INTRODUCTION

THIS BOOK is about the "penal couple,"[1] the two individuals most directly involved in a criminal act—the victim and the perpetrator. What roles do they play in a criminal episode? How should we evaluate their participation in it and attribute liability for the resulting harm? Should the perpetrator always be the single culprit or should his responsibility depend on the conduct of the victim? These questions are at the center of *Victims' Rights and Victims' Wrongs: Comparative Liability in Criminal Law*.

It is common to think of crime as something that "bad guys" do to "good guys" and of criminal adjudication as "us" against "them." This thinking is reflected even in the way we identify criminal cases: "People v. John Doe." We, "the People," prosecute John Doe. If he is wrong, then we—all of us, including the victim—are right. The guilt of the perpetrator presumes the innocence of the victim. In fact, perception of victims as innocent has a long history, which significantly predates our legal system. In numerous cultures, as evidenced by linguistics, the notion of victimhood is tied to the religious sacrifice. Most Semitic, Germanic, Romance, and Slavic languages have the same word for the victims of sacrifice and the victims of crime.[2] This homonymy is rooted in the dichotomous vision of the world as split into two categories, the guilty and the innocent. Those who were to serve as victims of sacrifice had to be pure, without blemish, and today too we continue to associate victimhood with innocence.[3]

It is also natural to think of the victim in the passive voice, as someone who was harmed, someone who was an object rather than a subject of an offense. Perhaps this image has historical and religious connotations as well.

Recall, for instance, the biblical story of the binding of Isaac and its depiction by Rembrandt: a young man is bound to an altar, motionless and helpless.

Yet, no matter what are the psychological, anthropological, or linguistic reasons for our separating the victim from the crime, they are largely misleading. In reality, victims are often co-authors of the harm they suffer. They may participate in risky activities; agree to infliction of pain or injury; attack or provoke others. Sometimes, they do not take necessary precautions against criminals; sometimes, they are criminals themselves. Frequently, yesterday's offenders become today's victims. For example, in Newark, New Jersey, where I am writing this book, approximately 85 percent of victims killed in the first six months of 2007 had criminal records.[4] In many instances, complex interpersonal dynamics between the victim and the perpetrator invoke a question of shared responsibility. Consider the following examples:

> A motorist driving ten miles per hour in excess of the speed limit hits and kills a pedestrian who intentionally threw himself in front of the car. Had the motorist not been speeding, he would have been able to avoid the collision. Is the motorist guilty of criminal homicide?
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> Three drivers participate in a drag race. One loses control of his car and is killed. The other two are charged with manslaughter. Should the surviving drivers' culpability be reduced because of the decedent's own recklessness?
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> A man agrees to be killed and eaten by another man. Should his voluntary consent to the homicide be a factor mitigating the killer's criminal liability?
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> After years of abuse, a woman lashes out and, during a nonviolent confrontation, kills her husband. Should she be punished as severely as if there were no history of domestic violence?

In other words, should the victim's own acts ever be taken into account when we evaluate the criminal liability of the perpetrator? The law seems to be clear on the point: "Victim fault is not a defense, either partial or complete, to criminal liability."[5]

"Don't blame the victim" is one of the cornerstone maxims of Anglo-American jurisprudence, frequently quoted by judges, trial lawyers, and scholars. But is that maxim true—does the law in fact ignore the victim's behavior in determining the level of the defendant's criminal liability? Even more importantly—*should* the law ignore it? And if the answer depends on the circumstances, how should we decide when the victim's behavior is a mitigating

factor and when it is irrelevant? To answer these questions, we need to integrate the victim into the theory of criminal law.

In recent years, as a result of the victims' rights movement, victims have become active participants in the American criminal justice system.[6] Today, thirty-two states have Victims' Rights Amendments, and all states have Victims' Bills of Rights that guarantee crime victims notice of important legal proceedings; participation in those proceedings, including victim impact statements at the time of sentencing; and restitution.[7] The increased role of victims in criminal law has raised new questions about their rights and responsibilities. However, most academic debates have focused on the victims' position in the criminal process rather than substantive criminal law.[8] This is not surprising in view of the fact that, until relatively recently, "there has been virtually no consideration of the victim's participation in the wrongdoing, or of any other interaction or interrelationship between criminal and victim."[9] As one commentator phrased it, the "analysis of victim conduct in substantive criminal law could be said to represent the dark side of the moon of the victims' rights movement."[10]

Both legal and nonlegal scholars agree that criminal law has developed "without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment."[11] Some authors have pointed out that there is a need for a comprehensive theory that would assign victims and perpetrators their proper places in each aspect of criminal law.[12] Despite a number of insightful works that have discussed victims in connection with various areas of criminal doctrine,[13] such a comprehensive theory is yet to be written. This book is a step in that direction. It takes the position that each criminal episode must be viewed in its complexity, as an interaction of victims and perpetrators. If the victims voluntarily (by consent or assumption of risk) or involuntarily (by an attack on legally recognized rights of others) change their moral and legal status vis-à-vis the perpetrators, the perpetrators should be entitled to a defense of complete or partial justification, which would eliminate or diminish their criminal liability.

The book consists of three parts and six chapters. Part I, "Reality Check: Can Victims Be Partly Responsible for the Harm They Suffer?" challenges the accuracy of the proposition that the perpetrator's liability does not, and should not, depend on the conduct of the victim. I start in Chapter 1 with a review of criminological and victimological studies, which strongly suggest that criminal liability may be properly evaluated only in the context of the victim-perpetrator interaction. I then turn attention to criminal law itself and show

that a number of criminal doctrines, such as consent, self-defense, and provocation, do in fact include victims' actions in the determination of perpetrators' liability. In Chapter 2, I make a normative claim that victims' actions should be considered a liability mitigator in all appropriate cases and not merely in the context of a few distinct defenses. My main arguments draw on the following:

1. The just desert principle, based on which perpetrators should be responsible for the harm caused only by them and not by the victim;
2. The efficiency principle, pursuant to which, in order to preserve the moral authority of criminal law, penal sanctions should not be overused and the law should develop in a dialogue with community perceptions of right and wrong;
3. The consistency principle, which mandates that punishment-justifying considerations be applied systematically;
4. The analysis of mitigating factors recognized at the penalty stage of a criminal trial; and
5. Considerations underlying the apportionment of liability in torts.

In Part II, "Toward a Unifying Theory of Comparative Criminal Liability," I propose a basis for developing a theory of comparative responsibility in criminal law and suggest a method allowing us to determine when the victim's conduct should provide the perpetrator with a complete or partial defense and when it should be legally irrelevant. Specifically, in Chapter 3, I revisit the doctrines of consent, self-defense, and provocation and consider some of the most problematic cases in each of these areas of law. Such cases include consensual homicide, sadomasochism, and gladiatorial contests; attacks by "innocent aggressors"; and killings provoked by spousal infidelity. I suggest that the doctrines of consent, self-defense, and provocation need to be revised to account properly for these cases. At the same time, as I argue in Chapter 4, these doctrines are based on a common principle, the principle of *conditionality of rights*. Pursuant to it, the perpetrator's liability may be mitigated or eliminated if the victim, by his own acts, has waived or reduced his right not to be harmed. With a view of putting it in the foundation of the defense of comparative criminal liability, I examine the principle of conditionality of rights in the context of a broader theory of rights and address a number of specific questions, such as: Should the defense be grounded in people's moral rights or legal rights? Do people have rights only against actual harm or against a risk of harm as well?

In Chapter 5, which opens Part III, "Incorporating the Principle of Conditionality of Rights into Criminal Law," I consider the temporal application of the principle: assuming the victim has reduced his right not to be harmed, how long does it remain reduced? To illustrate the issue, I discuss the effect of remote consent in the context of living wills; revocation of consent in connection with the law of rape; and "imminence" of threat in cases of killing of abusers in nonconfrontational circumstances. The final chapter of the book, Chapter 6, analyzes specific factors that may play a role in determining the scope of the perpetrator's liability—such as the magnitude of the affected rights of the perpetrator and the victim; the comparative causative impact of their conduct; and their respective culpability—and offers some thoughts about practical implementation of the principle of conditionality of rights and comparative liability in criminal law. I conclude with a proposition that the victim's rights-reducing conduct should function as an affirmative defense. In some circumstances, it would provide the defendant with complete justification, whereas in other circumstances it would only mitigate the defendant's liability. The new defense is sorely needed to reflect the realities of human interaction and bring the theory of liability in accord with fundamental principles of justice.