislators, making comparisons difficult.

In this paper, by taking advantage of newly available large-scale electronic data, I employ a model that is both national (50 states plus the District of Columbia) and comprehensive (including variables on identity, district characteristics, and institutional

[94] Haynie (2001), p. 12

context). To be sure, the trade-off in conducting a national analysis reaching all state legislators is that I sacrifice longitudinal analysis, focusing only on the 2007 legislative sessions. As a result, two limitations should be recognized. First, I can say little about whether contemporary intersectionality is similar or distinct from the role of gender and race five, ten, or more years prior. Second, if legislators proposed bills in prior sessions that either became law (or were flatly rejected), those legislators would likely not propose the bill in 2007. I am making inferences about legislator behavior based on one year of observation, but legislators work over a longer time horizon. Future analysis is called for to examine legislators' and states' historical record in more systematic detail.

The construction of the database involved two data gathering steps: (1) coding individual legislator background information for those serving in the State House or State Senate in 2007 and coding contextual variables such as electoral competition and seniority in the legislature; and (2) constructing measures of demographics for all 7,500+ state legislative districts. This individual legislator dataset was then merged with the rape and sexual assault legislation database previously discussed. Summary statistics for the legislator dataset are provided in Tables 1.3 and 1.4.

Table 1.3 Race and gender of state legislators serving in 2007

Race / Gender	N	Pct.
White Male	5169	68.3
White Female	1444	19.1
Black Male	379	5.0
Black Female	227	3.0
Hispanic Male	129	1.7
Hispanic Female	54	0.7
Asian Male	57	0.8
Asian Female	26	0.3
Native American Male	54	0.7
Native American Female	24	0.3

Table 1.4 Summary Statistics for Legislator Database, 2007

Variable	N	Mean	Std. Dev.	Min	Max
Total Sex Crime Bills	7542	1.34	4.02	0	83
Improve Non-Child Prosecution	7542	0.03	0.23	0	4
Sex Offender	7542	0.58	1.81	0	36
Child Rape	7542	0.29	0.96	0	15
Penalty	7542	0.20	0.93	0	20
Victim Focused	7542	0.10	0.37	0	4
GOP	7542	0.45	0.50	0	1
Female	7542	0.23	0.42	0	1
African-American	7542	0.08	0.27	0	1
Latino	7542	0.02	0.15	0	1
Asian	7542	0.01	0.10	0	1
Native American	7542	0.01	0.10	0	1
District % Female Residents, 18-34	7482	11.5%	2.9%	4.8%	47.0%
District % African-American	7482	10.7%	17.7%	0	97.8%
District % Latino	7482	7.0%	12.3%	0	95.5%
District % Asian	7482	2.4%	5.3%	0	70.9%
District % Rural	7482	29.3%	31.4%	0	1
District Median Family Inc. ($000)	7482	50.54	15.90	18.70	169.41
District % Unemployed	7482	5.6%	3.0%	1.0%	45.3%
District % in Military	7482	0.6%	2.3%	0	46.9%
Age	5267	55.25	11.39	22	91 [a]
% of Vote for Bush in Last Election	7050	67.79	25.67	4	100
Military Experience	7542	0.20	0.40	0	1
Seniority in Chamber	7107	56.91	57.49	1	397 [b]

NOTES: Data sources: Legislative district data calculated from Census 2000 sf3 summary files. Individual legislator data coded from National Conference of State Legislators StateConnect database. See text for discussion of sources for legislator race. a. Angeline A. Kopka (Rep-NH) was born in 1916. b. New Hampshire's legislature is unique and made up of 397 members. On its website, the House notes that it is "the third-largest parliamentary body in the English speaking world? Only the U.S. Congress and Britain's Parliament are larger."

Utilizing data from the StateConnect Directory maintained by the National Conference of State Legislatures (NCSL), I was able to identify all 7,542 individuals serving in lower and upper chambers of the fifty states and District of Columbia in 2007. The initial roster data provided information on legislators' gender and political party. Using individual online profiles, the following variables were then coded for each legislator: year first elected to the legislature, seniority in the chamber, margin of victory in last election, age, marital status, family size, religious affiliation, and military service.[95] Because some of the variables were not available for a significant number of legislators, I was not able to include all the variables in my empirical models without making a great sacrifice in sample size.

The NCSL directory did not include data on legislator race, so this data had to be coded based on several other sources. African-American state legislators were identified using the roster of Black Elected Officials maintained by the Joint Center for Political and Economic Studies. Latino state legislators were identified through the 2007 directory produced by the National Association of Latino Elected and Appointed Officials (NALEO).[96] Asian state legislators were identified through the National Asian Pacific American Political Almanac.[97] Native American state legislators were identified through records kept by the National Caucus of Native American State Legislators.[98]

Once individual legislator data was collected and coded, the next step was to obtain demographic data for each state legislative district. I utilized the raw U.S. Census

[95] For some legislators who chose not to report this information, the data was not available.
[96] "Since 1984, the NALEO Educational Fund has conducted an annual verification to ascertain the number of Latino elected officials nationwide. As part of this enumeration process, we re-verify Latino elected officials identified during the last annual verification."
[97] Online: http://www.aasc.ucla.edu/aascpress/comersus/store/comersus_viewItem.asp?idProduct=7. This coding included both East Asian and South Asian state legislators.
[98] Online: http://www.ncsl.org/programs/statetribe/nativecaucus.htm

Bureau's Population and Housing Characteristics for State Legislative Districts summary 3 files to develop measures from the 2000 census.[99] These files provide all the Census 2000 data at the legislative district level, and after extensive data cleaning and processing, these files allowed me to construct a large number of variables of social and economic district characteristics. Variables were constructed to measure district education and income levels, as well as the racial mix, age of residents, and percentage of residents in the military.[100] The final step of data preparation was linking the multiple layers of data together into a comprehensive dataset.

Model Specification

I used two related strategies to analyze the relationship between sex crime bills and legislator characteristics and district variables. First, following Haynie (2001), and Bratton and Haynie (1999), I construct a series of dependent variables measuring the number of bills proposed by each legislator in each of the six areas. Because these are count variables with a variance greater than the mean, it is appropriate to use negative

[99] State Legislative District Summary Files. "Public Law (P.L.) 94-171, enacted in 1975, directs the U.S. Census Bureau to make special preparations to provide redistricting data needed by the 50 states. It specifies that within a year following Census Day, the Census Bureau must send the governor and legislative leadership in each state the data they need to redraw districts for the state legislature. To meet this legal requirement, the Census Bureau set up a program that affords state officials an opportunity before each decennial census to define the small areas for which they wish to receive census population totals for redistricting purposes. Officials then could receive data for voting districts (e.g., election precincts, wards) and state house and senate districts, in addition to standard census geographic areas, such as counties, cities, census tracts, and blocks. State participation in defining areas is voluntary and nonpartisan. Abstract 1–1 U.S. Census Bureau, Census 2000 At the 2002 annual meeting of the National Conference of State Legislatures (NCSL), the Redistricting and Elections Committee passed a resolution recommending that the Census Bureau collect state legislative districts on an ongoing basis and produce data products, including data summaries, for the plans that result from the use of the P.L. 94-171 dataset. In addition, the states strongly recommended maintaining state legislative districts in the TIGER database throughout the decade, in part, so that they can be held as census tabulation block boundaries going into Census 2010 (as they were for Census 2000)." Page 1-1. State Legislative District Supplement Technical Documentation. All raw data files were downloaded from: http://www.census.gov/Press-Release/www/2007/sld_sumfiles.html

[100] A number of alternative variable constructions (e.g. using per-capita income instead of median family income) were considered in the models, without changing the substantive results.

binomial count models (King 1988).[101] Substantively, however, the crucial distinction may not be in the number of bills but in whether or not a legislator proposes any bill or not. The move from 0 bills to 1 bill means much more than a single unit move such as 4 bills to 5 bills. I therefore ran a series of logit models where the dependent variable was 1 (if a legislator proposed any bill) or 0 (if a legislator did not propose any bills). Reported models are from the logit models, but the results from the two models are substantively very similar. Including all the available variables, the base regression model takes the form of:

[1] $$RAPE\_BILL_i = \beta_0 + \beta_1 FEMALE_i + \beta_2 AFR\text{-}AMERICAN_i + \beta_3 LATINO_i + \beta_4 ASIAN_i + \beta_5 NATIVE\_AMER_i + \beta_6 MILITARY_i + \beta_7 PCT\_LAST\_VOTE_i + \beta_8 SENIORITY_i + \beta_9 AGE_i + \beta_{10} DIST\_PCT\_FEMALE_i + \beta_{11} DIST\_PCT\_BLACK_i + \beta_{12} DIST\_PCT\_LATINO_i + \beta_{13} DIST\_PCT\_ASIAN_i + \beta_{14} DIST\_PCT\_RURAL_i + \beta_{15} DIST\_INCOME_i + \beta_{16} DIST\_UNEMPLOY_i + \beta_{17} DIST\_MILITARY_i + \delta_i + \varepsilon_i$$

where $RAPE\_BILL_i$ is either a count or dichotomous variable measuring whether legislator i proposed a sex crime bill and whether that bill was in one of the five sex crime categories: improve non-child prosecution, sex offender, child sexual assault, penalties, or victim focused; $FEMALE_i$ is a dichotomous variable indicating whether legislator i is a female; $AFR\text{-}AMERICAN_i$ is a dichotomous variable indicating whether legislator i is African-American; $LATINO_i$ is a dichotomous variable indicating whether legislator i is Latino; $ASIAN_i$ is a dichotomous variable indicating whether legislator i is Asian; $NATIVE\_AMER_i$ is a dichotomous variable indicating whether legislator i is

[101] These models were run using the nbreg command in Stata.

Native American; $MILITARY_i$ is a dichotomous variable indicating whether legislator *i* has served in any branch of the United States military;

$PCT\_LAST\_VOTE_i$ measures the percentage of the vote that legislator *i* received in the last election; $SENIORITY_i$ is legislator *i*'s rank in their chamber (with lower numbers meaning greater seniority); AGE_i is legislator *i*'s age; $DIST\_PCT\_FEMALE_i$ is the percentage of residents in the legislative district who are females age 18-34; $DIST\_PCT\_BLACK_i$ is the percentage of residents in the legislative district who are African-American; $DIST\_PCT\_LATINO_i$ is the percentage of residents in the legislative district who are Latino; $DIST\_PCT\_ASIAN_i$ is the percentage of residents in the legislative district who are Asian; $DIST\_PCT\_RURAL_i$ is the percentage of residents in the legislative district who live in rural areas; $DIST\_INCOME_i$ is the median family income of residents in the legislative district; $DIST\_UNEMPLOY_i$ is the percentage of civilian residents in the legislative district who are not employed; $DIST\_MILITARY_i$ is the percentage of residents in the legislative district who are active-duty military; δ_s captures State Fixed Effects; and εi is an error term. Following Primo, Jacobsmeier, and Milyo (2007), I used clustered standard errors instead of HLM to model these mixed levels. State fixed effects are included in all models, and this allows me to control for the myriad of state-to-state differences across legislatures.[102]

V. Results & Discussion

How do race and gender intersect in the statehouse when legislators consider rape law reform? The results of my analysis suggest that the politics of contemporary rape law

[102] Because the data on percentage vote in last election and age were not reported for all individuals, I run models both with and without these controls. The substantive results for gender and legislator party remain the same, even with the reduced N and greater controls.

reform are indeed shaped significantly by intersectionality: female legislators are more likely to propose sex crime bills in all categories, but when we break this out by race, black female legislators are much more reluctant to make such proposals. Additional district demographics and political context also shape legislator behavior. Tables 1.5, 1.6, and 1.7 present the results of the regression analysis. To highlight the effect of legislator identity variables in isolation, I present both reduced and full models. To make inferences more accessible, I have also included a table of predicted likelihoods by race and gender of legislator (Tables 1.8, 1.9, 1.10 for black legislators and 1.11, 1.12, 1.13 for Latina/o legislators). To construct these tables, I used the full models (including all control variables) to predict the probability that each legislator (given their unique values for each variable) would propose a bill. I then looked at each race-gender group to see where they fell within the ten percentiles.

Table 1.5 Results of Logit Models Explaining Total # of Bills and Prosecution Improvement Bills in 2007

	Total # of Bills	Total # of Bills	Total # of Bills	Improve Prosecution	Improve Prosecution	Improve Prosecution
GOP Legislator	0.404***	0.395***	0.472***	-0.166	-0.315	-0.076
	(0.144)	(0.148)	(0.142)	(0.349)	(0.415)	(0.474)
Female Legislator	0.385***	0.368***	0.385***	0.487**	0.462*	0.460*
	(0.102)	(0.104)	(0.123)	(0.241)	(0.244)	(0.246)
District % Female, Age 18-34		-1.110	-0.601		0.806	0.297
		(1.691)	(1.652)		(2.372)	(4.126)
African-American Legislator	-0.169	0.004	-0.117	-0.364	0.174	0.259
	(0.141)	(0.210)	(0.236)	(0.284)	(0.410)	(0.473)
District % Afr.-American Residents		-0.921*	-0.737		-1.293	-0.999
		(0.494)	(0.560)		(1.115)	(0.933)
Latino Legislator	0.679***	0.796***	0.700**	0.036	0.096	-0.199
	(0.245)	(0.251)	(0.311)	(0.245)	(0.209)	(0.374)
District % Latino Residents		-0.745	-0.539		0.141	0.435

Table 1.5 Results of Logit Models Explaining Total # of Bills and Prosecution Improvement Bills in 2007

	Total # of Bills	Total # of Bills	Total # of Bills	Improve Prosecution	Improve Prosecution	Improve Prosecution
		(0.563)	(0.516)		(0.833)	(0.622)
Asian Legislator	0.171	0.207	-0.083	-0.581	-0.418	0.915
	(0.189)	(0.216)	(0.334)	(0.498)	(0.325)	(0.887)
District % Asian Residents		-0.973	-1.098		-1.697	0.401
		(1.002)	(1.217)		(2.580)	(3.241)
Native American Legislator	0.099	0.130	0.332	0.950	1.018	0.813
	(0.234)	(0.277)	(0.481)	(0.580)	(0.678)	(0.894)
District % Rural Residents		-0.713***	-0.635***		0.064	0.349
		(0.194)	(0.215)		(0.587)	(0.494)
District Median Family Income ($000)		-0.004	-0.003		0.009	0.012*
		(0.004)	(0.005)		(0.007)	(0.007)
District % Unemployed		1.156	2.406		1.511	1.955
		(2.489)	(2.905)		(5.950)	(6.356)
District % in Military		-0.864	-0.557		6.096**	7.346**
		(1.299)	(1.528)		(2.764)	(2.903)
Legislator Age			-0.011***			0.004
			(0.004)			(0.011)
Dist. % Bush in Last Election			-0.001			0.005
			(0.002)			(0.006)
Legislator Military Experience			-0.068			-0.051
			(0.101)			(0.223)
Legislator Seniority in Chamber			0.002			0.005*
			(0.002)			(0.003)
Observations	7505	7482	5225	3136	3117	2112

NOTES: All models employ robust standard errors clustered on state, and state fixed effects. Significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors reported in parentheses.

Table 1.6 Results of Logit Models Explaining Sex Offender and Child Sex Bills in 2007

	Sex Offender	Sex Offender	Sex Offender	Child Assault	Child Assault	Child Assault
GOP Legislator	0.699***	0.643***	0.756***	0.818***	0.720***	0.696***
	(0.162)	(0.163)	(0.142)	(0.179)	(0.184)	(0.169)
Female Legislator	0.256***	0.282***	0.358***	0.286***	0.287***	0.243*
	(0.079)	(0.080)	(0.101)	(0.101)	(0.107)	(0.134)
District % Female, Age 18-34		-4.085**	-4.877***		-0.837	-0.851
		(2.001)	(1.702)		(2.219)	(2.455)
African-American Legislator	-0.116	0.229	0.234	-0.293*	0.006	0.011
	(0.171)	(0.194)	(0.237)	(0.160)	(0.229)	(0.237)
District % Afr.-American Residents		-1.317**	-1.373*		-0.671	-0.483
		(0.609)	(0.706)		(0.591)	(0.551)
Latino Legislator	0.323	0.363	0.291	0.051	0.613**	0.849***
	(0.317)	(0.303)	(0.359)	(0.257)	(0.268)	(0.283)
District % Latino Residents		-0.609	-0.058		-1.721***	-1.696**
		(0.640)	(0.665)		(0.632)	(0.706)
Asian Legislator	0.123	0.321	0.253	0.954**	0.870**	1.025**
	(0.207)	(0.263)	(0.370)	(0.398)	(0.438)	(0.470)
District % Asian Residents		-2.556*	-2.980**		0.463	-0.257
		(1.483)	(1.431)		(1.278)	(1.214)
Native American Legislator	-0.618*	-0.684*	-0.458	0.157	0.241	-0.264
	(0.356)	(0.396)	(0.519)	(0.750)	(0.751)	(1.030)
District % Rural Residents		-0.699***	-0.806***		-0.265	-0.138
		(0.201)	(0.236)		(0.291)	(0.311)
District Median Family Income ($000)		-0.010***	-0.013***		-0.004	-0.007
		(0.004)	(0.004)		(0.005)	(0.006)
District % Unemployed		-0.435	-0.470		-2.580	-3.269
		(2.318)	(3.093)		(2.508)	(3.342)
District % in Military		-1.545	-2.273		-1.174	0.001
		(1.351)	(1.722)		(1.478)	(2.028)
Legislator Age			-0.010**			-0.003
			(0.004)			(0.006)
Dist. % Bush in Last Election			-0.003			-0.005**
			(0.002)			(0.002)
Legislator Military Experience			-0.099			0.079
			(0.092)			(0.114)

Table 1.6 Results of Logit Models Explaining Sex Offender and Child Sex Bills in 2007

	Sex Offender	Sex Offender	Sex Offender	Child Assault	Child Assault	Child Assault
Legislator Seniority in Chamber			0.003			0.003
			(0.003)			(0.003)
Observations	7388	7366	5155	5943	5921	4096

NOTES: All models employ robust standard errors clustered on state, and state fixed effects. Significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors reported in parentheses.

Table 1.7 Results of Logit Models Explaining Punishment/Penalty and Victim Focused Bills in 2007

	Penalty / Punishment	Penalty / Punishment	Penalty / Punishment	Victim Focused	Victim Focused	Victim Focused
GOP Legislator	1.393***	1.255***	1.321***	-1.009**	-0.956**	-1.083**
	(0.362)	(0.367)	(0.383)	(0.436)	(0.444)	(0.468)
Female Legislator	0.371***	0.395***	0.473***	0.787***	0.689***	0.642**
	(0.137)	(0.138)	(0.173)	(0.239)	(0.239)	(0.261)
District % Female, Age 18-34		-1.063	0.391		2.316	3.946
		(3.387)	(3.006)		(1.933)	(2.463)
African-American Legislator	-0.316*	0.242	0.280	-0.144	-0.398	-0.673*
	(0.166)	(0.216)	(0.307)	(0.194)	(0.355)	(0.366)
District % Afr.-American Residents		-1.621***	-1.591**		0.164	0.415
		(0.568)	(0.698)		(0.779)	(0.855)
Latino Legislator	0.127	0.803*	0.616	0.325	0.626	0.718
	(0.367)	(0.430)	(0.412)	(0.494)	(0.438)	(0.584)
District % Latino Residents		-2.512***	-2.638***		-1.032	-2.168***
		(0.914)	(0.891)		(0.744)	(0.829)
Asian Legislator	-0.095	0.056	-0.420	0.016	0.029	-0.477
	(0.842)	(0.904)	(1.065)	(0.319)	(0.283)	(0.316)
District % Asian Residents		-2.060	-3.042*		-0.437	-0.782
		(1.257)	(1.703)		(0.964)	(0.804)
Native American Legislator	-14.315***	-14.725***	-13.478***	-0.108	-0.073	0.358
	(0.384)	(0.410)	(0.414)	(0.237)	(0.224)	(0.463)
District % Rural Residents		-0.590*	-0.311		-0.920***	-1.056***
		(0.307)	(0.318)		(0.301)	(0.264)

Table 1.7 Results of Logit Models Explaining Punishment/Penalty and Victim Focused Bills in 2007

	Penalty / Punishment	Penalty / Punishment	Penalty / Punishment	Victim Focused	Victim Focused	Victim Focused
District Median Family Income ($000)		-0.015***	-0.013*		0.012***	0.014***
		(0.004)	(0.007)		(0.004)	(0.005)
District % Unemployed		-4.608	-4.309		4.142	5.709
		(4.283)	(6.208)		(3.457)	(5.009)
District % in Military		-1.883	-1.383		-0.057	-0.110
		(1.556)	(1.526)		(0.712)	(1.611)
Legislator Age			-0.008			-0.001
			(0.007)			(0.006)
Dist. % Bush in Last Election			0.000			0.000
			(0.003)			(0.004)
Legislator Military Experience			0.192			0.115
			(0.157)			(0.160)
Legislator Seniority in Chamber			0.002			0.001
			(0.003)			(0.005)
Observations	5067	5045	3214	4208	4187	2698

NOTES: All models employ robust standard errors clustered on state, and state fixed effects. Significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%. Robust standard errors reported in parentheses.

V.A. Results

Looking first at the models explaining proposal of any sex crime bill and proposal of a prosecution-friendly bill (Table 1.5), we see evidence of cross-cutting racial politics. Across the board, there is a significant, positive relationship between being a female legislator and proposing a sex crime bill generally or a bill specifically to improve prosecution. Race matters too: there is an inverse relationship between proposing these bills and the percentage of African-American residents in the legislative district, but a positive relationship between being Latino and proposing a sex crime bill (Table 1.5).

To look more closely at the intersectionality question, I used the data in Table 1.5 to look at predicted probabilities for legislators proposing sex crime bills and bills to

enhance prosecution. Predicted probabilities are calculated by taking the full regression model, and plugging in (for each unique legislator) their particular values for identity and legislative district. A straightforward way to interpret these predictions is that they answer this question: "Based on what we know from 2007, how likely is it that Legislator X (with a particular gender, race, party, age, seniority, etc.) in Legislative District Y (with a particular mix of constituents) will propose a sex crime bill (or particular type of sex crime bill) in the future?" Stata allows me to make this calculation with little effort. Once I had a predicted likelihood of bill proposal for each legislator, I broke the distribution down by percentile. I then examined how gender and race were distributed. I asked, for instance, of all the black women in the analysis, how many of them are in each percentile? i.e. how many are very likely to propose a bill, how many are not likely to propose one?

Table 1.8. Percentile distribution of predicted likelihood of proposing sex crime bill or prosecution sex crime bill, by Gender and Race (African-American)

	Proposing any sex crime bill					*Proposing non-child prosecution bill*				
Predicted Likelihood	Male	Female	Black	Black Male	Black Female	Male	Female	Black	Black Male	Black Female
1 - Most Likely	7.0	20.3	3.6	1.9	6.7	6.0	23.8	5.8	3.8	9.4
2	9.3	12.5	2.4	2.6	2.0	7.7	18.1	4.8	3.8	6.7
3	9.0	13.5	2.7	1.5	4.7	8.5	15.0	7.0	4.2	12.1
4	9.7	11.0	1.7	0.8	3.4	9.6	11.4	6.3	4.5	9.4
5	10.3	8.8	3.9	2.3	6.7	10.3	8.8	9.9	6.8	15.4
6	10.2	9.3	8.9	6.0	14.1	11.2	5.8	8.0	5.7	12.1
7	10.5	8.2	10.1	6.0	17.4	11.3	5.4	11.1	10.6	12.1
8	11.5	5.0	12.3	13.2	10.7	11.8	3.8	14.3	15.8	11.4
9	11.3	5.3	24.4	28.3	17.4	11.8	3.8	15.7	20.0	8.1
10 - Least Likely	11.1	6.2	30.0	37.4	16.8	11.7	4.1	17.1	24.9	3.4

Notes: These are not the percentages of actual legislators proposing bills in 2007, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on logit models (with all control variables included) in Table 1.5.

Table 1.9. Percentile distribution of predicted likelihood of proposing sex offender bill or child sexual assault bill, by Gender and Race (African-American)

	Proposing Sex Offender Bill					*Proposing Child Sex Assault Bill*				
Predicted Likelihood	Male	Female	Black	Black Male	Black Female	Male	Female	Black	Black Male	Black Female
1 - Most Likely	7.9	17.3	3.1	1.5	6.0	8.7	14.5	1.2	1.1	1.3
2	9.7	11.2	1.4	1.9	0.7	10.2	9.3	2.4	1.1	4.7
3	9.7	10.9	2.9	2.3	4.0	10.1	9.7	1.7	2.3	0.7
4	10.1	9.6	2.4	2.6	2.0	10.3	9.0	0.7	0.8	0.7
5	10.5	8.3	2.2	1.1	4.0	9.9	10.5	2.2	0.8	4.7
6	10.2	9.4	8.0	5.7	12.1	10.1	9.8	3.6	3.4	4.0
7	10.5	8.2	9.4	7.5	12.8	10.5	8.2	6.8	4.5	10.7
8	10.8	7.4	17.6	17.7	17.4	10.2	9.3	12.3	10.9	14.8
9	10.2	9.1	23.4	22.6	24.8	10.3	9.0	26.8	27.9	24.8
10 - Least Likely	10.4	8.6	29.5	37.0	16.1	9.8	10.7	42.3	47.2	33.6

Notes: These are not the percentages of actual legislators proposing bills in 2007, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on logit models (with all control variables included) in Table 1.6.

Table 1.10. Percentile distribution of predicted likelihood of proposing punishment / penalty bill or victim focused bill, by Gender and Race (African-American)

	Proposing Punishment / Penalty Bill					*Proposing Victim Focused Bill*				
Predicted Likelihood	Male	Female	Black	Black Male	Black Female	Male	Female	Black	Black Male	Black Female
1 - Most Likely	8.0	16.8	1.2	0.8	2.0	4.6	28.9	8.0	1.5	19.5
2	10.3	8.9	0.5	0.0	1.3	7.0	20.6	15.2	7.9	28.2
3	11.0	6.4	1.0	0.4	2.0	8.9	13.8	20.8	17.7	26.2
4	11.0	6.4	1.7	1.9	1.3	10.3	9.0	13.5	13.2	14.1
5	9.7	11.2	1.9	1.1	3.4	10.7	7.5	13.3	17.0	6.7
6	9.1	13.3	5.1	4.2	6.7	11.3	5.4	14.5	20.4	4.0
7	10.0	9.8	8.7	5.7	14.1	11.3	5.5	9.2	13.6	1.3
8	10.6	8.0	10.1	7.2	15.4	11.7	4.3	3.1	4.9	0.0
9	9.6	11.3	32.1	31.7	32.9	11.9	3.3	1.7	2.6	0.0
10 - Least Likely	10.6	7.8	37.7	47.2	20.8	12.4	1.7	0.7	1.1	0.0

Notes: These are not the percentages of actual legislators proposing bills in 2007, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on logit models (with all control variables included) in Table 1.7.

Table 1.11. Percentile distribution of predicted likelihood of proposing sex crime bill or prosecution sex crime bill, by Gender and Race (Latino)

	Proposing any sex crime bill					*Proposing non-child prosecution bill*				
Predicted Likelihood	Male	Female	Latino All	Latino	Latina	Male	Female	Latino All	Latino	Latina
1 - Most Likely	7.0	20.3	42.0	71.1	31.0	6.0	23.8	8.7	21.1	4.0
2	9.3	12.5	20.3	10.5	24.0	7.7	18.1	11.6	13.2	11.0
3	9.0	13.5	13.0	10.5	14.0	8.5	15.0	10.9	15.8	9.0
4	9.7	11.0	10.9	2.6	14.0	9.6	11.4	13.0	21.1	10.0
5	10.3	8.8	5.1	2.6	6.0	10.3	8.8	6.5	10.5	5.0
6	10.2	9.3	2.2	2.6	2.0	11.2	5.8	6.5	7.9	6.0
7	10.5	8.2	4.3	0.0	6.0	11.3	5.4	7.2	2.6	9.0
8	11.5	5.0	1.4	0.0	2.0	11.8	3.8	13.8	7.9	16.0
9	11.3	5.3	0.7	0.0	1.0	11.8	3.8	15.2	0.0	21.0
10 - Least Likely	11.1	6.2	0.0	0.0	0.0	11.7	4.1	6.5	0.0	9.0

Notes: These are not the percentages of actual legislators proposing bills in 2007, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on logit models (with all control variables included) in Table 1.5.

Table 1.12. Percentile distribution of predicted likelihood of proposing sex offender bill or child sexual assault bill, by Gender and Race (Latino)

	Proposing Sex Offender Bill					*Proposing Child Sex Assault Bill*				
Predicted Likelihood	Male	Female	Latino All	Latino	Latina	Male	Female	Latino All.	Latino	Latina
1 - Most Likely	7.9	17.3	18.8	36.8	12.0	8.7	14.5	23.2	31.6	20.0
2	9.7	11.2	15.9	21.1	14.0	10.2	9.3	8.7	7.9	9.0
3	9.7	10.9	13.0	10.5	14.0	10.1	9.7	5.8	5.3	6.0
4	10.1	9.6	18.1	15.8	19.0	10.3	9.0	6.5	7.9	6.0
5	10.5	8.3	7.2	5.3	8.0	9.9	10.5	9.4	21.1	5.0
6	10.2	9.4	8.0	2.6	10.0	10.1	9.8	2.2	2.6	2.0
7	10.5	8.2	9.4	5.3	11.0	10.5	8.2	9.4	2.6	12.0
8	10.8	7.4	6.5	0.0	9.0	10.2	9.3	11.6	10.5	12.0
9	10.2	9.1	2.9	2.6	3.0	10.3	9.0	10.1	7.9	11.0
10 - Least Likely	10.4	8.6	0.0	0.0	0.0	9.8	10.7	13.0	2.6	17.0

Notes: These are not the percentages of actual legislators proposing bills in 2007, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on logit models (with all control variables included) in Table 1.6.

Table 1.13. Percentile distribution of predicted likelihood of proposing punishment / penalty bill or victim focused bill, by Gender and Race (Latino)

	Proposing Punishment / Penalty Bill					*Proposing Victim Focused Bill*				
Predicted Likelihood	Male	Female	Latino All	Latina	Latino	Male	Female	Latino All	Latina	Latino
1 - Most Likely	8.0	16.8	11.6	18.4	9.0	4.6	28.9	25.4	42.1	19.0
2	10.3	8.9	2.2	2.6	2.0	7.0	20.6	15.2	18.4	14.0
3	11.0	6.4	3.6	5.3	3.0	8.9	13.8	13.8	15.8	13.0
4	11.0	6.4	0.7	0.0	1.0	10.3	9.0	14.5	15.8	14.0
5	9.7	11.2	8.7	10.5	8.0	10.7	7.5	7.2	2.6	9.0
6	9.1	13.3	13.8	21.1	11.0	11.3	5.4	8.0	5.3	9.0
7	10.0	9.8	8.7	7.9	9.0	11.3	5.5	7.2	0.0	10.0
8	10.6	8.0	13.8	7.9	16.0	11.7	4.3	1.4	0.0	2.0
9	9.6	11.3	13.0	15.8	12.0	11.9	3.3	4.3	0.0	6.0
10 - Least Likely	10.6	7.8	23.9	10.5	29.0	12.4	1.7	2.9	0.0	4.0

Notes: These are not the percentages of actual legislators proposing bills in 2007, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on logit models (with all control variables included) in Table 1.7.

The results, presented in Tables 1.8 and 1.11, show strong evidence for the explanatory power of intersectionality theory. While 56% of female legislators were in the top three percentiles for proposing a sex crime bill, only 13% of black female legislators were similarly grouped (Table 1.8). Instead, 45% of black female legislators were at the other end of the spectrum – in the three percentiles least likely to propose a sex crime bill. The figures were roughly the same when we narrowed down to prosecution bills only (Table 1.8). In proposing prosecution legislation, black males were evenly more heavily skewed (Table 1.8). It appears that black male legislators are acutely

aware of the potential implications of sex crime bills for their constituents. Comparing black male and black female legislators reveals that black female legislators occupy a middle-ground position: they are more likely than their black male counterparts to propose sex crime bills, but not nearly as likely as their fellow female legislators. Distinct from African-American women, Latina legislators were actually more likely than all females to propose a sex crime bill (Table 1.11), though similarly distributed for proposing prosecution friendly bills.

The pattern of intersectionality is seen again in the remaining four categories of sex crime legislation (Tables 1.6, 1.7). Consistent with the argument that minority concerns center on incarceration and disparate punishment in the criminal justice system, we see that the gender/race tension is especially notable in the punishment/penalty category. As in the overall sex crime regression models, being female is positively and significantly associated with proposing a bill, being Latino is positively associated, and the percentage of African-American residents in the district is inversely correlated (Tables 1.7). Looking at the distributions of predicted likelihood of bill proposal by gender and race (1.10, 1.13), we see stark differences in punishment bill proposals.

While 32% of female legislators were in the three groups most likely to propose a punishment/penalty sex crime bill, only 5.3% of black female legislators were in these groups (Table 1.10). Instead, *69%* of black female legislators were in the three groups least likely to propose a punishment/penalty bill (Table 1.10). This was just slightly less than black males, who were 79% in this group. The pattern for Latino legislators (Table 1.10) was not nearly as divergent.

Class also seems to play an important mediating role. A higher median income in the legislative district was positively associated with proposing bills to improve prosecution (Table 1.5) and address victim needs (Table 1.7), but inversely related to proposing sex offender bills (Table 1.6) and punishment/penalties (Table 1.7). Before discussing the implications of these intersectional findings in greater detail, several other additional findings are worth noting.

While Republican legislators are more likely than Democrats to propose a sex crime bill, they are not more likely to propose a bill that directly improves prosecution of non-child rape (Tables 1.5, 1.6). This is consistent with predictions about Republican law-and-order orientations. As predicted in light of lower rates of sexual assault in rural areas, legislators with greater percentages of rural constituents were less likely to propose sex crime bills generally (Table 1.5) and sex offender and victim focused bills in particular (Tables 1.6, 1.7). The sex offender finding may also be explained by the observation that rural areas have less population density, thus the perceived need for sex offender location restrictions is likely lessened.

Lower legislative seniority is positively correlated with proposing bills to improve prosecution, suggesting that newer legislators are more likely than more established politicians to engage in fundamental reform. Legislators who have been in the system for a while may feel that such reform is either not feasible or that enough reform has already been made. More work is necessary to understand these differences between new and established legislators. The significant relationship between larger military constituencies and greater emphasis on bills affecting prosecution is consistent with the large literature in political science examining the civil-military gap in ideology (Feaver and Gelpi 2004).

V.B. Discussion

The tension between race- and gender-based commitments in the arena of sexual assault is not new. In 1981, when noted scholar Susan Estrich was first gathering materials to teach about the law of rape at Harvard Law School, she offered this reflection on the interrelationship of sexism and racism:

> I knew that sexism infected the law of rape, although it was hardly as one-sided as much of the early feminist writing suggested. It was true that lawyers and judges, armed with the stereotype of the spiteful, vengeful, lying woman, had fashioned special rules designed to make rape prosecutions more difficult. But it was also true that black men charged with raping white women had for decades found the protections of due process illusory: racism trumped sexism when the defendant was a black stranger and the victim a white woman.[103]

The results of my analysis find that today's state legislators share Estrich's recognition of the racism-sexism tension in the context of rape laws. African-American women, in particular, are reluctant to follow their fellow female legislators in proposing sex crime bills. Rape victims are overwhelmingly female, but rape law reform occurs today in a criminal system where "at every step of the ... process, there is evidence that African Americans are not treated as well as whites - both as victims of crime and as criminal defendants" (Davis 1998, 16; note 10). That African-American women are acutely aware

[103] Susan Estrich. 1992. Teaching Rape Law. Yale Journal on Regulation. 02 Yale J. on Reg. 509 at 510-511.

of this is seen in the fact that the starkest divergence is within the category of punishment/penalty bills and softest within the category of victim focused bills.

How to normatively judge these results is open to debate. As George (2005) has explored in the context of criminal DNA databanks, there is a trade-off between protecting potentially innocent black men and providing support to female black victims.[104] Crenshaw (1991, 1273) takes a stronger view. Recognizing that the "antiracist critique" of rape has focused on false accusations launched at black men, Crenshaw argues that "as a result of this continual emphasis on black male sexuality as the core issue in antiracist critiques of rape, black women who raise claims of rape against black men are not only disregarded but also sometimes vilified within the African-American community." Through a Crenshaw-like lens, one might interpret the results as black victims of sexual assault once again being overlooked in favor of black male interests.

But an alternative view is also suggested by the evidence. Looking more closely at the results in Table 1.5, it is important to note that the strong inverse relationship is between bill proposal and the percentage of black residents *in the legislative district.* Serving in their function as representative of their district, black female elected officials may not so much be "choosing sides," so much as trying to best understand the needs and preferences of their constituents. In this view, legislators alone do not determine the "black interest" (and how gender affects it), but instead articulate that interest in conjunction with their legislative district. It is worth stressing again that I am not modeling here simple preference formulation, but rather legislative behavior. Identity interacts with statehouse and legislative district politics.

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[104] George, Marie-Amelie. 2005. Gendered Crime, Raced Justice: A Critical Race Feminist Approach to Forensic DNA Databank Expansion. National Black Law Journal. 19 Nat'l Black L.J. 78.

By putting intersectionality at the center of the rape law reform debate, my analysis provides an important corrective for law scholars who continue to ask why the reforms they have long proposed have not been more rapidly adopted. First, the results challenge the argument that the impediment to rape law reform is purely a story of gender. In what has been accurately called the "manifesto of the anti-rape movement," Susan Brownmiller argued that, "man's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times, along with the use of fire and the first crude stone axes. From prehistoric times to the present, I believe, rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear."[105] In today's state legislatures, the process of rape law reform does not pit all men against all women. Instead, it involves cross-cutting politics delineated in large part by concerns of racial injustice.

In the thirty years since Brownmiller's publication, the feminist literature on rape and the anti-rape movement in the United States rapidly expanded.[106] But the core of the literature has almost always glossed over race. Nancy Matthews' treatment of the subject, for example, starts from the premise that "the anti-rape movement was founded on two notions: first, the radical political insight that violence against women is a fundamental

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[105] Renzetti, Claire M. 2005. "Reflection," in Bergen, Raquel Kennedy, Edleson, Jeffrey L., & Renzetti, Claire M., eds. *Violence Against Women: Classic Papers*. Boston: Pearson. Brownmiller, Susan. 1975. *Against Our Will: Men, Women and Rape*. New York : Simon and Schuster. Brownmiller, page 5.

[106] Bevacqua (2000) provides a detailed historical account of the movement and a comprehensive timeline of major events. Bevacqua, Maria. 2000. *Rape on the public agenda: Feminism and the politics of sexual assault.* Boston: Northeastern University Press. In addition, see: Campbell, Rebecca and Sharon M. Wasco. "Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions," Journal of Interpersonal Violence 2005 20: 127-131. Koss, Mary P. (2005). "Empirically Enhanced Reflections on 20 Years of Rape Research," Journal of Interpersonal Violence, Vol. 20, No. 1, 100-107. Abbey, Antonia, "Lessons Learned and Unanswered Questions About Sexual Assault Perpetration," Journal of Interpersonal Violence 2005 20: 39-42.

component of social control of women, and second, that women should try to do something to turn victims into survivors."[107] Women are essentialized in ways that intersectionality theory and the findings in this paper challenge. Because "doing something about" rape law reform in the policy arena necessarily involves politics, women must simultaneously navigate competing commitments.

VI. Conclusion

Susan Brownmiller (1975, 254) argued over three decades ago that "by pitting white women against black men in their effort to alert the nation to the extra punishment wreaked on blacks for a case of interracial rape, leftists and liberals with a defense-lawyer mentality drove a wedge between two movements for human rights and today we are still struggling to overcome this historic legacy." The analysis in this paper suggests that even when interracial rape isn't explicitly the issue, these two movements – one to protect innocent black men unfairly charged, the other to gain more convictions of guilty rapists – remain in tension with one another. By applying an intersectionality approach to the study of rape law reform, this paper has uncovered the previously understudied political dynamics that operate to complicate statehouse efforts to combat rape.

While they suggest a tension, the results in this paper should not be construed as pitting "race vs. gender" in some sort of zero-sum game.[108] Rather, the results in this

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[107] Mathews, Nancy. 1994. *Confronting rape: The feminist anti-rape movement and the state.* London: Routledge. Page xii.

[108] This has been the tendency in at least some feminist scholarship – to acknowledge potential benefits of proposed legislation, but ultimately side against it. Wells and Motley (161), for instance, examine whether sex offender laws are helpful: "One can even say that registration, notification, and sexual predator laws recognize that sentences for rape are woefully short and thus attempt to provide some manner of protecting women from further assaults. By accepting the myth of the crazed rapist, however, the new legislation ultimately works counter to the feminist agenda's effort to expand the notion of rape and to remove obstacles lying in the path of rape prosecutions."

paper should be taken as a starting point for more rigorous investigation into the ways that successful legislation can be sensitive to each. The paper also lays the groundwork for statehouse explorations of other intersectionalities beyond race and gender.

One issue ripe for statehouse intersectionality study is abortion. The motivation comes from Clawson and Clark's (2003) study of the 1991 Southern Grassroots Party Activists Project. The authors studied precinct and county level Democratic party activists across eleven southern states. Focusing on African-American female activists, they found "that black women organize their race and gender policy attitudes along a single dimension, but they offered "one caveat: for religious black women, abortion is not a part of that dimension" (Clawson and Clark 2003, 218). Abortion involves cross-cutting politics in the same way that rape law reform does, and abortion politics are often similarly described in overly essentialized terms. Close empirical investigation may reveal previously overlooked cleavages.

The centrality of state politics and variation across individual legislators challenges the monolithic conception of "politics" and the political system that is typical in the moral panic literature examining legislatures and sex crimes. Methodologically, the paper has made substantial contributions in the field of state politics research by conducting individual legislator analysis across all fifty states and the District of Columbia and by including a broader set of both legislator and district control variables than have previously been included in similar analyses.

There remains much opportunity for further research in this area. First, more investigation is also needed on racial categories beyond black-white. I echo a call by

Demuth and Steffensmeier (2004) for better race statistics.[109] The number of Asian legislators outside of Hawaii and California remains very small, but as their numbers rise additional empirical analysis will become possible. Second, longitudinal analysis is called for to examine the changing dynamics of sex crime bills over time.

Finally, the empirical analysis raises many questions of mechanisms. How does race/gender interact with media and interest groups? Another mechanism to consider is the importance of "focusing events".[110] These events are an important part of the policymaking situation because they focus the public's attention on certain problems, and in response lawmakers must craft new legislation or agencies must reform. In the realm of rape, the focusing events we are most familiar with are those of serial rapists, child molesters, and priest sexual abuse. Responses to such events have included Megan's Laws and increased policing of priest activity with children. The high-profile enactment and implementation of these laws, however, masks the fact that most rapes are not committed by priests or child abductors fleeing across state lines. Because citizens, and in turn lawmakers, are more likely to react to these high-visibility cases, a disconnect develops between state/federal policy response and the well-known empirical reality that most rape happens behind closed doors between people who know each other.

In addition, other traditional political actors such as interest groups and parties could be more fully examined. It could be that interest groups target minorities and women, but Hrebenar and Thomas (1987, 1992, 1993) suggest that interest groups for

[109] Demuth and Steffensmeier (2004, 995) note that despite "changes in population structure, social scientists continue to focus predominantly on black and white defendants, with less consideration for whether Hispanic or other racial-ethnic minority groups are affected by sentencing practices (or other criminal justice outcomes) in U.S. courts" and "the main reason for the inattention stems from limited availability of relevant data. ... For reporting purposes, Hispanics are often classified into either ''white'' or ''black'' categories. Also, it has been difficult to identify a population of criminal defendants that included sufficient numbers of Hispanics." (Demuth and Steffensmeier 2004, 995)

[110] Kingdon, John. (1984). *Agendas, Alternatives, & Public Policies.*

women and minority interests rank low in their effectiveness in the states relative to other interest groups.[111] Party platforms do not include specific planks about rape and sexual assault, but more detailed case study work will better reveal how parties shape the legislative agenda in this area.

[111] Research guide to U.S. and international interest groups / edited by Clive S. Thomas. Westport, Conn. : Praeger, 2004.

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Racialized Retrenchment: The Politics of Crime Victim Compensation Programs in the United States

There exists in the United States a social policy that is neither a direct nor indirect government expenditure. It is not privatization, yet it also requires no general taxation of American citizens. It provides money to individuals who can't afford private insurance to cover their needs, yet it falls outside of both the traditional and hidden welfare state (Howard 1997). It is, in this sense, part of a *really* hidden welfare state. Beyond its visibility, however, this program is distinguished from the rest of the welfare state by its rationale for redistribution. Traditional tax and transfer focuses on ability to pay. This program focuses on (purported) *deservedness* to pay. The program being referred to here is crime victim compensation, and its unique politics are the focus of this paper.

Crime victim compensation programs are straightforward in their operation: when individuals are faced with medical and other costs in the wake of a criminal assault, and when they cannot meet these costs through private insurance or other welfare programs, they can apply for aid. Like other welfare programs, victim compensation programs faced retrenchment with the Reagan revolution. It is the argument of this paper, however, that victim compensation is unique in the type of retrenchment experienced: benefit levels were maintained (or even expanded), but the burden of payment was shifted from tax payers to *criminal offenders*. This introduced a new rationale, typically reserved to the legal arena, of redistribution on the grounds of (purported) "deservedness," rather than ability to pay. Although there remains some variation across the states, today the vast majority of revenues for crime victim compensation funds are generated through fines and penalties assessed to those convicted of crimes in U.S. courts.

The politics of the modern American welfare state is a study of retrenchment (Pierson 1994). But retrenchment means more than simply cutting back on benefits. Pierson (1994, 15) noted that it is important to "study systemic retrenchment as well as programmatic retrenchment." Systemic retrenchment changes that "the context for future spending decisions" by altering the rules of the game. Critically, systemic retrenchment can introduce new political cleavages.

I argue that because of historical and contemporary concerns about a racialized criminal justice system, shifting to an offender-based revenue stream for victim compensation has opened up a new tension for minority legislators. The new dilemma, which I call "racialized retrenchment" emerges from two empirical realities. On one hand, black offenders, and in particular young black men, are incarcerated at much higher rates than whites (Blumstein 1980, 1993; Mauer 2006). In their annual report on "Prison and Jail Inmates at Midyear," the Bureau of Justice Statistics (BJS) reported in 2007 that (based on data collected in 2006), "black men were incarcerated at 6.5 times the rate of white men" (Sabol, et. al. 2007, 9).[1] On the other hand, however, blacks (both males and females) experience greater crime rates. BJS statistics estimate that in 2005, the overall crime rate for blacks was 27/1,000 versus 20/1000 for whites. For rape and sexual assault, where victim compensation programs have been targeted in many states, the disparity is even greater: 1.8 for blacks compared to 0.6 for whites. Faced with these realities, racialized retrenchment creates a new tension: minority victims of crime are in greater need of additional crime victim support, but the revised compensation programs draw their revenues from offenders who are disproportionately minority as well.

[1] In its methodology section, the data sources are explained: "Bureau of Justice Statistics (BJS), with the U.S. Census Bureau as its collection agent, obtains midyear and yearend counts of prisoners from the departments of corrections in the 50 States and from the Federal Bureau of Prisons." (10).

Complicating the politics further is the special role that crime victim compensation plays for female victims of rape and sexual assault. Extending the intersectionality thesis advanced in the accompanying paper, I argue that female minority legislators may face particularly tough decisions.

To develop this argument, I examine both the historical and contemporary statehouse politics concerning victim compensation. Victim compensation was first adopted by California in 1965 and has subsequently been adopted by every other state and the District of Columbia. Although they are not high-visibility programs, they continue to draw the attention of state lawmakers. In 2007 alone, 34 different state legislatures considered a total of 158 different bills related to modifying crime victim compensation funds. Substantively, the programs are a crucial source for victims of crime. They currently provide over $450 million annually to victims.[2] Understanding the politics of retrenchment in this case has policy relevance for the many victims who rely on the programs. It also has substantial value for welfare scholars, as the racialized retrenchment we see in this case may illuminate similar racialized retrenchment in other proposed program revisions.

The paper proceeds in five sections. Part I of the paper provides historical background on the origins and growth of crime victim compensation programs in the United States. These programs arose in a period of welfare state growth, as "from 1950 to 1975, policymakers gradually fortified existing policies by making benefits both more generous and more inclusive [and] ... also created new programs that further extended economic security and well-being" (Mettler and Milstein 2007, 118). A majority of

[2] National Association of Crime Victim Compensation Boards. "Crime Victim Compensation: Resources for Recovery". Online: http://www.nacvcb.org/ (accessed February 2008).

commentators have viewed the politics of victim compensation as inconsequential. As the *University of Chicago Law Review* wrote in 1966, "most people find the victim of crime an appealing object of concern, and because the plans are small in scale and do not, like medicare or other major reforms, threaten existing interests, they have evoked little opposition."[3] What this commentary and many others since overlooked was that while most politicians wanted to help victims of crime, they were less inclined to spend the money to back up their sentiments. Adequate funding for crime victim compensation programs has presented a consistent economic and political challenge.

In Section II, I present an empirical analysis of the diffusion of crime victim compensation programs from 1965-1991. I employ an Event History Analysis (EHA) model that draws on Bayesian Model Averaging (BMA) techniques. First applied to the state policy diffusion literature in Shen (2003), BMA methods allow me to average over hundreds of regression models, and allow me greater confidence in drawing conclusions about the relationships between my explanatory variables and policy adoption.

My analysis finds that states were more likely to adopt victim compensation when they had larger populations, higher median incomes, and a higher percentage of urban residents. These results support the argument that states required fiscal capacity to fund victim compensation funds as an expanded welfare state. The analysis also finds that a greater percentage of African-American residents was inversely related to policy adoption, consistent with "the general tenor of the new work on race and social policy … [finding] that … the welfare state and debates about it are explicable first and foremost through the lens of racial analysis. (Hacker 2005, 130). Resistance to program adoption may be related to concerns about benefits going to minorities.

[3] University of Chicago Law Review (1966), p. 557

In Section III, I shift my focus to contemporary politics of crime victim compensation funds. The compensation programs, and the politics behind them, have been low on citizen and scholarly radar screens. Most Americans are unaware that crime victim compensation programs exist. As the director of Montana's program commented, "For 30 years we have done a lot of work on trying to make sure victims are aware of the program ... yet people right here in Helena don't know about it."[4] Scholars have also overlooked the programs. While there was a flurry of analysis surrounding the advent of compensation programs (Edelhertz and Geis 1974; Meiners 1978; Elias 1984), the literature in the past twenty years has not been well developed. Most recent studies of crime victim compensation have focused primarily on the extent to which the programs are run effectively and meet the needs of victims (Newmark, et. al 2003; Brickman, et. al. 2002). While Hays (1996a, 1996b) provides a notable exception to be discussed in the paper, political science perspectives have largely been missing from the literature.

Examining the politics of victim compensation provides a unique opportunity to study racialized retrenchment and the intersection of gender with race. Hacker (2005, 130) has noted that "while race has long been a central theme in the study of the American welfare state, gender, surprisingly, has not." By employing an intersectionality frame, I contribute to a growing body of literature recognizing the need to see race and gender as interrelated. To build the case for an intersectionality approach, I conduct preliminary county-level analysis of expenditures and revenues in the states for which data is available. I then develop and test a series of hypotheses about individual legislator behavior related to victim compensation in 2007 state legislative sessions. Tracking every

[4] Interview with Kathy Matson. December 4, 2007.

proposed bill related to victim compensation in 2007, I examine what types of legislators are concerned with victim compensation.

My results suggest evidence of both partisan cleavages and identity tensions. While female legislators are more likely to propose victim compensation bills, both Republican and African-American legislators are less likely to make proposals. I argue that this is a result of the redistributive effects of victim compensation as currently organized. Victim compensation provides a unique resource for female victims of crime, but by drawing heavily on offenders for revenues, it puts disproportionate burdens on African-American males. Employing an intersectionality analysis, I find that black females are particularly reluctant to propose victim fund legislation.

I conclude the paper in Section IV with a discussion of the implications of this research for policy formulation and for future research. The future of victim compensation remains an open question. At the federal level, George W. Bush's FY 2009 budget proposed to completely eliminate the $2 billion balance in the Victim of Crimes Act Fund, a move that could prove fatal to compensation programs.[5] I argue that current funding debates over victim compensation should recognize the possibility of returning to the programs' roots in social welfare policy. I also argue that both the gender and racial implications of victim compensation programs are likely to become more central to debates in the ensuing years. As a result, it will be incumbent on states to make available data on both expenditures *and* revenues so that we can properly understand the nature of the programs' redistributive effects.

[5] Reuters. February 5, 2008. "Advocates urge Congress to protect funding for life-saving services"

I. Political Origins of Victim Compensation Programs

In this section I first present a brief historical sketch of where crime victim compensation programs came from and how they were typically funded in their first fifteen years. [6] I then discuss the development of scholarship on victim funds, noting how the politics of funding is consistently recognized, but rarely explored.

I.A. Historical Background

The development of crime victim compensation programs in the United States owes its start to the introduction of similar programs in New Zealand and Great Britain. In large part due to the advocacy and research of British magistrate and penal reformer Margery Fry, both countries introduced victim compensation programs in 1964.[7] In Fry's view, the justification for compensation programs was straightforward: "Compensation cannot undo the wrong, but it will often assuage the injury, and it has a real educative value for the offender, whether adult or child."[8]

Americans learned from their European counterparts, and "interest in victim compensation in the United States was based in large measure on awareness of the emergence of such programs in New Zealand and Great Britain."[9] The justification used by early proponents in the United States was modified slightly to fit with the social

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[6] For more on the history of victim compensation, see Wolfgang (1965), Edelhertz and Geis (1974) chapter one, Meiners (1978) chapter two, and Elias (1984) chapter two; Wright (1971). For discussion of the New Zealand program see Cameron (1963)

[7] Similar programs were introduced subsequently in Ireland, Australia, and Canada. Fry, whose book *Arms of the Law* is widely credited with sparking the victims compensation movement in the United Kingdom, pointed out that in primitive societies, restitution or compensation was the standard response to many crimes. Fry wrote that "it is probably unfortunate that we have got so far away as we have from these primitive usages." Fry continued by asking: "has not the injured individual rather slipped out of the mind of the criminal court, which, with our modern distinction between civil and criminal law, is apt to leave him to go seek his compensation elsewhere?" Fry's answer was for the state to step in and provide a means of compensation for the victim with nowhere else to turn. (125-126).

[8] Fry (1951), p. 126

[9] Edelhertz and Geis (1974), p. 12

welfare ethos of the Great Society. The first federal legislation was the "Victims of Crime Act" introduced by Texas Senator Ralph Yarborough in 1965.[10] Yarborough, a liberal Senator from Texas and proponent of Great Society programs, felt that victim compensation should be viewed as "a social welfare program rather than as ... a true legal right."[11] A piece in the *Stanford Law Review* summarizing the recent legislation concurred that the policy was "not an attempt to compensate crime victims for their loss; it aims instead at easing the crime victim's misfortune through the extension of the welfare system."[12]

Many state legislators were quick to see the political viability of victim compensation programs.[13] A Gallup poll taken at the time suggested that nearly two-thirds of Americans were in support of the idea.[14] One year after California's initial adoption and Senator Yarborough's first federal proposal, the *University of Chicago Law Review* observed that, "the degree of interest which the compensation proposals have generated is nonetheless remarkable in that until a few years ago the possibility had received virtually no serious consideration."[15]

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[10] Yarborough "introduced the first crime victim compensation bill in Congress in 1965 (S.2155). He followed that with S.646 in the 90th Congress (1967) and S.9 in the 91st Congress (1969). ... Senate Majority Leader Mike Mansfield took up the cudgel, and in the waning days of the 91st Congress, he introduced S.4576. When the 92nd Congress convened in January of 1971, Senator Mansfield introduced substantially the same bill (S.750)." (Rosenthal 1972, p. 969).

[11] Yarborough (1965), p. 256

[12] Cullhane (1965), p. 270. The Delaware Supreme Court would later recognize the same moral justification: "... although there is no personal duty between the state and a private citizen which guarantees protection from criminals, the harshness of the situation is best ameliorated by some form of statutory compensation, an idea not founded on traditional tort liability but out of moral considerations for the victims of society's and government's inherent limitations." 1979. 401 A.2d 643-644. Biloon's Electrical Service v. City Of Wilmington.

[13] It should be noted that the early legislation was accompanied by "Good Samaritan" laws. In California, for instance, in addition to victim compensation an accompanying piece of legislation provided "for indemnification of citizens who are personally injured or suffer property damage in aiding the prevention of a crime or apprehension of a criminal" (Culhane 1965, 266).

[14] Gallup Organization, 7/12/2004, "Gallup Poll # 718",Roper Center for Public Opinion Research

[15] Page 532. Yarborough noted that "the idea is so simple and just that its novelty makes less of a first impression than the regret that the idea has not been previously adopted. Seemingly compensation by the

Political opposition in Congress and statehouses was centered primarily on the question of how these programs would be paid for.[16] The early states all relied heavily, or even completely, on general revenues for funding (Rejda and Meurer 1975).[17] Edelhertz and Geis suggested that "legislative opponents of victim compensation generally operate quietly [because] it is not the best kind of politics for an elected official to be seen as antagonistic to the interests of innocent victims of violent crime."[18] Nevertheless, there was often opposition and "the harshest legislative criticism of proposed schemes ... [was] that they [would] prove too expensive and that original modest cost estimates [would] escalate dramatically once the programs become operative"[19] Landis writes that in Illinois, "opponents of the bill, basically those opposed to the social welfare philosophy, centered their arguments upon the possible loopholes in the bill which could allow false claims."[20]

In California, State Senator John Schmitz argued against the compensation fund on the grounds that it was double taxation: "you are taxed once to pay for a system whose alleged function is to protect life, limb, and property, and then, when that system fails to do what it is paid to do, you are taxed again to pay for its failure."[21] Although a clause for

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state to those injured by criminals should have been a popular topic of discussion in law and political science. Yet neither cryptic sentences in the Code of Hammurabi nor Bentham's suggestions inspired any predicate of scholarly or public debate in American circles until very recently." Yarborough, Ralph W. (1965), p. 255

[16] Brooks (1973, 467) was correct in recognizing that "one of the chief political considerations that will be weighed by policy makers thinking about the adoption of crime compensation programs is the cost of such a program."

[17] The authors noted at the time that "The programs normally are financed by general revenues appropriated by the state legislatures. In addition, California, Maryland, and Rhode Island provide for additional financing by imposing fines on convicted criminals to supplement appropriated funds. To date this provision has produced only a small fraction of the total revenues needed to fund the programs." (Rejda and Meurer 1975, 606).

[18] Edelhertz and Geis (1974), p. 3.

[19] Edelhertz and Geis (1974), p. 174

[20] Landis (1973), p. 493

[21] Edelhertz and Geis (1974), p. 81

subrogation was included, it did not produce much revenue because "no systematic effort was made to see that fines were consistently or uniformly imposed."[22] Other states had similar experiences. The "major obstacle to passing the New Jersey program again was fear about its costs."[23] In Hawaii in 1965, legislators could not get a victim compensation bill passed "largely because of the bill's specification of $25,000 as the maximum on awards, an amount some legislators believed too high."[24]

Recognizing these budget constraints, compromises were reached in several ways. First, legislators adjusted the scope and scale of victim benefits. In a piece looking at the development of benefits over the 1965-1980 period, Hoelzel (1980, 488) recognized that "legislators, keenly aware of the potential costs of these benefits, have actually been fairly generous toward those victims eligible for compensation – but eligibility is the key." One method of restricting eligibility was to make the program means-tested. In California, "to qualify, a victim had to show that he was incapacitated and that his family income fell below a certain level" (Meiners 1978, 25). The program also did not initially cover medical or hospital care. Describing the legislative debate in New York, and the arrival at a needs-test, one legislator commented that, "'[O]ur legislature had already been badly bitten by Medicaid. They were told one thing and when it got into existence, it blossomed. They treated this [victim compensation] program as another one of those runaways, and that's why they actually put the serious financial hardship in it."[25] While these provisions would change later, in the period of initial adoption there were many restrictions placed on eligibility and benefits.

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[22] Edelhertz and Geis (1974), p. 81
[23] Elias (1984), p. 145.
[24] Edelhertz and Geis (1974), p. 131
[25] Friedsam (1984), p. 880-881

A second method of compromise was simply to limit appropriations. Without enough money, some programs were forced to cut back their outreach. The California program was harshly criticized for failure to effectively fulfill its mandate due to limited funding. The director of the department of social welfare said it was "like telling us to go out and buy a steak and giving us 35 cents to do it with."[26] In its early years, the Massachusetts legislature appropriated funds *after* awards were already made. Victims would not be sure if they would actually receive their compensation award until this appropriation. In New Jersey, in the mid-1970s, "due to a shortage of state funds to cover the claims made by victims, the board ... discontinued a publicity campaign it had in the past to make victims aware of the existence of the program."[27]

A third method of compromise, which would take on greater significance over time, was to look to sources beyond general tax revenues to pay for victim compensation. From the first program in California, legislators had looked toward offender fines and penalties, subrogation, and restitution.[28] But initially little money was collected, and it wasn't until later state adoptions that revenue streams were derived solely from non-tax revenues. Virginia was "the first state to attempt to fund a compensation program solely by use of a Criminal Injuries Compensation Fund."[29] Florida followed a similar pattern, looking to fines on felonies and misdemeanors as its primary revenue source.[30] The

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[26] Meiners (1978), p. 26. Citing Edelhertz and Geis (1974)
[27] Meiners (1978), p. 31.
[28] Though in some states general revenues were considered necessary precisely because these other methods were ineffective. Writing about Massachusetts, Floyd (1968, 361) notes that "remedies available to the victim in the past have been: restitution as a condition of probation or parole, prison wages as compensation and personal insurance. None of these remedies has proved effective."
[29] Meiners (1978), p. 36.
[30] Friedsam (1984, 871) writes that Florida chose "a multitude of funding elements: an added $ 15 court cost for any case where the defendant pleads guilty or nolo contendere or is convicted of a crime; a five percent surcharge on all criminal fines and bail bonds; the creation of an additional major fine of up to $ 10,000 which the court may impose on offenders; and the subrogation to the state, after payment of an

Tennessee legislation was described as "unusual" in 1977 because it provided "that monies in the fund [would] come exclusively from persons convicted in criminal court of crimes against property and persons."[31] In general, state collections from non-tax sources were so small that Edelhertz and Geis predicted that "there is no basis for concluding that no more than a small portion of the costs of compensating crime victims can be raised" by levying fines on offenders.[32] This prediction would be turned on its head in the second half of compensation program operation, but it accurately captured operational dynamics in the first fifteen years.

By 1980, thirty state legislatures had found a way to reach compromise and adopt victim compensation programs (Table 2.1).[33] Crime victim compensation programs had become a policy fixture, as evidence by the creation in 1977 of the National Association of Crime Victim Compensation Boards (NACVCB). Accompanying this growth in victim compensation programs was a scholarly literature on program justifications and policy evaluation. I turn now to a review of that literature.

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award, of any cause of action accruing to a claimant, victim, or intervenor to recover losses resulting from the crime for which the award was made. Importantly, awards paid to claimants are considered debts owed to the state by the criminal offender. Thus, restitutionary repayment to the state may be considered by the court as a condition of probation or by the Parole and Probation Commission as a condition of parole."

[31] Eisenstein (1977), p. 258-9. The legislation allowed for collecting a $21 fine on convicted offenders, as well as the possibility of collecting a percentage of wages from those incarcerated, on parole, or on probation. Eisenstein warned that "it will be important in the near future to assess the funding mechanisms to see if they are effective and productive methods providing victims of crime with just and full compensation."

[32] They suggested that "in the last analysis, taxpayers must pay the costs," and called it "an illusion to look to criminal fines, or subrogation, as a substantial source for financing reparations to crime victims." Edelhertz and Geis (1974), p. 274, 290

[33] Throughout I refer to the year of adoption as the year that the legislature passed the bill. The effective or start date of the program may have been later. It should also be noted that enactment of a statute may not coincide with victims actually receiving funding. For instance, "Rhode Island enacted enabling legislation in 1976, but its victim compensation program did not become operational until federal funds became available in 1984" (Sarnoff 1997, 59, citing Carrow 1980).

Table 2.1. State adoption of victim compensation programs, by year

Year	New Adoptions	Cumulative Adoptions	% Adopted
1965	1	1	2.0%
1966	1	2	3.9%
1967	2	4	7.8%
1969	1	5	9.8%
1971	2	7	13.7%
1972	3	10	19.6%
1973	2	12	23.5%
1974	3	15	29.4%
1976	5	20	39.2%
1977	3	23	45.1%
1978	4	27	52.9%
1979	3	30	58.8%
1981	6	36	70.6%
1982	1	37	72.5%
1983	1	38	74.5%
1984	1	39	76.5%
1985	1	40	78.4%
1986	3	43	84.3%
1987	2	45	88.2%
1988	1	46	90.2%
1989	2	48	94.1%
1990	1	49	96.1%
1991	2	51	100.0%

NOTES: Tallies are of the number of legislatures passing victim compensation legislation (enactment), not necessarily the effective date.

I.B. Studying crime victim compensation

Scholarly attention to victim compensation funds can be understood as part of a larger scholarly interest in crime victims generally. In 1974, Edelhertz and Geis wrote that "the fate of victims of crime remains an almost totally neglected area of study in the United States and elsewhere," but just a decade later Robert Elias (1984, 4) observed that victims "became the focus of a tremendous outpouring of research and writing from the

academic community." While a general crime victims literature did expand, scholarly analysis of crime victim compensation programs failed to develop theoretically.[34] Summarizing this lack of theoretical development, Greer (1994, 397) writes that "the creators of the British Scheme could find 'no constitutional or social principle' to justify state compensation for crime victims, and academic commentators were no more successful. Compensation programs in the United States have experienced similar theoretical problems."

One issue considered by theorists at the outset was the normative justification of favoring crime victims. Normative justifications for crime victim compensation were "based on several legal and economic theories: (1) obligation of the state to protect its citizens, (2) welfare considerations, and (3) least social costs" (Rejda and Meurer 1975, 602-3; Meiners 1978).[35] Critics argued against the programs on both moral and economic grounds. Morally, some argued that "society should not favor crime victims more than victims of structural unemployment, uncompensated automobile torts, poor education, nonviolent crimes, and other products of society ... [because] crime victims are no different from other victims and should not be singled out for special treatment."[36]

In terms of economics, the argument of supporters focused on the failure of existing social welfare and insurance options. Meurer's (1979, 56) analysis of insurance concluded that "the outcome is obvious; victims of violent crime are not being

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[34] In part, this may have been due to the lack of successful constitutional challenges to the programs. For a note on the review of compensation programs in the courts, see Bragdon (1984).

[35] Meurer (1979, 58) summarized it as "two basic arguments emerge in support of crime compensation. The first centers about the duty of the state to provide police protection to its citizenry. ... This approach established the right of the victim to compensation. The second major argument in support of crime compensation laws is founded on a welfare concept. ... This approach establishes the need of the victim for compensation." For an articulation of the moral obligation argument, see Denenberg. 1969. Compensation for the Victims of Crime: Justice for the victim as well as the criminal. 1970 Ins L.J. 628.

[36] Culhane (1965), p. 272

compensated for their losses through private insurance coverage." But it was not clear to all that this observation necessarily suggested a state-run compensation program. Starrs (1965), for instance, argued that the answer was to improve private insurance.

While these moral and economic debates were recognized, the bulk of scholarship was concerned with the details of program administration. Crime victim compensation programs all followed a basic pattern. When an individual (who meets certain criteria) was injured as the result of a crime (identified by the legislature as a covered crime), that individual could apply to the state for compensation for some of their injuries (usually medical costs and not pain and suffering). Beyond this general approach, however, there was great variation in terms of administrative authority, location within the state bureaucracy, types of claims covered, time limits for submitting claims, and maximum amounts awarded. Moreover, some programs were part of comprehensive victim services, while others operate independently of other complementary programs. By 1973 over a hundred scholarly articles had been written (Lamborn 1973), and most of these examined these variations in operation and administration. In these evaluations, analysis of funding and politics was typically not conducted.[37]

Later studies began to focus on program evaluation, but they did not consider the preceding policy process. Elias (1984, 39) was explicit that his study "focuses not so much on the policymaking process producing compensation programs," and more "on board decision making and on the plan's effectiveness in achieving its objectives."

[37] Rejda and Meurer's (1975, 612) summary paragraph (the only one in their article that directly concerned revenues) is typical of the analysis appearing in these early pieces: "Since crime is a social problem, the financial burden of crime losses should be spread widely throughout society. This objective is best accomplished by using a broad financing base such as general revenue financing, which is the primary funding method used by all states. Revenue raised by levying fines against the criminal is a desirable provision which is present in several state laws. This provision is consistent with equitable financing, and might strengthen the plans in those states which presently do not include such a provision."

Focusing on a group of victims in New York and New Jersey in 1976-1977, Elias argued that the victim compensation programs in these states "can be regarded as nothing short of failures, at least in the eyes of the victims who the programs are designed to serve."[38] Most subsequent evaluations also examined the programs through the eyes of the victims. In this paper, I take a different approach and examine crime victim compensation through the eyes of state legislators.

II. Explaining Policy Adoption

Existing scholarship has failed to examine the politics of program adoption. Most discussions tend to assume that after California (1965) and New York (1966) other states simply fell in line, with a final push coming from the federal government's increased financial backing starting in 1984. Some legal scholars felt the process of issue evolution was beyond explanation. Mueller (1965, 213) noted that "virtually unknown only ten years ago, [crime victim compensation] has already made its appearance on the post-midnight radio talkathons, the popular magazines, and the Sunday supplements. ... [and] by no known processes is it ascertainable why the public" should become interested. For Mueller and other scholars, victim compensation just happened.

Scholarly explanations that do exist are too general. Elias, for instance, views victim compensation as emerging primarily because of "its relationship to the disruption and crisis of the period."[39] Campbell (1979) argued that "the simplest and most logical" explanation for the rise in victim compensation legislation was "that fundamental changes in the basic concepts embodied in the American system of criminal procedure

[38] Elias (1984), p. 245.
[39] Elias (1984), p. 27.

[were] occurring."[40] Such treatments view victim compensation as a monolithic whole, without regard to state-by-state variation in timing of adoption. To provide for a more systematic analysis of the state politics behind the adoption of crime victim compensation programs, I present an empirical analysis grounded in the state politics literature on policy diffusion. I review the relevant literature, develop my empirical model, conduct EHA analysis, and discuss the results.

II.A. Policy adoption in the states

Following Walker (1969) and Gray's (1973) pioneering studies, scholars of American state politics have been empirically studying these two questions: "Why do some states act as pioneers by adopting new programs more readily than others?" and "How do these new forms of service or regulation spread among the American states?" (Walker 1969, 881). As summarized in Berry (1994), the determinants of state policy innovation can be generally classified into three categories: internal, regional diffusion, and national interaction.

The significant methodological advance in state policy innovation research has been Berry and Berry's (1990, 1992) introduction of event history analysis (EHA).[41] Unlike earlier studies, which relied predominantly on factor analysis techniques (e.g. Nice 1994), research utilizing EHA can evaluate the impact of internal, regional, and national effects simultaneously (Berry 1994). Event history analysis is a method of pooled, cross-sectional time series, and it has allowed for the use of more sophisticated models to explain the adoption of innovations (Berry and Berry 1990, 1992, Mooney and

[40] Campbell (1979), p. 321.

[41] Event history analysis, also called hazard or proportional-hazard models, were used in many other areas before being picked up by political scientists. For further discussion on the history and application of EHA in the social sciences, readers are encouraged to see Allison (1984) and Yamaguchi (1991).

Lee 1995, Hays and Glick 1997, Mintrom 1997, Mintrom and Vergari 1998, Karch 2007).

Event history analysis (EHA) is the "current standard" statistical approach for state policy innovation researchers (Mooney 2001). Since Berry and Berry (1990, 1992) introduced EHA as a tool for studying policy innovation, it has become widely accepted as the most effective way to empirically assess the causes of policy innovation in the states. Over the past decade, EHA has been used to study innovations in many state policy arenas, including lotteries, taxes, abortion rights, open enrollment school choice, same-sex marriage bans, and higher education (Berry and Berry 1990, 1992, Mooney, 1995, Mintrom 1997, Haider-Markel, 2001).

Although EHA has been a breakthrough for policy innovation research, it is not without its drawbacks. An important limitation in EHA analyses is the modeling of the dependent variable as a dichotomous (0,1) variable.[42] Responding to this limitation, Boehmke and Witmer (2004, 40) have produced a study of policy expansion which "results from changes in the extent of that policy that occur any time after innovation." They employ an event count model to examine the extent of the law, e.g. which provisions it includes.[43]

A related problem with the dichotomous dependent variable is that implicit in such a model is the assumption that the policy being adopted is the same across all states and all years (across all "state-years" in the terminology of EHA). This assumption, as

[42] A prevalent suggestion for improvement in state policy research is the call echoed by Mooney (2001) for renewed focus on micro-level processes, e.g. individual state lawmakers.

[43] In a paper on the international diffusion of "gender mainstreaming" organizations, True and Mintrom (2001) address this problem by running both an EHA model and a second logit model that identifies "high-level" vs. "low-level" mechanisms of gender mainstreaming. This approach may also be useful in state policy innovation research.

discussed at length by Glick and Hays (1991), is a tenuous one, as it ignores the processes of "reinvention" and "evolution." Policy evolution and reinvention occur over time, as states see what other states have done and adjust accordingly. Similarly, reinvention may occur when a bill is passed initially as a trial run, with the real legislation coming in subsequent years.

The most relevant work related to this paper is that of Hays (1996a, 1996b). Studying child abuse reporting laws, crime victim compensation laws, and public campaign funding laws Hays (1996b) examined whether or not later adopting states passed legislation that was more broad or narrow than the original legislation. Termed "policy reinvention," the theory "suggests that policies change systematically over their diffusion period" (Hays 1996a, 552). Hays examined individual provisions of the law, to see how comprehensive each law was.[44] Hays concludes that "the pattern of reinvention for crime victim compensation laws reveals increasing comprehensiveness over time, although at a much slower pace than child abuse reporting laws." Hays (1996b, 642) tested whether or not "more ideologically conservative states have more comprehensive laws" and whether "states with larger crime rates in the year prior to adoption will have more comprehensive crime victim compensation laws." He found, however, no significant relationship between the variables and law comprehensiveness.

Hays' analysis provides a starting point, but we are left with a number of questions. First, there was no consideration of appropriations and funding. Although a law might add additional coverage provisions, if the funding was not there to back those provisions, in practice it would not amount to expansion. Moreover, Hays (1996a, 560)

[44] This data was not available for comparison purposes, as the original dataset was lost (Personal communication with Scott Hays, January 2002).

concludes that "the diffusion of crime victim compensation laws indicates that reinvention, or the addition of provisions to a law, also may result in a reduction in comprehensiveness, at least for particular provisions." Thus, it's not clear from Hays' (1996a) analysis what legislators were attempting to do via their amendments, and how the dynamics of different legislatures affected this amendment process.

II.B. Hypotheses

To more systematically examine the adoption of crime victim compensation programs, I develop a series of hypotheses that can be tested in an EHA model. First, and most straightforward is the *crime response* hypothesis: states will be more likely to adopt crime victim compensation programs when faced with higher violent crime rates. In Maryland in 1968, for instance, "rising fear of crime" made legislators view the bill differently than they had originally in 1966. To measure crime, I utilize state-level violent crime rates (CRIME) from the Bureau of Justice Statistics' data from the FBI's Uniform Crime Reports.[45] Violent offenses include murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. The UCR data has been criticized for potential biases in reporting. Nevertheless, it provides the best available data for assessing crime rates over the 1965-1991 period.

Next, both the state politics literature and the specific history of crime victim compensation programs suggest the importance of the *diffusion* hypothesis: either through social learning or economic competition, states will be more likely to adopt as the percentage of their neighboring states adopting increases. To account for this, I include a diffusion variable (DIFFUSE) that measures the proportion of a state's

[45] Crime rates are "are the number of reported offenses per 100,000 population". See: http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/Crime.cfm

neighbors who have adopted victim compensation reform by year t-1. A state's neighbors were defined in the same way as Berry and Berry (1990), under the assumption that states are neighbors if they share a border.

In addition to diffusion through neighboring states, there are a number of temporal factors which encourage adoption. With each adopting state, there were more templates to choose from. A model act was published in 1966 by the *Harvard Law Review*, and states later were able to draw on a suggested uniform code.[46] In the late 1970s, and especially with the passage of VOCA in 1984, federal influences also played an important role in promoting crime victim compensation. Moreover, all of this occurred in the context of a very successful victims' rights movement.[47] To account for all of these temporal shocks, I included a time trend variable. In state policy innovation research, time has been modeled as either a series of time dummies (Mintrom 1997) or as a trend variable (Mooney and Lee 1995; Hays and Glick 1997). In this paper, time (TREND) will be modeled as the square root of the number of years since the year of the first adoption, i.e. the number of years since 1965.

Crime victim compensation arose in an era of "Redistributive Governance" more generally across the period 1935-1975 (Mettler and Milstein 2007). Alesina, et. al. (2001) report that the United States increased its spending on subsidies and transfers from 5% of GDP in 1960 to 10.4% in 1980, but then growth slowed as 1990 the percentage was still 11.0%. At the state level, with early adopters relying so heavily on general tax revenues, victim compensation can be considered an extension of the welfare state. This expansion, however, is contingent on requisite funding. Therefore I develop a *fiscal*

[46] 1966. A state statute to provide compensation for innocent victims of crimes, 4 Harv. J. Legis. 127.
[47] For historical overview, see Friedman (1985), and the timeline at: http://www.ojp.usdoj.gov/ovc/ncvrw/1999/histr.htm

capacity hypothesis, which predicts that states with greater fiscal capacity will be more likely to adopt victim compensation programs. I measure three different aspects of fiscal capacity: population, income levels, and budget surplus as a percentage of state Gross Domestic Product (GDP). The budget surplus (SURPLUS) variable was derived from the annual GDP by state series consisting "of estimates for 1963–1997 for Standard Industrial Classification (SIC-based) industries" published by the U.S. Department Of Commerce, Bureau Of Economic Analysis.[48] Population (POP) draws on U.S. Census data, and the median family income (INCOME) is taken from the Current Population Survey data by Guetzkow, Western, and Rosenfeld.

Victim compensation, through the sponsorship of Senator Yarborough, initially was thought of as part of a federal welfare program agenda in the Great Society mold. Its partisanship at the state level may also therefore have been seen along Democrat / Republican lines.[49] I predict (the *partisanship* hypothesis) that because victim compensation was likely to be seen as an increase in state social spending, it should be promoted most heavily by Democrats. Because the time period of adoption spans into the 1970s and 1980s (Table 2.1), however, it is possible that the old New Deal politics are not applicable. Victim compensation also potentially appeals to Republicans because of its coherence with a long held law-and-order policy agenda. The partisanship test will see how these competing expectations play out. To measure democratic control, I employ the Ranney party control index (DEM) as constructed by Hanssen (2004).[50] As calculated,

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[48] See: http://www.bea.gov/regional/gsp/default.cfm?series=SIC

[49] Unfortunately, a similar ideology measure is not available for the entire period. The commonly used Wright, Erikson, and McIver (1985) state ideology scores do not stretch back far enough.

[50] The Ranney index was calculated as described in Bibby and Holbrook (1999). The index averages four percentages: "the average percentage of the popular vote won by Democratic gubernatorial candidates; the average percentage of seats held by Democrats in the state senate, in all legislative sessions; the average percentage of seats held by Democrats in the state house of representatives, in all sessions; and the

the Ranney index is a proxy for the degree to which the Democratic party holds control of the governor's seat, the state House of Representatives, and the state Senate. The Ranney Index takes a value of 0-1, with 1 representing total Democratic control and 0 denoting complete Republican control.[51]

Victim compensation funds have many redistributive features. As discussed by (Rejda and Meurer 1975, 612-3) "crime compensation plans fulfill the objective of the redistribution of income from upper- and middle-income classes toward the lower income groups. Although general revenue financing tends to be regressive at the state level, the absolute amount of taxes paid is greater for those with higher incomes. Since low-income people receive a disproportionately higher amount of crime compensation benefits, the net result in all states is an absolute transfer and redistribution of income to the lower income groups." It should be noted, however, that conversations with state program administrators suggest that the compensation is most important for those just above the poverty level, i.e. those not covered by other social welfare programs. As Texas Director Gene McCleskey described it, they are victims "just on the edge of a lot of things."[52] Farmers and self-employed individuals who experience a hard year fall into this category.

Because of these redistributive possibilities, I develop an *inequality* hypothesis: states with greater income inequality will be more likely to adopt victim compensation programs. The logic is that these states will have more need at the bottom of the distribution and more to draw on at the top. An equally compelling logic, however, makes a different prediction. Greater inequality may also indicate less political voice for

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percentage of all gubernatorial, senate, and house terms that were controlled by the Democrats" (Bibby and Holbrook 1999, page 93).

[51] The index is unavailable for several state-years, but including or excluding these observations does not substantively alter the results.

[52] Personal interview (January 2008).

those most in need of expanded benefits. In this view, we would expect inequality to be inversely related to program adoption. To measure inequality, I use a measure of the Gini Coefficient of median family income. The figure is calculated from the Current Population Survey data by Guetzkow, Western, and Rosenfeld.[53] The Gini coefficient takes on values of 0-1, with larger numbers meaning more inequality.

Crime victim compensation programs have the potential to redistribute not only along class lines, but also on dimensions of geography, race, and gender. I therefore develop additional redistribution hypotheses. Geographically, an *urban redistribution* hypothesis predicts that because urban population centers experience higher crime rates, states with greater urban populations should be more likely to adopt programs. With more legislators from urban cores, there may be greater state house support. In addition, with greater urban populations the need for additional victim compensation may be greater. I measure the percentage of urban residents (URBAN) in each state using data from Katz, Levitt, and Shustorovich (2003).[54]

Crime victim compensation programs arose in the same period that saw major improvements in the laws governing rape and sexual assault. Female support for crime victim compensation suggests itself for three reasons related to gender biases in the existing law. First, because women find great barriers in typical tort recovery (VanderVelde 1996, Chamallas 1998), they may see the state as providing a more reliable source of compensation. Second, victims of rape, sexual assault, and domestic violence may find it especially difficult to recover through insurance policies. With private

[53] Data calculated by Joshua Guetzkow, Bruce Western, and Jake Rosenfeld for the Russell Sage program on the Social Dimensions of Inequality. See: http://www.inequalitydata.org/.

[54] The data was downloaded from http://bpp.wharton.upenn.edu/jwolfers/DeathPenalty.shtml. The authors note that "The two variables measuring percentage black and percentage urban are linearly interpolated between decennial censuses."

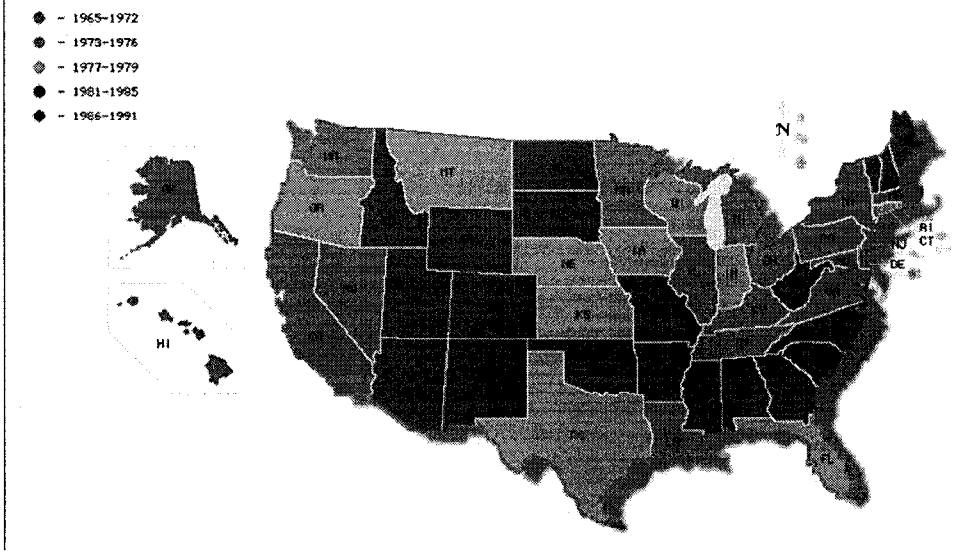
insurance options more difficult, victim compensation alternatives may be more appealing. Finally, recognizing the harms of rape and sexual assault with money compensation may be seen by some interest groups as raising awareness about the true costs of the crime. In Britain in the early 1990s, the group Women Against Rape (WAR) pushed the British Criminal Injuries Compensation Board to award more and larger compensation awards for rape victims. WAR's reasoning was "that only when rape is made expensive will governments and other bodies do everything they can to prevent it."[55] While interest group activity in the United States around this issue has not been documented, my *gender redistribution* hypothesis predicts that more female influence in a state will be associated with greater adoption rates. While a direct measure of such influence is not possible, as a proxy I calculated the percentage of female average income to male average income (FEMALE_INC) in each state. The closer the gender income gap, the greater the potential influence of women in the state.

Although race was not expressed as a concern of victim compensation fund proponents / opponents, we need to look below the surface of the political debate. As Hacker (2005, 129) notes in a review of the American welfare state literature, "few would deny that race has been a leading subtext of welfare state debates since at least the New Deal". Hacker (Ibid., 129) goes on to summarize the general expected relationship between race and welfare policymaking: scholars "generally echo the argument of Michael K. Brown that 'the problems of race, on the one hand, and the failure to create broadly inclusive social policies for all Americans, on the other, have become entwined.'" In the case of crime victim compensation, the *welfare and race hypothesis* is that in states with greater proportions of black residents, there will be greater opposition

[55] Bawdon (1993), p. 371.

to crime victim compensation since it may be perceived as providing benefits disproportionately to minority populations. As a consequence, we should expect to see adoption of victim compensation as inversely related to a state's percentage of black residents. To test this hypothesis, I include in my models a measure of the percentage of African-American residents in the state as used by Katz, Levitt, and Shustorovich (2003). Finally, a look at the graphical distribution of adoption (Figure 2.1) visually suggests that a cluster of Southern states were amongst the latest to adopt. To see if this visual suggestion is borne out by the panel data, I include in all models a dummy variable noting if the state is a Southern state.

Figure 2.1. State Adoption of Crime Victim Compensation Legislation, grouped by year



Note: Figure created using Map Maker Utility created by John Adamson (online: http://monarch.tamu.edu/~maps2/us.htm)

II.C. Model specification

Having defined the relevant variables, I constructed my EHA model. To guide my EHA analysis, I referred to Allison (1984), Yamaguchi (1991) and Lelievre and Bringe (1998). Focusing on states, and using the calendar year as my unit of time produces a series of "state-years" to analyze. I am interested in tracking the history of what happens to a state *i* in year *t*. I make the assumption that adoption of crime victim compensation is a "nonrepeatable one-way transition, that is, transition from one state to another state that occurs at most once for each subject" (Yamaguchi 1991, 15). In other words, I assume that once a state adopts a crime victim compensation law, it cannot repeal it.[56] In my dataset, I have an N of 705 state-years. Because I use years to measure time and make this assumption of nonrepeatable events, it is appropriate to use a discrete-time logit model of EHA (Berry and Berry 1990, Allison 1984, Yamaguchi 1991).

Before employing the discrete-time logit model, I must define the "risk set" and the "hazard rate" based on our individuals, events of interest, and length of observation. The risk set is the "set of [states] who are at risk of event occurrence at each point in time" (Allison 1984, 16). Following Berry and Berry (1990), I assume that a state is not at risk of adopting a policy innovation until at least one state has adopted it. When a state adopts a policy, it is no longer "at risk" of adopting it again, and thus drops out of the risk set. Because I want to include the potential effects from regional diffusion, I include only

[56] While it is theoretically possible for repeal to occur, it has not in this case. As Mooney (2001, page 107) notes, "the possibility of repeal has been virtually ignored by state policy researchers, and is ripe for future research."

the forty-eight continental states in our risk set. I start my observations of each state in 1965 (when CA first adopted) and end it in 1991 (when ME last adopted).

Once the risk set is determined, the hazard rate, P(t) can be calculated. The hazard rate is the "probability that an event will occur at a particular time to a particular [state], given that the [state] is at risk at that time" (Allison 1984, 16). The EHA model takes the simple form of

$$\log (P(t) / (1 - P(t)) = a(t) + b_1X_1 \ldots + b_nX_n + \text{time control}$$

where P(t) is the hazard rate, a(t) is a constant for each year t, the explanatory variables are the independent variable of interest (previously defined), and the time control is the the square root of the number of years since the year of the first adoption.

As discussed in the appendix, in state politics research it is difficult to know precisely which variables should be included in the final model. To account for this uncertainty, I employ Bayesian Model Averaging (BMA) procedures. Following Shen (2003), I identified three variables (in addition to the time trend) – state population, state crime rate, partisanship – as the essential variables to include in every model. I then shuffled in and out the eight other variables, producing 512 unique regression models. I weighted each model by its explanatory power, as measured by the Bayesian Information Criterion (BIC).[57] The specific model used took the form of

$$\begin{aligned}[1] \quad ADOPT_{i,t} = {} & b_1POPULATION_{i,t} + b_2CRIME_{i,t} + b_3DEM_{i,t} \\ & + b_4AFR\text{-}AMER_{i,t} + b_5INCOME_{i,t} + b_6GINI_{i,t} \\ & + b_7DIFFUSE_{i,t} + b_8SURPLUS_{i,t} + b_9FEMALE\_INC_{i,t} \\ & + b_{10}URBAN_{i,t} + b_{11}SOUTH_{i,t} + b_{12}TREND_{i,t}\end{aligned}$$

[57] The BIC was calculated in R using the code AIC(logLik(ml1), k = log(<nobs>) ## BIC. See: https://stat.ethz.ch/pipermail/r-help/2006-June/106886.html

where the dependent variable $ADOPT_{i,t}$ is the hazard rate, the probability that a state *i* will adopt victim compensation legislation in year *t*, given that the state has not already adopted a victim compensation law; and where the remaining variables are measured as previously described for state *i* in year *t*. Summary statistics for all variables included in the model are presented in Table 2.2.

Table 2.2. Summary statistics for variables included in state adoption analysis

Variable	Mean	Std. Dev.	Min	Max
Population (Millions)	3.29	3.08	0.32	18.60
Rate of Violent Crime	262.68	154.48	19.80	720.00
Ranney Index (Dem Control)	0.58	0.21	0.19	1.00
% African-American Residents	0.09	0.10	0.00	0.39
Mean State Income ($000)	22.83	3.21	12.15	33.27
Income Gini Coeff.	0.32	0.03	0.24	0.46
Diffusion	0.26	0.30	0.00	1.00
Budget Surplus (as % GDP)	0.36	0.06	0.23	0.58
Female / Male Income Ratio	0.66	0.07	0.47	0.89
% Urban Residents	0.61	0.14	0.32	0.89
Southern State	0.36	0.48	0.00	1.00
Time Trend	2.65	1.23	0.00	5.10

NOTES: N for the Event History Analysis is 695. Income is measured in $1997 dollars.

II.D. Results: Explaining adoption of victim compensation programs

What factors explain state adoption of crime victim compensation plans? The results of the analysis suggest that the fiscal capacity hypothesis is supported. States with larger populations and higher mean incomes increased the odds of adopting crime victim compensation programs (Table 2.3). This finding is consistent with historical evidence

from the states. Later adopting states often waited until they could receive matching funding from the federal government. In Rhode Island, for instance, the fund was set up and didn't operate until federal funds started flowing in.[58]

Table 2.3. Explaining state adoption of crime victim compensation programs

	Weighted Logit Results from BMA Analysis
Population (Millions)	0.17 ***
	(0.05)
Rate of Violent Crime	0.0013
	(0.0011)
Ranney Index (Dem Control)	0.08
	(0.07)
% African-American Residents	-0.73 **
	(0.37)
Mean State Income ($000)	0.13 ***
	(0.04)
Income Gini Coeff.	0.03
	(0.35)
Diffusion	0.01
	(0.03)
Budget Surplus (as % GDP)	-0.13
	(0.17)
Female / Male Income Ratio	1.37 **
	(0.65)
% Urban Residents	0.74 **
	(0.34)
Southern State	-0.03
	(0.03)
Time Trend	1.05 ***
	(0.22)
Intercept	-11.39 ***
	(1.90)

NOTES: Averaged results based on 512 separate regressions, weighted by BIC. See appendix and text for discussion.

[58] Rhode Island hoped for federal matching funds: "payment of up to $25,000 was to be made from anticipated federal funds and from a newly established Violent Crimes Indemnity Fund, which was to receive 20 percent of all collected fines and penalties from criminal charges in Rhode Island." Edelhertz and Geis (1974), p. 183

Looking at the diffusion and time controls, it appears that national rather than state-to-state diffusion better accounts for the spread of victim compensation programs. This is not a surprise given the extensive federal involvement in promoting and funding these programs. Also, evidence from some states suggests that they drew on uniform acts. Jones (1984, 1197) reports that the North Carolina "General Assembly relied heavily on the Uniform Crime Victims Reparations Act."[59] Other states looked to both neighbors and national standards. In developing the bill in North Dakota, "the North Dakota Legislative Council took the bill proposed by the Criminal Justice Commission, added elements of the Minnesota and the Washington acts, and requested input from the North Dakota Workmen's Compensation Bureau."[60]

Despite the partisanship involved in debates over victim compensation, the weighted BMA results do not provide support for the partisanship hypothesis. In some states the parties seemed to avoid debate altogether. In Massachusetts, the "program was enacted by its legislature on August 18, 1967 without any formal debate."[61] Although it may be the case that "political considerations" influenced legislators (Elias 1984), this influence was likely felt not in whether or not to adopt a program, but in how to administer it. [62] In New York, after the bill was passed, "the Republican administration and Senate in New York actually opposed appropriating money for the program."[63]

The findings also suggest that the politics of victim compensation programs do not fall neatly along party lines. Because violent crime rates were continuing to rise and

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[59] Jones (1984), p. 1199.
[60] Gross (1977), p. 15
[61] Edelhertz and Geis (1974), p. 114
[62] Elias (1984), p. 146.
[63] Elias (1984), p. 144.

President Nixon had made "law and order" a campaign issue already in 1968, Brooks (1973, 445) notes that "in 1972, it seemed that crime compensation programs might become a significant issue between the major political parties before the presidential election." Concerns over the Vietnam War, however, dominated the 1972 Nixon-McGovern election and crime victim compensation did not emerge as a major issue for voters (Miller, et. al. 1976). After the Nixon administration, the partisanship of victim compensation continued to blur. While Republican voters may have been more supportive of law-and-order policies, the same split is not evident for victim compensation.[64]

The crime increase hypothesis failed to gain support in the model, suggesting that it was not underlying crime but focusing events that drove policy adoption. Focusing events alert the public to certain problems, and in response lawmakers must craft new legislation or agencies must often reform (Kingdon 1984). Multiple accounts have identified focusing events as important predecessors for crime victim compensation programs. Mueller (1965, 217) writes that "if Margery Fry is at the root of all current proposals for victim compensation schemes, and she is, then it was a single episode involving a man blinded as a result of an assault in 1951 which prompted her first proposals for a vast governmental crime insurance scheme."[65] In New York "the fatal stabbing of 28-year-old Arthur F. Collins on October 9, 1865 provided the major motive force that led to passage of legislation granting compensation to victims of violent

[64] Erskine's (1975, 623) summary of the public opinion data at the time reported that "GOP voters are significantly more in favor of strict penalties for criminal convictions, and more inclined to call the courts too lenient."
[65] Mueller (1965), p. 217.

crime."[66] These singular, emotionally charged events account for more in the development of crime victim compensation adoption than do statistical rises in crime rates.

The findings with regards to redistribution confirm the gender hypothesis, complicate the race hypothesis, and challenge the class hypothesis. Taking each in order, there is a significant, positive relationship between gender income equality and likelihood of adoption. While I have argued that the ratio of female to male income is a proxy for women's political power in the state, this variable may be picking up on a number of other underlying factors. For instance, gender equality may be correlated with liberal ideology toward social welfare (not captured in the model).

The results related to race support the hypothesis that racial concerns, even if not articulated as such, are woven into the politics of victim compensation. There is a significant, inverse relationship between percentage African-American and likelihood to adopt. This is consistent with Alesina, et. al.'s (2003, 189) national over-time analysis finding that "race is the single most important predictor of support for welfare." Just as the authors conclude that "America's troubled race relations are clearly a major reason for the absence of an American welfare state," so it seems here that racial sensitivities are a major reason for slow adoption of crime victim compensation programs. While data on the racial breakdown of applicants is not available (and would not have been available to policymakers in later adopting states either), there was a perception in this policy domain that the programs would be especially beneficial for minorities because "crime victimization rates are disproportionately high for low-income minority groups

[66] Edelhertz and Geis (1974), p. 21

particularly those who reside in urban poverty areas and many of whom are not covered by private health insurance"? (Rejda and Meurer 1975, 602).

My analysis of crime victim compensation adoption is consistent with Hays' (1996b, 637) argument that crime victim compensation bills diffused "with a medium level of controversy," primarily over "the indeterminacy of program costs rather than from the idea of assisting victims of violent crime." But my analysis also uncovers elements of redistributive politics that have previously been overlooked. The politics of redistribution were present in policy adoption, and as the rest of the paper will show, have taken on new importance as victim programs have grown.

III. Racialized Retrenchment and Contemporary Politics

The analysis to this point provides us with an understanding of the politics of welfare state expansion in the context of crime victim compensation funds. But as Pierson (1994) has shown, the politics of expansion differ markedly from the politics of retrenchment. In this section of the paper, therefore, I discuss the new politics of crime victim compensation. I argue that victim funds have undergone systematic retrenchment, being transformed in the face of budgetary pressures. State legislatures, following the federal government's model, now generate their victim fund revenue from criminal offenders instead of tax payers. Because the offender population is disproportionately black, this new institutional arrangement has the effect of *racialized* retrenchment. State legislators face new dilemmas, as their interests in providing services to crime victims (disproportionately minority) now come into new tension with interests in protecting the disproportionately minority offender / accused population.

III.A. Federal Partnerships, Program Growth, & Revenue Shifts

Victim fund retrenchment, like retrenchment more generally (Pierson 1994), is linked to the Reagan administration. Crime victim compensation programs had been spreading and growing before Ronald Reagan took office, but the Reagan administration's efforts on behalf of crime victims mark an important turning point.[67] Proposals for a federal victim compensation program had existed for almost two decades, but it wasn't until Reagan that federal institutions were established. In 1982, Reagan appointed a Task Force on Victims of Crime, in 1983 the Office for Victims of Crime (OVC) was created by the U.S. Department of Justice, and in 1984 the Victims of Crime Act (VOCA) was passed.[68] VOCA supported many victim programs, including state victim compensation funds. The state compensation programs were supported through grants based on previous years' state expenditures. With VOCA passed, federal funding was received by the states starting in 1986.[69] Since FY 2003, the federal government has matched 60% of prior year state expenditures, "so that about 37 percent of a state's total compensation funds are VOCA."[70]

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[67] To be sure, the programs had been amended and enlarged from the start. In New York, for instance, early proposals after initial adoption included expanding the program to cover "compensation for pain and suffering, compensation for property damages resulting from crime, and compensation to churches for damages suffered by vandalism, bombing, or arson." Meiners (1978), p. 28. The Georgia law has also been repeatedly amended. See: Natalie Zellner. Victims Compensation: Provide for Eligibility for Compensation of Victims of Certain Crimes Committed Outside the State; Change Definitions and Time Period for Filing a Claim. 14 Ga. St. U.L. Rev. 110. Fall, 2002. Paige Peltier Freeman. Victim Compensation: Change Certain Provisions Relating to Victim Compensation Awards, Maximum Amounts Allowed, Types of Awards Authorized, and Effective Date of Awards; Increase the Fee Charged to Probationers. 19 Ga. St. U.L. Rev. 124. December, 1997.

[68] A 1972 note in the ABA Journal's Legislation Forum noted that "although not receiving much publicity this election year, programs to provide governmental compensation for victims of crime are gathering increasing support in both houses of Congress." (Rosenthal 1972, 968)For more on the development of federal law on victim compensation, see Edelhertz and Geis (1974) chapter eight.

[69] Department of Justice (1998)

[70] Newmark (2004), p. 7. Before this, it was 40%.

With the help of the new federal funds, state victim compensation programs grew rapidly: "from 1985 to 1992, victim compensation claims doubled, tripled, and even quadrupled in some states. The greater visibility of the programs, the growth in other victim services, and new laws mandating that rights, services, and information be provided to victims resulted in more and more victims applying for financial assistance."[71]

In the states, compensation programs expanded their reach and also became advocates in the legislature. In New York, for instance, "in 1979, New York State Crime Victims Board's role was expanded and designated by the Legislature to be the advocate for crime victims' rights, needs and interest in New York State. This advocacy role has resulted in NYSCVB's formulation of legislation, subsequently enacted, which not only has protected and extended the rights of crime victims, but also expanded the services and assistance available to them."[72] Federal victim policy continued to be a high priority, and was an issue in the 1988 presidential race.[73]

At first glance, it would seem that instead of retrenchment, the Reagan revolution actually expanded victim benefits. But as Pierson (1994, 14) emphasizes, looking solely at expenditure levels is misleading because "expenditures reveal only size and not content." Following Pierson's advice and looking beyond expenditures reveals an important change in compensation programs. The change was rooted in Republican emphasis on law-and-order policy.

Victim compensation emerged as a Republican issue in a context of law-and-order politics. Analyzing the change in party platforms over time, Parker (2004, 17) finds

[71] U.S. Department of Justice (1998), p. 327.
[72] Personal correspondence with New York State Crime Victims Board (January 2008).
[73] See Smith and Freinkel 1988 for a review.

that while "the Democrats and Republicans [were] playing to different constituencies, there is no clear evidence that the Republicans [owned] the issue of crime in the public arena in the 1970s." In the 1980s, however, the two parties began to diverge more substantially. Concern for victims came not out of social welfare concerns, but out of spite for criminals: "We must never allow the presidency and the Department of Justice to fall into the hands of those who coddle hardened criminals. Republicans oppose furloughs for those criminals convicted of first degree murder and others who are serving a life sentence without possibility of parole. We believe that victims' rights should not be accorded less importance than those of convicted felons."[74]

In keeping with this philosophy, VOCA was funded without taxpayer money, instead relying on "federal criminal fines ... the proceeds of forfeited appearance bonds, bail bonds, and collateral; special forfeitures of the collateral profits of crime proceeds retained in an escrow account for more than 5 years; and newly created penalty assessments on federal misdemeanor and felony convictions."[75] As a result of this funding shift, victim compensation was no longer a program of social welfare but a program of redistribution from "bad guys" to "innocent" victims. This was explicitly stated and recognized, as "one of the original principles for the creation of the Fund, as articulated by the 1982 President's Task Force on Victims of Crime Final Report, *was that criminals, not taxpayers, should pay to support crime victim programs.*"[76] Expressed more simply, the principle was "that 'the bad guys' should pay for victim services."[77]

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[74] 1988 Republican Party Platform.
[75] Derene (2005), page 2
[76] Derene (2005), page 21
[77] Derene (2005), page 21

The Regan VOCA principle of "bad guys should pay" had a tremendous retrenchment effect on the states. In the first decade of program operation, most states still relied heavily on general taxpayer revenues. When Hoelzel (1980, 492) surveyed the 27 victim programs operating in 1980, he noted that "most states finance their victim compensation programs through their general revenues, thus giving the funds the security of a complete appropriation." Indeed, there was skepticism that programs run solely on offender fines/penalties could be viable (Gahan and Lennon 1977).[78] As a result, the politics of revenue collection were assumed to be forever reliant on some taxpayer revenue.[79]

In the early 1980s, however, the federal funding philosophy coincided with increased pressure in the states to make up for funding deficits. In a 1985 article summarizing victim compensation programs, Smith noted that "despite increased revenue devoted to victim compensation programs, 'under-funding has been a perennial problem.'"[80] In New Jersey efforts were made to find new (non-taxpayer) revenue sources. In 1982, New Jersey "successfully enacted legislation mandating the assessment of penalties against all persons convicted" of certain enumerated offenses.[81] In 1983, the state collected almost $2 million as a result. Administrators in other states also looked to this approach. Keith Jordan, an assistant attorney general working with the Tennessee program noted that, "Revenues have not kept up with the number of claims. As claims

[78] When Gahan and Lennon (1977, 92) asked "How do states finance their programs?" they answered that, "most are funded through general appropriations." The authors were skeptical that relying purely on offender-based payments would allow compensation programs to operate effectively.
[79] Elias, for instance, looked over the revenue side of the equation, noting that with the exception of Virginia and Florida, "almost all compensation plans are funded from tax revenues." Elias (1984), p. 30.
[80] Smith (1985), p. 83.
[81] Smith (1985), p. 83.

come in now, they go on a waiting list."[82] The answer, Jordan said was to look to criminal offenders: "Taxing every criminal offender would be the best answer. We would be awash in money if we could tax them all."[83]

Turning to offender-based revenue soon became the norm. Since the early 1980s, "the trend in state funding has been to follow the federal model by funding programs through fines levied against offenders, rather than spending public tax dollars to fund compensation programs" (Sarnoff 1997, 67). In Arizona, where revenues are generated through supervision and other court fees, revenues have increased annually. In 1991 revenues stood at $590,200, and in 2005 they had risen to almost $2.2 million.[84] Even after accounting for inflation, this is a *250% increase.*

Arizona is not alone in changing its revenue streams. National estimates from 1993 found that only about 11% of U.S. crime victim compensation funds came from general revenues, with 55% coming from fines and penalties and 24% coming from federal VOCA grants.[85] By 1998, "according to the National Association of Crime Victim Compensation Boards, more than four-fifths of the states ... [gained] most of their income from offenders ... [and] in a large majority of states, no tax dollars [were] involved in either the administration of programs or in the awards they provide to

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[82] Hoelzel (1980), p. 492
[83] Hoelzel (1980), p. 492
[84] Source: Arizona Compensation Funding History. Online: http://azcjc.gov/pubs/cvs/Comp_Funding_History.pdf
[85] Greer (1994). Greer also notes that state fines and penalties are diverse. "This "tax" can take one – or both – of two forms. The first is a relatively small, additional court fee charged in all criminal and quasicriminal proceedings. The second is a "penalty fine" (which may be substantial) levied on those convicted of almost any criminal offense. The constitutionality of this method of funding compensation programs was upheld in *State v. Champe*, where a defendant convicted of shoplifting and reckless driving was fined $ 300 and ordered to pay a five percent surcharge ($15) into the criminal injuries compensation fund."

victims."[86] Today, "nearly every state has some form of general offender assessment, penalty, or surcharge that all convicted offenders must pay. This money may go to the state's victim services, victim compensation, or be divided between the two" (U.S. Department of Justice 2003, 1).

Victims had, from the start of these programs, been discussed *vis á vis* offenders. When signing into law the first program in 1965, California Governor Pat Brown observed that, "the murder of a family provider killed in a holdup ... has his basic needs of food, shelter, and medical attention provided in prison. But the victim's family, suddenly deprived of all economic support, may be left destitute. Some form of public assistance is the only way to remedy this situation."[87] In this formulation, victims were thought of as deserving of state help as offenders. In the later formulation, however, offenders were increasingly seen as targets for revenue generation.[88]

The current funding philosophy behind victim compensation programs was on display in February 2006, when Congress held a hearing on "Victims and The Criminal Justice System: How to Protect, Compensate and Vindicate the Interests of Victims."[89] At the hearing it was emphasized that revenues for the federal victim fund are "generated from fines levied on the convicted criminals. This fund is not taxpayers' money. It comes from the *correct source*, from the criminals" (emphasis added). Not only had the funding source shifted from taxpayers to offenders, the shift had taken on a normative gloss.

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[86] U.S. Department of Justice (1998), p. 335
[87] Quoted in Edelhertz and Geis (1974), p. 76.
[88] "An increasingly significant funding issue facing compensation programs today is recovering restitution from convicted offenders to help offset the cost of compensation benefits to their victims. Programs are making special efforts to seek restitution from offenders, including working with prosecutors and judges to ensure restitution is ordered and collected." U.S. Department of Justice (1998), p. 335
[89] Hearing before The Subcommittee On Crime, Terrorism, And Homeland Security of The Committee On The Judiciary. House Of Representatives, One Hundred Ninth Congress. Serial No. 109–87. February 16, 2006,

Victim compensation was clearly no longer a matter of social welfare policy, but part of a tough-on-crime regime. As a result, offenders were not just a different source than taxpayers, they were the morally more desirable source.

III.B. New Politics of Redistribution

The turn to offender-based funding for victim compensation programs presents a new, unique politics of redistribution. Rather than the more straightforward redistribution from rich to poor, this is redistribution from offenders to victims. I argue that this unique redistributive scheme creates a tension along race and gender lines: victim compensation programs are especially important to female victims, but at the same time offenders may be disproportionately male and African-American. Recognition of this tension between defendants' and victims' rights was expressed by Hawaii Victims Compensation Director Pamela Ferguson Bay, who reported one legislator saying to her, "you mean, I can be for defendants' rights and still be for victims' rights?" How individual legislators may negotiate this balance, and how that negotiation is mediated by gender and race, is the subject of my analysis.

III.B.1 Gender and Victim Compensation

Victims of rape, sexual assault, and domestic violence are disproportionately female.The most recent BJS statistics (analyzing 2005 data) find that 91.4% of all rapes and sexual assaults involve a female victim, compared to less than 10% male victims. There is also a racial disparity. Amongst female victims, the percentage of black victims was close to 30%, despite being only 12% of the national population. If these female victims consider tort options for damage recovery, they face a series of legal hurdles (Bublick 2006). Victim-plaintiffs have to identify their offender, be willing to take them

into court, and hope that he is not judgment-proof, i.e. has no money to pay even if found liable. Victims also have to fund their legal proceedings, and because insurance does not typically cover intentional acts like rape, lawyers are unlikely to take the cases on contingency fees. If a victim does take the case to trial, unlike criminal law, where "rape shield" laws protect rape victims from exposure to examination on their prior sexual history, in civil suits her character is likely to be at issue.

State-funded victim compensation may be particularly important to women because of the nature of homeowners' insurance policies. Today the majority of homeowners' policies don't provide coverage when injuries are the result of intentional acts.[90] Female victims of domestic abuse may thus fall through the insurance cracks. This issue gained some traction in the 1990s, as lawsuits challenged insurance companies' refusal to provide health care coverage to battered women. In 1997 a working group of the National Association of Insurance Commissioners found "that insurance companies 'discriminated unfairly against victims of domestic abuse and violence.'"[91] Brian Cook, chief of the crime victims' services for Ohio, noted that "It's not uncommon for health policies in Ohio to have exemptions for domestic violence. I'm aware that many victims with health insurance coverage are being denied claims." Victims in this situation are more likely to turn to crime victim compensation boards. Ohio, for instance, "has often stepped in to pay medical bills out of its crime victims compensation fund."[92] Other insurance policies also prove problematic for rape victims who wish to seek monetary recovery. In the case of college date rape, for instance, insurance policies similarly avoid

[90] When an individual pleads guilty in a related criminal case it may estop tort claims because the insurance policy doesn't cover intentional, criminal acts (Hoemann 2002).
[91] Sloat (1997). Quoting Washington State Insurance Commissioner Deborah Senn.
[92] Sloat (1997).

liability for intentional acts.[93] Without an insurance policy to draw on, the potential for recovery is greatly diminished.[94]

Even when tort suits are theoretically possible, Gilles (2006, 606) notes that "in the absence of liability insurance, plaintiffs are effectively barred from bringing suit unless the tortfeasor is an asset-rich corporation or an affluent individual who neglects to take elementary precautions to protect his or her assets from tort liability." Private tort suits are hard to bring because attorneys screen out cases that are not likely to produce high payouts (Trautner 2006), and civil sexual assault cases are typically seen as not lucrative. Similar issues arise for victims of domestic violence.[95]

Women may encounter many elements of gender disparity in the legal system. There is evidence, for instance, of biases in assigning comparative contributions to harm (Bublick 1999).[96] Legal scholar Martha Chamallas' research also suggests that gender bias may pervade the tort system, making recovery options there less attractive.[97]

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[93] The Phi Kappa Sigma Risk Management and Insurance Manual notes that insurance coverage is "specifically restricted or eliminated when ... [these] types of conduct are involved ... Criminal acts ... Intentional acts ... Sexual abuse or misconduct ... [and] Violations of Fraternity policy." (Equal to the Stars in Endurance - Phi Kappa Sigma Risk Management and Insurance Manual. 2002 by James R. Favor and Phi Kappa Sigma International Fraternity.

[94] Another method to get at insurance is through negligence: "Victims of crimes or intentional torts often sue innocent or negligent coinsured family members in order to gain access both to the assets of the coinsured and the proceeds of the homeowners' insurance policy. Savvy plaintiffs know that homeowners' insurance policies will not pay claims arising out of intentional conduct of an insured, but may cover a negligence claim against a merely negligent coinsured. By drafting carefully crafted exclusions, insurers have attempted to erect barriers to this indirect recovery for intentional acts, but they have not been uniformly successful." Beh, Hazel Glenn. 2000. Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand by You? 68 Tenn. L. Rev. 1. Page 2.

[95] Underenforcement of domestic violence torts stems from three reasons: "First, standard liability insurance policies generally do not cover domestic violence torts. n10 Second, many defendants have limited or no assets. Third, statutes of limitations are typically shorter for intentional torts than for negligence" (Wriggins 2001, 123)

[96] Bublick, Ellen M. "Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies," 59 SMU L. Rev. 55, Winter 2006. Ellen Bublick, Citizen No-Duty Rules: Rape Victims and Comparative Fault, *99 Colum. L. Rev. 1413 (1999).*

[97] Martha Chamallas. 1998. The Architecture Of Bias: Deep Structures In Tort Law. 146 U. Pa. L. Rev. 463. Martha Chamallas. 2005. Access To Justice: Can Business Co-Exist With The Civil Justice System?: Civil Rights In Ordinary Tort Cases: Race, Gender, And The Calculation Of Economic Loss. 38 Loy. L.A.

Historically it was also true that women found it difficult (or impossible) to obtain compensation through the legal system (VanderVelde 1996). Swent's (1996, 55) synthesis of a number of studies conducted by state gender task forces found that "Women receive unfavorable substantive outcomes in cases because of their gender, and men do not. Women's complaints are trivialized and their circumstances misconstrued more often than men's, and women more often than men are victims of demeaning and openly hostile behavior in court proceedings."

In light of these challenges with other legal options, crime victim compensation has become especially important for female victims. Initially, there were concerns about gender equity in victim payouts. Based on 1983 data, Kendrigan and Steger (1991, 11) argued that crime victim compensation programs in Michigan and Wisconsin did "not serve women nearly as well as it does men."[98] Their argument centered, however, not on the dollar amounts spent on female and male victims of crime, but on whether the programs "[met] the needs of female victims of crime" (12). In the twenty-five years since, much has changed.

Victim compensation programs, both at the federal and state levels, have made attempts to specifically target victims of rape, sexual assault, and domestic violence. The VOCA guidelines require states to "use at least 10 percent of each annual grant to support services for victims of spousal abuse, sexual assault, child abuse, and 'previously underserved victims of violent crimes.'"[99] In addition, the Violence Against Women Act

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L. Rev. 1435. Martha Chamallas. 2001. Deepening The Legal Understanding Of Bias: On Devaluation And Biased Prototypes. 74 S. Cal. L. Rev. 747. Martha Chamallas. 1988. Consent, Equality, and the Legal Control Of Sexual Conduct. 61 S. Cal. L. Rev. 777.

[98] They concluded then that "rape victims and victims of domestic abuse have needs that are not being met" (26).

[99] Derene (2005), page 14

(VAWA) passed in 1994 provided more federal funding for a wide variety of victims' services. Restitution was an important part of the federal plan, as "the Violent Crime Control and Law Enforcement Act ... made restitution mandatory in cases of sexual assault or domestic violence."[100]

At the state level much has been done to improve responses to victims of sexual assault. Today, most states have made specific provisions to inform sexual assault survivors of the availability of compensation programs. In Kentucky for instance, "Pursuant to KRS 421.500 and 42 USC 112 § 10606, victims of crime have the right to be ... informed of emergency, protective, social, and medical services, crime victim compensation, community treatment programs and the criminal justice process."[101] Both state and federal grants are made to agencies working with victims to help them navigate the process. Politicians from both parties have promoted these types of services. In Missouri Republican Governor Matt Blunt proposed additional funding for victims of sexual assault to cover the costs of their medical exams. Discussing the proposal, Governor Blunt said that, "This funding will ensure that sexual assault victims will not be further traumatized by being forced to pay for the medical exams needed to collect information about their attacker's DNA, which requires specialized training."[102]

While most have applauded these efforts to address gender violence, there have been critics. Sarnoff (1997) argues that women and the elderly have received disproportionate amounts of funding from VOCA and VAWA. Sarnoff (1997 86),

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[100] DOJ (1998), p. 356

[101] Kentucky Association of Sexual Assault Programs. 2002. Responding To Sexual Assault: A guide for professionals in the Commonwealth. Page 20.

[102] Office of Missouri Governor Matt Blunt. Press Release. Wednesday, October 17, 2007. "Gov. Blunt Calls for Funding to Protect Sexual Assault, Domestic Abuse Victims." Online: http://www.gov.mo.gov/cgi-bin/coranto/viewnews.cgi?id=EEAkyypypuEOmylZBn&style=Default+News+Style&tmpl=newsitem

concerned about the possible influence of "Take Back the Night" as an interest group, speculates that "these narrowly focused groups are ... worrisome because their single-issue appeals are made to legislators increasingly unwilling to take hard positions on substantive policy issues."[103] Criticisms like this aside, however, there is likely to be strong female political support for maintaining and expanding crime victim compensation programs.

III.B.2 Race and Offender-Based Funding

Offender-based revenue streams intersect with existing racial disparities in the criminal justice system. As a result, there is a potential for race politics to influence the development of crime victim compensation programs. Presently, the quality of available data does not allow for specific comparisons of "who pays" versus "who receives" in crime victim compensation programs. A circumstantial case, however, can be made that racial disparities may be a real concern.

Much research has considered the relationship between race and imprisonment. As summarized by Arvanites and Asher (1998, 217), there are two dominant sociological models for conceptualizing incarceration: "The Durkheimian (traditional) view posits that imprisonment is a function of crime. Conflict theories (both cultural and Neo-Marxist) argue that extra-legal factors such as minority populations and economic inequality will directly affect incarceration when controlling for crime." To the extent that extra-legal factors are associated with punishment (either through imprisonment, parole, or monetary fines), a new type of redistribution enters the crime victim compensation equation.

[103] Sarnoff (1997, 84) additionally argues that "to give victim compensation benefits the advantage of broad, popular support, efforts should be made to make redistribution as direct as possible, and to ensure that personal responsibility is supported, rather than undermined."

Victims are receiving their money from individuals who are themselves disproportionately poor, unemployed, and minority.

What little research has been conducted on the process of penalty assessment suggests that extra-legal factors may be secondary to crime-related factors. Ruback, Cares, and Hoskins (2006) examined a random sample of adult and juvenile cases from 2000 in six counties in Pennsylvania. Looking at how fines are levied, the authors found that "the imposition of economic sanctions was dependent more on crime-related factors, such as severity and type of crime, than on offender-related factors such as age, race, or gender."[104] The mandatory Crime Victim Compensation (CVC) penalty was assigned in over 90% of cases. These were paid in full about 56% of the time. But in terms of assigning restitution, which is supposed to happen when a victim receives compensation from the CVC, the percentages are much lower, ranging from 3% in one county to a high of 56%. As we would expect, being incarcerated (and thus without a wage) makes payment significantly less likely.

Whether this finding can be broadly generalized is not clear. Indeed, disentangling the marginal effects of race in the victim compensation funding equation is nearly impossible given available data and the high correlation of local crime rates with minority populations. At a national level, we know that African-Americans are "nearly six times more likely than whites to be murdered in 2000, and seven times more likely than whites to commit a homicide. With respect to prison population, by year-end 2000, African Americans made up nearly two thirds of all inmates, with incarceration rates for

[104] Ruback, Cares, and Hoskins (2006), p. 5

African Americans roughly eight times that of whites" (Kovandzic and Vieraitis 2006, 224).[105]

Rising incarceration rates have disproportionate effects on young black males (Western 2006), and the turn toward more offender-based revenue may exacerbate these effects. It is not clear, however, that this is the case because as Western (2002, 2006) has shown, young African-American males will earn less over time after incarceration. Thus, although targeted for payment, as a practical matter they may not be able to make as many (or as substantial) payments into the fund. Some research on restitution suggests that black offenders are less likely to follow court ordered restitution payments.[106]

Given the paucity of data and competing expectations about the potential disparate racial effects of offender-based revenue structure for victim compensation programs, what should we expect? To gain some purchase on this question, I constructed an original county-level database to compare compensation fund in-flows and out-flows. While problems of ecological inference prevent me from drawing inferences about the backgrounds of the actual individuals who are paying into or receiving from the fund, county-level analysis is politically relevant because legislatures are representing localities and not individuals. Thus, if a legislator perceives that her/his part of the state is putting in more revenue than others, that legislator may be less likely to support the program or may move to modify its operation.

[105] Citing to U.S. Bureau of Justice Statistics, 2004b and U.S. Bureau of Justice Statistics, 2001:11
[106] See Outlaw and Ruback (1999), who studied probation orders from 1994 in Allegheny County, Pennsylvania.

County-level data on revenues and expenditures is made available by a small number of states in their annual reports.[107] Expenditure data at the county level is more commonly published than revenue data, and as a result I do not have both sides of the ledger in all cases. On the expenditures side, I examine five years of data from California (2001, 2002, 2003, 2004, 2005); three years from Texas (2001, 2003, 2004); two years from Florida (2005, 2006); and one year each from Michigan (2004) and Maryland (2006). On the revenue side, I have three years of data from Texas (2001, 2003, 2004), and two years each from California (2004, 2005) and Florida (2005, 2006). Of these states, the only state using general revenue dollars in my sample is Maryland. Focusing on within-state variation avoids the problem of comparing services across states with significantly different operational machinery. Even though there is more coordination across states, "compensation programs still appear to be more dissimilar than similar" (Sarnoff 1997, 58). Within a state, however, the programmatic elements are held constant.

Since previous work has not examined county-level compensation receipts, I base my empirical model on a related literature that has examined incarceration rates at the county level (Kovandzic and Vieraitis 2006). In each model, the dependent variable is either the total victim compensation expenditures paid to the county or the total revenue generated by the county. Crime levels should be the most important explanatory variable for both receipts and expenditures. The more crimes in a county, the greater amount of money coming from offenders and the greater the needs of victims for compensation. I

[107] I examined all states' annual reports, and followed up with written requests to all states' program administrators. Some provide the number of claims by county, but not the actual expenditures and revenues. Claims data is available for Texas 2001, 2003, 2004, and 2007; Ohio 2007; New York 2002-2007; Michigan 2004; Maryland 2006;

enter into my models the Uniform Crime Report crime measures at the county level.[108] Analysis (Appendix Tables A and B) show that using only crime levels in the model explains a large portion of the variance across counties.

To see if extra-legal factors are also associated with compensation funding, I added a set of five control variables. First, to see if race plays a role, I included the percentage of county residents who are African-American. I next included unemployment, the "most frequently examined variable" used in studies examining predictors of incarceration rates (Arvanites and Asher 1998, 210).[109] To account for economic conditions, I included the median family income of the county. As a measure of partisanship (and a proxy for ideology), I included the percentage of county residents who voted for George W. Bush for President. Finally, to control for the unique crime issues facing urban areas, I included the percent of county residents living in urban areas. Including these variables led to the specification of an Ordinary Least Squares (OLS) regression model of the following form:

$$[2] \quad \underline{\text{REVENUE/EXPEND}}_j = b_1\text{CRIME}_j + b_2\text{AFR-AMER}_j + b_3\text{UNEMPLOY}_j + b_4\text{INCOME}_j + b_5\text{BUSH}_j + b_6\text{URBAN}_j + \varepsilon_j$$

where the dependent variable is either the total dollar amount received from county *j* (REVENUE) or the total dollar amount distributed to victims in county *j* (EXPEND); the explanatory variables are as described above; and ε_i is an error term. To be sure, there are potential problems of multicollinearity. The high correlation between race and crime

[108] Data was obtained from the BJS and also from ICPSR 4009, ICPSR 4360, ICPSR 4466, and ICPSR 4717. This data is the best available, but it is not without criticism. See debate on county level crime rate: Lott, John R. and Whitley, John E., "A Note on the Use of County-Level UCR Data: A Response" (July 1, 2002). Available at SSRN. Maltz, Michael D. and Joseph Targonski, "A Note on the Use of County-Level UCR Data,"
Journal of Quantitative Criminology (September 2002).

[109] Annual unemployment data was obtained from: http://www.bls.gov/LAU/

levels has been a recurring challenge for studies of incarceration.[110] The models are also not accounting for issues such as publicity and local cooperation. Presumably, counties where local law enforcement is more supportive of victims may have greater numbers of victims coming forward (and consequently greater total payouts). The models also do not include the actual number of offenders, and the disconnect between crimes and offenders brought into the system will reflect judicial and law enforcement effectiveness and strategy. As noted earlier, there are also problems of ecological inference. But despite these limitations, the analysis is useful for preliminarily exploring the potential for race politics to enter into the provision of victim compensation. Models were run separately for each state and year, and all results are presented in Tables 2.4, 2.5, and 2.6.

Table 2.4. County-level analysis of victim compensation expenditures, CA and MD, 2001-2006; OLS regression results and robust standard errors reported

STATE	CA	CA	CA	CA	CA	MD
YEAR	2001	2002	2003	2004	2005	2006
Violent Crime	0.334***	0.445***	0.467***	0.302***	1.468*	0.022
	(0.003)	(0.009)	(0.006)	(0.003)	(0.739)	(0.029)
% Afr-American	-751.950	976.516	2,117.660	-698.982	5,259.730	-11.739
	(1,805.487)	(2,947.486)	(2,880.443)	(1,400.630)	(6,277.022)	(881.355)
Med. Fam. Inc.	15.270	25.591	20.579	10.734*	3.685	-11.831
	(9.400)	(15.327)	(13.358)	(5.986)	(15.511)	(10.240)
% in Urban Areas	194.341	785.877**	162.099	66.322	215.195	262.668
	(190.096)	(364.872)	(248.772)	(130.108)	(587.548)	(305.155)
% Vote for Bush	-66.761	317.496	-23.823	153.981	1,173.134	-2,351.767

[110] "Michalonrski and Pearson reported that the high correlation between percent black males and violent crime-,769 in 1970 and ,628 in 1980-made it impossible to "determine whether race does or does not have an independent effect on imprisonment" (1990:67)." (Arvanites and Asher 1998, 211)

	(424.167)	(863.011)	(652.496)	(345.318)	(1,999.173)	(1,413.921)
Unemployment	-32.350	-63.000	-49.522	-21.877	-78.295	9.111
	(30.981)	(59.166)	(43.108)	(19.035)	(73.869)	(87.736)
Constant	-381.539	-997.686	-479.832	-365.901	-477.789	1,927.706
	(634.581)	(1,124.288)	(1,031.991)	(462.347)	(1,208.196)	(1,509.920)
Observations	58	58	58	58	57	24
R-squared	0.9900	0.9839	0.9910	0.9918	0.6318	0.7730

NOTES: Robust standard errors in parentheses. Two-tailed significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%.

Table 2.5. County-level analysis of victim compensation expenditures, TX, MI, FL, 2001-2006; OLS regression results and robust standard errors reported

STATE	TX	TX	TX	MI	FL	FL
YEAR	2001	2003	2004	2004	2005	2006
Violent Crime	0.303***	0.536***	0.549***	0.082***	0.246***	0.131***
	(0.029)	(0.057)	(0.056)	(0.004)	(0.036)	(0.029)
% Afr-American	188.287*	74.328	58.548	-164.533	-155.715	-526.223*
	(96.144)	(132.041)	(147.829)	(153.442)	(333.424)	(299.582)
Med. Fam. Inc.	2.481	4.547	3.985	-1.695*	1.383	-1.464
	(2.003)	(3.449)	(2.697)	(0.942)	(6.402)	(4.404)
% in Urban Areas	27.201	32.477	51.601	-9.485	192.939	214.604*
	(32.779)	(53.655)	(50.725)	(16.291)	(168.525)	(107.865)
% Vote for Bush	-129.131	-255.092	-351.320*	55.231	-928.547*	-1,209.159***
	(118.428)	(199.221)	(206.661)	(64.246)	(486.690)	(422.251)
Unemployment	-4.475	-1.776	-4.806	-5.463**	-34.109	-57.525
	(4.288)	(6.022)	(7.515)	(2.442)	(38.983)	(38.858)
Constant	5.134	10.287	126.036	90.196	636.278	1,042.190**
	(59.257)	(100.486)	(125.140)	(58.392)	(448.035)	(439.266)
Observations	253	252	254	83	66	66
R-squared	0.9568	0.9619	0.9644	0.9766	0.7977	0.7494

NOTES: Robust standard errors in parentheses. Two-tailed significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%.

Table 2.6. County-level analysis of victim compensation revenues, selected states, 2001-2006; OLS regression results and robust standard errors reported

STATE	TX	TX	TX	CA	CA	FL	FL
YEAR	2001	2003	2004	2004	2005	2005	2006
Crime Level	0.052***	0.049***	0.048***	0.026***	0.060	0.026***	0.026***
	(0.004)	(0.003)	(0.002)	(0.001)	(0.062)	(0.006)	(0.006)
% Afr-American	188.914	18.433	29.462	-6,523.270***	3,872.812	-146.207	-126.262
	(148.761)	(146.590)	(140.361)	(2,173.790)	(4,055.411)	(354.379)	(356.512)
Med. Fam. Inc.	7.918***	9.631***	10.790***	10.693	-8.925	-0.893	-0.386
	(1.602)	(1.963)	(2.008)	(6.435)	(21.548)	(5.659)	(5.374)
% in Urban Areas	54.285**	41.416	68.596**	286.303*	955.409**	501.379***	507.268**
	(27.388)	(32.165)	(29.471)	(165.828)	(459.158)	(176.103)	(191.459)
% Vote for Bush	-92.672	-181.036	-233.306**	972.183*	519.824	-1,149.982	-1,098.805
	(91.639)	(124.744)	(108.995)	(579.031)	(1,608.168)	(828.433)	(789.199)
Unemployment	3.995	4.274	2.660	-6.015	-119.287*	-95.686*	-108.582
	(5.091)	(5.289)	(5.098)	(18.373)	(69.038)	(51.288)	(67.804)
Constant	-233.073**	-231.713**	-216.465*	-959.747	634.757	1,037.870	979.459
	(109.217)	(116.347)	(120.613)	(619.102)	(1,941.250)	(637.155)	(694.362)
Observations	254	253	254	58	57	66	66
R-squared	0.9602	0.9669	0.9726	0.9494	0.3074	0.6131	0.6482

NOTES: Robust standard errors in parentheses. Two-tailed significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%.

Looking at the results of the analysis, when controlling for crime rates and urban residents, there is not a consistent, significant relationship between the percentage of African-American residents and expenditures (Tables 2.4, 2.5). The two anomalies (Texas in 2001 and Florida in 2006) are not in the same direction, nor are they supported by other years of the same state's data. It also appears that there is not a consistent, significant relationship between the county percentage of African-American residents and the revenues provided to the fund by the county. What is significant and positive, however, is the county percentage of urban residents. Across all states, there is a positive and significant relationship between the amount of revenue generated and the percentage of urban residents (Table 2.6). This is likely picking up part of the minority effect, and leaves open the strong possibility that legislators with ties to urban areas may be sensitive to concerns about funding for victim compensation programs.

Looking next at median family income, it appears that in Texas, county wealth is significantly and positively associated with revenue generation. In this way, the program

is serving a more traditional redistributive function: money is being distributed roughly evenly across the state, but revenues are coming disproportionately from more well-off counties. Finally, neither unemployment nor partisanship seem consistently related to either revenues or expenditures in a systematic way. The results of this county-level analysis are not conclusive, but suggest that there are distributive properties of victim compensation programs tied to urbanity and race. To the extent that this holds for other states, the groundwork is laid for a racialized politics of victim compensation.

III.C. Legislators and Victim Compensation

In this section I complement the state-level policy adoption analysis with an examination of individual legislator behavior in 2007 legislatures. Little attention has been paid to legislator behavior, but turning to a smaller unit of analysis has significant advantages.[111] Most importantly, it allows me to separate the effects of personal identity from constituent responsiveness. The analysis thus far in the paper has focused exclusively on county and state characteristics that may correlate with support for crime victim compensation programs. But individual legislator identity may also contribute to legislators' behavior. Specifically, if female and minority legislators are aware and sensitive to the distributive effects of victim compensation, they may be more or less likely to invest their legislative time to modifying the programs.

[111] Meiners (1978) viewed legislator behavior through a public choice lens, arguing that "although there are relatively few specific pressure groups that would benefit from the legislation, it may be viewed by legislators as a program which would be generally popular, and apparently would not hurt anyone. ... There is general sympathy for victims of crime, and legislators perceive this emotion." In Meiners' view, it was the incentive of receiving federal matching funds that should drive legislative behavior: The incentives for state legislators to support victim compensation are easy to discern. If they do not support compensation they allow federal tax dollars to be shifted from their state residents to states which have the program." (51). In contemporary legislatures, however, this incentive is already passed. Kendrigan and Steger's (1991, 11) discussion of legislators was also short and speculative: "While many legislators approve of bills to assist victims of crime, they tend to be cautious in designing these programs and do not want to sign a blank check. The cost-containment procedures incorporated in victim-compensation legislation often have an ad hoc quality. Typically, these restrictions are not derived from the broad principles used to justify the program, but they are not often necessary to get the bill passed."

III.C.1. Tracking Legislator Activity in 2007

In 2007, legislators in thirty-four states proposed legislation related to victim compensation. To gain a comprehensive, national perspective, I constructed a database of every bill proposed in 2007 state legislatures related to crime victim compensation. The database of bill proposals was constructed through online collection of state legislative documents. Appendix Table C reports the online source for state legislative databases. The search was conducted for both House and Senate bills in all 50 states.

It is important to note that the database is comprised of *proposed* bills, not enacted legislation.[112] This is in keeping with Haynie (2001), and follows a long political science tradition of examining bill proposals as a way to understand setting the legislative agenda (e.g. Arnold 1990). As Haynie writes, "bill introductions are important because, unlike roll-call votes, they detail what representatives actually add to the policy agenda."[113] My search methods produced a database of 158 unique bills. Appendix Table C notes the number of bills coded for each state. For each of these bills, I coded all sponsors and co-sponsors of the legislation.

Victim compensation bills were generally in a few categories (Table 2.7). Fifty-seven percent of the bills concerned either expanding program benefits or improving program administration. Another 34% of bills were about either offender- or fine-based funding or related restitution issues. Five percent of the bills concerned general fund revenues, and the final four percent of bills sought to reduce or restrict benefits.

[112] Appropriations bills were excluded from the database.
[113] Haynie (2001), p. 25

Table 2.7. Content and Number of Victim Fund Bills Included in Analysis, from 2007 state legislatures

Content	Number of Bills	% of Total
More General Fund Resources	8	5.2%
Restitution	28	18.3%
Fines & Penalties	24	15.7%
Administration & Organization	42	27.5%
Expand Benefits / Coverage	45	29.4%
Reduce Benefits / Coverage	6	3.9%

In addition, 2 bills focused on protecting fund monies, 2 made technical corrections, and 5 concerned miscellaneous other issues. Appropriation bills were not included in this analysis.

III.C.2. Analytic Model

What types of legislators are proposing these bills? How do their personal backgrounds and the demographics of their constituents affect their legislative behavior? In this section I answer those questions through an empirical, legislator-centered analysis of bill proposal. Central to the models is simultaneous testing of potentially competing interests. As has been discussed, gender and race politics may make a legislator more or less interested in crime victim compensation. In addition to their personal identities, legislators serve as representatives of constituent interests. Racial and gender identity presents a paradox for state legislators, as they must "balance the expectation that they will carry the banner for women's and minority issues with their obligation to represent all people in their constituencies" (Haynie 2001).[114] A comprehensive model of crime victim compensation legislation must account for each of these separate interests.

[114] Haynie (2001), p. 8. Quoting Carroll, Susan J. 1991. Ed. *Women, Black, and Hispanic State Elected Leaders*. New Brunswick, N.J.: Eagleton Institute of Politics. Haynie theorized that there were three strategies for black state legislators: (1) "persist as race representatives"; (2) "deracialize their legislative agendas in order to appeal to a more diverse audience"; or (3) adopt a "middle-ground approach" between the two extremes. Haynie (2001), pp. 9-10.

In order to test for the independent, relative effects of gender and race on policymaking, I include in my models a host of confounding variables which might affect agenda setting in the context of crime victim compensation. In this section I consider four categories of confounding variables: partisanship and politics; age; ideology; and district demographics. There is a large body of research suggesting partisan differences on issues of law and order (Erskine 1974; Jacobs and Carmichael 2001). As Jacobs and Carmichael (2001, 65) note, "Instead of highlighting social arrangements that close off law abiding alternatives for the poor, conservatives see reprehensible individual choices as the primary explanation for street crime." In the context of crime victim compensation, Republicans can be expected to promote bills since they are now tied to offender penalties. In addition to partisanship, statehouse legislators are constrained by their political setting in the form of seniority and electoral safety.

Legislators who have been in the state house or state senate for more years have more flexibility than their newer colleagues who may feel pressure to focus on bills that will build goodwill with their new constituents. To the extent that victim compensation bills are seen as politically useful – for instance, as symbolic legislation showing commitment to victims without having to draw on more tax revenue – we should expect younger legislators to propose them. A similar logic holds for those whose seat is tenuous. With more pressure to win over voters, there may be greater incentive to produce legislation like victim compensation bills. Both of these expectations, it should be noted, are predictions after controlling for race and gender. These possibilities will be tested in the model by including measures of chamber seniority and the percentage of votes received in the most recent election.

Legislator age serves as a proxy for ideological beliefs about crime victims, and will test to see if older legislators are more/less interested in making victim compensation programs a part of their legislative work. The hypothesis is that older legislators will be less inclined to see "victim's rights" as a policy priority. While ideology about crime victim compensation cannot be directly measured given available data at the state legislative district level, several variables can be used as proxies. First, I include two military measures – a measure of whether the individual legislator served in the armed forces, and a measure of the percentage of district residents in the military. An extensive literature in political science has identified opinion differences between civil society and the military.[115] Relevant to victim compensation is the military-ideology emphasis on law and order and punishment. Because victim compensation funds target offenders as revenue sources, they should be particularly attractive to the military mindset. In addition, I include a measure of the rural population to capture cultural differences between the urban core and the rural parts of each state. Data from the Department of Justice (2005) finds that the urban rate of violent crime (29.8 / 1,000) was significantly greater than the rural rate of 16.4. Urban legislators thus have constituencies more likely to be victims of crime, and more likely to need crime victim services.

Finally, as representatives of their constituents, state legislators should be acutely aware of the demographics of their legislative districts. I considered a broad spectrum of measures which may likely be related to the formulation of crime victim compensation

[115] See: Feaver, Peter D. Richard H. Kohn, eds. *Soldiers and Civilians: The Civil-Military Gap and American National Security.* Cambridge, MA: MIT Press. Feaver, Peter D. and Christopher Gelpi. 2004. *Choosing Your Battles: American Civil-Military Relations and the Use of Force.* Princeton: Princeton University Press. Feaver, Peter D. 2003. *Armed Servants: Agency, Oversight, and Civil-Military Relations.* Cambridge, MA: Harvard University Press.

laws.[116] First, I include a measure of the percentage of district residents who are females, age 13-34. This is the group at the highest risk of sexual assault victimization, and therefore there may be greater constituent pressure for victim compensation programs. Second, I also include median family income and unemployment rate, as measures to capture the class standing and economic health of the district. Both measures are consistently included in analyses of Congressional behavior.

By taking advantage of newly available large-scale electronic data, I employ a model that is both national (all 50 states) and comprehensive (including variables on identity, district characteristics, and institutional context). To be sure, the trade-off in conducting a national analysis reaching all state legislators is that I sacrifice longitudinal analysis, focusing only on the 2007 legislative sessions. The construction of the database is described in the companion paper ("Intersectionality in the State House").

I used two related empirical strategies. First, following Haynie (2001), and Bratton and Haynie (1999), I construct a dependent variable measuring the number of victim compensation bills proposed by each legislator. Second, I also ran a series of logit models where the dependent variable was simply 1 (if a legislator proposed any bill) or 0 (if a legislator did not propose any bills). Because the proposing of bills is a rare event, I also employ rare events logit models as described by Tomz, King and Zeng (2003). Including all the available variables, the regression model takes the form of:

[1] $$VICTIM\_BILL_i = \beta_0 + \beta_1 GOP_i + \beta_2 FEMALE_i + \beta_3 AFR\text{-}AMERICAN_i + \beta_4 LATINO_i + \beta_5 ASIAN_i + \beta_6 NATIVE\_AMER_i + \beta_7 MILITARY_i + \beta_8 PCT\_LAST\_VOTE_i + \beta_9 SENIORITY_i + \beta_{10} AGE_i +$$

[116] The substantive results reported later were not sensitive to the particular operationalization of these demographic variables. Using a measure of college completion instead of median family income, for instance, did not change findings related to the gender of the legislator.

$$\beta_{11}DIST\_PCT\_FEMALE_i + \beta_{12}DIST\_PCT\_BLACK_i +$$

$$\beta_{13}DIST\_PCT\_LATINO_i + \beta_{14}DIST\_PCT\_ASIAN_i +$$

$$\beta_{15}DIST\_PCT\_RURAL_i + \beta_{16}DIST\_INCOME_i +$$

$$\beta_{17}DIST\_UNEMPLOY_i + \beta_{18}DIST\_MILITARY_i + \delta_i + \varepsilon_i$$

where $VICTIM\_BILL_i$ is either a count or dichotomous variable measuring whether legislator *i* proposed a crime victim compensation bill; GOP_i is a dichotomous variable indicating whether legislator *i* is a Republican; $FEMALE_i$ is a dichotomous variable indicating whether legislator *i* is a female; $AFR\text{-}AMERICAN_i$ is a dichotomous variable indicating whether legislator *i* is African-American; $LATINO_i$ is a dichotomous variable indicating whether legislator *i* is Latino; $ASIAN_i$ is a dichotomous variable indicating whether legislator *i* is Asian; $NATIVE\_AMER_i$ is a dichotomous variable indicating whether legislator *i* is Native American; $MILITARY_i$ is a dichotomous variable indicating whether legislator *i* has served in any branch of the United States military; $PCT\_LAST\_VOTE_i$ measures the percentage of the vote that legislator *i* received in the last election; $SENIORITY_i$ is legislator *i*'s rank in their chamber (with lower numbers meaning greater seniority); AGE_i is legislator *i*'s age;

$DIST\_PCT\_FEMALE_i$ is the percentage of residents in the legislative district who are females age 18-34; $DIST\_PCT\_BLACK_i$ is the percentage of residents in the legislative district who are African-American; $DIST\_PCT\_LATINO_i$ is the percentage of residents in the legislative district who are Latino; $DIST\_PCT\_ASIAN_i$ is the percentage of residents in the legislative district who are Asian; $DIST\_PCT\_RURAL_i$ is the percentage of residents in the legislative district who live in rural areas; $DIST\_INCOME_i$ is the median family income of residents in the legislative district; $DIST\_UNEMPLOY_i$ is

the percentage of civilian residents in the legislative district who are not employed; *DIST_MILITARY*$_i$ is the percentage of residents in the legislative district who are active-duty military.

δ_s captures State Fixed Effects; and εi is an error term. Following Primo, Jacobsmeier, and Milyo (2007), I used clustered standard errors instead of HLM to model these mixed levels. State fixed effects are included in all models, and this allows me to control for the myriad of state-to-state differences across legislatures and operation of crime victim compensation programs.[117]

III.C.3. Results and Discussion

The results of the analysis suggest that individual legislator party affiliation, gender, and race are the factors that account for propensity to propose crime victim compensation legislation. That none of the district-level variables are significant predictors is consistent with the observation that crime victim compensation politics are not high profile. There is not an organized constituency lobbying for reform, and the vast majority of regular citizens are likely not aware of the programs' existence. The state house politics, then, is mediated most by individual legislator identity. Membership in the Republican party is inversely related to proposing crime victim compensation (Table 2.8). This suggests that although the GOP during the Reagan-era promoted victims' programs, in contemporary legislatures it is Democrats who are more likely to be advocates for victim compensation.

[117] Because the data on percentage vote in last election and age were not reported for all individuals, I run models both with and without these controls. The substantive results for gender and legislator party remain the same, even with the reduced N and greater controls.

Table 2.8. Results of Binomial Count and Logit Models Explaining Crime Victim Compensation Bill Proposals in 2007

	Total Bills (nbreg)	Any Bill (logit)	Any Bill (relogit)
GOP	-0.453**	-0.638**	-0.613*
	(0.230)	(0.322)	(0.318)
Female	0.243**	0.239	0.239
	(0.116)	(0.186)	(0.184)
African-American	-0.356*	-0.190	-0.143
	(0.199)	(0.381)	(0.364)
Latino	-0.503***	-0.509	-0.589
	(0.190)	(0.426)	(0.440)
Asian	-0.149	0.088	0.075
	(0.247)	(0.324)	(0.318)
Native American	0.360	0.383	0.429
	(0.317)	(0.358)	(0.359)
District % Female Residents, Age 18-34	2.413	4.065	4.246
	(2.876)	(2.732)	(2.808)
District % African-American Residents	0.095	0.002	-0.345
	(0.497)	(0.945)	(0.867)
District % Latino Residents	-0.123	-0.752	-0.486
	(0.737)	(0.682)	(0.625)
District % Asian Residents	-0.224	-0.568	-0.552
	(0.660)	(0.854)	(0.901)
District % Rural Residents	-0.035	0.007	-0.086
	(0.251)	(0.405)	(0.378)
District Median Family Income ($000)	-0.000	-0.001	-0.001
	(0.003)	(0.005)	(0.005)
District % Unemployed	0.463	1.797	1.736
	(3.420)	(4.009)	(3.857)
District % in Military	-0.683	0.328	0.673
	(1.507)	(2.142)	(2.187)
% of Vote Bush in Last Election	0.000	0.004	0.005
	(0.002)	(0.003)	(0.003)
Military Experience	-0.127	-0.220	-0.239
	(0.155)	(0.161)	(0.160)
Seniority in Chamber	-0.003	-0.002	-0.003
	(0.002)	(0.003)	(0.002)
Constant	-2.766***	-3.362***	-3.986***
	(0.563)	(0.702)	(0.613)

Table 2.8. Results of Binomial Count and Logit Models Explaining Crime Victim Compensation Bill Proposals in 2007

	Total Bills (nbreg)	Any Bill (logit)	Any Bill (relogit)
Observations	4915	4781	4915

Notes: Robust standard errors in parentheses. Significance denoted as * significant at 10%; ** significant at 5%; *** significant at 1%

The Democratic sensitivity to crime victim compensation programs may also be due to shifting focus of legislation. Some of today's legislation concerns expanding and amending the program to meet the needs of underserved populations. Recent activity in Texas provides an illustrative example. Osborn and Alford (2002) conducted a study of the Texas victim compensation program that found gender disparities. The report's findings were striking: "ever since the state government started paying compensation to victims of crime 22 years ago, the average awards in cases involving male victims consistently have exceeded those in which the victim was female."[118] The disparities were noted by state legislators, as Democratic State Sen. Gonzalo Barrientos said that "the victims have to be treated equally whoever they are, and any kind of injustice shall not be tolerated." While possible explanations for the disparities were wage differences and the nature of the specific crimes, William Kelly, director for the Center for Criminology and Criminal Justice Research at the University of Texas raised an important concern: "At some point you can't account for all of these gender differences based on purely objective characteristics or circumstances. Are men better victims? Are they better at applying? I'd be hard-pressed to say that women minimized their victimization." Senator Barrientos' reaction may be part of a new politics of victim compensation tied to equity concerns.

[118] Of the 36,119 claims paid in cases where women were victims, the average compensation was $3,681. Of the 49,070 claims paid where men were victims, the average compensation was $6,434.

Victim compensation in practice is often integrated with improved state services for victims of rape and sexual assault. In many states, the same agency that administers victim compensation also administers rape crisis resources and federal Violence Against Women Act (VAWA) grants. Because of these close ties, victim compensation funds may be viewed (either symbolically or substantively) as improving the lives of women. This context helps us understand the significant, positive relationship between female legislators and proposal of crime victim compensation bills (Table 2.8). Victim compensation programs continue to pose gender-related challenges. Danis (2003) examined the percentage of victims across the states using victim assistance programs, as compared to victim compensation programs. She found a disparity, with domestic violence accounting for roughly 50% of clients served through victim assistance, but only 13% of victim compensation claims. Female legislators may be most interested in addressing issues such as these. In addition to concern for women victims who have few other resources to turn to, it may also be the case that female legislators are particularly sensitive to the non-compensatory goals (e.g. closure, control) that female victims seek (but do not receive) from the legal system (Madigan and Gamble 1991). Crime victim compensation potentially provides these victims with a new means of redress.[119]

Evidence from Hawaii confirms the connection with an illustrative example. Hawaii Program Director Pamela Ferguson Bay noted that one of the "most important" factors in improving victim compensation services has been legislative support from the women's caucus. These women, in Ferguson Bay's view, are "not legislators that you need to educate about victims' issues" because the issues are already on their agenda. The

[119] In a study of sexual assault victims in Canada, Feldthusen, Hankivsky, and Greaves (2000) found that victims pursuing compensation through the civil system experienced therapeutic results (both negative and positive).

national empirical analysis suggests that female legislators in other states are also well aware of the importance of victim compensation.

Finally, there is an inverse relationship between proposing victim compensation bills and being African-American or Latino (Table 2.8). The finding is consistent with the argument that the new politics of crime victim compensation is racialized, most likely driven by concerns about black males in the criminal justice system. While this finding could be driven by concerns about payout disparities by race, there do not appear to be racial inequalities in payout in the same ways as there were gender inequities. Salinas (2005) found that in Texas, white claimants, both employed and unemployed, received less on average than black and Hispanic claimants.

Looking beyond race to the race-gender interaction reveals that intersectionality is operating as well (Table 2.9). If we examine predicted values based on the regression model, black females are less likely than women generally to fall into one of the three deciles most likely to propose bills, and even less likely than their black male counterparts. The table also reveals a notable split between Latino and Latina legislators. 65% of Latino legislators fell into the three deciles most likely to propose a victim fund bill, compared to only 19% of Latinas. This disparity may be due to divergent policy priorities. Fraga, et. al. (2005) found that Latinas were most interested in education, health care, and jobs legislation. Crime and victim compensation appear to be greater policy priority for Latino legislators.

Taken together, the results provide confirmation for a new, cross-cutting politics of redistribution through crime-victim compensation. Social theorists have long viewed crime and punishment policy as a political response to ordering society (Foucault 1977;

Garland 1990). Smith (2004, 926) makes the connection to politics: "those who control the coercive power of the state use that power to impose their values on others and to advance one constituency's interests by damaging the interests of another."[120] This is, in one sense, an apt description of a program that redistributes money from offenders to victims. While few politicians would claim offenders as their constituency, the demographics of offenders and perceptions of the criminal justice system may make politicians more or less accepting of this offender-to-victim redistributive policy.

Table 2.9. Percentile distribution of predicted likelihood of proposing a crime victims compensation bill, by Gender and Race

Predicted Likelihood	Male	Female	Black	Hisp.	Black Male	Black Female	Hisp. Male	Hisp. Female
1 - Most Likely	11.8	4.2	0.9	20.1	1.1	0.5	27.2	3.7
2	11.8	4.1	1.6	16.8	2.0	0.9	20.8	7.4
3	11.0	6.9	2.5	14.0	3.7	0.5	16.8	7.4
4	9.5	11.7	7.7	19.0	10.4	3.3	10.4	38.9
5	10.1	9.7	16.7	6.7	20.6	10.2	4.0	13.0
6	10.0	10.0	17.5	0.6	18.0	16.7	0.0	1.9
7	7.8	17.0	15.8	2.8	5.6	32.6	4.0	0.0
8	8.7	14.1	7.9	7.8	7.0	9.3	5.6	13.0
9	9.6	11.3	10.7	3.4	13.5	6.0	0.8	9.3
10 - Least Likely	9.7	10.9	18.8	8.9	18.0	20.0	10.4	5.6
N	5357	1672	570	179	355	215	125	54

Notes: These are not the percentages of actual bill proposers, but rather the likelihood that a legislator would propose a bill (e.g. in 2008), given their identity, legislative district characteristics, etc. Predicted likelihood based on the rare events logit model presented in Table 7.

[120] Smith (2004, 926) summarizes five political factors that may affect incarceration rates: "the underclass hypothesis, the democracy-in-action hypothesis, the partisanship hypothesis, the electoral cycle hypothesis, and the policy hypothesis."

IV. Conclusion

Paul Pierson's theory of retrenchment is the standard for analyzing politics of the contemporary welfare state. But Hacker (2002) has criticized the Pierson model for failing to account for many "subterranean" methods by which welfare policy can be altered. The transformation of victim fund compensation is a unique method of program revision. Benefits were not cut, and programs were not privatized. But victim compensation funds were fundamentally changed. The burden of funding this welfare program was shifted from taxpayers to criminal offenders, and the shift introduced a new element of racial politics. Victim compensation may help the minority community by providing an additional resource for victims who are disproportionately minority. But under the new institutional rules defined by retrenchment, these additional resources now come at a cost: increasing burdens on disproportionately minority offenders.

Although victim programs have grown, most victims of crime do not seek state compensation, with national estimates consistently lower than 10% (McCormack 1991; Sims, Yost, and Abbott 2005). This remains roughly true today, as even in 2001 Harris, Texas Asst. County Attorney wrote to colleagues in the Texas Bar Journal that "even though our clients can benefit from these resources, for some reason, most of the beneficiaries of this law do not apply for, nor receive the available benefits."[121] Crime victim compensation programs have, for the most part, reached an equilibrium. They exist in a non-insignificant form, but they remain a marginal contribution to overall compensation for crime victims. Because victim funds remain a relatively small part of the overall social welfare program, there is a distinct possibility that some of the victim

[121] Wind, Dori A. 2001. Texas' Big Secret: The Crime Victims' Compensation Fund. 64 Tex. B. J. 362

fund legislation serves a symbolic purpose. But amidst the intersectionality of gender and race, it is not entirely clear what signals are sent through the proposal of a victim fund bill.

On one hand, it could be perceived as being supportive of the victim's right movement more generally. The victims' movement has been a powerful one in legislative halls. A U.S. Department of Justice (1998, ix) report remarked that "few movements in the history of this nation have achieved such success in igniting the kind of legislative response that victim rights activists have fostered over the past two decades. In the early 1980s, state laws addressing victims rights, services, and financial reparations numbered in the hundreds. Today, there are more than 27,000 crime victim-related state statutes, 29 state victims' rights constitutional amendments, and basic rights and services for victims of federal crimes." On the other hand, however, because of the intersectionality concerns outlined in the companion paper, legislation aimed at offenders may send the wrong signal to black constituents about support for black male youth.

However these cross-cutting tensions work themselves out, it is clear that ensuring adequate revenue streams will continue to be the most important policy issue for state legislatures and the federal government to wrestle with in the coming decade. Many program administrators I spoke with echoed the concern that "federal cuts to VOCA are becoming an increasing concern."[122] This may coincide with a more general trend toward private-public partnerships in operating prisons and other crime services (Larson Schneider 1999). In both cases, states are looking for new ways to save money without changing program outcomes, e.g. reducing victim benefits or releasing prisoners. But in both cases, too, the racial consequences of the proposals are often overlooked.

[122] New York State Crime Victims Board personal correspondence (January 2008)

That funding is at issue is not a novel development. Calcutt (1988, 834) argued twenty years ago that "a new battle has replaced the old. Now, it is not victims fighting for a place in the system; the current consensus is that they belong. But a new battle now rages between the state and its own limited resources. Vying for these resources are overcrowded jails, rising crime rates, and competing welfare and infrastructure programs."

What is novel in the contemporary politics of victim compensation is the *source* of funding. Contrary to Calcutt's prediction that social welfare programs would compete for victim compensation money, in fact victim compensation has been redefined out of the social welfare category altogether. Currently at both the federal and state levels these discussions center largely on finding new ways to extract money from offenders. At the federal level, the Department of Justice (1998, 347) has recommended that "in cases in which the victim's losses exceed the program's maximum payment, programs should, in addition to expanding caps, intercede with creditors and providers and request that they accept reduced payment on a victim's outstanding bills." Proposed solutions at the state level are roughly the same. In 2005 the Texas Crime Victims' Institute issued a legislative brief entitled, "Avoiding Insolvency of the Texas Crime Victim Compensation Fund."[123] The report offered four options: "Increase fees; Expand fees to specific offenses or to non-offender based fees; Introduce procedures to improve the collection of fees, ... [and] Include CVCF fees in a consolidated court cost."[124] Increased use of general fund revenues (i.e. raising taxes or spending differently) did not make it onto the list. In another study, it was emphasized that "Although the state is currently facing

[123] 2005. Crime Victims' Institute at the Criminal Justice Center at Sam Houston State University. Online: http://www.crimevictimsinstitute.org/doc/no12005.pdf.
[124] Page 4

budget difficulties, it is important to remember that compensation is supported with offender-generated funds, **not tax dollars.**"[125] The boldface, in the original report, accurately captures the present political climate: there is sympathy for crime victims, but not enough to draw from general tax revenues.

With offenders now paying for victim compensation, new debates may ensue about the equity of such a system. In a Congressional hearing in 2006, Rep. Bobby Scott (D-VA) made this point when discussing prison work programs: "if you're talking about general fund money, you're not even discussing whether or not you're affecting defendants' rights or not, and when you start talking, as I've mentioned, the constitutional amendment and balancing rights, you get into a debate. You don't get into a debate if you just put general fund money in there to help the victim." [126] At present, these debates are not being engaged in at the state level. Given the political alignments identified in this paper, however, it seems likely that they will surface. Legislators may be forced to reconsider whether victim compensation should return to its social welfare roots. Should victims receive money because offenders owe it to them or because society has a moral duty to provide this type of social insurance? Should other states adopt the Texas approach and amend their constitution to ensure funding?

Turning to a research agenda, crime victim compensation specifically and crime victims' pains more generally should be the subject of more attention by political scientists. In his 1999 APSA Presidential Address, M. Kent Jennings wrote that, "although manifestations of pain and loss phenomena are treated in various parts of the

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[125] Newmark and Schaffer (2003), p. 56. Emphasis in original

[126] Hearing before The Subcommittee On Crime, Terrorism, And Homeland Security of The Committee On The Judiciary. House Of Representatives, One Hundred Ninth Congress. Serial No. 109–87. February 16, 2006,

discipline, the focus is seldom on pain and loss as a distinctive form of political experience or as one that offers a broad canvas on which the workings of the political process can be depicted."[127] Jennings' call for more political science research on pain and suffering can be answered with more study of crime victims.

A renewed debate over victim compensation could inform welfare retrenchment discussions more generally. In particular, it could encourage new analytical focus on racialized retrenchment. The ability to understand the dynamics of victim compensation – in particular its potential racial and gender implications – is tied to the availability of accurate data on expenditures *and* revenues. Because revenue streams are collected outside of victim compensation offices, legislatures may need to look to other administrative agencies to produce reports on exactly who is paying. It is not uncommon for legislatures to request such data. In Louisiana, for instance, the legislature recently mandated by law that the Commission on Law Enforcement's Statistical Analysis Center engage in a Disproportionate Minority Contact study in relationship to the Juvenile Justice Delinquency Prevention Act (JJDP).[128] Accurate data may provide not only researchers, but legal advocates new evidence to work with. If evidence emerges of significant disparities, constitutional challenges may emerge.[129]

Promising avenues for study would include analysis of smaller samples of these offenders, looking at who pays and how much they contribute. By comparing contributions and awards within a given locality, we can gain a more precise understanding of the nature of compensation redistribution. Additional qualitative work

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[127] Jennings, M. Kent. 1999. "Political Responses to Pain and Loss: Presidential Address, American Political Science Association," American Political Science Review, 93 (March, 1999), 1-13. Page 1.
[128] See: http://www.cole.state.la.us/programs/dmc.asp
[129] To date, these programs have passed constitutional muster in the states, e.g. Florida State v. Champe 373 So.2d 874, 1978.

can also be employed to better understand the discourse surrounding victim compensation and how it has changed over time. While the Event History Analysis provides compelling quantitative explanations of correlations between state variables and policy adoption, it leaves many questions unanswered. As Karch (2007, 51) rightly points out, the event history analysis approach "does not reveal much about the causal processes that link these inputs to the enactment decision" Case study design can uncover these causal processes.

International comparisons also provide opportunities for additional research. The British system, "which has, since its inception, been funded entirely by a grant from general tax revenues" stands in "stark contrast" to the developments in the United States (Greer 1994, 389). Comparisons of the distinct political consequences is warranted. In addition, counties such as South Africa have experienced gender disparity.[130] How different countries address these inequities can serve as a guide for the United States, just as international developments spurred the initial impetus to adopt programs in the 1960s.

Whatever the comparisons – across states, within states, or across countries – the results in this paper suggest that politics must be central to the account. The politics of victim compensation is not usually included in evaluations. For instance, in an otherwise comprehensive review of Maryland's crime victim compensation program, the word "politics" does not appear (Newmark and Schaffer 2003). What's more, some program administrators would like to avoid the politics altogether. Newmark, et. al. (2003, 48) found that "State politics was a prime concern for several administrators; some thought

[130] The issue of gender disparities in contemporary victim compensation programs has also been raised in the context of South Africa's program. See: been raised in the context of South Africa's program. See: Greenbaum. Bryant Leslie. 2005. Compensation for victims of sexual crime in South Africa: Is gender bias obstructing financial redress for victims of sexual violence?

that elevating the program to a cabinet-level position would facilitate efforts to get more funding and would increase their influence on the legislative process. Others wanted to remain independent of the political process; they felt a need for just the resources, staff, and discretion to get the job done." While administrators may dislike politics, and researchers may prefer to focus on evaluation criteria, the political realm cannot be readily overlooked. It is in the political realm where crime victim compensation was created, where it has been amended, and where it will continue to evolve.

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Toward a General Theory of Defendant Class Actions

When and how can defendant class actions serve the goal of maximizing social welfare? This paper attempts to answer this question by articulating a general theory of defendant class actions.

Academic analysis of class action litigation has to date focused almost exclusively on plaintiff class actions.[1] Although there have been a handful of articles and notes concerned with the defendant class action, they do not provide us with a comprehensive theory on which to evaluate and implement defendant class actions.[2] Recent proposals for expanding the use of defendant class action devices have focused primarily on issues arising out of Internet and mass communication markets, without considering more

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[1] See a partial bibliography in footnote 2 in Shapiro, David. "Class Actions: The Class As Party and Client," 73 Notre Dame L. Rev. 913 at 914. "A full bibliography of those publications devoted in whole or substantial part to the use of class actions in litigation would warrant a sizable appendix. But a listing of books and articles I have found helpful - some of which are long and detailed, while others, though short, are incisive and provocative - may serve a dual purpose: to provide a brief, accessible bibliography for those interested in further research and to furnish a single, easily consulted source of cross-reference for later citations in this essay."

[2] Note, Defendant Class Actions, 91 HARV. L. REV. 630, 647-50 (1978). Robert E. Holo. 38 UCLA L. Rev. 223. Comment: Defendant Class Actions: The Failure of Rule 23 And a Proposed Solution. 1990. Debra Lyn Bassett. U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction. 72 Fordham L. Rev. 41, 2003. Robert R. Simpson & Craig Lyle Perra. Symposium: Defendant Class Actions. 32 Conn. L. Rev. 1319. 2000. Scott Douglas Miller. Note: Certification Of Defendant Classes Under Rule 23(B)(2). 84 Colum. L. Rev. 1371. 1984. Note: Statutes of Limitations and Defendant Class Actions. 82 Mich. L. Rev. 347. 1983. Fairness To The Absent Members Of A Defendant Class: A Proposed Revision Of Rule 23. Brandt, Elizabeth Barke, Brigham Young University Law Review, 1990, Issue 3. : Randy Clarke, A defendant class action lawsuit: one option for the recording industry in the face of threats to copyrights posed by Internet based file-sharing systems. (2001). Chicago Kent College of Law. Honors Seminar Paper. Parsons & Starr, "Environmental Litigation and Defendant Class Action: The Unrealized Viability of Rule 23," 4 Ecology L. Q. 881, 911-3 (1975). Vince Morabito. 2004. "Defendant Class Actions And The Right To Opt Out: Lessons For Canada From The United States," 14 Duke J. Comp. & Int'l L. 197. Gross, Debra J. 1991. "Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants," 40 Emory L.J. 611. 82 Mich. L. Rev. 347, Note: Statutes of Limitations and Defendant Class Actions. 1983. Angelo N. Ancheta. 1985, 33 UCLA L. Rev. 283, "Comment: Defendant Class Actions And Federal Civil Rights Litigation." Gordon, 42 Ill.L.Rev. 518 (1947-1948). Wolfson, Defendant Class Actions (1977), 38 Ohio St. L.J. 459. Parsons & Starr, Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23, 4 Ecology L Q 881, 909-910 (1975). Samuel L. Shafner, The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship between Standing and Typicality, 58 B.U. L. Rev. 492 (1978). Theodore W. Anderson & Harry J. Hoper, Limiting Relitigation by Defendant Class Actions from Defendants Viewpoint, 4 Mar. J. Prac. & Proc. 200 (1971). Federal Rule of Civil Procedure 23 Class Action in Patent Infringement Litigation, 7 Creighton L. Rev. 50, 59-60 (1973).

general application.[3]

Most commentators follow a strategy such as Shapiro (1998) in setting aside analysis of defendant class actions with an explanation that, "today defendant class actions are rare and pose special problems of representation and due process that are beyond the scope of this paper."[4] Academics are correct to observe that defendant class actions are rarer and more legally suspect (in the eyes of courts) than plaintiff class actions. But how are we to evaluate this present state of affairs?

Why do defendant class actions receive such little treatment? If they are seen as theoretically untenable or unfair, then the theory needs to be examined. If we ignore defendant class actions because they are fewer in number than plaintiff class actions, the question to ask is if they should be in greater use. If the argument is that in practice they aren't feasible, then system design issues come to the forefront. These issues – theory, frequency, and feasibility – are related, but distinct from one another. The paper will address each of them, focusing most attention on the fundamental principles that should motivate courts to certify defendant classes. The goal of the paper is thus to lay out a

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[3] Netto, Nelson Rodrigues. 2007. The Optimal Law Enforcement with Mandatory Defendant Class Action. 33 Dayton L. Rev. 59. University of Dayton Law Review. Johnson, Nicole L. 2006. Comment: BlackBerry Users Unite! Expanding the Consumer Class Action To Include a Class Defense. The Yale Law Journal. 116 Yale L.J. 217.

[4] Shapiro (1998), supra note 1, at 920. Shapiro also notes that, "As Stephen Yeazell has shown in his informative history of the class action, defendant classes with a pre-existing coherence were often litigants in the early stages of class action development." Nagareda, too, tables the question for another day: " ... Though the Supreme Court has yet to speak definitively to the matter, federal appellate courts have proven relatively unreceptive to defendant classes under Rule 23(b)(2). [citation omitted] ... Whether that chilly reception stands as either a proper reading of Rule 23 or otherwise a sensible conception of the class action is a question that I leave for another day." Richard A. Nagareda The Preexistence Principle and the Structure of ihe Class Action,. Note 131. 103 Colum. L. Rev. 149. (2003). Erichson makes the same move when he writes in a footnote that: "Defendant class actions are permitted by Rule 23(a), and are certified on rare occasion ... [citations omitted] ... This paper, however, considers only plaintiff class actions, which are far more common and offer a better foil for understanding mass non-class litigation. Although mass litigation sometimes involves hundreds of defendants, and defense lawyers often coordinate their efforts through joint defense agreements, the mass collective representations that resemble class actions occur almost exclusively on the plaintiff side." Howard M. Erichson.. Beyond the Class Action: Lawyer Loyalty

general theory of defendant class actions.

In developing this general theory, I argue that courts and commentators have recognized the benefits of aggregation, but have overlooked the informational advantages of the defendant class device. Specifically, I argue that the class device can serve an auction-like function of producing information about defendants' relative contribution to harm. In situations where the market is unlikely to produce comparable information, the relative value of defendant class actions is greater. I delineate a series of general situations in which these informational benefits can be gained.

In developing its theory, the paper argues that three interrelated principles should guide the use and evaluation of defendant class actions:

(1) Forward looking deterrence principle. The forward looking deterrence principle holds that utility of defendant class actions should be measured by its contribution to future deterrence of harms by the proposed defendant class. This stands in stark contrast to an existing strand of jurisprudence that looks backwards and attempts to determine pre-existing relationships (or "juridical links") between members of the proposed defendant class.

(2) Dynamic effects principle. The dynamic effects principle holds that our evaluation of defendant class actions should include all secondary effects such as information generation, feedbacks, price adjustments, new incentive structures, and changing group dynamics. Similar to arguments for dynamic budgeting in the federal budget process, this principle stands in opposition to the position that the court's focus should be solely on the immediate effects for the named plaintiff and defendants.

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and Client Autonomy in Non-Class Collective Representation, Footnote 37. 2003 U Chi Legal F 519. (2003).

(3) Aggregate analysis principle. Taking the dynamic effects principle one step further, the aggregate analysis principle holds that our evaluation of defendant class actions should ultimately rest on an aggregate, society-wide cost-benefit analysis. In situations where deterrence of harm simultaneously involves deterrence of a good, the aggregate analysis principle instructs the analyst to consider the multiple cross-cutting effects at high levels of aggregation.

With these three background principles laying the foundation, the paper makes a series of more specific arguments. Drawing on an analysis of 177 cases where defendant class actions were contemplated, the paper argues that courts have failed to see that plaintiff and defendant class actions should not be distinguished on conceptual grounds, but rather on the different group dynamics that are likely to exist in defendant, as opposed to plaintiff, classes. Specifically, the incentives for intra-class information sharing between plaintiff and defendant class members is likely to be quite different without the class device in place.

In developing its general theory, the paper spends significant time analyzing Hamdani and Klement's proposal for "the class defense," a device that would allow defendants to class themselves with others similarly situated.[5] This paper argues that although Hamdani & Klement's analysis is more thorough than previous work on defendant class actions, it still fails to go far enough toward a general theory. The paper also examines Netto's recent argument for the use of defendant class actions in the case of illegal downloading. Netto provides a defense of aggregation, but like Hamdani and Klement fails to recognize the informational benefits likely to arise out of some even small defendant classes.

In addition to a general discussion, two potential applications for defendant applications are considered at various points in the paper: (1) deterring illegal uses of the Internet, and (2) deterring corporate fraud and illegal dealing. In both contexts, this paper argues that existing literature and jurisprudence generally takes a backwards looking approach, doesn't properly account for dynamic effects, and too often ignores aggregate analysis. The paper argues that failure to follow these principles makes it much less likely that the existing solutions will achieve optimal deterrence. The paper also considers the hard case of copyright infringement, which challenges the feasibility of defendant class actions in cases where no group of defendants is readily identifiable as the group to lead the class defense.

The paper is organized into four sections. The first section of the paper reviews the existing literature on defendant class actions. The second section develops a general theory. The paper then presents a system design based on the general theory, thinking in particular about the application of these systems to the case of illegal file sharing on the Internet, illegal dealings by corporate executives, and the hard case of rampant copyright infringement. The fourth section concludes with thoughts for future research directions in this area.

I. Existing Literature

The existing literature on defendant class actions is comprised of a few journal articles, several Notes, and a handful of additional publications.[6] Much of the literature on defendant class actions has considered how Rule 23 can be applied to defendant class

[5] Assaf Hamdani & Alon Klement, The Class Defense, 93 Calif. L. Rev. 685 (2005)
[6] See list in *supra* note 2.

actions.[7] Miller discusses the "dispute over Rule 23's terminology" and provides an analysis of the text of the Rule.[8] Clarke moves through the language of the Rule in evaluating a potential defendant class action against music downloaders.[9] Holo also proceeds with a formalist analysis, considering how the language of Fed.R.Civ.Proc. 23 applies. Holo, despite the functionalist moves noted before, returns to a formalist conclusion: "Despite *Doss* it is clear that (b)(2) certification of defendant classes is always inappropriate because of the express language of the rule. Courts should not ignore the clear language of the rule in order to better serve their perceptions of justice or fairness."[10] This paper does not focus on formalist concerns such as the best interpretation of the language of Rule 23. Rather, this paper adopts a functionalist framework and attempts to theorize about when defendant class actions will best serve the goals of maximizing social welfare.

In the past few years, articles by Netto (2007), Johnson (2006), and Hamdani & Klement (2005) have begun to address more functionalist concerns, but the literature remains limited.[11] My review of the literature argues that scholars have generally

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[7] Interpretation of Rule 23 has been a challenge for courts and academics alike because Rule 23 is open to varying readings. As Posner noted in Henson v. East Lincoln Township (1987), "the question whether there can be a defendant class in a Rule 23(b)(2) suit cannot be answered by reference to authority." 814 F.2d 410 at 413. Because of this potential latitude, federal appeals courts have moved to reign in the class mechanism. The Second Circuit wrote in that "a rule like the one in Dale Electronics "would enable any action, with the possibility that it might be one of multiple actions, to be certified pursuant to Rule 23(b)(1)(B)." In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1546 (11th Cir. 1987)."

[8] The language in 23(b)(2) is his concern. "Few actions for equitable relief are based on plaintiffs' conduct; rather, plaintiffs initiate such suits in response to defendants' conduct." Miller's analysis of court cases proceeds to consider how they look at the language of the Rule. "Thus, all federal courts that have considered defendant class certification under Rule 23(b)(2) have done little more than superficially reviewed the rule's terms."

[9] Clarke (2001), supra note 2.

[10] Holo (1990), supra note 2.

[11] The literature also remains disconnected from previous studies. The literature, for instance, has yet to be synthesized in a single article. Even the more recent articles have not cited all previous works. In Hamdani & Klement's analysis of defendant classes, they fail to cite several works on defendant class actions, including a short piece from 3 years earlier that had considered defendant class actions in the similar context of file sharing. The uncited work was: Randy Clarke, A defendant class action lawsuit: one option

concentrated too much on proceduralist concerns (e.g. scrutiny of the language of rule 23), and have failed to provide a thorough functionalist analysis. My purpose in reviewing this literature is to identify some of the most discussed market and incentive dynamics associated with defendant class actions. Once these dynamics are recognized, Section II of the paper develops a general theory to incorporate them.

I.A. All defendant classes are not the same

Defendant class actions originate out of the same legal history and Federal Rule of Civil Procedure as plaintiff class actions.[12] Like plaintiff class actions, defendant class actions became more feasible after the 1966 amendments to Rule 23.[13] Although defendant class actions are less frequent than plaintiff class actions, "the use of a defendant class action is not a recent development."[14]

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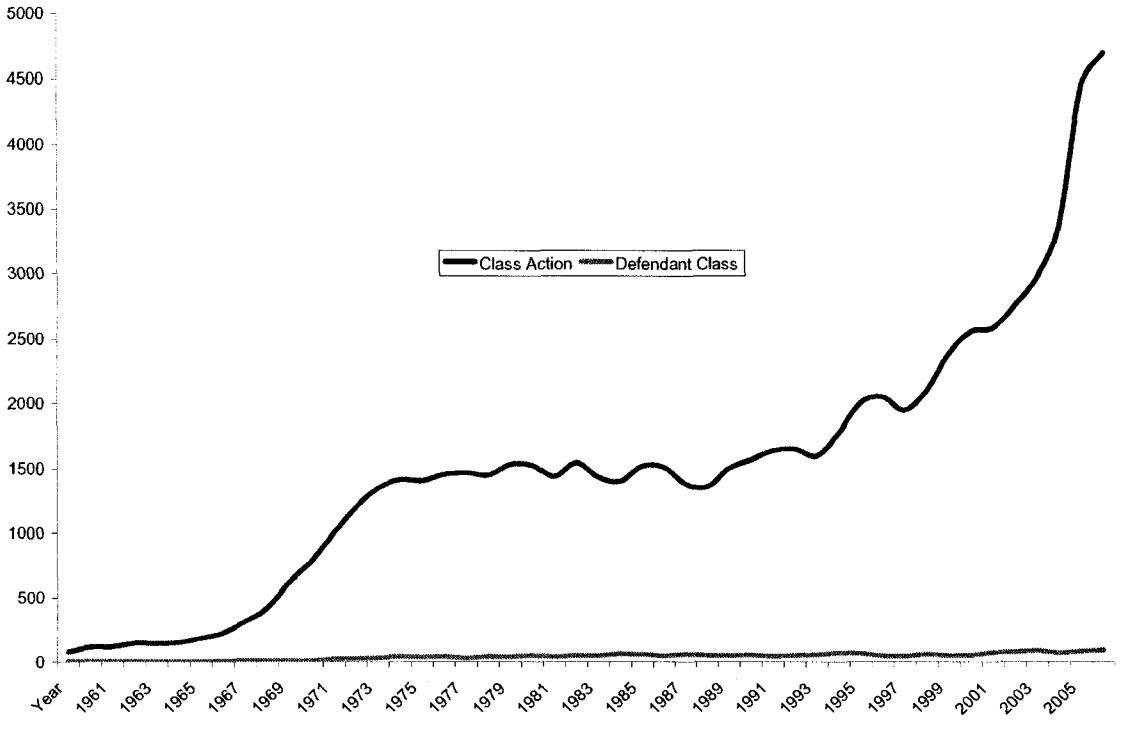
for the recording industry in the face of threats to copyrights posed by Internet based file-sharing systems. (2001). Chicago Kent College of Law. Honors Seminar Paper. http://www.kentlaw.edu/perritt/honorsscholars/clarke.html.

[12] Netto (2007) provides a history of the defendant class action, and its development in the United States.

[13] Dows notes that "Whereas original Rule 23 restricted binding class actions to cases involving "joint or common rights" or actions affecting "specific property," amended Rule 23 relaxed these restrictions, which extended the social and economic uses of the class device." Howard M. Downs. 1993. Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon. Ohio State Law Journal. 54 Ohio St. L.J. 607 at 608. "Although it appears that the modern-day class action was born probably some time during the Middle Ages, there are reports of ecclesiastical proceed-ings against numerous insects and animals dating as early as A.D. 824." 91 F. Supp. 2d 942 at 946. "These early "defendant class actions" "date from a very early period: in A.D. 824, against moles in Aosta; in A.D. 864, bees in Worms; 5 in A.D. 886 locusts of Romagna; and in the same century, serpents of Aux-les-Bains." At 947

[14] 93 F.R.D. 112 At 115. "See, Smith v. Swormstedt, 57 U.S. (16 How.) 288, 14 L. Ed. 942 (1853), and defendant classes appear in recent Supreme Court cases, Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); Lee v. Washington, supra (Court expressly affirms class certification); Reynolds v. Sims, supra."

Figure 1. Number of "class action" and "defendant class" mentions in federal and state cases, 1960-2007



Notes: Graph notes the number of hits for "class action" vs. "defendant class" action cases in LexisNexis database of all state and federal cases. The number of hits does not represent the actual number of certified plaintiff or defendant classes.

Still, the explosion of class action litigation has been overwhelmingly on the plaintiff side. To gain some historical perspective, I conducted a LexisNexis search of all Federal and State cases from 1960-2007 using the phrase "class action" or "plaintiff class". I then re-ran the search with the terms "defendant class action" or "defendant class". These searches, while not providing an accurate count of the actual number of cases contemplating class actions, nevertheless serves as a proxy for the popularity of the class device in the courts. The number of hits per year, presented graphically in Figure 1, give us a sense of the disparity between defendant and plaintiff class actions. While discussion of class actions generally has risen steadily since 1966, growing very significantly in the last decade, contemplation of defendant class actions has remained quite low throughout the forty years.

One straightforward reason for such little use of the defendant class device is current interpretation of Fed.R.Civ.P. 23. Defendant class actions are governed by Rule 23, and thus as a preliminary matter courts look for satisfaction of the four Rule 23(a) prerequisites: numerosity, commonality, typicality and adequacy of representation. For reasons to be discussed subsequently, I believe that these prerequisites prevent many instances of efficient and socially desirable class certification. Nevertheless, courts currently do not depart radically from accepted views of Rule 23 jurisprudence. A recent (2003) decision in the Third Circuit provides a concise summary of the state of the law:[15]

> There is a significant split of opinion as to whether Rule 23(b)(2) ever permits injunctive relief against a defendant class. The Fourth and Seventh Circuits, together with the leading treatise on federal procedure, take the view that defendant classes are not authorized by Rule 23(b)(2). [citations omitted] ... These authorities are generally of the view that the text of 23(b)(2) itself forbids defendant classes. ... On the other hand, the Second Circuit, together with the leading class action treatise, take the view that

[15] Clark v. McDonald's Corp., 213 F.R.D. 198 at 217. (2003)

> defendant classes are permitted by Rule 23(b)(2). [citations omitted] ... The Sixth Circuit appears to agree that defendant classes are permissible under Rule 23(b), but only if individual defendants are all acting to enforce a locally administered state statute or uniform administrative policy. ... The principal justification for permitting defendant classes under Rule 23(b)(2) seems to be that the device can be particularly useful to bind to a court decree a group of defendants who, out of recalcitrance or neglect, have refused to conform their conduct to settled substantive law ... or to eliminate the need for ancillary proceedings against a number of semi-autonomous defendants once the court has made a basic determination of legal issues applicable to all.

The court concluded that, "A review of the foregoing district court decisions reveals that the certification of 23(b)(2) defendant classes has been implemented only tepidly in the Third Circuit, and has met success, if at all, only in cases where the individual defendants of the class are alleged to be acting in conformity with an illegal state statute, rule, or regulation."[16] Commentary from other courts similarly notes that "defendant classes seldom are certified," and if they are certified, "such certification most commonly occurs (1) in patent infringement cases; (2) in suits against local public officials challenging the validity of state laws; or (3) in securities litigation."[17]

To gain a broader perspective on defendant class actions, I examined cases in

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[16] In the particular case, Clark v. McDonald's, plaintiffs sought to class all McDonald's under Title III of the Americans With Disabilities Act. The court did not certify a defendant class because "the individual members of the defendant class have been non-uniform in their non-compliance with such policies." The court speculated that, "Had plaintiffs alleged, for example, that McDonald's and its franchisees adhered to a company-wide policy of providing just one handicapped parking space in restaurant parking lots, or of installing no "grab bars" in restaurant toilet stalls, then one could imagine why injunctive relief--against the defendants as a class--might be appropriate to redress such violations."

[17] Thillens 97 F.R.D. 668 at 675 (citations omitted). *Thillens* went on to read: "Several rules, useful in unilateral as well as bilateral defendant class actions, emerge from In re Gap and similar cases: (1) A defendant class will not be certified unless each named plaintiff has a colorable claim against each defendant class member; (2) A defendant class will not be certified under Fed. R. Civ. P. 23(b)(3) 7 without a clear showing that common questions do in fact predominate over individual issues; 8 (3) The requirement that each named plaintiff must have a claim against each defendant may be waived where the defendant members are related by a conspiracy or juridical link." Thillens at 675 Netto notes that the defendant class action device "is more frequent in lawsuits involving civil rights, disputes challenging constitutionality of state and local law and practices enforced by public officials, and suits against

which a defendant class action was contemplated.[18] Utilizing the LexisNexis database of all Federal & State Cases, as well as previous academic and court citations, I identified 177 cases in which a defendant class was contemplated.[19] These cases were coded for subject. Table 3.1 provides a summary of the subject matter.

The analysis of these cases is consistent with the courts' observations that defendant class actions have been used frequently for securities cases and for constitutional challenges. These two categories alone account for 53% of the defendant class action cases. There are, however, more extensive uses of class actions than typically acknowledged. While declaratory judgments on property rights and benefits are similar to the constitutional challenge and security cases, ten percent of the cases concerned damages.

Table 3.1. Summary of selected cases in which defendant class action was proposed

Case Subject Matter	Number	Pct.
Constitutional Challenge	63	35.6%
Securities	31	17.5%
Damages	18	10.2%
Property Rights	17	9.8%
Benefits - Insurance or Retirement	14	7.9%
Monopoly / Anti-Trust	7	4.0%
Taxes / Fees	6	3.4%
Patent	7	4.0%
Contractual	4	2.3%
Bankruptcy	4	2.3%
Other	4	2.3%
Copyright	2	1.1%

NOTES: Defendant classes were not certified in all cases. The 173 cases coded here were identified through searches in the LexisNexis database of All Federal and State cases. See text for details of search procedures.

unincorporated associations, e.g., labor unions. Defendants' classes have also been certified in other contexts, such as patent infringement, antitrust, securities, and environmental law."

Both academics and judges have paid close attention to the nature of the potential defendant class. Over 25 years ago, The Harvard Note recognized the functional nature of many defendant class actions. "The structure of certain types of defendant class actions virtually guarantees adequate representation. Suits against the members of a labor union or other unincorporated association, naming the officers as representative of the class, provide one example."[20]

When the relationship between defendants is clearly demarcated, the courts have less problem certifying defendant classes. Analyzing when courts are likely to certify defendant classes, Miller finds that "Correctional institutions, county magistrates, county sheriffs, local prosecutors, and voting officials have all been certified and bound as defendant classes."[21] Courts have developed the juridical links exception to understand connections between defendant members of the class. Courts have defined a juridical link "as 'some [independent] legal relationship which relates all defendants in a way such that single resolution of the dispute is preferred to a multiplicity of similar actions.'. Examples of such links include partnerships or joint enterprises, conspiracy, and aiding and abetting, since these terms denote some form of relationship or activity on the part of the members of the proposed defendant class "that warrants imposition of joint liability against the group even though the plaintiff may have dealt primarily with a single member."[22]

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[18] Defendant classes sometimes emerge out of counter-claims in plaintiff class actions. I have excluded them from this analysis, as they are not the focus of the paper.
[19] The search was conducted in February 2008.
[20] Harvard Note (1978), *supra* note 2.
[21] Scott Douglas Miller. Note: Certification Of Defendant Classes Under Rule 23(B)(2). 84 Colum. L. Rev. 1371. 1984.
[22] 658 F. Supp. 492 at 508. Citing Thillens, 97 F.R.D. at 676 and Akerman, 609 F. Supp. at 375. In a Note, Miller suggested the test: "The test suggested by this Note minimizes the dangers inherent in class heterogeneity by certifying only those defendant classes whose members share a relationship predating the

In a similar vein, Holo sees defendant class actions as more likely when the defendants are connected through some superior authority.[23] Holo provides examples of courts certifying defendant classes in securities fraud cases, and suits against groups of state/local officials.[24] It is important to note here that the courts in these cases look backwards to see if a relationship existed between the potential defendant class members.

The courts' analyses in these cases bear some resemblance to the search for a conspiracy or coordinated action. In a 1990 opinion, Federal District Judge D. Brock Hornby recognized this connection in a footnote, in which he quotes Holo and states that:

> ... I leave to the plaintiffs determination of how properly to join the dealers as named defendants. I recognize the complexities in joining a large number of defendants or, as suggested at oral argument, creating a defendant class. Commentators have wondered: 'Can the existence of a conspiracy be proven in a single proceeding representing the entire defendant class, or does proof of a conspiracy depend upon proving each defendant's participation in the alleged conspiracy, an inherently individual question that must be answered separately for each defendant?'[25]

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litigation, and whose role in the litigation derives from their membership in the preexisting group. Courts have characterized such classes as "juridically linked."" ... "When the defendant class is juridically linked these courts miss the mark. In such cases individual relief is subordinate to class relief. Traditional party relationships should be far less significant than the general nature of the interclass dispute." Courts do not always agree on whether sufficient juridical links exist. In *Funliner v. Pickard*, the Alabama Supreme Court focused on a lack of written agreement as determinative: "In Re Activision Securities ... the Court found that the defendants, who were all underwriters and members in a securities syndicate, had entered into a written agreement. ... We do not find the facts of Activision analogous to those of the instant case. There has been no finding that the defendants in this case entered into a written agreement or that they agreed to be bound to a common course of conduct; the trial court did not even note that the plaintiffs alleged a conspiracy among the defendants. Thus, the juridical-link exception found in Activision is missing here." Funliner v. Pickard 2003 WL 21205391 at 39.

[23] Robert E. Holo. 38 UCLA L. Rev. 223. Comment: Defendant Class Actions: The Failure of Rule 23 And a Proposed Solution. 1990. "All the defendants are bound together because of their common obligation to adhere to a particular state law or policy."

[24] "For example, modern securities fraud litigation often involves a plaintiff class of investors suing a defendant class of securities underwriters." Holo also notes the usefulness of defendant class action in the context of state/local officials who are illegally discriminating. "By binding all members of a defendant class to a single judgment, widespread discriminatory practices can be brought to a halt more quickly and efficiently."

[25] Winder Licensing, Inc. v. King Instrument Corp., 130 F.R.D. 392 (1990), Citing Holo, supra note ___ at 258.

One additional rule courts have introduced is a membership ratification theory. "Under this theory dealing with individual proof of illegal conduct becomes unnecessary. Rather, a presumption arises that all members of the association joined in the alleged conspiracy."[26] It is essentially a 'guilty by association with the Association' rule. Functionally, this is telling individual defendants that they should have asked questions up front and should have monitored their association, or otherwise contracted *ex ante* to avoid this liability.[27] Like the juridical links rule, however, the membership ratification rule looks back to earlier relationships between potential class members.

I.B. Financial Incentives & Free Riding

The most often noted incentive problem with defendant class actions is the lack of an incentive for defendant class representatives to fully litigate. This basic insight was offered over 25 years ago: "Defendants generally oppose motions to certify them as class representatives. The major reason for their opposition presumably is a desire to avoid a possible increase in litigation expenses if they represent a class, in light of the fact that no source of funds is available to pay for any additional costs."[28] The point has been made subsequently in most discussions of defendant class actions.[29] As discussed by Hamdani and Klement, when the defendant class wins, "the defendants owe nothing to the plaintiff

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[26] Holo, *supra* note 2.
[27] Phelps,
[28] Harvard Note, 1978, *supra* note 2.
[29] E.g. Netto (2007) writes that "There are three foremost concerns related to the choice of adequate representation in defendant class actions: (i) the choice of the representative is made by the plaintiff; (ii) the absence of incentive for any defendant to bear the expenses of defending a lawsuit on behalf of the entire class when the costs of litigation are disproportionate to the representative party's stake; and (iii) the difficulty of compensating class counsel for the benefits conferred upon the class." Brandt (199) writes that: "In comparison, a defendant class representative will seldom be able to take advantage of the same fee incentives as a plaintiff representative. ... Consequently, the defendant representative must be prepared to assume some, if not all, of the economic burden of the litigation."

– no money changes hands."[30] Thus, there is no money to pay counsel for the class representative because no single member of the defendant class has the proper financial incentives to litigate the defense fully.[31]

The incentive problem is connected to a free-rider problem: defendant class members who are not litigating stand to benefit without cost from a successful class defense.[32] Unlike plaintiff classes, where litigation costs can be subtracted out of a settlement, there is not as clear a way to extract money from passive defendants in the class.[33] Analysts have been grappling with this problem, and how to correct it, for many years.[34] Dwelling on the comment that it would be difficult, if not impossible, to "devise a method to tax such 'free riders,'" the 1978 Harvard Note observes that:

> assuming that all the class members or collateral estoppel beneficiaries could be identified, there would still be problems of determining how much to charge each individual. Only the common issues will have been litigated if the defendant class prevails, and the court will therefore have no knowledge of the magnitude of total liability avoided or of the proportion attributable to each class member. ... the class members would need to be taxed according to their potential liability, a figure difficult if not impossible to determine.

Aware of the incentive problems with defendant class actions, some courts have refused

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[30] Hamdani & Klement, *supra* note 6 at 8.
[31] An important exception, discussed later in the paper, is when there are 'dominant players' in the class.
[32] The Harvard Note observes that, "there might seem to be a certain unfairness to the defendant class representative even if his defense of the class entails no extra costs; if the common question is resolved in favor of the defendant class, absentee members will have received a benefit at the representative's expense without having to compensate him for it." See, *supra* note 2. Miller, too, observes: "Further, party heterogeneity increases the legal fees and administrative costs associated with coordinating a defense. The defendant class representative cannot expect to recoup these additional costs."
[33] The ability to correct for the free-rider problem, as discussed in Section II, depends heavily on the nature of the group dynamics within the defendant class.
[34] Footnote 96. The Note argues for expanded use of what it terms "expanded common question defendant class action". They suggest that courts frame the question "not in terms of what each individual class member owes but rather in terms of what formula should be used to allocate the total liability." Unfortunately, after this interesting discussion, the Note suggests that, "of course, in any of these 'fully litigated' defendant class actions a final stage of individualized hearings is needed – whether conducted along with the class suit or entirely separately from it."

to certify defendant classes on the grounds that the parties representing the class do not have the proper incentives to litigate fully.[35] This issue of free riding and funding optimal defendant class representation is a topic I take up at length in the system design section of the paper.

I.C. Funding defendant class actions

Recognizing the free-rider problems, several funding schemes have been proposed. Some of these proposals involve a tax-like levy on defendant class members. To fund the defendant class action, the court could choose "to tax the expenses attributable to the class action to the plaintiff, to tax them to the absentee defendants, or to refuse to certify the class on any questions not perfectly common to the class members".[36] This proposed solution is to tax the absentees "with a proportionate share of at least the class-action-related expenses of the named defendant".

A common alternative is to find some organization with deep pockets and make them a party as well.[37] Plaintiffs brining the suit are typically in a position to identify the deep pocket class members on the other side. In the securities case *Northwestern National v. Fox*, the plaintiffs sued the class of Fox partners in addition to Fox itself "in order to assure recovery of the substantial judgment likely to issue if plaintiffs succeed in

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[35] See, e.g., National Asso. for Mental Health, Inc. v. Califano, 230 U.S. App. D.C. 394 (1983). Here, defendant university U.S.C. said explicitly in testimony that, "it was 'unwilling to expend the effort and funds necessary to defend itself in this action, let alone represent the interests of a large group.' ... The school's position was supported by the affidavit of one of its administrators, who stated: 'Due to the minimal amount of its alleged liability in this action, the University of Southern California does not intend to defend this action on behalf of itself or any others.'".

[36] Harvard Law Review Note (1978).

[37] Holo's solution is for the judge to bring in some defendant with the money, "Nevertheless, the judge may, in her discretion, assign additional defendants to act as corepresentatives, thus lessening the financial burden on any one defendant and at the same time preventing any defendant from shirking his duties." The Note makes a similar point. Adequate representation (aligning incentives) might be accomplished in some instances by requiring "the plaintiff to name as an additional defendant a trade organization whose membership coincided with that of the class."

proving their claims."[38] Courts have recognized that financial stakes will motivate defendants to mount adequate defenses. In *Consolidated Rail Corporation v. Hyde Park*, the court found that "by including as [defendant] class representatives the 10 highest tax collectors from Conrail ... the district judge created a fair group of representative parties who presumably have the greatest financial motivation to defeat Conrail's case."[39]

Where plaintiffs don't already include deep pockets defendants, the court can also find the necessary parties. Holo suggests that, "a court can require a plaintiff to join additional defendants as class representatives and can also permit associations or other institutional representatives to join as representative defendants." In other words, the court can look to kick a private market into motion to fund the class defense. In *Weinman v. Fidelity Capital Appreciation Fund*, the court did just this, naming Fidelity as the defendant class representative against Integra because the Fidelity Capital Appreciation Fund was the largest Integra shareholder when Integra spun-off (thus bringing on the litigation).[40]

I.D. Aggregation, Opt-Out, and Deterrence

The benefits of aggregating claims in order to enjoy economies of scale is discussed at several points in the literature. Netto writes that amongst courts and academics today, "it is a general consensus that the primary advantage of class actions is to override the transactional cost of low stake claims, which would not be individually prosecuted because the costs of litigation."[41] The primary point, as noted by Holo, is that, aggregation "allows the defendants to pool their resources, decide who among them

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[38] 102 F.R.D. 507 at 510.
[39] 47 F.3d 473 at 484 Consolidated Rail
[40] Weinman v. Fid. Capital Appreciation Fund. 2001. 262 F.3d 1089.
[41] Netto, p. . The issue is also discussed at length by Hamdani & Klement (2005).

would be the most fit representative, and present a strong, united front against their opponents."[42] The spirit of these comments, in favor of aggregation, is the same spirit animating Rosenberg's arguments in "Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't."[43] In Rosernberg's analysis of plaintiff class actions he recognizes that defendants are able to enjoy the benefits of scale in defending themselves, while plaintiffs (unless they have a class device) cannot. Here, in the case of defendant class actions, plaintiffs start with pooled resources that defendants don't. The defendant class action serves as a tool to even up the odds.

The majority of analysis on defendant class actions has argued for an opt-out option based on fairness and due process concerns.[44] But the cost of opt-out (and unraveling the defendant class) has been noted. Simpson and Perra explain the rationale for not allowing opt out: "ordinarily no one wants to be a defendant, so that defendant class members who have an opportunity to opt out can be expected to do so. . . . Massive opt-out undermines the breadth and finality of judgments, increases the possibility of duplicative litigation, and lessens the probability of giving plaintiffs full relief."[45]

The empirical data on how the opt-out option is used in practice is lacking. As

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[42] Holo, supra note 2.

[43] Rosenberg, David. "Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't," 37 Harvard Journal on Legislation 393 (2000).

[44] See, e.g., Brandt (1990), supra note 2. Netto (2007) notes that "In fact, some circumstances will actually create incentives not to opt out of a defendant class. For example, a plain-tiff who commences a defendant class against a group of underwriters of a new stock offering may also threaten and be able to commence litigation against each of the underwriters individually. Given the certainty of having to make a choice between remaining in a defendant class or defending individual litigation, the economics of a joint defense con-siderably outweighs those of defending an individual action, and defendant class members would have an incentive to remain in the class" at 98.

[45] Simpson & Perra, supra note 2 at ___. Holo, though he doesn't stick with it, actually considers proposing a no-opt-out rule as well: "One more possible modification would be to eliminate the 23(c)(2) opt-out provision for proposed members of a defendant class. Some courts have worried that any defendant named in a 23(b)(3) defendant class action would promptly opt out, thus rendering the class action device useless, but this modification would successfully resolve that problem." In the next line, he moves away from this suggestion, but the logic was there.

observed by Morabito, "there is little information available concerning the percentage of class members who have opted out of defendant class proceedings, after being offered the opportunity to do so following the certification of defendant classes." Morabito found only three U.S. cases in which opt-out rates were discernible: "3 defendants opted out of a class of 91; no one exited another defendant class; and in a third proceeding, 115 defendants opted out."[46]

The deterrence objectives of class action litigation have also been raised several times in the existing literature.[47] In the deterrence view, "the primary purpose of class litigation is not so much to redress injured plaintiffs as to deter wrongful conduct on the defendant's part by forcing him to disgorge his unlawful gains or by restructuring his behavior through the use of injunctions."[48] Hamdani and Klement have focused extensively on deterrence, and their proposal will be discussed more in depth in the next few sections.

I.E. Formalist and Proceduralist Concerns

While there are strains of functionalist thinking throughout the literature on defendant class actions, still the bulk of the literature grounds itself in proceduralist concerns. Although some of these authors acknowledge deterrence objectives, they fall back on a position articulated by Miller, that "the usual incentive for defendant class

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[46] Morabito, p. 227.

[47] Simpson & Perra suggest the possibility of using defendant class actions to solve the problem of holding the firearms market liable. As they ask at the outset, "how can municipalities and other 'representative organizations' summon each allegedly culpable firearms industry player to the table? How can these suits be structured to ensure that each participant in the manufacturing, advertising and distribution channels is held accountable for its tortious behavior? How can a plaintiff, who has suffered damages potentially caused by 191 different firearms manufacturers, hundreds of wholesalers and over 80,000 retailers nationwide, join these potential defendants in a manner that ensures that each suffers its proportional share of damages caused?" They structure their article, however, around the language of Rule 23, demonstrating how the four requirements can be met – not discussing why it would be a good thing to have defendant class actions.

certification rather is not economic utility, but social justice." This focus on social justice is accompanied by a focus on due process and fairness.

In the context of defendant class actions, the concerns of commentators and courts are often those of due process.[49] The court noted in *Thillens* that "fundamental fairness to absentee members must be balanced against judicial savings, [and] where representative adjudication occurs pursuant to a defendant class, due process concerns not inherent in plaintiff class actions arise. The crux of the distinction is [that] the unnamed plaintiff stands to gain while the unnamed defendant stands to lose."[50] The court in *Gaffney v. Shell* arrived at the same point, arguing that "in the final analysis, the propriety of a class action -- plaintiff, defendant or both -- depends upon a finding that due process will be accorded the members of the class who are not before the court."[51] I will argue in the next section that courts' analysis of gain and loss should include not only unnamed parties, but also future potential parties with deterrence in mind. Fairness should be the result of *ex ante* analysis.

Exceptions, such as the juridical links exception just discussed, are used by courts to address due process concerns.[52] Brandt, trying to reconcile defendant class actions with

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[48] Harvard Note, 1978, *supra* note 2.

[49] Netto points out that, "mandatory class actions aggregating damages claims implicate the due process principle and "'deep-rooted historic tradition that everyone should have his own day in court'" Netto at 105-6. In *In re the Gap Stores*, the cited Peter Parsons and Kenneth Starr, who "reviewed the use of defendant class actions in environmental litiga-tion and ... carefully explored the due process problems posed by defendant class adjudications." Parsons and Starr "observed: 'The basic constitutional dilemma of defendant class actions arises out of the due process rights of absent members of the defendant class. Fundamental to due process is the notion that the authoritative determination of a personal liability, obligation or right of a defendant requires the court's in personam jurisdiction over that party.'" 79 F.R.D. 283 at 290-1. See Downs 1993 for further discussion of due process in class actions.

[50] Thillens at 674. Citing See, e.g., Marchwinski v. Oliver Tyrone Co., [**9] 81 F.R.D. 487 (W.D. Pa. 1979).

[51] 19 Ill. App. 3d 987 at 991

[52] "A defendant class member would consent to representative adjudication only if he perceived, or might reasonably be expected to perceive, that the savings resulting from another party's representation would exceed any liabilities -- monetary or otherwise -- resulting from the representation. An absent defendant

due process concerns, proposes a complicated measure.[53] Fairness (usually to absentee defendants) is another way of discussing due process.[54] Taking a position that this paper will argue is mistaken, these fairness concerns are rooted in the belief that we should treat class actions in the same way we would treat 1-to-1 litigation. Bassett argues that:

> there is no reason to believe that a court has the power to issue a binding judgment upon a defendant - even if that defendant is part of a defendant class - where that defendant has no nexus to the forum and her purported consent to suit is based on her failure to opt out of the class. Accordingly, there is no reason to treat members of a defendant class any differently than a defendant in a non-class lawsuit.[55]

Due process issues can be summarized in what one court has labeled the "Rubik Cube" puzzle: "each plaintiff does not have a cause of action against each defendant."[56] When faced with this situation, courts may be hesitant to certify the defendant class because they look backwards for pre-existing connections.[57] I argue that this view, articulated in different forms by most courts, fails to recognize the intra-group dynamics that a class

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would only prefer representative action where he perceived himself as adequately represented. The perceived probability of loss would then be no greater in representative than in individual adjudication, but there would be a net savings of litigation costs. Only if the defendant class is juridically linked would absent members be so confident."

[53] "In order to protect the due process rights of absent defendant class members, Rule 23 should be revised in two respects. First Rule 23 should ensure that absent defendants will not be bound by a class judgment unless they receive actual notice of the pendency of the action. This protection should be extended so that it applies not only to actions under 23(b)(3) but also to defendant class actions maintained under 23(b)(1) and 23(b)(2)."

[54] The Harvard Note, for instance, introduces the subject by arguing that defendant class actions should not be "purchased at the expense of fundamental unfairness to persons who are not before the court that binds them."

[55] Bassett continues that this means "that minimum contacts with the forum state would be necessary in order to bind the defendant class member to the judgment, and if minimum contacts were not established, the class judgment would be unenforceable with respect to that defendant."

[56] The Rubik Cube problem can be considered "in terms of standing, typicality, or commonality," but underlying it is concern with due process. 2007 U.S. Dist. LEXIS 70339 at 9. The court in *Thillens* noted the same thing: "There is great judicial reluctance to certify a defendant class when the action is brought by a plaintiff class. The primary concern with bilateral actions, antitrust or other types, is a fear that each plaintiff member has not been injured by each defendant member." *Thillens* at 675.

[57] In *LaMar* in 1973, the Ninth Circuit considered the issue of "whether a plaintiff having a cause of action against a single defendant can institute a class action against the single defendant and an unrelated group of

device introduces. I therefore argue that in cases where there are sizeable enough informational and incentive benefits to be gained from classing a group of defendants, then there is *every* reason to treat members of the class differently than we would treat them if they were a stand-alone defendant. Commentators who fail to see the reason for this distinction may miss it because they are too caught up in the language of Rule 23. Lilly (2003) spends considerable time on issues of due process and the constitutionality of defendant classes under Rule 23, while ignoring functionalist concerns such as what aggregate result might come from a particular defendant class.

II. Developing a General Theory of Defendant Class Actions

With the groundwork now laid, the paper picks up on its three central principles, and develops a general theory of defendant class actions.

II.A. Forward Looking Deterrence

To build a theory of defendant class actions, a preliminary question about the purpose of tort law must be addressed. This paper, like Netto (2007), adopts the initial position taken by Fried and Rosenberg, that "tort liability should be seen as part of the imperfect and partial system serving the goals of compensation and deterrence."[58] This approach follows a line of scholarship that focuses on maximization of social welfare as the goal of law generally, and of tort law specifically.[59] In the context of mass torts and

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defendants who have engaged in conduct closely similar to that of the single defendant on behalf of all those injured by all the defendants sought to be included in the defendant class." LaMar at 462.

[58] Fried, Charles & Rosenberg, David. (2003). Making Tort Law: What should be done and who should do it. American Enterprise Institute. The authors discuss these three functions at length in Chapter 3, and justify them in Chapter 2. In addition to deterrence, Fried and Rosenberg identify "optimal insurance, and related appropriate redistribution of wealth" as goals of the tort system. *Infra* note 46 at 18. I consider redistribution and insurance issues in Section III.A.1.

[59] Major works in this field, as noted in footnote 2 of David Rosenberg. *Response: Mandatory-Litigation Class Action: The Only Option For Mass Tort Cases*. 115 Harv. L. Rev. 831. (2002).are: Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); A. Mitchell Polinsky, An Introduction to

collectivized adjudication, the paper follows Rosenberg's (2002) premise that, when government and first-party insurance are not adequate, a "need exists for 'optimal tort deterrence' to prevent unreasonable risk of accident and for 'optimal tort insurance' to cover residual reasonable risk."[60] This position has not gone uncontested. Scholars such as Richard Epstein and Richard Nagareda have criticized this approach in exchanges with Rosenberg and others.[61] Because the larger debate has been carried out elsewhere, this paper will not rehash it here.

The Fried and Rosenberg approach rests on an appreciation of the *ex ante* perspective.[62] The *ex ante* perspective is one which seeks to understand an individual's preferences "under conditions of uncertainty, at a point in time before the person knows which of possible alternative fates will come to pass."[63] In this *ex ante* state, "each individual internalizes all possible fates of all people."[64] Because the individual internalizes all possible states of the world, the individual rationally desires a legal system that maximizes welfare over all the possible situations the individual could find himself in. In a 2002 article, Rosenberg emphasized the importance of the *ex ante*

Law and Economics (2d ed. 1989); Richard A. Posner, Economic Analysis of Law (5th ed. 1998); Steven Shavell, Economic Analysis of Accident Law (1987); and Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961 (2001).

[60] Rosenberg (2002), *supra* note 46 at 831.

[61] See, e.g. Richard A. Nagareda, Autonomy, Peace, and Put Options in the Mass Tort Class Action, 115 Harv. L. Rev. 747 (2002). Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & Com. 1, 2-5, 49-50 (1990). Richard A. Epstein. Class Actions: Aggregation, Amplification, and Distortion. 2003 U Chi Legal F 475. (2003). In criticizing Rosenberg's position, Epstein argues that, "Even if we reject (as current law manifestly does) the view that ex post compensation is irrelevant, powerful implications still flow for the governance of class action litigation. This position presupposes that the judgment should be collective and not individual, such that a person who objected to the strategies pursued by the class would be required to remain a class member on the ground that the economies of scale in running the class action would leave him better off than before. There is obviously a powerful paternalistic streak in this argument." At 494.

[62] Other than this paragraph's brief discussion, the paper elaborate in detail on the details of the Fried & Rosenberg framework. Those details can be found in Chapter 2 of their book, *supra* note 45.

[63] Fried & Rosenberg, *supra* note 45 at 14.

[64] Id at 15.

perspective as central to the argument for mandatory class action for mass torts:

> Essentially, this argument addresses the fundamental disjuncture between an individual's preferences ex ante - that is, before knowing whether one will suffer tortious injury, and if so, how strong the related claim will be - and ex post - after learning the 'luck of the draw.' Understanding how individual preferences change over time, particularly as individuals acquire knowledge, is central to the argument for mandatory mass tort class action.[65]

In the context of defendant class actions, the starting point for an *ex ante* approach is recognizing that *ex ante* an individual doesn't know whether he/she will be on the plaintiff or defendant side, or whether he/she will be part of a large firm or in a large class of individuals. Thus, in the *ex ante* world, a rational, social-utility maximizing individual would have no reason to favor either 'plaintiff' and 'defendant' classes. In the context of music downloading, for example, an individual doesn't know if they will be an RIAA employee, a musician, a downloader of copyrighted music, a non-downloading user of the Internet, or some other individual that might be affected by a class action against those who download copyrighted music. In the context of corporate fraud, an individual doesn't know if they will be on the corporate board, working in the corporation's mailroom, holding stock in the corporation, or purchasing services produced by the firm. In the context of mass copyright violation (e.g. hundreds of thousands of pirated DVDs being sold across the globe), one doesn't know where in the supply chain they will be located.

Hamdani and Klement's analysis fails to consider this *ex ante* position. As a result, Hamdani and Klement's core thesis does not plant its roots as deeply as it could. Hamdani and Klement's "core thesis is that the fundamental justification for

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[65] Rosenberg (2002), *supra* note 46 at 831.

consolidating plaintiff claims applies with equal force to defendants."[66] The fundamental justification is, "in the plaintiff case, the cost of bringing a suit might dissuade victims from suing wrongdoers [and] ... this failure to litigate undermines justice and deterrence."[67] This fundamental justification, however, is not so deep. Justice and deterrence *may* be undermined if plaintiffs can't bring their case – but it may also be the case that something other than a plaintiff class action will generate optimal deterrence for similarly-situated defendants. We need a more general theory to understand in what contexts the defendant class action is likely to be effective for achieving optimal deterrence.

The lack of a general theory is evident in Hamdani and Klement's choice to ground their analysis in the "standard justification for class actions."[68] The authors implicitly acknowledge their choice of the standard justification in a footnote. Citing the work of Rosenberg, they note that "The standard justification for class actions focuses on claims for insignificant amounts that would not be filed individually. There are those who argue, however, that class actions are desirable even for larger claims as long as the common defendants enjoy economies of scale."[69] Beyond this cite, however, the authors don't discuss the Rosenberg position and why even large claims class actions may be desirable. As in previous articles on defendant class actions, Hamdani and Klement jump into their analysis without a thorough discussion of first principles.

Johnson's recent extension to the Hamdani and Klement argument also fails to

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[66] Hamdani & Klement, *supra* note 6 at 5.
[67] Id, p. 5.
[68] Id., p. 5.
[69] p. 5. The authors cite Rosenberg, David. Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harvard Law Review 831 (2002). and Note: Locating Investment Asymmetries And Optimal Deterrence In The Mass Tort Class Action, 117 Harv. L. Rev. 2665, (2004).

adequately consider fundamental principles. Johnson "takes the Hamdani and Klement proposal a step further and suggests that the class defense has a more expansive applicability, not only for achieving economies of scale and overcoming collective action problems in litigation, but perhaps more importantly in obtaining settlements."[70] The new settlement possibilities produced by aggregation of claims are important, but we need more general discussion of when such possibilities are likely to occur (and thus when courts should look toward defendant class certification).

Nelson Netto has advanced the defendant class argument on the basis of Rosenberg and Fried's theory of collectivizing claims. Netto argues that "the optimal economy of scale for investment in litigation requires the compulsory reunion of the defendants and their defenses."[71] Similar in spirit to Netto's argument, I start from the *ex ante* perspective and build a series of propositions about what defendant class actions should seek to do.

In light of great uncertainty in the *ex ante* world, what can we say about individual preferences for design of a legal system? We can say, first, that an individual will desire to maximize his utility *over all possible states of the world.*[72] Since an individual could end up either as defendant or plaintiff, this leads to the corollary that in the context of class actions, the individual will seek to maximize utility by maximizing *total utility of defendant and plaintiff.* In the case of traditional plaintiff class actions, this means that we are not only concerned with the reduction in harm to the plaintiff class, but

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[70] Nicole L. Johnson 2006. BlackBerry Users Unite! Expanding the Consumer Class Action To Include a Class Defense. The Yale Law Journal. 116 Yale L.J. 217 at 218. Johnson notes that "In the recently settled suit between NTP and RIM, a consumer class defense would have allowed consumers, including large corporate firms that rely on BlackBerry devices for critical communication, to protect their in-terests and take action in their own defense. BlackBerry users might have obtained an earlier settlement or might have been assured that they could reach a settlement regardless of a standoff between the parties" at 224.

[71] Netto, supra note ___ at 98.

also the *cost of reducing harm* as paid by the defendant. In the case of defendant class actions, the same logic is applicable: we should consider not only the harm/risk-reduction to the plaintiff; but also the cost of precautions to the defendant class.[73]

Second, we can say that defendant class actions should be considered in light of their future deterrent effect. I label this '*forward looking*' to distinguish it from jurisprudence and commentary that looks 'backward' at pre-existing links between potential defendant class members. My position can also be seen, however, as going 'all the way back' to the *ex ante* position. Regardless of which conception one uses – forward looking or a return to the *ex ante* world – the important point for defendant class actions is that we are not concerned with *existing or previous* relationships between individuals/firms, but rather on the *likely future relationships between similarly situated individuals/firms that will result from a particular legal ruling.*[74]

A corollary of this second point is that courts should not be concerned about whether or not there was actual conspiracy or concerted action between individuals/firms in the defendant class. Instead, courts should ask: Will classing this group of individuals/firms be more effective for optimal deterrence than would the alternatives of individual proceedings or joining under Fed.R.Civ.P. Rule 20? If the answer is Yes, then the court should certify the defendant class. If the answer is No, then the court should deny certification. Defendant class actions should be employed only when they are the most effective legal means for maximizing social welfare.

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[72] Fried & Rosenberg, *supra* note 45 at 17.

[73] In principle, this bears some resemblance to Leonard Hand's famous negligence calculus: finding someone negligent when B < PL, where B = the "burden of precautions", P is the "probability of harm" and L is the "gravity of harm". Both formulas emphasize a type of cost-benefit analysis.

[74] Current or previous relationships between individuals and firms would be important to the extent that they help us predict what would happen in the future. But they should not be, in and of themselves, the standard for evaluating a defendant class.

By posing the question this way, the analysis invites a comparison to joinder. Rule 20 of the Federal Rules of Civil Procedure says that defendants can be joined if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(A)(B). Courts look to the number of defendants to determine whether joinder is impracticable. Presently, if the number of defendants is greater than forty, then joinder will generally be presumed to be impracticable.[75] Courts often look to class devices as an alternative if joinder is not possible. As the U.S. District Court reasoned in *Flying Tiger v. Central State* (1986), "before the Court takes the drastic step of certifying a defendant class; however, the joinder alternative should be investigated more thoroughly."[76] While courts have made the focus of their joinder analysis the number of defendants, I argue in the next section that we should compare the two options on the basis not only of numerosity, but of more general group dynamics.[77]

My proposed approach also makes clear that the defendant class action is not necessarily, as seems to be suggested by Hamdani and Klement, a device to go after the

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[75] In Monaco v. Stone (1999), the U.S. District Court noted that "the question of whether joinder is impracticable depends on the particular circumstances of the case, [and] a higher threshold number of members is required for a plaintiff class than for a defendant class. Luyando, 124 F.R.D. at 56 (citing 1 H. Newberg, New-berg on Class Actions, 2d ed., § 4.55 at 395). ... a class of more than forty members raises a presumption that joinder is impracticable. See Robidoux, 987 F.2d at 936; see also Marcera v. Chinlund, 91 F.R.D. 579, 583 (W.D.N.Y. 1982) (defen-dant class of thirty-five sheriffs satisfies numerosity requirement)." 187 F.R.D. 50 at 66.

[76] 1986 U.S. Dist. LEXIS 17409 at 16.

[77] This distinguishes my analysis from Netto, who writes that "The defendant class action, certified on behalf of the defendant requirement, is superior to mandatory joinder, because mandatory joinder is impractical when the number of defendants is extent and a defendant class action does not need any drastic modification of actual statutes." Netto cites to Edward Hsieh, Student Author, Mandatory Joinder: An Indirect Method for Improving Patent Quality, 77 S. Cal. L. Rev. 683 (2004) and Charles Silver, Comparing Class Action and Consolidations, 10 Rev. Litig. 495 (1991).

'little guy'.[78] In deciding whether or not to class the corporate executives of WorldCom, for instance, the approach advocated in this paper might well lead to the conclusion that they too should be classed. The reason would *not* be that they are too numerous or incapable of being joined under other rules, but rather that treating them as a class would better deter similarly-positioned executives in the future. If the executives know they will sink or swim as a class, they have greater incentive to internally check up on one another. This would create a mechanism of self-governance that should improve deterrence. Forward-looking deterrence is not concerned with parceling out causation within the group. Critics might argue at this point that such an approach will fail to make the proper causal connections between harm-causing parties' actions and sanctions. To see why this will not be the case, we need to consider the second guiding principle: dynamic effects.

II.B. Dynamic Effects

The principle of dynamic effects says that we should consider all likely effects of the court's legal ruling. In the context of defendant class actions, this means that we should pay particularly close attention to the *group dynamics* that would operate if a court decided to class a group of defendant individuals/firms. One of the most important, but overlooked, dynamic effects of the class device is the creation of a new market for information generation. Drawing on the work of Michael Abramowicz, who has reviewed and made the normative case for integrating market mechanisms into legal proceedings, I focus in this section on how incentive structures change when individuals are made

[78] While not explicit on this point, the tone of Hamdani & Klement's article is that small, dispersed defendants need a device to help them fight a potentially over-bearing plaintiff. The language of their article is not neutral in this respect. For instance, in building what seems to the specter of groups like the RIAA, the authors write that, "Most alarmingly, plaintiffs can act strategically to exacerbate the problem confronting each plaintiff in order to ensure that defendants have no incentive to challenge them in court." At 15.

members of a class.[79]

II.B.1. Group Dynamics

In determining whether it is marginally beneficial to class a group of individuals/firms as a defendant class, we have to know what the 'baseline' group dynamic are, i.e. if the court did nothing to class the defendants, how would they likely act in the face of individual lawsuits? Up to this point in the paper, the proposed theory has laid out only similarities between plaintiff and defendant class actions. This is consistent with the argument that at a conceptual level, there is little to distinguish plaintiff and defendant classes. In contrast to the conceptual/theoretical similarities, however, the paper now argues that at the level of group dynamics, defendant and plaintiff class actions have markedly different baselines. Specifically, I argue that individual plaintiffs are (without any judicial intervention) less likely than individual defendants to establish a 'market relationship' with others in their group.

I define *market relationship* as broadly as possible. I take market relationship to mean any sort of relationship in which individuals/firms act (or react) either directly or indirectly in response to actions (or reactions) by other individuals/firms. This concept of market relationship considers not only traditional market elements such as collective action and price adjustments, but also social psychological elements such as herd mentality and the fundamental attribution error (where we fail to recognize the effects of situation in determining human behavior). It also emphasizes the ability of the market to produce information, most importantly information on relative contributions to harm by defendants or relative harm experienced by plaintiffs.

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[79] Michael Abramowicz. 1999. The Law and Markets Movement. American University Law Review. 49 Am. U.L. Rev. 327.

Defendant class actions have been promoted in the past few years as a solution to dispersed defendants each generating a small amount of damage through new technological means. Netto (2007) argues, for instance, in favor of mandatory defendant class actions as a response to mass production and a "technologically savvy society with the propensity for massive unlawful behavior."[80] While defendant class actions may be useful in this context, it is important not to view the defendant class device narrowly as a response to technological innovation. A defendant class may be useful more generally as an auction-like mechanism to produce information about relative contributions to harm.

Auction mechanisms already are in use in a variety of legal contexts.[81] Auctions and exchange can serve important informational purposes. For instance, if plaintiffs are allowed to sell their claims to bidders, "the price at which such shares trade in the secondary market provides an indication of the plaintiff's expected recovery at trial and thus may dampen parties' abilities to puff in pretrial settlement bargaining."[82] In the context of patent buy-outs, Michael Kremer has proposed that an auction be used to determine the value of the patent.[83] Applying similar reasoning to defendant class actions, the class action device may be useful as a means of generating information about relative harms. [84] That information can then be used for settlement purposes.

To illustrate how this information production might play out, consider a simple

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[80] Netto (2007) at 59.

[81] Michael Abramowicz. 1999. The Law and Markets Movement. American University Law Review. 49 Am. U.L. Rev. 327. Over twenty years ago, Marc Shukaitis proposed a market for personal injury tort claims. Marc J. Shukaitis. A Market in Personal Injury Tort Claims. The Journal of Legal Studies, Vol. 16, No. 2. (Jun., 1987), pp. 329-349.

[82] Michael Abramowicz. 1999. The Law and Markets Movement. American University Law Review. 49 Am. U.L. Rev. 327 at 360

[83] Michael Kremer, Patent Buy-Outs: A Mechanism for Encouraging Innovation, 113 Q.J. Econ. 1137, 1146-47 (1998)

prisoner's dilemma case in which two firms, A and B, are both defendants in a case where negligence has caused 100 units of damage. The plaintiff firm knows that it experienced damage of 100, but it does not know that Firm A caused 30% of the damage and Firm B is responsible for 70% of the damage. To see how collectivization can be useful even with just two firms as defendants, examine the pay-off matrices with and without the defendant class device (Table 3.2).

Without knowing relative contributions to harm, and without joint-and-several liability, Firm B will have an incentive in the settlement stage to settle for 50 of the damage because Firm B knows that if it goes to trial, it will be shown liable for 70 harm. Firm A, however, faces a different incentive structure. Firm A would rather litigate than settle for 50 because litigation will lead to only 30 of harm. If Firm A and Firm B are treated separately, then, the plaintiff (who knows nothing of the actual relative contributions) will likely settle with Firm B and proceed to litigate with Firm A. The non-class result, shaded in gray in Table 3.2, is thus a transfer of 80 from the two firms to plaintiff.

Now consider what happens if the two firms are considered a single class, held jointly and severally liable for the damage. Knowing that they face a total payout of 100 if they litigate or settle, the choice will be to settle. But now in the settlement stage, Firm A has an incentive to make clear its contribution to harm, either through proceedings against Firm B or (more likely) through negotiations with Firm B. Whichever route is taken, information will be generated about relative contributions to harm – information that would not have been generated in the world without class certification.

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[84] The informational benefits of defendant class actions were recognized by the Ohio Supreme Court in 1990, which noted that "a class suit may be especially useful in a case where putative class members refuse

Table 3.2. Pay Off Matrices With and Without Defendant Class Action			
NO CLASS ACTION			
		Firm A (30%)	
		Litigates	Settles
Firm B (70%)	Litigates	-30, -70	-50, -70
	Settles	**-30, -50**	-50, -50
WITH DEFENDANT CLASS ACTION			
		Defendant Class: A + B (100%)	
		Litigates	Settles
		-100	**-100**

The 2 x 2 matrix is admitted over-simplified, but it suggests a more general point that incentives *amongst the defendants* change when they are held liable *as a class*, and not just as individuals. For a group of N defendants, the N defendants in the class have an incentive to work out their proportional liability to the plaintiff. Enforcement remains a challenge, of course, and I will address it in Part III of the paper on system design.

It should be emphasized that my suggested approach does not always lead to defendant class action certification. Rather, it looks for the marginal value that the class device potentially offers. In cases where all defendants are jointly and severally liable, the class device will not significantly change the incentive structure already in place. A defendant class device may also not be useful if all defendants are already bound through a single party. In *Gaunt v. Brown*, for instance, the U.S. District Court correctly concluded that since the case was being brought against the Attorney General, there was not a need to certify a class of local boards of elections (in a case challenging the age

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to identify themselves or deliberately act to avoid being controlled in law." 52 Ohio St. 3d 56 at 61

requirement for elections).[85] In this case, since the entirety of the defendant class was bound by law to follow the Ohio Attorney General's directives, the marginal value of the class device was non-existent.

Comparing defendant and plaintiff group dynamics

I turn now to consider a broader set of possible plaintiff and defendant dynamics. As a basis for discussion, Table 3.3 considers the possible combinations that might occur in a world where there are four types of groups: (1) single firms/individuals, (2) a single dominant firm/individual, (3) an intermediate number of firms/individuals, and (4) a large number of firms/individuals. I assume that each group could find themselves either on the plaintiff (harm bearing) or defendant (harm causing) side. This generates 16 scenarios to consider. I sketch out what I believe would be the "baseline" result: the likely result if there was no judicial certification of a class on either side. I then offer my suggested "class outcome": what would likely happen if the court decided to certify a defendant class, a plaintiff class, or both.

This table is admittedly general, and it leaves out many nuances. What the table reinforces, however, is that our focus should be on the *difference between the baseline and class outcome* columns. This is the marginal value added by class certification. I have arranged the table so that every other row flips the defendant and plaintiff sides. To make the table easier to read, and to isolate the differences between defendant and

[85] The court argued that "We agree that if plaintiffs prevail this would be an appropriate case to designate as a plaintiff class action. However, we are not persuaded that [**15] it should be designated as a defendant class action if plaintiffs prevail, inasmuch as the Secretary of State of the State of Ohio is a party-defendant, and his duties are to advise members of local boards of elections as to proper methods of conducting elections. Ohio Rev. Code [*1193] § 3501.05(B). Also, the Secretary of State has the further duty to 'compel the observance by election of officers in the several counties of the requirements of the election laws," id., subpara-graph (L). Since the Secretary has the duty and power over all the members whom plaintiffs would have us include in a defendant class action, the need for a defendant class action is not apparent." 341 F. Supp. 1187 at 1193.

plaintiff class actions, I have highlighted the rows where defendant class actions would be a possibility.

Table 3.3. Comparison of baseline and class-outcomes for selected configurations of plaintiff and defendant groups

No.	PLAINTIFF SIDE	DEFENDANT SIDE	BASELINE	CLASS OUTCOME
	Who is suffering the harm/damage?	**Who is causing the harm/damage?**	**With no judicial class certification, what do we expect to see?**	**What changes if the court classes defendants, plaintiffs, or both?**
1	Single firm / individual	Single firm / individual	Traditional tort outcome: single party vs. single party	Optimal deterrence achieved at baseline; class certification is a non-issue
2	Single firm / individual	Dominant firm, controlling >50% market share	Case against the dominant firm, dominant firm will litigate fully	Optimal deterrence achieved at baseline; class certification is a non-issue
3	Dominant firm, controlling >50% market share	Single firm / individual	Dominant firm will prosecute fully, defendant the same	Optimal deterrence achieved at baseline; class certification is a non-issue
4	Single firm / individual	Intermediate number of firms, controlling <50% market share	Plaintiff will enjoy economies of scale; Defendants likely to bind together because they will be joined as named defendants (maybe conspiracy alleged), and will see benefits of collective defense	If court certifies defendant class action, optimal deterrence will be achieved; But even without court certification, defendants may bind together when they are sued
5	Intermediate number of firms, controlling <50% market share	Single firm / individual	If firms cannot overcome collective action problem, they will either drop the case, or will bring a case without enough resources to litigate fully; Defendant will be able to enjoy economies of scale	If court certifies plaintiff class action, optimal deterrence will be achieved [a]
6	Single firm / individual	Large number of firms / individuals, each controlling very small market share	If plaintiff cannot figure out who is causing the harm, may not be able to bring enough suits; Defendants, when sued, will not be able to match resources with the plaintiff [b]	If court certifies defendant class action, optimal deterrence achieved (so long as economic incentive issues are corrected for) [b]
7	Large number of firms / individuals, each controlling very small market share	Single firm / individual	Plaintiffs will not be able to overcome collective action problem (the traditional plaintiff class action); Defendant will enjoy economies of scale	If court certifies plaintiff class action, optimal deterrence will be achieved
8	Dominant firm, controlling >50% market share	Dominant firm, controlling >50% market share	Dominant firm on both sides should be able to kick their market into gear	Optimal deterrence achieved at baseline; class certification not necessary

Table 3.3. Comparison of baseline and class-outcomes for selected configurations of plaintiff and defendant groups

No.	PLAINTIFF SIDE	DEFENDANT SIDE	BASELINE	CLASS OUTCOME
9	Dominant firm, controlling >50% market share	Intermediate number of firms, controlling <50% market share	Dominant plaintiff has resources and incentive to bring suit; defendant firms will likely find it beneficial to work together as named defendants in the same suit	If court certifies defendant class action, optimal deterrence will be achieved; But even without court certification, defendants may bind together when they are sued
10	Intermediate number of firms, controlling <50% market share	Dominant firm, controlling >50% market share	If firms cannot overcome collective action problem, they will either drop the case, or will bring a case without enough resources to litigate fully; Defendant firm will kick market into gear	If court certifies plaintiff class action, optimal deterrence will be achieved; but class certification may not be necessary
11	Dominant firm, controlling >50% market share	Large number of firms / individuals, each controlling very small market share	If plaintiff cannot figure out who is causing the harm, may not be able to bring enough suits; Defendants, when sued, will not be able to match resources with the plaintiff.[b]	If court certifies defendant class action, optimal deterrence achieved (so long as economic incentive issues are corrected for) [b]
12	Large number of firms / individuals, each controlling very small market share	Dominant firm, controlling >50% market share	Plaintiffs will not be able to overcome collective action problem (the traditional plaintiff class action); Defendant will be able to defend itself and kick market into gear	If court certifies plaintiff class action, optimal deterrence will be achieved
13	Intermediate number of firms, controlling <50% market share	Intermediate number of firms, controlling <50% market share	Indeterminate. Both sides may face collective action problems, but both have a chance to overcome them.	Class action certification, on either side, will promote optimal deterrence if collective action problems are serious.
14	Intermediate number of firms, controlling <50% market share	Large number of firms / individuals, each controlling very small market share	Large number of defendants makes it more difficult for plaintiffs to overcome collective action problems	Certification of both defendant and plaintiff classes may lead to optimal deterrence
15	Large number of firms / individuals, each controlling very small market share	Intermediate number of firms, controlling <50% market share	Plaintiffs are not likely to overcome collective action problems	Certification of plaintiff class would promote optimal deterrence; Defendants may need class certification as well
16	Large number of firms / individuals, each controlling very small market share	Large number of firms / individuals, each controlling very small market share	Neither side will be able to overcome collective action problems	Certification of both classes is required to obtain optimal deterrence

NOTES: a. See: Rosenberg (2000), supra note 32. b. See: Hamdani & Klement (2005), surpa note 6.

Perhaps the most interesting (and contentious) action in Table 3.3 occurs when we compare rows 4-5 and rows 9-10. In each case, we are flipping the "intermediate" number of firms from the defendant to the plaintiff side. The crux of my argument is that it is more likely for this mid-size group to overcome collective action problems when they are on the defendant side. The reason for this logic is straightforward: on the defendant side, they don't have to initiate the proceedings. In fact, if they are all named as defendants in a suit by the plaintiffs, they have had much of the work of identification done for them. To the extent that this happens, defendants already take concerted actions when sued by a plaintiff. The court's class certification would be functionally redundant, and the marginal value of class certification would be minimal.

Defendant class actions are likely to have more value when defendants are less capable of somehow binding themselves together. This failure is most likely to happen when: (1) identification and monitoring is not possible or practical, or (2) enforcement of group 'rules' is not possible or practical. Both challenges open the door for significant free riding. In Section III, on system design, I consider both of these issues and possible legal remedies to correct for them.

A closer look at what binds individuals in a potential defendant class

Another way to think about this difference is to see that in the plaintiff class action case, the individual plaintiffs are passive harm-takers. In the defendant class action cases, the individual defendants are active harm-makers. This distinction leads to important differences between plaintiff and defendant classes, in terms of the *ex ante* market relationships that may develop. Three types of relationships are likely to exist

between individual defendants: (1) they are all conducting market transactions with a single (or small set of closely related) firms; (2) they are all legally bound in a government organization; (3) they are all voluntarily bound in an organization of their own making. In the first case, adjustments can be made via price levels. In the second and third cases, contracting can be worked out through the governing organizations. It is only when none of relationships exist that we see a need for defendant class actions.

What distinguishes the harm caused by small defendants, as opposed to the harm caused by large firm defendants is the indirect nature of the small defendants' action. In almost every case where defendant class actions seem apt, there is a 'market' intermediary. Unlike pollution, there is not a direct line from the defendant's action to the plaintiff's harm. In the context of securities fraud, the defendant security underwriters were not hired by individual plaintiffs, but were working through some firm. In the context of other corporate fraud, middle managers and others in the firm who acted wrongly were all bound via contract to the same employer. In the context of state/local officials, they are causing harm by virtue of their role within the state government/legal system. In the context of music downloading, individuals are working with the help of several intermediaries – their Internet Service Provider, their software maker, etc.

To make this argument clearer, consider these two contrasting hypotheticals. First, consider a standard plaintiff class action in which a firm has a poorly constructed factory which sits on the corner of a busy intersection. Every day bricks fall off the building and cause damage to passing cars. Because the damage is always minor, the cars never stop, and no potential plaintiff ever brings a case. A plaintiff class action would be necessary here because there is likely no *ex ante* market relationship between those who

have been harmed. They were each harmed directly by the plaintiff, with no intermediary – the brick fell directly on their car.

Now consider a second hypothetical. A big firm has an old factory that they no longer use. The factory, however, has bricks that are very valuable if taken and re-sold. Imagine that individuals go up to this factory and remove one brick at a time. No single person takes more than one brick. Setting aside for now the question of what precautions the firm could take to stop this, let's consider the relationship between these individual brick-stealers. It could be that each brick-stealer randomly wandered up the factory, in the same way that the car drivers randomly drove past the brick-drop intersection. But it is more plausible that the brick-stealers share common traits; common traits that make them more likely to belong to one of the three types of *ex ante* markets laid out above. In this case, they are probably all selling their bricks on similar markets. They could also belong to a brick collector's society.[86]

When relationships such as these exist between defendants, the defendant firm can find convenient entry points for litigation. It need not necessarily resort to a defendant class action because it can go after the agency, organization, or other binding agent between the defendants. When the American Society of Composers, Authors and Publishers tried to move against the Girl Scouts for copyright infringement (for singing copyrighted songs around the campfire), they did not have to go after thousands of 8 year old girls. Instead, they went directly to the national organization that binds the girl scouts together.[87] The push toward potentially making Internet Service Providers (ISPs) liable in

[86] The hard case, a version of which I consider in the system design section, would be if they each found the brick valuable for some reason that didn't require re-sale, e.g. as a mantle piece.
[87] "ASCAP Changes Its Tune; Never Intended to Collect Fees for Scouts' Campfire Songs, Group Says," *Washington Post*, by Ken Ringle. (1996).

illegal music downloading can be understood in a similar vein.[88]

II.C. Aggregate Analysis

The Aggregate Analysis principle adds an extra layer to both the forward-looking deterrence and the dynamic effects principles. The aggregate analysis principle says that we should look at deterrence and dynamic effects *at an aggregate, system-wide level.* In this section, I will show how analysts in both the Internet and corporate fraud examples have missed this aggregate picture.

II.C.1. Cost Benefit Considerations

At the outset, a distinction should be made between (1) an overall cost-benefit valuation, e.g. do we want to reduce the activity or care levels of downloading of copyrighted material? and (2) a comparison of the cost of precautions versus the benefit of harm reduction associated with that precaution. Conflating these two distinct evaluations may lead to some confusion. To make each stage clear, I will label the first cost-benefit analysis process as "Valuation" and the second (borrowing the Fried/Rosenberg framework), "Determining optimal precautions".

In both stages, the aggregate perspective is important. At the valuation stage, aggregation means we must determine overall how much utility is being lost, and how much utility is being gained from a particular activity which individuals or firms are engaging in. Class actions factor into this analysis in a preliminary way: it is more likely that we will have aggregate analysis when there is a class action then when there is not. The reason is that courts will have to consider welfare/utility across *all* members of the class (not just the ones listed on the court documents as representatives). When adjudicating, courts will weigh both sides at the aggregate level. If total benefit

[88] See, e.g. In re Aimster Copyright Litig., 334 F.3d 643 (2003), where Judge Posner

outweighs total harm, there should be no basis for class action. If harm outweighs total benefit, then individuals will desire to have that harm/risk reduced, but only if the cost of precautions is less than the reduction in harm.

II.C.2. Aggregate Analysis of Internet Governance

When discussions of Internet governance are raised, popular (and to a large extent academic) discussion has focused on illegal file sharing.[89] Jonathan Zittrain argues that such a narrow focus is greatly misguided: "Current scholarship about 'Internet governance' largely fails to appreciate this larger picture, rendering most of its deliberations absurdly narrow, with public policy recommendations that have a near-uselessly short shelf life."[90] Zittrain is announcing an aggregate analysis principle, suggesting that analysts should be considering more than simply the issue immediately before them.

The aggregate analysis principle has great bite in the Internet context because of the Internet's great "generativity". Zittrain defines "generativity as a function of (1) how deeply a technology leverages a set of possible tasks; (2) its adaptability to a range of different tasks; (3) its ease of mastery; and (4) its accessibility."[91] The Internet provides a new "generative grid" whose potential is still being realized.[92] What does talk of a generative grid, or of the Internet so generally, mean for defendant class actions? It

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[89] For a summary of this literature, see: Jonathan Zittrain, "The Future of the Internet and How to Save It,", version 1.5. January 2005. Available on-line at: http://www.oii.ox.ac.uk/collaboration/seminars/20050118_Future_of_Internet_V15.pdf. The three cases in this area cited most often are: *Aimster*, supra note 63; A&M Records v. Napster, Inc., 239 F.3d 1004 (2001); and MGM Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (2004) (currently on appeal before the Supreme Court).

[90] Zittrain (2005) at 30.

[91] Id at 7.

[92] The generative grid phrase is Zittrain's. Scholarship is emerging to try and assess the myriad of effects the Internet has had on our lives. See, e.g., Borgida, Eugene. "New Media and Politics: Some Insights From Social and Political Psychology." American Behavioral Scientist; Dec2004, Vol. 48 Issue 4, p467-479.

means that our analysis of defendant class actions in the Internet context cannot rest solely on the costs and benefits of file-sharing.

Hamdani and Klement provide an example of analysis that stops short. They introduce considerations of overall social welfare in their analysis of a proposed class defense mechanism, but don't carry out the necessary aggregate analysis. In considering a hypothetical lawsuit from the RIAA against an individual, for instance, Hamdani and Klement detail how an individual's incentive will be to settle for $3,000, even when they have done nothing illegal.[93] They argue, correctly, that "the *ex post* settlement decisions of defendants impact the *ex ante* decisions of Internet users whether to download music."[94] But it does not necessarily follow, as they argue in the next sentence, that "when defendants settle even when they may have a good defense, there is a considerable risk of excessively deterring music downloads by Internet users."[95] The reason it doesn't necessarily follow is that optimal deterrence must be determined at an aggregate level. In other words, we may want to deter perfectly legitimate uses of file-sharing (and therefore make some innocents pay $3,000) if we believe that it will benefit society overall (by keeping the bad guys out of the game). By the same logic, we may want to allow illegal file-sharing by some crooks, if we believe that it will benefit society overall (by letting the good guys stay in the game).

This paper takes no substantive position on what the legal rule should be about file sharing, i.e. whether we should hold Internet Service Providers (ISPs) liable, or

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(investigating the extent to which the internet is providing an important and increasingly influential forum for acquiring politically relevant information)

[93] The reason is that they face a decision between settling for $3,000 or going through a lawsuit for $50,00 just to avoid payment.

[94] P. 19.

[95] P. 19.

whether the Digital Millennium Copyright Act (DMCA) properly assigns liability.[96] This paper does, however, argue that we should assess the DMCA, and related decisions such as *Aimster*, *Napster*, and *Grokster*, under the aggregate analysis principle. At a minimum, this will involve incorporation of several strands of literature, e.g. economic analysis of the effects of individuals' copyright infringement[97]; and, analysis of actual usage of a file-sharing program, especially estimates of usage for illegal versus legal purposes[98].

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[96] The DMCA was signed into law in 1998, and among other things, holds ISPs liable for their users' illegal actions if the ISPs do not follow guidelines laid out by the Act (e.g. removing offensive material, reporting violations, etc.). See: 17 USCA § 1201. I also take no view here as to whether it is in the Record Company's best long term interest to prosecute file-swappers. Some have suggested that alternative strategies may be better suited. "Coverage of the lawsuits could hurt as much as help the anti-piracy crusade. Anthony Prapkanis, a University of California-Santa Cruz professor of social psychology, says that while people may be sympathetic to the music industry's plight, "the image is out there of the bully ganging up on people with the least amount of money, the rich taking from the poor." Quote from: "RIAA Lawsuits Bring Consternation, Chaos," by Jefferson Graham, September 10, 2003. http://www.newsfactor.com/perl/story/22266.html.

[97] In the context of music file-sharing, there remains an empirical debate over the effect of illegal file sharing on music sales. See, e.g.: Kai-Lung Hui & Png, Ivan. (2004). "Piracy and the Legitimate Demand for Recorded Music," Contributions to Economic Analysis & Policy, Berkeley Electronic Press, vol. 2(1), pages 1160-1160. (Finding that the demand for music CDs decreased with piracy, suggesting that "theft" outweighed the "positive" effects of piracy, but that the impact of piracy on CD sales was considerably less than estimated by industry). Liebowitz, Stan J., "File-Sharing: Creative Destruction or just Plain Destruction?" (December 2004). Center for the Analysis of Property Rights Working Paper No. 04-03. (Finding that the evidence seems compelling that file-sharing is responsible for the recent large decline in CD sales for which it has been blamed). Oberholzer, Felix & Strumpf, Koleman. (2004). "The Effect of File Sharing on Record Sales: An Empirical Analysis", Working Paper, Harvard Business School and UNC Chapel Hill. http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf. (Finding that downloads have an effect on sales which is statistically indistinguishable from zero, despite rather precise estimates, but that these estimates are of moderate economic significance and are inconsistent with claims that file sharing is the primary reason for the recent decline in music sales.). Rafael Rob & Waldfogel, Joel. (2004). "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students," NBER Working Papers 10874, National Bureau of Economic Research, Inc. http://www.law.upenn.edu/polk/dropbox/waldfogel.pdf. (Finding that that downloading reduces their per capita expenditure (on hit albums released 1999-2003) from $126 to $100 but raises per capita consumer welfare by $70). Zentner, Alejandro (2004). "Measuring the Effect of Music Downloads on Music Purchases", Working Paper, University of Chicago. http://home.uchicago.edu/~alezentn/musicindustrynew. (Finding that peer-to-peer usage reduces the probability of buying music by an average of 30%, and that without file sharing sales in 2002 would have been around 7.8 percent higher).

[98] Some evidence from Russia suggests that even amongst young people, use of the Internet for illegal file-sharing is not a common activity. Palesh, Oxana, Saltzman, Kasey, Koopman, Chery. "Internet Use and Attitudes Towards Illicit Internet Use Behavior in a Sample of Russian College Students." CyberPsychology & Behavior; Oct2004, Vol. 7 Issue 5, p553. (Finding that among Internet users, most reported having Internet access either at home or at a friends' home, and 16 % reported having Internet access from work, school, or a computer center. Among Internet users, the main purpose was for school-

More importantly, such aggregate analysis also demands that courts take seriously the technological aspects of the cases they're dealing with. In the context of file-sharing, for instance, the future is not in limiting the ability to trade, but in limiting the ability to *play*, via Digital Rights Management (DRM).[99] An entire chapter of a forthcoming volume on Cyberlaw is devoted to "Technological Counterparts to Copyright," where "the general idea is to create technological shields for digital assets: architectural limits on how particular data can and cannot be used by end-users."[100] Mark Stefik has observed that despite the fact that "everyday experience with computers has led many to believe that anything digital is ripe for copying ... behind the scenes ... technology is altering the balance once again."[101]

If courts are not aware, or deliberately choose to avoid discussion of what's going on "behind the scenes," their rulings and analysis are not only likely to be out-dated, they could be seriously flawed. What if, for instance, DRM technology had already advanced to a stage where recording artists could protect (with great assurance) everything they wanted to, but courts (unaware of this development) went ahead with a legal regime that severely limited file sharing? The result might be over-deterrence. On the other hand, if courts errantly believed that DRM had reached a point where state-of-the-art was to produce files incapable of being pirated, they might under-deter file-swapping. The substantive analysis is beyond the scope of this paper, but I hope I have demonstrated that if courts do not take technological considerations into account, they violate the aggregate

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related activities (60%), followed by e-mail (55%), entertainment (50%), chatting (24%), and searching for pornography (6%).)

[99] For an introduction, see: "Digital Rights Management: Technologies and Strategies," MT&R Media Center Dialogue, in partnership with the Berkman Center for Internet & Society at Harvard Law School. Briefing materials presented on February 4, 2005.

[100] Draft chapter of Cyberlaw Casebook. Chapter 9. Casebook forthcoming.

[101] Mark Stefik. "Trusted Systems," *Scientific American*, March 1997.

analysis principle, and likely produce sub-optimal outcomes as a result.

II.C.3. Aggregate Analysis of Corporate Wrongdoing

At first glance, the high-profile corporate wrongdoing over the past few years may seem an odd place to think about defendant class actions. The defendants are not numerous, hard to identify, or judgment proof. Why, then, should we consider defendant class actions a potentially useful tool? The answer, as it did in the Internet context, centers on the realization that there is something more going on here than simply the actions of the named defendants. In the Internet case, that "something more" is more readily identifiable: complex and changing technologies are clearly tied into the cases at bar. In the corporate fraud cases, the "something more" is subtler.

Drawing on social psychology and research on the corporate environment, the "something more" that a defendant class action can aim its reach at is the 'situation' or 'corporate climate' that may contribute mightily to fraud and wrongdoing.[102] There is a longstanding consensus amongst social psychologists that we commit a "fundamental attribution error" in attributing actions to individual choices, rather than to situational pressures. As put by Zimbardo and Leippe, "We tend to look for the person in the situation more than we search for the situation that makes the person."[103] The value of a defendant class action is that it has the potential to get at the 'situation'. The reason is that it will implicate virtually everyone involved in the office.

Research and expert commentary on the corporate environment suggests that

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[102] For an introduction to the social psychology literature in the corporate law context, see: Hanson & Yosifon, "The Situation: An Introduction To The Situational Character, Critical Realism, Power Economics, And Deep Capture," 152 U. Pa. L. Rev. 129. (2003). See also, Williams, Christopher W., Lees-Haley, Paul R., Price, J. Randall. "The Role of Counterfactual Thinking and Causal Attribution in Accident-Related Judgments." Journal of Applied Social Psychology; 12/01/96, Vol. 26 Issue 23, p2100.

[103] Philip G. Zimbardo & Michael Leippe, The Psychology of Attitude Change and Social Influence 93 (1991).

situational pressures to commit wrongs are indeed intense. When he talked about the "numbers game" that corporate executives sometimes play, former SEC chairman Arthur Levitt suggested "that almost everyone in the financial community shares responsibility ... [and that] Corporate management isn't operating in a vacuum. In fact, the different pressures and expectations placed by, and on, various participants in the financial community appear to be almost self-perpetuating."[104] One of the most comprehensive studies of moral action in the workplace is Robert Jackall's study, *Moral Mazes.*[105] Jackall engaged in extensive case studies of two firms, and found that most middle managers would sacrifice their own morals in order to fit in: "Team play also means ... 'aligning oneself with the dominant ideology of the moment,' or ... 'bowing to whichever god currently holds sway.'"[106]

If it is the case that it is not just a few top executives that are contributing to the harm caused by the firm, then a legal regime which points liability solely toward those CEOs is not likely to achieve optimal deterrence. Consider the *Tyco* case, where separate actions were brought against former CEO Dennis Kozlowski, former chief lawyer Mark Belnick, and former CFO Mark Swartz. From a deterrence perspective, members of society (and most especially Tyco shareholders) don't care who actually cooked the books. What society wants is for this sort of firm behavior not to happen again in the future, by Tyco, *or by any other firm.* In order to achieve that deterrence objective, we must have an understanding of the causal factors for the fraud. To the extent that it was not just a few "bad apples," but instead is in part driven systematically by certain kinds of

[104] Levitt, Arthur. (1998). "The 'Numbers Game'", Remarks at the NYU Center for Law and Business, September 28, 1998.
[105] Jackall, Simon. (1988). *Moral Mazes: The World of Corporate Managers.* Oxford University Press.
[106] Id at 52.

corporate cultures, we want a legal device that can possibly change those cultures. A defendant class action might do that. In operation, if future members of a firm knew that they could be held liable (as a defendant class member) for any harm caused by the firm, it seems more likely that they would stand up to their bosses when asked to do illegal tasks.

II.C.4. Additional Comments on Aggregate Analysis

Two additional comments, in response to likely concerns, should be made in regards to aggregate analysis. First, some reading this paper may be concerned that asking for aggregate analysis is too much for the courts to handle. On that count, it can be said that courts (themselves and in conjunction with administrative agencies) already engage in substantial, aggregate cost-benefit analysis.[107] It can also be said that even if courts at present are not well-equipped to handle these sorts of analyses, there may be other parts of the system that courts can out-source to carry out the analysis. The Government Accountability Office (GAO) frequently engages in these sorts of analyses.

The final comment is one that bends in a normative direction. When taken together as a pair, the Internet and corporate fraud examples make it clear that defendant class actions are not designed to go after a particular kind of group, e.g. "the little guy" or the "big, bad corporation". Rather, the defendant class action is a neutral tool that can be employed whenever it is needed to kick aggregate analysis into gear.

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[107] For discussions of cost-benefit analysis in the government context, see: Robert W. Hahn. "Policy Watch: Government Analysis of the Benefits and Costs of Regulation," The Journal of Economic Perspectives > Vol. 12, No. 4 (Autumn, 1998), pp. 201-210. David Whiteman. "The Fate of Policy Analysis in Congressional Decision Making: Three Types of Use in Committees," The Western Political Quarterly > Vol. 38, No. 2 (Jun., 1985), pp. 294-311

III. System Design

This section of the paper identifies the major challenges courts face in implementing defendant class actions. Although the challenges are significant, I build partially on the proposals made by Netto and put forth a number of system design elements which may make defendant class actions more feasible and more capable of achieving the objective of optimal deterrence.

In addition to the Internet and corporate fraud examples which I have already discussed, this section will also address a third, more difficult, type of case: the case where there are defendants who appear to have no connection to each other. To make this hard case concrete, let's consider this scenario. In 2002, 100,000 individuals across the Globe illegally sneak a camera into their local movie theatre and tape their favorite movie, *Spiderman I*. They then show this movie to their friends and family, who consequently don't pay for either movie admission or for the DVD when it is released. This is a case where there is no discernible 'market' relationship between any of the defendants. Note that it's not the size of the class that matters, but the relationship between them. There could be 1 million illegal tapers of *Spiderman*, but if they all acted independently there would still be no easy way to tie them together as a class. As I proceed with my discussion of system design, I will return to this hard case and how the general theory of defendant class actions should be applied to it.

III.A. Preliminary considerations

III.A.1. Insurance and redistributive functions of tort law

The tort system serves an insurance and redistributive function as well as a

deterrent one.[108] In the context of defendant class actions, if the harm to the plaintiff can be identified, it does not seem that having a large number of small harms (as opposed to a single large harm) should affect insurance availability or premiums. If there were a market for these insurance claims, this situation might be different because having a larger number of smaller claims would make it more difficult for insurers to get paid. But I leave this question for another day, as currently such a market does not exist.[109] Questions of redistribution are taken up again under the issue of fee-shifting and making sure that class defendants have proper economic incentives to fully litigate a defense for the entire class.

III.A.2. Deference to the market and legislative bodies

I adopt the position that as a guiding principle, courts should be deferential to the market they find in operation. As Fried and Rosenberg observe, "no logical impediment exists to the market's serving as a full substitute for legal intervention to achieve the social objective of ensuring optimal precautions."[110] Because the cost-benefit calculations, especially at the aggregate level, can be quite complicated, I also take the position that courts should be deferential to legislatures and administrative bodies that have conducted research on particular issues. Where courts see that legislatures are captured, or are not adhering to the principle of aggregate analysis, then they should take more independent actions.

III.A.3 Activity and Care Levels

Throughout considerations of system design, it is important to keep in mind the

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[108] See, *supra* note 45.

[109] Rosenberg, David, "Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims" . Harvard Law School, Public Law Research Paper No. 43; Harvard Law and Economics Discussion Paper No. 395.

distinction between activity levels and care levels. This is a point seemingly missed by Hamdani and Klement. Using the Hamdani and Klement example, individuals may react to RIAA litigation in one of two general ways. First, they may simply reduce their activity level. This is the only possibility that the authors consider. But second, individuals may react to RIAA litigation by increasing their care level. They may take extra measures to insure that they are not found liable. This care level adjustment may take one of two forms. It may take the traditional form of trying to avoid the harm, e.g. downloading only with approved programs. But it may also take another form – trying to avoid detection. The distinct possibility of this "circumvention care" is particularly important to consider in the context of defendant class actions involving technology.

III.B. Identification & Monitoring

Identifying exactly who is generating the harm/risk may arise as an acute problem in the defendant class action context. Initially there are several distinctions to make. First, in order to work effectively, class members need to identify not only who is causing the harm, but how much marginal contribution is being made. Monitoring can be introduced here as a form of "repeated identification" – re-evaluating on a regular basis who is in the market and what their market share is. Depending on the stability and fluidity of the market, this monitoring may be more or less costly.

A second distinction to make is between 'ability' and 'feasibility' to identify harm/risk producers. Prohibitively high identification costs may make it infeasible for identification to occur in some situations when it is theoretically possible (in a costless world). Putting these two concepts together, the identification problem can be considered along a continuum. Table 3.4 provides a rough outline of the scope of this problem.

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[110] Fried & Rosenberg, *supra* note 45 at 47.

Table 3.4. The Scope of the Identification Problem

Perfect ID	Strong ID	Mid-Strong ID	Mid-Weak ID	Weak ID	No ID
Know who caused the harm and each party's marginal contributions	Know who caused the harm, a little less sure of marginal contributions	Not entirely sure who caused harm, but can narrow it down, and can do the same for marginal contributions	Know the general 'group' of people who caused the harm, but not the specific individuals in the 'group', and know nothing of marginal contributions	Not entirely sure which 'groups' are responsible, and have no idea of marginal contributions to harm	Don't know who caused the harm

III.B.1. Legal tools to address the problem of identification

Looking at Table 3.4, the goal of the legal system should be to enable parties to move as far as possible to the left, toward the ideal of perfect identification. There are three plausible ways that the legal system might improve identification of defendants and their relative contributions to harm. As a first cut, the legal system can use sub-classes to reduce its workload. Sub-classes will be most beneficial when it is easier to identify the marginal causal contribution of some members of the defendant class, relative to others. In practice, courts have carved out sub-classes in larger defendant class actions since at least 1968.[111] By breaking up the larger class, the court reduces the number of individuals on the right hand side of the table. In an Alabama case, where all state registrars of voters were made into a defendant class, the court administered its ruling on the basis of

[111] 285 F Supp 714 (ND Ill 1968). This was a patent infringement case in which the court found a defendant class appropriate, and in administering it, created several sub-classes.

different sub-classes.[112] The "harm" in this Alabama case was to convicted felons who were thrown off the voter rolls. The court found that some counties had done more harm than others, and appropriately tailored their remedy. The same logic can be applied by courts in other defendant class action contexts.

The second thing courts can do is create incentives for self-identification by adjusting presumptions on marginal contribution to harm, and then allowing for rebuttal of that presumption with sufficient evidence. To flush this out, it may be helpful to consider a numerical example (Table 3.5). Let's assume that a plaintiff has experienced total harm of 500, and has won in court. The defendant class is composed of 100 individuals, and neither the plaintiff nor the court knows which defendants did which amounts of harm. Each individual defendant doesn't know the other defendant's contribution to harm, but he knows his own. He knows how many people are in the class, so he knows that the average harm is 5. Let's say that the distribution is as presented in Table 3.5.

Table 3.5. Hypothetical: Contributions to Harm

[A] Contribution to harm:	2	3	4	5	6	8	10	*TOTAL*
[B] Number of individuals:	5	25	25	15	10	10	10	*100*
[A] x [B] = [C] Sub-Total of Harm:	10	75	100	75	60	80	100	*500*

The puzzle is this: if we can't directly observe their contributions to harm, how do we get the various sub-groups to volunteer, *ex post*, information about their contributions to harm? Courts can use damage assignments as a carrot-and-stick. In this example, instead of setting the average damage payment for defendants at 5, courts could set it at 8. Initially such a move would strike of over-deterrence because total damages would equal

[112] Hobson v Pow, 434 F Supp 362 (ND Ala 1977)

800. But courts could, at the same time they set damages to 8, offer defendant class members a chance to reduce their liability to 6 if they can show that they contributed less than 8 to harm. In this example, 80 people would rationally come forward to get their liability reduced by 2. The 10 in the "8 category" would break even, and the 10 in the "10" category would get away with 2. Total damages would thus be 800 – 160 = 640. There is likely some over-deterrence here, but it should be noted that the over-deterrence is the cost of identification. Over time, courts could calibrate their carrot-and-stick game.

A third option, which is probably quite costly and therefore not as practical, is for the court to appoint a guardian or special master specifically for the purpose of determining marginal contributions to risk. Guardians have been a frequent topic of discussion in the class action context.[113] Here, "special master" may be a more appropriate title, but the person charged with the responsibility of looking at contributions to harm will also likely be faced with questions of settlement and in-fighting as well.

In addition to these mechanisms, courts must also recognize that their choice of representative can affect information production.[114] A common problem with large defendant classes is how many and which defendants should be assigned as class

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[113] See, e.g., Alon Klement . Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers. Winter, 2002, 21 Rev. Litig. 25. Also, Edward Brunet. Class Action Objectors: Extortionist Free Riders or Fairness Guarantors," 2003 U Chi Legal F 403 at 446: "The theory of appointing a guardian ad litem is deceptively simple. The guardian will represent the interests of the absent class members and thereby monitor the behavior of class and defense counsel during settlement negotiations."

[114] Courts have long recognized the problem of defendant class representation, but not usually through the lens of information production. The court in *In re Gap Stores Sec. Litigation*, noted that "commentators have frequently criticized the potential for inadequate representation of defendant classes. Because the named defendant generally does not seek his representative status and often vehemently opposes it, a court may fear that an unwilling representative will necessarily be a poor one. Defendant Class Actions at 639. Related to this concern is the fear that the plaintiff will exercise his power of selection to appoint a weak, ineffective opponent as class representative. Id. at 640. "It is a strange situa-tion where one side picks out the generals for the en-emy's army." Z. Chafee, Some Problems of Equity 237 (1950). 79 F.R.D. 283 at 290

representatives. Courts have encountered what I call the "red rover" problem: just as in the game red rover, where kids seek to run through the weakest link on the other side, plaintiffs want to pick the weakest link as the defendant class representative. Such was the case in *Weiner v. Krapf* (1988), where a corporate lot owner sought to name just one lot owner as representative of a class of 203 lot owners. The corporate owner sought declaratory judgment that its property was not subject to restrictions, and the alleged 'harm' the corporate owner experienced was the potential restrictions on the land as carried by other lot owners.

Faced with this situation, the court recognized that the single named defendant was not in a position to adequately produce information on the many possible restrictions that might arise from the deeds of other lot owners. The court concluded that the plaintiff corporate owner "selected one neighbor to represent the property interests of 203 lot owners, many of whom will likely have different interests and views. The effect of Weiner's motion is to place the costs of notice, discovery and litigation on the shoulders of the Krapfs."[115] Such costs would make it virtually impossible for the defendant representative to engage his peers and kick-start the information market.[116]

III.C. Enforcement

Even in some situations in which identification and monitoring are practical, enforcement may not be. Here, "enforcement" means getting other defendant class members to contribute to (i) the litigation costs, and then (ii) if necessary, the damage

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[115] 1988 Del. Ch. LEXIS 8 at 9.

[116] A similar analysis was made in a case in Illinois where a single owner of a Shell gas station was proposed as representative of a class of all Shell gas owners in the state. In rejecting this proposed representative, the court reasoned that, "The entire economic burden of defending the present suit was thrust upon one man, Razowsky. His financial stake in the outcome of the suit was not shown to be greater than that of any other of the hundreds of Shell dealers in Illinois." Gaffney v. Shell Oil Co., (1974) 19 Ill. App. 3d 987 at 994.

costs as well. Enforcement is difficult because without a well-working network between defendants (e.g. without an umbrella organization), no single class member (or even a small pocket of class members who may be strongly connected) can achieve the economies of scale required to effectively enforce group-wide policies. In the face of such an enforcement problem, individuals *ex ante* would look to the legal system to provide mechanisms for making enforcement feasible.

On this enforcement point Hamdani and Klement offer a useful analysis with their class defense proposal. They propose a "class defense" mechanism, a "defendant-initiated procedure designed to balance defendants' litigation position vis-à-vis a single plaintiff."[117] With help from the court (via fee shifting), a defendant could use Hamdani and Klement's class defense procedure to reach out and essentially force contributions from the entire class.[118] Hamdnani and Klement's proposal allows defendants to class themselves without as much judicial intervention as would currently be required. Legal tools that make it easier for aggregation of claims promote the aggregate analysis principle, and thus the forward-looking deterrence principle as well.

Hamdani and Klement's proposal runs into trouble, however, when we reach the hard hypothetical case of the *Spiderman* DVDs. Suppose that through some investigation, Marvel Comics (the producer of Spiderman) is able to identify 100 of the 100,000 people who illegally taped the movie. Suppose too that Marvel then asks for certification of a defendant class for all illegal tapers (which they have estimated at 100,000 based on lost revenue from movie tickets and DVD sales). The problem at this point is that even if the defendants "class" themselves, no single defendant is in a position to serve as a

[117] Hamdani & Klement, *supra* note 6 at 31.

representative for the entire class. Even when the hundred identified defendants put their resources together, it is not going to scale up enough to match Marvel's legal resources. This is a problem because the issues may not be fully litigated. For instance, perhaps Marvel made some contribution to the harm which wouldn't come out unless the defendant class had better representation.

To deal with this hard case, it is helpful to recall that a forward looking court hopes to minimize similar harms like these from arising in the future.[119] In order to arrive at optimal deterrence, we need to conduct aggregate analysis. In this hard case, the only way to achieve fully litigated aggregate analysis would be for the court to incur tremendous costs and essentially fund a legal team for the defendant class. The great majority of the defendant class remains anonymous, and thus would not contribute to a pool to fund the legal fees. Given these prohibitive costs, and the requirement of aggregate analysis which fails in this hard case, the general theory of this paper suggests that here defendant class actions will not be an optimal legal tool.[120]

While defendant class actions are not optimal in these hard cases, it should be emphasized that such cases are in practice very rare. The Judicial Panel on Multidistrict Litigation, for instance, usually seems to find a few 'big players' or some other market mechanisms by which to identify representatives for the diverse parties involved in

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[118] The procedure assumes that identification and monitoring are possible. If a defendant has no idea who else is in his class, he will not obtain maximum benefits from classing himself.

[119] "Fairness" to this particular group of Spiderman tapers or to Marvel Comics is not, in the general welfare framework of this paper, at issue.

[120] Although they arrived at the conclusion by different means, the court in Angel v. ABC Sports (1986), a copyright case with a large potential class of copyright infringers, denied certification. Hung up on the connections between defendants, and issues of standing. The plaintiff, Angel Music, argued that "the members of the defendant class have engaged in a common violation of the Copyright Act which places their actions within the juridical link exception to LaMar," but the court recognized that no such relationship existed. 112 F.R.D. 70 at 75. What the court could have also said was that when confronted

litigation. The actual cases where defendant class actions have been certified also point to consistent findings of links between defendants.[121] More generally, it is difficult to find frequently occurring instances in which there are no market relationships between defendants in a potential defendant class.

III.D. Free Riding

The free riding problem is the result of identification, monitoring, and enforcement failures. Examining the defendant class action, there are two types of free rider problems we need to consider. The first is most analogous to standard prisoner's dilemma scenarios, and is the problem already discussed in Section I: a classwide defense would be beneficial to all defendants, but no single defendant can fund the defense adequately because they cannot extract payments from the free-riders in their class. As Netto has pointed out, "Only economy of scale in investment in the lawsuit can overcome the problem of the reluctance of defendants to assume the litigation as class representative. This objective is achieved with incentives for the class counsel through an optimal mechanism of compensation for his performance."[122] In these cases, an individual *ex ante* would desire that the legal system provide a means by which the defense can be properly funded. Individual defendants would desire a mast-tying device.

But a second sort of free-riding problem may also exist. This second type of free-riding problem arises when the "prisoners" in our scenario – the defendants – would not be better off if they all stopped causing the harm. Rather, it is society that would be better

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with this hard case of copying infringement, a class device was not likely to create links between future defendants in similar situations.

[121] In a defendant class action brought under the Sherman anti-trust laws, for instance, Columbia Broadcasting System, Inc. (CBS), targeted the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) in order to get at the numerous defendant musicians and performers in the proposed class. Broadcast Music, Inc., Et Al. V. Columbia Broadcasting System, Inc., Et Al. 441 U.S. 1

off because the utility that the defendants are deriving from their harmful behavior is not equal to the dis-utility they cause others (the plaintiff).

The *ex ante* perspective is crucial for understanding this second free riding problem. Once an individual knows if he will be in the defendant class, it is no longer in the individual's interest to maximize utility over both states (plaintiff and defendant) of the world. To see how these interests can diverge once we move out of the *ex ante* world, consider this numerical example.

One hundred defendants each cause 5 in harm to the Plaintiff when they steal a brick, for a total of 500 harm. They derive only 3 in utility from each harm, by selling the brick, for a total of 300 utility. Plaintiff cannot identify every member of the class, but when they are identified, knows that the marginal contribution to harm is 5. Overall, we want to deter the defendants if we can do it for less than 200. Let's say plaintiff can find 20 of the wrong-doers, and every time wins against them for their marginal contribution, 5. When we look overall at defendant and plaintiff (Table 3.6), we see that optimal deterrence is not achieved because the defendants wind up 200 better off, while the plaintiff is 400 worse off. The harm producers do not bear the loss.

Table 3.6. Social outcomes *without* a Certified Defendant Class

	Defendant Class	**Plaintiff**	**Society Overall**
Initial gain / loss	100 people gaining 3 utility each from their wrong-doing = **+ 300**	100 wrong-doers each causing plaintiff 5 in: **-500**	**-200**
Subsequent legal gain / loss	20 people get sued and lose 5 each: **-100**	Successfully suing 20 people for 5 gain each: **+100**	No change
Final Result	**+200**	**-400**	**-200 with harm producers NOT bearing the loss, so sub-optimal deterrence**

[122] Netto at

Table 3.7. Social outcomes *with* a Certified Defendant Class			
	Defendant Class	**Plaintiff**	**Society Overall**
Initial gain / loss	100 people gaining 3 utility each from their wrong-doing = + **300**	100 wrong-doers causing 5 in harm a piece: **-500**	-200
Subsequent legal gain / loss	20 people get sued, and get certified as Defendant Class, so are hit with the entire harm, lose 500 total: **-500**	Successfully suing the defendant class: **+500**	No change
Final Result	**-200**	**0**	**-200 with contributors to harm bearing the loss, so optimal deterrence**

Now consider how a defendant class action would change the final results (Table 3.7). If the 20 defendants were certified as a defendant class, they would be liable not only for their marginal contribution (the 100), but for the entire 500 in harm. This would benefit society overall because it would create the proper deterrent effect, but it would not benefit the defendant class. Thus, one's desire for a defendant class would depend on whether one knows if they will be in the class or not.

Courts encountering this issue – making some defendants liable for the harms of the entire class – have been wary of pushing forward. In *In re the Gap Stores*, the U.S. District Court for the Northern District of California suggested that, "a defendant class action may be simply an inappropriate method of adjudicating any case where the combination of punitive damages and joint and several liability threaten to transform a statutory scheme for personal accountability into ready martyrdom for the unlucky defendant whose deep pocket will pay for the sins of the multitude."[123] The court's focus

[123] 79 F.R.D. 283 at 295. A New Jersey court echoed a similar sentiment in a defendant class action case: "... it is noted that the New Jersey Antitrust Act, under which relief is requested, contemplates joint and several liability. The accumulated damages, trebled pursuant to statute, recoverable by the entire class of mortgagors from the entire class of mortgagees, may aggregate many millions of dollars. Yet, if the class

on the "unlucky defendant" is misplaced, for there is also an "unlucky" plaintiff who has experienced harm. The court should look to the good of both plaintiff and defendant, using aggregate analysis to consider the overall social welfare implications of its legal rule.

My argument for aggregate analysis is distinct from Hamdani and Klement's approach. When they propose the "class defense" mechanism, they fail to recognize that whether it is a plaintiff who wants to certify a defendant class or defendants who want to certify themselves, our evaluation of the merits of that class certification should rest upon the determination of overall benefit to society. If one's primary social objective is maximizing overall utility, then focusing solely on maximizing plaintiffs' or defendants' utility is mis-guided. Once individuals have information about where they will find themselves in the legal system, they will desire a legal system that favors their position.

III.D.1. Solving the free riding problem with fee shifting

The free rider problem is one of the most difficult challenges to overcome in successfully carrying out a defendant class action. The problem, however, has been addressed and solved through various fee-shifting proposals. Most on point is Netto's (2007) proposed solution, drawing on the English rule for lawyer fees:

> Defendant-favoring fee shifting is considered fee-shifting on a one-way (or one-side) basis, granting fees only to the defendant's attorney when the defendants prevail in the lawsuit, but not awarding fees to the plaintiff's lawyer even if he wins the case ... The advantages of the defendant-favoring fee-shifting system include: (i) overcoming the asymmetric costs between separate litigation and collective suit, aggregating the multitude of defendants, (ii) compensating the class counsel by equalizing his

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recovery were allowed, each member of defendant class, no matter how minor its participation in the scheme, would be individually answerable for the full amount of the judgment. We conclude that such a result would constitute a major alteration in the substantive legal relations between the parties and goes beyond the intent of class action policy. See 3B Moore's Federal Practice, § 23.45[3] at 23-806." 133 N.J. Super. 124 at 143

> investment in the litigation with the amount of the fees award; and (iii) precluding nuisance value suits.

The fee shifting literature also provides other solutions relevant to defendant class actions. Particularly useful is Joseph Miller's work on the free rider problem faced by those who challenge the validity of a patent.[124] Miller's starting point for the bounty analysis is that, "A court judgment that a patent claim is invalid is a public good. And obtaining such a judgment requires the expensive, up-front cost of patent litigation. These facts suggest that profit-maximizing firms will supply definitive patent challenges at a less-than-optimal rate."[125] A similar fact pattern is found in our context. When a defendant class is engaged in activity that (as determined by aggregate analysis) is good for society, that is a public good. Fully litigating such a stance and showing that you are engaged in a public good also involves substantial costs. Just as invalidating a patent invalidates it for everyone, so winning the right to continue engaging in your actions (e.g. file-swapping) allows everyone else to do the same. Given these similarities, what can we learn from Miller's article? The first lesson is one about theoretical approach. Miller sets the stage in this way:

> Any bounty mechanism -- in the patent context or elsewhere -- depends for its success upon when the bounty is awarded (or, put another way, what one must do to earn it), and of what the bounty consists (e.g., cash payment of $X, or enough money to cover expense Y). A poor choice as to either feature reduces a bounty's effectiveness at encouraging the desired result, making these features the best focus in assessing whether a proposed bounty is likely to succeed.[126]

Miller's analysis, not detailed further here, considers several existing bounty and fee

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[124] Joseph Scott Miller. Building a Better Bounty: Litigation-Stage Rewards for Defeating Patents. Berkeley Technology Law Journal, Vol. 19, 2004, 19 Berkeley Tech. L.J. 667.
[125] Id at 688.

shifting proposals in the patent context. Like Miller, I believe that, "Paying a successful patent challenger a cash bounty that need not be shared with others who benefit from the patent's invalidation directly counteracts the free rider problem."[127] The question then turns to: (i) when should the bounty be awarded, and (ii) how much should the bounty be?

For defendant class actions, the timing question is somewhat easier than the parallel question in patent law.[128] The bounty should be awarded at the litigation stage. A litigation stage bounty should be awarded to those defendants who step up to defend on behalf of the entire class. If too many lawyers step forward, the court can adjudicate between them, either on the merits or via a lottery. The timing of this bounty would encourage full litigation of the issues. To pay for the bounty, the court could mix-and-match between (i) fee shifting provisions in the event of a win by the defense, (ii) a mandatory 'litigation tax' imposed on all members of the defendant class, and (iii) a sliding 'litigation investment' in which defendant class members could contribute to the class defense, with a promise that they would receive their investment plus a percentage of the second-stage bounty. The amount of the bounty is something that courts would have to determine based on the size of the class and the issues involved.

Legislatures can be a partner in establishing and revising fee-shifting programs. In Colorado in 1990, for instance, the company Terrestrial Systems sought to bring a class action suit against a class of television owners that they alleged were using unauthorized equipment.[129] Fee shifting in the case was guided by legislative mandate. Under Colorado

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[126] Id at 695-96.
[127] Id at 704.
[128] The reason for this is that the challengers to patent infringers must initiate the lawsuits.
[129] 132 F.R.D. 71

Revised Statutes §18-4-702(3), "in any action for civil theft of cable television service the prevailing party shall be entitled to an award for his reasonable attorney fees".[130] The case illustrates the possibilities of fee-shifting to be designed for specific situations and to be put into practice. Legislatures thinking about social good for the state or country can produce background fee-shifting rules that address the free-rider concerns inherent in defendant class actions.

All of these funding options still leave open the possibility that lead defense lawyers might be quick to settle, or might work out a sweetheart settlement for themselves. Because they might be representing defendants who aren't even known to the plaintiffs (thinking back to the identification problems), there seems a distinct possibility that whatever the bounty or fee shifting regime, settlement incentives will remain askew. To counter this, I propose making representation of defendant classes a *repeat game* by looking favorably upon legal defense teams that have successfully litigated in the past, and looking unfavorably upon those who have lost (and especially unfavorably at those who have struck deals that seemed to be of the sweetheart variety). Such repeat games are similar in spirit to proposals to use repeated auctions for informational purposes.[131] If law firms in these cases are one-time players, then this solution will do little. But in a world of consolidated firms, I suspect that we would see many repeat players. Because they are now maximizing revenue not just in this particular case, but across all future cases, firms will be less likely to engage in behavior that is not in keeping with the class as a whole.

III.D.2. Solving the free riding problem with command-and-control

If all else fails, full blown government regulation in the form of command-and-

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[130] 132 F.R.D. 71 at 73.

[131] Abramowicz (1999), supra note .

control may be necessary. This approach is likely to be incredibly expensive. Terry Fisher has proposed such an approach for copyright.[132] In his proposal, Fisher suggests that Internet Service Providers (ISPs) pay royalties, based on the level of downloads of particular pieces, into a government-run fund which would then disperse those royalties to individual artists.

It should be observed that many potential defendant class actions are already addressed with government regulation. The "tragedy of the commons" cases preempt class action lawsuits by using regulatory agencies (fines, taxes, etc.) to deter socially-detrimental conduct such as littering. The government may be in the best position to identify, monitor, and deter the risk-creation of the large number of defendants. Where the legislature has not already stepped in, however, courts may be more hesitant to push for such regulation.[133]

III.E. Liability rules

While the legal rule may vary in some situations, the default rule should be strict liability for the defendant class, with contributory negligence. Strict liability would have the benefit of eliminating in-fighting within the defendant class. For instance, none of the members of the brick re-sellers association could show that they hadn't stolen bricks

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[132] William Fisher. (2004). Promises to Keep: Technology, Law, and the Future of Entertainment. Stanford University Press

[133] A moderate, and potentially more cost-effective path for legislatures to take is to mandate defendant class actions in certain circumstances. An illustration is a Missouri law that required certain annexation proceedings to proceed via a class action. The "Sawyer Act passed by the 67th General Assembly (Laws 1953, page 309; Sec. 71.015 RS Mo 1949, V.A.M.S.) ... provides that before a city may proceed to annex any area otherwise authorized by law, it must file an action in the Circuit Court of the County in which such unincorporated area is situated praying for a declaratory judgment authorizing such annexation. According to the Sawyer Act: "The peti-tion in such action shall state facts showing: 1. The area to be annexed; 2. That such annexation is reasonable and necessary to the proper [**2] development of said city; and 3. The ability of said city to furnish normal municipal services of said city to said unincorporated area within a reasonable time after said annexation is to become effective. Such action shall be a class action against the inhabitants of such unincorporated area under the provisions of Section 507.070 RS Mo."" 299 S.W.2d 546 at 547.

from this particular factory. This should theoretically create very strong self-monitoring and self-policing incentives. The logic is that: If you do something illegal, we all pay for it, so we're going to try and make sure that you don't do anything illegal. Or, perhaps more realistically, we are going to take more care (e.g. screening) our members to make sure that we reduce our risk.

The tool of vicarious liability could also be used to bring in an existing organization that has been standing on the sidelines or to generate the creation of a new organization that no one had the incentive to start yet. In thinking at the aggregate level about deterrence, even though it might be too late for the particular group on trial to create an organization that could have better protected their interests, future groups in similar situations will look to this court's ruling and realize that the threat of individual liability is so great, they are not going to even enter the market (e.g. not going to take a single brick) unless they are sure that there is some sort of organization/agency/binding agreement that they can become a party to.

Allowing for contributory negligence makes sure that plaintiffs don't get off the hook. It might be the case, for instance, that recording artists made their work too easy to illegally obtain. Contributory negligence could be assessed to the extent that a firm is not up to the state-of-the-art with certain technological precautions.

IV. Conclusion

This paper has synthesized existing knowledge about defendant class actions and proposed a general theory of defendant class actions. The argument of the paper rests on three principles: (1) Forward looking deterrence; (2) Dynamic effects; and (3) Aggregate

analysis. Of these three, it is the aggregate analysis principle that overshadows the other two in importance. The paper provided some illustrations of these principles, and sketched out some ways in which these principles can be applied in system design. The proposals made in this paper challenge courts and legislatures to broaden the scope of their legal reasoning beyond purely formalist concerns about the language of Rule 23.

There is much more to be considered in the defendant class action context. It remains to be seen, for instance, how the proposed tools of system design will hold up in practice. Because of the aggregate analysis principle, more work needs to be done on bringing in additional data and perspectives on the substantive issues at hand.

Despite these unanswered questions, it is my hope that this paper has contributed to the literature by calling for scholars to frame their discussion of defendant class actions within a broader theoretical framework. What is it that one wants a defendant class action to do? Which parties should we think about when adjudicating defendant class actions? How much marginal value do we expect defendant class actions to have in particular situations? Continuing to answer these questions in more detail will enable courts to feel more confident in their ability to certify defendant classes. That, ultimately, will lead to greater social welfare.

Appendix

Discussion of Bayesian Model Averaging Techniques Used in Essay 2

There is significant uncertainty in both the theory and measurement of explanatory variables in the practice of empirical research on state policy innovation. In this sub-field, there is much debate over such questions as, "What variables should be included?" and "How should those variables be measured?" Thus, there is a corresponding debate over the "right" or "best" statistical models to employ. This debate can have important implications, especially if the coefficients are significantly different across various models being considered. Given these implications, it is important to ask: What can scholars do to handle specification uncertainty in state policy innovation research?

Building on earlier work (Shen 2003), in this paper I employed Bayesian model averaging (BMA) techniques to handle the model specification uncertainty issue in state policy innovation studies. Although Bayesian model averaging is not a perfect solution, it is an improvement upon current approaches in the literature. I use the model averaging techniques as presented by Bartels (1997).[1]

State policy Event History Analysis (EHA) places a tremendous burden on the researcher to collect state-level data over time. The variables researchers would like to include in their models are often not available. Hays and Glick (1997) describe a typical problem when the write, "we employ national public opinion support for the right to die. Even though national opinion research on this issue is spotty at best, state-level data – although ideal – would be all but impossible to collect" (503). Caveats such as these

[1] Bartels (1997) cites the work of Draper (1995) and Raftery (1995) as developers of the technique, and he also acknowledges Jeffreys (1961) and Leamer (1978) as building blocks for the technique.

appear in the theory-building sections of all state policy innovation studies.[2] Given these data limitations, what do researchers do in practice? As coined by Mooney and Lee (1995), one common approach is to turn to the "usual suspects," a set of variables that are readily available by state and by year. The usual suspects include measures such as political party strength, population, wealth, political ideology, and degree of urbanization. The explanatory variables of interest are added to these controls. The state policy innovation researcher thus ends up with a set of potential explanatory variables. He/she must then decide which ones to include in the EHA model.

The reported models of published EHA policy innovation models have included a diverse set of explanatory variables. To be sure, part of this differentiation is due to variations in the policy being studied, i.e. what would affect the adoption of lotteries might not affect school choice adoption. But part of the variation is also due to researcher preferences about what to include and what to throw out of their final (reported) model.

The footnotes of policy innovation studies using the EHA approach, provide evidence that the process for deciding which variables to include in the final reported model(s) is similar to that of the applied econometrician as described by Leamer (1983): "The econometric art as it is practiced at the computer terminal involves fitting many, perhaps thousands, of statistical models. One or several that the researcher finds pleasing are selected for reporting purposes" (36).[3] Mintrom (2000) notes that "in preliminary

[2] As another example, Berry and Berry (1990) write about the attractiveness of a "conception of regional [that] would involve both predesignated regions and predesignated leader states within those regions ... this conception of regional diffusion is most attractive when there are reliable data about which states are perceived by public officials to be regional leaders in a policy area. Unfortunately, we have no such data for lotteries" (403). Other such examples are littered about in this sub-field's literature.

[3] This comparison is not made to criticize the intentions of state policy innovation researchers or to accuse them or data-mining or other such practices. The inclusion of many footnotes discussing alternative models, in fact, highlights the fact that these researchers wish to faithfully and fully report their methods to readers. The author's earlier EHA study followed this technique as well.

analyses, in addition to these state politics variables [included in his model], [he] worked with a measure of the Ranney competition index (Bibby and Holbrook 1996, 105) and the ... in all cases the results failed to meet any test of statistical significance" (207, footnote 15). In Hays and Glick (1997), it is noted that "several variants on the state courts variable were also tried ... [but] none of these variables performed any better than the number of cases in the previous year" (514, footnote 3).

As these examples illustrate, state policy innovation research in practice involves consideration of a number of possible combinations of explanatory variables. The present method of dealing with these considerations is to justify a set of assumptions for inclusion/exclusion of variables, include notes to report any other notable models that were considered, and then settle on a final model(s) to report. In light of this present method, Bayesian model averaging seems a useful tool to introduce.

The history of BMA (as discussed in Hoeting, et. al. 1999), dates back to Barnard (1963) and was developed chiefly by economists in the 1970s (e.g. Leamer 1978). It has been used in a number of non-political science applications. It surfaced relatively recently in a debate between economists on the effectiveness of concealed-handgun laws.[4] Since its introduction to political science by Bartels (1997), BMA is starting to appear in published political science articles. Two articles in *Political Science & Politics* on the 2000 presidential election used BMA in the election forecasting problem (Bartels and Zaller 2001; Erikson, Bafumi, and Wilson 2001).

[4] The debate was sparked by Lott and Mustard's (1997) controversial finding that concealed-weapons laws deterred violent crimes without increasing accidental deaths. Critics such as Black and Nagin (1998) and Dezhbakhsh and Rubin (1998) were quick to attack the model specification used by Lott and Mustard. Lott (1998) responded, but the debate remained unsettled. Bartley and Cohen (1998) estimated the model uncertainty in Lott and Mustard's specification by using an extreme bound analysis. This extreme bound analysis is based on the same principle as BMA: instead of relying on one "best" model, run a bunch of models (nearly 20,000 in the case of Bartley and Cohen) to see how robust the finding is.

It is likely that BMA may gain appeal in other sub-fields as well. As stated by Erikson, Bafumi, and Wilson, "BMA is intuitively appealing because it allows researchers to harness the predictive power of a series of regression models rather than rely on one model alone" (815). Or put another way, 64 or 96 regressions are better than 1. State policy innovation research, which focuses on the "coefficients of a linear regression model," (645) is a good candidate for the application of BMA. Researchers want to make inferences from these coefficients, e.g. a positive coefficient on the income variable means wealthier states are more likely to adopt this policy. It is therefore important to know, "How confident can I be in making inferences from my coefficient estimate?" BMA can help state policy researchers answer this question by putting the key casual variable into a number of different models and seeing how it performs across them.

Further, with readable and detailed accounts of BMA provided by Bartels (1997) and Bartels and Zaller (2001), it is an approach that need not remain mysterious. Bartels and Zaller's non-technical description makes the case for BMA:[5]

> "To understand our argument, it suffices for the nontechnical reader to understand two general principles. First, when plausible alternative models produce different results, it is important to recognize those differences – and the differences in the models that produced them – as a significant source of uncertainty in our statistical inferences, including out-of-sample forecasts. Rather than trusting (and touting) the results of any one model as if they were the final word, analysts should base their conclusions (whether formally or informally) on the range of evidence provided by plausible alternative models.
>
> The second general principle of Bayesian model averaging is that the results of alternative models should figure more or less heavily in this synthesis depending, at least in part, on how well they fit the data. If, by some appropriate criterion, one model works better than another, then the

[5] Bartels (1997) provides a formal discussion of BMA and discusses the assumptions underlying the models.

results it generates should be given correspondingly more (though never total) credence. All reasonable models, even those that perform poorly, deserve at least some weight" (Bartels and Zaller 2001, p. 11).

Statistical framework of BMA

What does this discussion of BMA mean in practice for state policy researchers? First, the researcher can run a number of models M_j and obtain a set of parameters and variances for each model. The researcher can then determine how much credence to give each model by using the posterior probability, π_j. The researcher sums over all the models, and the mean of the unconditional posterior distribution is:

$$E(\boldsymbol{\beta} \mid \mathbf{X}, \mathbf{y}) \equiv \mathbf{b} = \Sigma\, \pi_j\, \mathbf{b}_j \qquad [1]$$

and the variance of the unconditional posterior distribution is:

$$V(\boldsymbol{\beta} \mid \mathbf{X}, \mathbf{y}) = \Sigma\, \pi_j\, V(\mathbf{b}_j) \;+\; \Sigma\, \pi_j\, V(\mathbf{b}_j - \mathbf{b})^2 \qquad [2]$$

where $\pi_j = p(M_j \mid \mathbf{X}, \mathbf{y})$ is the posterior probability for model M_j.[6] To calculate the posterior model probabilities, the "Bayes factor" is introduced. The Bayes factor, B_{ij}, is the ratio of marginal likelihoods for model M_i and model M_j and is calculated by:[7]

$$B_{ij} \equiv p(\mathbf{X}, \mathbf{y} \mid M_i) \,/\, p(\mathbf{X}, \mathbf{y} \mid M_j) \qquad [3]$$

The Bayes factor can be calculated readily using the Bayesian Information Criterion (BIC).[8] Calculated using the BIC, the Bayes factor is:

$$B_{j0} \equiv \text{e}\text{\^{}}(-.5\ \text{BIC}(M_j)) \qquad [4]$$

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[6] Equations [1] and [2] here correspond to Bartels (1997) equations [5] and [6]. They are derived from an earlier set of equations in Bartels' article. See Bartels (1997) for this discussion.

[7] Equation [3] corresponds to Bartels (1997) equation [9], which is derived in the Bartels article.

[8] In statistical programs such as R, the BIC() command computes the BIC directly. It can also be derived from the Mean Square Error (MSE) by: BIC = n ln(MSE) + k ln(n), where n is the number of observations and k is the number of parameters being estimated.

Using the Bayes factor, "we can solve for the model posterior probability for any particular Model M_i as a function of the complete set of model prior probabilities and Bayes factors:"[9] (p. 648)

$$\pi_i = B_{i0}\,\pi^0_i \,/\, \Sigma\, B_{j0}\pi^0_j \qquad [5]$$

To calculate π_i, this paper will make the assumption of "uniform model priors," ($\pi^0_1 = \ldots$ $\pi^0_j = \ldots = \pi^0_J = 1/J$). In this case, "the posterior probability for each model is simply proportional to the corresponding Bayes factor:" (p. 648)

$$\pi_i = B_{i0} \,/\, \Sigma\, B_{j0} \qquad [6]$$

If there is good reason to believe (*a priori*) that certain models are more appropriate than others, the assumption of uniform model priors can be modified.[10] The uniform model priors assumption is appropriate, however, when all models are considered to be equally plausible. As discussed earlier, this is usually the case for state policy researchers: there are many plausible models and no convincing reason to choose one over the other. Once π_i has been solved for in equation [6], it can then be used to calculate the weighted means and variances.

[9] Equation [5] here corresponds to Bartels equation [16]. Bartels notes that this solution is arrived at by repeatedly applying the derived equation [12]: $\pi_i / \pi_j = B_{ij}\, \pi_i^0 / \pi_j^0$, where π_i^0 and π_j^0 are the prior model odds.

[10] Bartels (1997) shows how this can be done when he discusses dummy-resistant model priors in the context of BMA analysis of Lange and Garrett (1985, 1987) and Jackman (1987).

Appendix Table A. County-level analysis of victim compensation expenditures using only violent crime as explanatory variable, selected states, 2001-2006; OLS regression results and robust standard errors reported

STATE	TX	CA	CA	TX	CA	TX	CA	MI	CA	FL	FL	MD
YEAR	2001	2001	2002	2003	2003	2004	2004	2004	2005	2005	2006	2006
Violent Crime	0.307***	0.337**	0.453**	0.542***	0.473**	0.557***	0.302***	0.076***	1.539**	0.281***	0.168***	0.115*
	(0.028)	(0.004)	(0.013)	(0.055)	(0.008)	(0.055)	(0.004)	(0.003)	(0.654)	(0.028)	(0.028)	(0.064)
Constant	16.497*	232.745***	503.464***	24.267	296.445***	28.004*	103.219**	-5.849**	57.953	72.247**	94.328***	45.750
	(8.612)	(61.324)	(106.661)	(15.535)	(80.027)	(14.995)	(41.210)	(2.593)	(233.079)	(30.835)	(28.508)	(32.930)
Observations	253	58	58	252	58	254	58	83	57	66	66	24
R-squared	0.9554	0.9852	0.9741	0.9610	0.9858	0.9631	0.9888	0.9700	0.6209	0.7448	0.6009	0.4130

NOTES: Robust standard errors in parentheses. Two-tailed significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%.

Appendix Table B. County-level analysis of victim compensation revenues using only violent crime as explanatory variable, selected states, 2001-2006; OLS regression results and robust standard errors reported

STATE	TX	TX	TX	CA	CA	FL	FL
YEAR	2001	2003	2004	2004	2005	2005	2006
Crime Level	0.053***	0.051***	0.050***	0.024***	0.086	0.036***	0.036***
	(0.004)	(0.003)	(0.002)	(0.001)	(0.065)	(0.004)	(0.004)
Constant	62.854***	62.390***	75.764***	56.279	342.378**	170.916***	173.973***
	(7.629)	(8.297)	(8.218)	(37.777)	(149.769)	(55.315)	(54.085)
Observations	254	253	254	58	57	66	66
R-squared	0.9560	0.9614	0.9644	0.9215	0.2321	0.4844	0.5151

NOTES: Robust standard errors in parentheses. Two-tailed significance denoted as: * significant at 10%; ** significant at 5%; *** significant at 1%.

Appendix Table C. Source and number of 2007 crime victim compensation bills included in analysis

State	Web Source	Total
Alabama	http://www.legislature.state.al.us/	5
Alaska	http://w3.legis.state.ak.us/home.htm	2
Arizona	http://www.azleg.state.az.us/	5
Arkansas	http://www.arkleg.state.ar.us/	0
California	http://www.legislature.ca.gov/	10
Colorado	http://www.leg.state.co.us/	1
Connecticut	http://www.cga.ct.gov/	3
Delaware	http://www.legis.state.de.us/	1
Florida	http://www.leg.state.fl.us/	2
Georgia	http://www.legis.state.ga.us/	0
Hawaii	http://www.capitol.hawaii.gov/	7
Idaho	http://www.legislature.idaho.gov/	2
Illinois	http://www.ilga.gov/	0
Indiana	http://www.in.gov/legislative/	8
Iowa	http://www.legis.state.ia.us/	4
Kansas	http://www.kslegislature.org/	4
Kentucky	http://www.lrc.state.ky.us/home.htm	0
Louisiana	http://www.legis.state.la.us/	0
Maine	http://janus.state.me.us/legis/	0
Maryland	http://mlis.state.md.us/	2
Massachusetts	http://www.mass.gov/legis/	0
Michigan	http://www.legislature.mi.gov/	1
Minnesota	http://www.leg.state.mn.us/	1
Mississippi	http://www.ls.state.ms.us/	1
Missouri	http://www.house.mo.gov/	1
Montana	http://leg.state.mt.us/css/default.asp	1
Nebraska	http://www.unicam.state.ne.us/	0
Nevada	http://www.leg.state.nv.us/	0
New Hampshire	http://www.gencourt.state.nh.us/ie/	1
New Jersey	http://www.njleg.state.nj.us/	13

Appendix Table C. Source and number of 2007 crime victim compensation bills included in analysis

State	Web Source	Total
New Mexico	http://legis.state.nm.us/lcs/	1
New York	http://assembly.state.ny.us/	26
North Carolina	http://www.ncga.state.nc.us/homePage.pl	4
North Dakota	http://www.legis.nd.gov/	2
Ohio	http://www.legislature.state.oh.us/	0
Oklahoma	http://www.lsb.state.ok.us/	4
Oregon	http://www.leg.state.or.us/	4
Pennsylvania	http://www.legis.state.pa.us/	1
Rhode Island	http://www.rilin.state.ri.us/	0
South Carolina	http://www.scstatehouse.net/	3
South Dakota	http://legis.state.sd.us/index.aspx	1
Tennessee	http://www.legislature.state.tn.us/	14
Texas	http://www.capitol.state.tx.us/	5
Utah	http://le.utah.gov/	4
Vermont	http://www.leg.state.vt.us/default.htm	1
Virginia	http://legis.state.va.us/	5
Washington	http://www1.leg.wa.gov/legislature/	2
West Virginia	http://www.legis.state.wv.us/	2
Wisconsin	http://www.legis.state.wi.us/	2
Wyoming	http://legisweb.state.wy.us/	2