

# The Emerging "Victim Factor" in the Supreme Court's Criminal Jurisprudence: Should Victims' Interests Ever Prevent a Court from Overturning a Conviction and Ordering a Retrial?

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In two 1983 cases<sup>1</sup> the United States Supreme Court, in reinstating convictions that had been overturned on appeal, clearly signaled that the interests of the testifying victims are a relevant factor to be considered by courts in determining whether to reverse a conviction and award a retrial. The decisions appear, thus far, strangely to have gone unnoticed.<sup>2</sup> Yet the implications of the Court's "signal" are troublesome and significant and the cases warrant examination. The scope of the emerging "victim factor"<sup>3</sup> in criminal jurisprudence is unsettled and almost certainly will provoke further debate as other courts, perhaps urged by prosecutors, seek to divine and implement the Court's teachings.

## I. STATEMENT OF THE CASES

The first of the two cases, *Morris v. Slappy*,<sup>4</sup> is the more important. The respondent was convicted in two trials in state court of various crimes including rape, robbery, and burglary, all involving the same victim. The issue before the Supreme Court concerned the sixth amendment right to counsel. The court of appeals, in a habeas corpus action, had reversed the convictions on the ground that the trial court had violated Slappy's right to counsel by denying his motion for a continuance until the deputy public

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1. *Morris v. Slappy*, 461 U.S. 1 (1983); *United States v. Hasting*, 461 U.S. 499 (1983).

2. The aspect of the decisions discussed herein has not been the subject of interpretation, or even citation, in any other as yet reported opinion of a lower court. Its only mention in legal literature appears to be a passing reference in a recent article. See T. O'Neill, *The Good, The Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 379-80 (1984).

3. The term "victim factor," as used in this article, refers to the rights and concerns of victim-witnesses who are forced to retestify because an appellate court overturned a defendant's conviction. See *infra* notes 8-14 and accompanying text.

4. 461 U.S. 1 (1983).

defender initially assigned to represent him was available.<sup>5</sup> The court of appeals held that the sixth amendment guarantees a right to counsel with whom the accused has a "meaningful attorney-client relationship"<sup>6</sup> and that the trial judge had infringed this right by denying a motion for a continuance based on the substitution of another deputy public defender six days before trial.

Five members of the Supreme Court joined in an opinion by the Chief Justice reversing the judgment of the court of appeals. After setting out the facts, the Court, in part III of its opinion, rejected the holding below that the sixth amendment embodied a right to a "meaningful attorney-client relationship," terming this a "novel ingredient" of the constitutional right to counsel that was without basis in precedent or in logic since no court "could possibly guarantee that a defendant will develop the kind of rapport with his attorney" that the court below thought was part of the constitutional right.<sup>7</sup> That holding is not the focus of this article's consideration, but rather serves as a backdrop for the Court's victim factor discussion contained in a conspicuous fourth part of its opinion that seems clearly designed to give general guidance to judges beyond the relatively narrow holding of the case. The critical paragraph of that part of the opinion—the focus of this commentary—reads as follows:

In its haste to create a novel Sixth Amendment right, the court [below] wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witness; the Constitution permits nothing less. But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.<sup>8</sup>

Four Justices, although concurring in the result, joined in two opinions distancing themselves, *inter alia*, from the Court's treatment of the interests

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5. *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981).

6. *Id.* at 720.

7. *Morris v. Slappy*, 461 U.S. at 13.

8. *Id.* at 14-15.

of victims. In a footnote, Justice Brennan, joined by Justice Marshall, tersely criticized the Court's observations as appearing to suggest "that the interests of a victim in a particular case should be considered by courts in determining whether to enforce the established rights of a criminal defendant."<sup>9</sup> Justice Blackmun, joined by Justice Stevens, contented himself with the observation that the Court's remarks about "the concerns of victims (deserving of sympathy as they may be)" were unnecessary dicta.<sup>10</sup>

A little more than a month later, the Court decided *United States v. Hasting*.<sup>11</sup> Again, the underlying offenses of which the defendants had been convicted were sexual in nature, including rape and sodomy of the victims. Again, the case reached the Supreme Court in a posture in which the convictions had been reversed by the court of appeals, in this instance on the ground of alleged impermissible comment by the prosecutor in closing argument on the defendant's failure to rebut the government's evidence. Again, the Chief Justice wrote the opinion of the Court, joined by the same four Justices who had joined his opinion in *Slappy*. The basis for the court of appeals' holding—whether the Constitution or supervisory power—was not clear; thus the Court elected to treat both aspects by concluding that the court below had failed to apply appropriate factors in the event it relied upon its supervisory authority, and that it had erred in failing to apply a harmless error analysis to the prosecutor's remarks.

In its discussion of the appropriate considerations to be weighed by courts in invoking their supervisory authority to reverse a conviction, the Court again alluded to the victim factor. Summarizing its holding that the court of appeals had acted improperly in using its supervisory power, the Court noted that reversals of convictions based upon supervisory power must be approached with "caution" and only after "balancing the interests involved."<sup>12</sup> The Court then stated:

As we shall see below, the Court of Appeals failed in this case to give appropriate — if, indeed, any — weight to these relevant interests. It did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events. See *Morris v. Slappy* . . . .<sup>13</sup>

In an opinion concurring in part and dissenting in part, Justice Brennan, joined by Justice Marshall, while rejecting certain parts of the Court's opinion, did not disagree with the proposition that the interests of victims

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9. *Id.* at 28 n.10 (Brennan, J., concurring in result).

10. *Id.* at 29 (Blackmun, J., concurring in judgment).

11. 461 U.S. 499 (1983).

12. *Id.* at 506-07.

13. *Id.* at 507 (citation omitted).

may properly be taken into account before a court determines to invoke its supervisory power to overturn a conviction.<sup>14</sup>

## II. DISCUSSION

### A. *Scope and Implications of the Cases*

It may be argued that there is nothing remarkable about the solicitude for victims' interests displayed in *Slappy* and *Hasting* since our law recognizes a number of doctrines and devices designed to protect victims even though the effect is to disadvantage criminal defendants in terms of the trial outcome. For example, in a sensitive case, courts may take measures to guard against the embarrassment of victims by closing certain portions of the trial or hearing.<sup>15</sup> Moreover, many state and local governments, as well as the federal government, acting pursuant to statutes, provide counseling and other services for witnesses and victims designed in part to relieve their trauma and encourage them to testify.<sup>16</sup> The federal government also has available a witness protection program which was first enacted in 1970 as part of the Organized Crime Control Act.<sup>17</sup> The purpose of this program is to protect witnesses from the threat of physical harm by the defendant or other hostile persons, and thus to facilitate their testimony.

However, the *Slappy* and *Hasting* decisions go far beyond these heretofore recognized victim measures and could elevate victims' interests to a new plateau. For, whereas the aforementioned doctrines or devices of trial closure, victim counseling, and witness protection have the effect of making it easier, or even in some cases making it possible, for victims to testify, thereby perhaps causing some guilty persons to be convicted, no court prior to *Slappy* and *Hasting* had ever suggested that concern for a victim's ordeal in testifying at a retrial may be sufficient to cause a court to stay its hand

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14. Although reiterating his view set forth in *Slappy* that "the interests of a victim in a particular case are not relevant to determining whether to enforce the established rights of a criminal defendant," Justice Brennan stated that

the interests of a victim may be relevant to determining whether to invoke the supervisory powers to reverse a conviction in a particular case even though the error is harmless. Whether a continuing problem calls for the exercise of supervisory powers is a different question from whether a particular case is an appropriate context in which to exercise those powers.

*Id.* at 528 n.7 (Brennan, J., concurring in part and dissenting in part).

15. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-10 (1982); *Gannett Co. v. DePasquale*, 443 U.S. 368, 388 n.19 (1979).

16. See, e.g., Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

17. Pub. L. No. 91-452, 84 Stat. 933 (1970). The program, which permits the Attorney General to safeguard witnesses from physical harm and to relocate and furnish them with new identities after their testimony, was recently revised and expanded by part F of title XII of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2153.

and decline to overturn a conviction which otherwise would be reversed.

That such is the import of *Slappy* and *Hasting* cannot be doubted,<sup>18</sup> although the precise scope of the Court's emerging doctrine cannot be confidently charted. Some of the doctrine's boundaries, however, seem reasonably clear. For example, Justice Brennan's hostilely exaggerated interpretation of *Slappy* as authorizing or requiring courts to refrain from enforcing "established rights" of defendants in order to safeguard victims' interests<sup>19</sup> is surely misplaced in light of the Court's explicit affirmation that "inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused"<sup>20</sup> that result in a new trial.<sup>21</sup> Likewise, by limiting its description of the victims' interest to be protected to that of not being required, *at a retrial*,<sup>22</sup> to undergo the ordeal of reliving particularly traumatic experiences through exposure to the process of direct and cross-examination, the Court appears, for the present, to have cabined the emerging victim factor to retrial situations.

Beyond these guideposts, the intended purview for the victims' doctrine announced in *Slappy* and *Hasting* is less clear, leaving the question of the precise nature of the Court's message still to be deciphered. Accepting both that Justice Brennan's interpretation is properly to be dismissed as extravagant and that the Court was not writing without purpose, what rational meaning can be ascribed to the Court's deliberately inserted pronouncements with regard to the interests of the victims in these two cases?

The most plausible reading, I submit, is that courts should not use cases in which witnesses would apparently face a particularly onerous burden in

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18. Although the Court in *Slappy* declined to specify the weight to be given to the interests of victims, it did unmistakably indicate that those interests are to be accorded some weight. 461 U.S. at 15 ("that factor is not to be ignored"). It follows that in cases where other relevant factors are equal, the victim factor will be outcome determinative, that is, it will be sufficient to deny an otherwise warranted new trial.

19. *Id.* at 29 n.10 (Brennan, J., concurring in result).

20. *Id.* at 14.

21. While the Court limited its statement to "constitutional rights," it is difficult to believe that this is intended to portend a different outcome as to established rights of non-constitutional dimension. Such a rule would authorize a court to decline to reverse a conviction and order a new trial in a case involving a severe strain on one or more witnesses, even though, for example, a confession was found inadmissible under 18 U.S.C. § 3501 (1982) because of delay in bringing the accused before a magistrate, or the court had denied the defendant the right to exercise peremptory challenges under Rule 24(b) of the Federal Rules of Criminal Procedure (such challenges being not mandated by the Constitution, *see Swain v. Alabama*, 380 U.S. 202 (1965)), or had admitted prejudicial evidence in contravention of the Federal Rules of Evidence. Contrary to Justice Brennan, nothing in *Slappy* suggests that the Court is prepared to go to such lengths to relieve victims from the burden of testifying at a retrial.

22. In *Slappy*, the Court spoke, in the framework of the facts of that case, of the victims' interest "in not undergoing the ordeal of yet a third trial." 461 U.S. at 14. Any notion that the Court's concern was confined to third-trial situations, however, was dissipated by *Hasting*, which involved the more common circumstance of a potential second trial.

retestifying<sup>23</sup> as the occasion to announce a new or expanded legal right mandating the defendant's retrial. This fits the facts in *Slappy*, where the court below had purported to find in the sixth amendment a novel right to a "meaningful" attorney-client relationship. It is also consistent with the narrower application of *Slappy* in the *Hasting* decision where the Court said the victim factor was relevant in determining whether to use a particular case as the vehicle for invoking supervisory power to order a retrial.

However, the acceptance of even this relatively modest (by comparison with Justice Brennan's) scope for the Court's doctrine raises serious questions. Acceptance of the doctrine requires that one endorse a problematic distinction in relative importance between rights that are clearly "established" and other rights not yet declared or perceived. Thus, under this construction of *Slappy*, a court would not be free to consider victims' interests, however compelling, in avoiding the burden of retrial if prejudicial error of an established variety (whether or not of constitutional dimension) had occurred; but if the error were of a type involving the identification of a right not theretofore appreciated or announced, then the court, on the basis of *Slappy*, would be entitled or even required to consider victims' interests and could properly decline to reverse the conviction in some cases. Such a distinction resulting in disparate treatment of defendants can be defended only on the hypothesis that all "established" rights are considerably more important than all as yet undiscovered ones.

The fact that a right is novel, however, has not heretofore been thought to mean that it is any less valid or substantial than a right previously noticed or established.<sup>24</sup> Virtually all rights that required any judicial extrapolation from the language of the Constitution or a statute to discover were novel once. It would appear to be a remarkable jurisprudence, at this juncture, to draw a distinction between old and new rights. Such a distinction could only be legitimized by a view of the universe of criminal defendants' rights as one in which all such important rights have been unearthed and no others, or at least none large enough to warrant a judgment of reversal and retrial in the past, remain to be found.

One cannot know, of course, whether in the future any such virgin rights will be found to exist, but nothing in our history suggests that we have

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23. The Court in *Slappy* cites nothing in the record to support its assumption that the victim in that case had found the experience of testifying to be traumatic. While this is undoubtedly a fair assumption for many victims of sexual offenses, it is not so universally true that the Court was entitled to take judicial notice of it. See *infra* text accompanying notes 39-41.

24. For example, in *O'Callahan v. Parker*, 395 U.S. 258 (1969), the Court, in contravention of almost two centuries of understanding and practice, held that servicemen in peacetime had a right to trial before a civilian court rather than a military one for non-service-connected crimes.

reached the point of stasis in this regard.<sup>25</sup> Perhaps, nonetheless, a majority of the Supreme Court believes—as it must in order to justify the interpretation of *Slappy* which has been posited here—that the world of criminal defendants' rights has been totally explored and its contents mined in judicial opinions, but no Justice has ever said so, and it is difficult to believe the Court would subscribe to such a proposition if presented with it squarely.

The foregoing reflections lead to the following alternatives: (1) the posited purview of the victim factor in *Slappy* and *Hasting* is incorrect and the Court intended some other meaning; (2) the posited interpretation is correct but the Court failed to appreciate its implications and would reject an application of the victim factor that denied a new trial to a defendant who had suffered a novel form of deprivation of rights; or (3) the posited interpretation is correct and the Court would not shirk from its implications.

Although some other commentator, or the Court in a later case, may demonstrate the viability of the first alternative, I must discard it. Even though, as has been shown, justification for the posited interpretation of *Slappy* requires adherence to a set of legal beliefs that are fraught with radical implications,<sup>26</sup> it nevertheless is even more difficult to assign another rational construction to the victim factor discussion in *Slappy* and *Hasting*.

Without completely discounting the deliberately included language in the *Slappy* and *Hasting* opinions, it is impossible to shrink from the conclusion that the Court did mean to signal to lower tribunals that the interest in shielding victims from the onus of reliving traumatic experiences through testimony at a retrial is a potent factor; that is, it is sufficient, in some cases, to override the interest in the defendant's being afforded such a retrial. If this is so, then however far-reaching the consequences, it is more reasonable (and more in keeping with the language in the cases) to posit an interpretation of the *Slappy* doctrine as limited to situations in which a "new" right is to be announced or supervisory power is to be invoked,<sup>27</sup> than to accept Justice Brennan's even broader understanding in which victims' interests must

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25. For example, the Court appears to be moving in the direction of enlarging a defendant's right to challenge the use by prosecutors of peremptory challenges to exclude jurors on the basis of discriminatory factors, and to retreat from, or abandon, the holding in *Swain v. Alabama*, 380 U.S. 202 (1965). See Comment, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L. REV. 477, 481-91 (1984). The Court recently agreed to review a case challenging the viability of *Swain*. *Batson v. Kentucky*, cert. granted 105 S. Ct. 2111 (1985).

26. See *supra* notes 23-25 and accompanying text for a discussion of "new" versus "established" rights.

27. This interpretation, to be sure, does create some internal tension with the Court's statement in *Slappy* that "prejudicial error . . . that clearly impairs a defendant's constitutional rights" requires a new trial, 461 U.S. at 14, since this acknowledgment of the limitations of the "victim factor" might be read to apply even to a newly discovered constitutional right. However, the posited interpretation may be harmonized with the quoted statement, without undue strain, by supposing that the phrase "clearly impairs" was meant to exclude new rights.

be factored in by courts in making retrial determinations even when prejudicial violations of established rights have taken place. Moreover, no other reading of *Slappy* that accords with the minimal respect to be accorded to the Court's purposefully uttered victim factor passages attains an equal measure of credibility.

For example, another possible interpretation of the *Slappy* doctrine is that it (a) recognizes the applicability of the victim factor, where factually present, in all cases in which error has occurred that would otherwise warrant reversal and a new trial (except perhaps those in which the error involved "established" constitutional rights), and (b) contemplates that the determination whether to reverse the conviction in such a case will depend upon the outcome of a balancing test in which the perceived error is weighed against the harm to the victim from a new trial. Under this interpretation, which is similar to that of Justice Brennan, the victim factor would be relevant to both old and novel forms of trial error.

What makes this interpretation of *Slappy* problematical is that it would require courts, in effect, to classify various rights in terms of their seriousness, and then to engage in a virtually impossible task of weighing the extent of harm upon the defendant's right to a fair trial against the potential degree of harm to the victim from a retrial. While courts must sometimes attempt the difficult task of balancing one *right* against another, this would be a very different sort of exercise since there is of course no right in a victim, or anyone else, not to testify, even if to do so would endanger his life or that of another person.<sup>28</sup> Moreover, apart from the normally not too difficult determination of whether or not a particular right is of constitutional dimension in terms of its impact upon the criminal justice process,<sup>29</sup> courts are not equipped to distinguish violations in terms of seriousness,<sup>30</sup> much less weigh such violations against the very different interests of victims in avoiding the rigors of retrial. No standards are suggested in *Slappy* for

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28. See *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973). Nor should *Slappy* and *Hasting* be regarded as having impliedly created a right in victims not to testify in traumatic circumstances. Such a doctrine would be inconsistent with the notion that physical safety, even to the extent of jeopardizing one's own life or that of a family member, is not a valid reason for declining to testify. If a well-founded fear for one's *life* is insufficient to remove the duty to testify, it is surely misplaced to read *Slappy* and *Hasting* as holding that the duty can be dispensed with because of a victim-witness's lesser interest in avoiding having to relive the testimonial experience, however traumatic this may be in an individual case.

29. Cf. *Chapman v. California*, 386 U.S. 18 (1967).

30. By this is meant that, while courts bifurcate rights into those of constitutional and non-constitutional dimension for purposes of a harmless error assessment, *see id.*, there is no legal framework, within those broad categories, for ranking rights generally in terms of seriousness. For example, how would a court determine whether the admission of prejudicial evidence were more serious than prejudicial argument, when each was weighed against the victim factor?



drawing such distinctions nor does the Court's opinion indicate that this sort of exercise is contemplated.

In sum, attempting to glean the import of the Court's victim factor language in *Slappy* and *Hasting* is not an easy task since all conceivable interpretations lead to extreme and unprecedented consequences. Nevertheless one of the interpretations must be accurate and the most likely candidate, it is submitted, is the one posited above.<sup>31</sup>

As between the two remaining alternatives a resolution is not currently feasible. Both alternatives assume that the posited interpretation of the victim factor is accurate; they differ only in a predictive sense, that is, in whether the Court should be presumed to have fully appreciated the consequences of a victim factor of the posited scope and whether, therefore, the Court is prepared to accept those consequences. This is a question that cannot now be answered. Since the Supreme Court has not yet confronted, post-*Slappy*, a situation in which both prejudicial error of a novel variety exists and a severe victim-witness ordeal on retrial is anticipated, it is possible only to speculate on the Court's reaction.<sup>32</sup> We shall have to await such a case to see whether (and how) *Slappy* will be applied, or whether it will be abandoned or limited.

### B. A Critique

It may be quickly conceded that the victims of crime are worthy of sympathy and that their interests have in general been too long neglected. It may also be taken as a "given" that society has a stake in not unnecessarily prolonging or intensifying a victim's ordeal in testifying beyond constitutional requirements, since the ordeal, if deemed too onerous, may deter victims from reporting to the proper authorities violations involving peculiarly degrading experiences.<sup>33</sup> These precepts do not, however, begin to justify a rule of law that would require courts to make judgmental decisions about the extent of a victim's anticipated ordeal and, when deemed severe, to refrain from reversing a conviction and ordering a new trial when the basis for the reversal is a new or novel right or the invocation of a supervisory power.

Such a doctrine is subject to criticism on a number of grounds. First, as discussed earlier, the doctrine discriminates against defendants whose trials

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31. Compare the aphorism of detection attributed to the character Sherlock Holmes: "[W]hen you have eliminated the impossible, whatever remains, however improbable, must be the truth." A. DOYLE, *THE SIGN OF FOUR* 93 (1890). Even if the alternative interpretation, discussed *supra* at text accompanying note 28, is accepted, virtually all of the criticisms leveled at the doctrine in the remainder of this article are applicable.

32. Nor does there appear to be any other reported decision construing or applying the *Slappy* or *Hasting* pronouncements with respect to victims' interests.

33. See *Slappy*, 461 U.S. at 14.

are determined to have involved violations of a new right rather than an existing or established right. The only logical hypothesis justifying this disparity—that there are no hitherto unappreciated rights substantial enough to warrant a new trial where the prospect is that the victims will undergo an unusually difficult experience on retrial—seems inherently suspect and unlikely to be vindicated by the future course of development of the law in criminal cases.

Second, to single out victims' interests in not undergoing retrial as the basis for overlooking error and sustaining a conviction ignores other societal interests in sustaining convictions that are of equal or greater strength yet that have not prevailed. For example, protecting innocent citizens from a physically dangerous and convicted defendant (as to whom the government might not be able to prevail at a second trial) would seem to be an interest at least as weighty as that of protecting victims from a retrial ordeal. Yet the Court has never recognized such an interest as a valid basis for declining to overturn a conviction predicated upon a finding of violation of a novel right.<sup>34</sup>

Thus, the victim factor is inconsistent in exalting to preferred status only one of a number of relevant factors that militate against overturning convictions. Either the Court should enlarge the *Slappy* and *Hasting* doctrine to one that would comprehensively treat the subject and acknowledge the relevance of other factors to a court's choice whether to announce a new right

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34. See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969), in which the Court, on the basis of an unforeshadowed constitutional interpretation, reversed the conviction of a serviceman for rape despite the fact that the reliability of the guilty verdict was not impugned by the Court's holding. See also *Brewer v. Williams*, 430 U.S. 387 (1977); *Edwards v. Arizona*, 451 U.S. 477 (1981). It is true that the Court has, in effect, recognized reliability of the verdict as a relevant, indeed important, factor in its decisions establishing criteria for determining whether a new constitutional holding is to be applied retroactively, noting that "[c]omplete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Solem v. Stumes*, 104 S. Ct. 1338, 1342 (1984). The retroactivity issue, moreover, is superficially analogous to the context in *Slappy* since the question in the retroactivity cases is whether the Court should give an entire class of convicted defendants the benefit of a new constitutional right. However, the analogy is not authentic. For it is one thing to recognize as pertinent to the retroactivity of a new right the circumstance whether the right affects the reliability of the factfinding (i.e., guilt-determining) process, but quite another to assert the pertinence of the nature of the new right to the question whether a court should choose a particular case as the vehicle to announce the right in the first place. If the latter relevance were accepted, then new rights that did not affect the reliability of the guilty verdict would almost never be announced except as an alternative holding in a case requiring reversal on established grounds. The Court has not followed such a practice.

See, e.g., *Rose v. Mitchell*, 443 U.S. 545 (1979), holding that a defendant convicted by a properly constituted petit jury at an error-free trial may nevertheless collaterally attack his conviction on the ground that there was racial discrimination in the selection of the grand jury. The Court recently reaffirmed *Mitchell*. See *Vasquez v. Hillery*, 54 U.S.L.W. 4068 (Jan. 14, 1986).

and reverse a conviction in a particular case,<sup>35</sup> or it should retreat from the implications of *Slappy* and *Hasting* and acknowledge that the countervailing values that have thus far caused the Court not to shrink from overturning such convictions, even in the face of the risk that a reliably convicted defendant who may be dangerous will be released through inability of the government to convict at a second trial, should also apply and prevail when those same values are matched against the interests of victims in avoiding the rigors of a second trial.

Third, the Court's victim factor pronouncement is subject to criticism on the ground that, if applied, it would unjustifiably benefit the government. Recognition of a victim factor sufficiently powerful to require a court to refrain from ordering a new trial need not, as a purely logical matter, operate to the government's advantage. Although the *Slappy* Court used this "factor" to suggest that courts should, on account of it, decline to find or declare error that may upset a conviction, another use of the "factor" that equally serves victims' interests in avoiding a retrial would be to hold that, if error (whether novel or otherwise) occurs in a case in which the victim factor is present, the conviction should be reversed and the government ordered not to retry the defendant. The arguments in favor of such a disposition, in preference to the Court's doctrine of not recognizing the error, would be that the government has had its one, albeit flawed, attempt at conviction; the defendant, in most cases, will not have been responsible for the error; and in this context the government's interest in further prosecution should be subordinated to the victims' interests in being spared a second trial. Whether or not such a doctrine is defensible, the Court is at least remiss in failing to identify the reasons for choosing to penalize the defendant rather than the government for the victim factor.

Fourth, recognition and application of a victim factor of the kind posited here carries with it unacceptable costs for judicial decisionmaking. To begin with, there exists, at least for most federal courts, a jurisdictional problem with the victim factor doctrine. For it is doubtful whether, consistent with the "cases" and "controversies" limitation of article III of the Constitution, a federal article III court is free to announce a new right and yet not give the defendant in the case its benefit.<sup>36</sup> Indeed, respect for the strictures of article III has caused the Court to condone, as a necessary part of the judicial process, a form of inequity, and to give the chance litigant in a case

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35. Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing that collateral challenges to convictions should be permitted only when the basis for the challenge is a right that goes to the reliability of the factfinding process).

36. See, e.g., *Bowen v. United States*, 422 U.S. 916, 920-21 (1975). This limitation would not, of course, apply to courts, such as most state courts, which are not bound by the restrictions of article III or equivalent provisions in state constitutions.

announcing a new constitutional right that is later determined not to apply retrospectively the benefit of the right, even though that person is the only litigant so situated who receives such a benefit.<sup>37</sup> If, then, an article III court is not at liberty to announce a new right that otherwise would require reversal and yet determine, on some extraneous basis such as the victim factor, that reversal is inappropriate in the case,<sup>38</sup> the question arises how an article III court is to apply the victim factor.

It would appear that such a court may be required to repress all mention of the new right and, to the extent it may have written an opinion expounding on the right, put it in a "tomorrow file" to be resurrected only when and if another suitable case arises in which the victim factor is not present to a degree sufficient to warrant the court's withholding announcement of its new rule or invoking its supervisory power and reversing the conviction. The alternative is for the court to write an opinion that says, in effect: "The court might have been prepared to hold that there is a new right to XYZ

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37. See *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969) (acknowledging this inequity but terming it an "insignificant cost for adherence to sound principles of decision-making").

38. It is admittedly a murky question, perhaps warranting exploration in a separate article, how far the "cases" and "controversies" requirement acts to inhibit article III courts from asserting new legal rights in a case in which the right is not to be applied. Clearly, it has been deemed acceptable judicial practice to first announce a new right but then conclude that the defendant is not entitled to its benefit because the facts of the case are not sufficient to invoke the right, see *Rose v. Mitchell*, 443 U.S. 545 (1979), or because of application of the harmless error doctrine. At the other end of the spectrum are the retroactivity cases, where the Court has indicated that it is at least inappropriate, and likely a violation of article III, to announce a new constitutional rule yet not apply it to the case before the Court. In between, apparently, is a veritable host of other possible scenarios. For example, the issue arose two years ago in a case far more notable for its principal holding that the fourth amendment exclusionary rule is not to be applied when law enforcement authorities have reasonably relied upon a search warrant. *United States v. Leon*, 104 S. Ct. 3405 (1984). The opinion for the Court in *Leon*, in responding to the argument that to recognize a reasonable good-faith exception might prevent courts from giving needed guidance on the constitutionality of searches conducted pursuant to warrants or even "freeze Fourth Amendment law in its present state," *id.* at 3422, stated: "If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue." *Id.* (footnote omitted). Justice Stevens, dissenting, castigated the Court for "amazingly suggest[ing]" this proposition, which he viewed as violating the principle of *Bowen v. United States*, 422 U.S. 916, 920 (1975) (courts should not unnecessarily decide constitutional questions), and said that "such a proceeding, in which a court would declare that the Constitution had been violated but that it was unwilling to do anything about it, seems almost a mockery." *Leon*, 104 S. Ct. at 3456 (Stevens, J., dissenting). It is difficult to divine a principled basis to distinguish the above cases and justify the disparate results as to the propriety of announcing a new rule of law that is not to be applied in the case. Without embarking on any rigorous quest for such a guiding principle, it suffices for present purposes to observe that the interest of victims in avoiding retrial is a type of factor wholly extraneous to the nature of the new right being announced or to the facts of the case bearing upon the guilty verdict. As such, the victim factor more closely resembles the retroactivity cases where the practice of rendering rulings that are not to be applied was disapproved, rather than the kinds of cases cited above in which the practice has been found proper.

but because a retrial in this case would produce a severe strain on the victim witnesses, *see Morris v. Slappy*, 461 U.S. 1 (1984), we do not decide this question and reserve it to another day. No other prejudicial error appearing, the judgment of conviction is affirmed."

Such an alternative is plainly unsatisfactory, for while it has the virtue of at least publicizing the possible or likely emergence of the new right, it requires the court to lie (in that the court was not, by hypothesis, merely possibly prepared to announce the new right *XYZ* but had in fact concluded that *XYZ* existed) and to engage in the practice of issuing obiter dictum. Yet for the court to be silent and to refrain altogether from any mention of the new right which it has determined to exist is also unsatisfactory. While this practice may be defensible in the context of a declination by the Supreme Court to exercise its discretionary certiorari review jurisdiction, where by tradition the Court rarely indicates its reasons, it is antithetical to sound judicial processes when applied to trial courts of mandatory jurisdiction faced with motions for a new trial asserting the new right or to courts of appeals faced with appeals raising the question of the proposed new right. It is hardly sound jurisprudence in such cases for the court to ignore the defendant's claims.

Moreover, according legal status to the victim factor also threatens to disrupt decision-making processes by requiring courts to determine the extent to which the factor exists. For a victim to be called as a witness in a criminal case is, we may assume, in most instances an experience rather avoided, but the victim factor announced in *Slappy* and *Hasting* was meant to come into play only when more than mere inconvenience to victims from having to testify at a retrial is involved. The Court in *Slappy* and *Hasting* clearly had in mind those circumstances in which a victim's appearance for the second time as a witness would be an unusually stressful or traumatic experience. How is it to be determined whether a retrial would likely be, for a particular victim-witness, an ordeal of that kind as opposed to inconvenience of lesser or ordinary magnitude? Although the Supreme Court in *Slappy* and *Hasting* did not engage in any special fact-finding process or suggest the need for such in this regard, it would seem that some kind of factual determination with respect to the witnesses in the case must be made before a court would be justified in considering whether to apply the victim factor. It will not do to operate purely by assumptions or probabilities.<sup>39</sup>

For while it may be true that for victims to testify about some types of offenses, such as the sexual crimes in *Slappy* and *Hasting*, is ordinarily a harrowing experience which may attain traumatic proportions, for at least

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39. The Court indeed so held in an analogous context as to minor victim-witnesses in sex offense cases, in requiring that a "case-by-case" determination must be made before a trial court may order that part of the trial in which the victim testifies closed to the public. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-10 (1982).

some victims of this kind of crime the act of testifying may not elicit such an emotional reaction. Some victims may be so occupied with the desire for revenge and punishment of the defendant, and may see the legal process as the only avenue through which to achieve it, that they actually look forward to testifying. For others, even testifying about a criminal episode in which they were not singled out for brutal treatment, such as a bank robbery during which they, along with others, were made to lie on the floor while the robbers collected money, may be an unusually difficult and emotional experience. The passage of time between the crime and the testimony, as well as any number of other circumstances, may also be relevant to a determination of how much an ordeal a victim's experience in testifying will be. In short, people's attitudes toward being victimized in a crime vary tremendously, as do their inner resources and abilities to undergo intensive interrogation about such an incident in a trial setting. Ascertaining which type of victim is before the court would seem to require specialized fact-finding of some sort. This might take the form of an evidentiary hearing, or conceivably a request that the probation service, in a federal case, include such an evaluation in the so-called victim impact portion of the presentence report.<sup>40</sup> The holding of such hearings, or the preparation of such reports focusing specifically on the degree of strain undergone by victims in testifying (and thus likely to be undergone again on retrial), would however, be extremely burdensome and costly to the system of justice, for it may be surmised that in only a small fraction of cases in which such hearings were held or reports prepared would the courts conclude that the victim factor should be applied to deny a new trial. Moreover, the holding of such hearings and the preparation of such reports might ironically cause victims to undergo some of the additional trauma in reliving the criminal incident that the Court's victim factor was designed to spare them. In light of this, it may be wondered whether, under a purely cost-benefit analysis, recognition of the victim factor—a factor likely to be applied in only a handful of cases<sup>41</sup>—will operate

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40. A provision of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248, 1249, amended Rule 32(c)(2) of the Federal Rules of Criminal Procedure to require, among other things, inclusion in the presentence report of "information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense."

41. Although it would seem a priori impossible to prove the negative proposition that in *no* case should the victim factor be applied to induce a court to refrain from announcing a new right or invoking supervisory power and thereby reverse a conviction and order a new trial, it is difficult to imagine such a case. For example, the supervisory power context would not seem hospitable to an application of the victim factor. Unlike some new rights which may have a merely unique application to the case at hand, the invocation of supervisory power by a court is typically to correct a practice deemed harmful to the administration of justice, or to improve the administration of justice, in situations of a recurring nature. *See, e.g., McNabb v. United States*, 318 U.S. 332 (1943); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

In such cases, it would seem important for the court to announce its rule as soon as possible,

to improve the system of criminal justice, or even whether it is in victims' interests considered as a whole.

Finally, quite apart from its wisdom, it is not even clear that the victim factor doctrine passes constitutional muster. Even assuming, *arguendo*, that victims' interests in not having to testify more than once in sensitive criminal cases such as sexual or child-abuse prosecutions might justify a state in denying altogether a right to appeal in such cases, it does not follow that a state—once having determined to afford an appeal of right—may deny a defendant its benefits predicated upon the ordeal of a retrial to victims. The Supreme Court recently held that a state must, if it grants a right to appeal, conduct the appeal in accordance with the dictates of due process, including the right to the effective assistance of counsel.<sup>42</sup> Since the object of appeal, from the defendant's standpoint, is to persuade a court that error infecting the verdict has occurred and then to obtain the opportunity of a new trial, it is questionable whether a doctrine that would deny such a trial based on wholly extrinsic considerations relating to the potential impact of the experience on the witnesses would be consistent with this constitutional guarantee of appellate due process.

#### CONCLUSION

The doctrine announced in *Slappy* and *Hasting* that victims' interests in avoiding the rigors of retrial should be considered by courts in determining whether to select a particular case as the occasion to reverse a conviction on the basis of a new right or the invocation of supervisory power is ill-considered and should be repudiated. The doctrine irrationally distinguishes between novel and established rights, unwarrantedly exalts such victim's interests above other factors, and would require the expenditure of resources to determine the extent of those interests that would likely exceed any benefits accruing from the doctrine. While the interests of victims in avoiding the trauma of trial testimony are deserving of recognition,<sup>43</sup> those interests should not cause a court to go to the extreme lengths of forbearing to hold in a particular case that some error or defect, albeit novel in nature, has occurred that requires that the defendant be awarded a new trial.

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so as to give immediate guidance and halt an ongoing harmful practice affecting a number of cases and litigants. In this context, the interests of the particular victims in the pending case in avoiding the rigors of retrial are unlikely to outweigh the interest in prompt announcement of the new trial. Accordingly, contrary to Justice Brennan's position in *Slappy* and *Hasting*, it may be that the latter case is a *less* hospitable context for recognition of a victim factor than the former, although obviously a new right, too, may be of a type affecting multiple situations. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

42. *Evitts v. Lucey*, 105 S. Ct. 830 (1985).

43. See *supra* notes 15-17 and accompanying text for a discussion noting the various kinds of judicial and statutory accommodations of victims' interests that are available.

Thus to strike the balance is certainly not intended, and should not be construed, to denigrate the victim's plight. It is, rather, to reaffirm society's overriding interest in maintaining the integrity of the criminal justice process. Surely one of the core principles underlying the constitutional guarantee of a fair trial is that verdicts be reliable and be perceived as reliable, not only by judges but by the citizenry as a whole. A verdict of guilty which a court finds was infected by prejudicial error<sup>44</sup> requires the remedy of a new trial, not solely for the defendant's benefit, but so that the community at large may be satisfied that justice has been done under our system of laws. The victim factor is a misguided doctrine because it would subordinate this basic societal interest in the integrity of the verdict in criminal cases to that of the victim's ordeal in having to experience another trial. However tempting might be the notion of sparing innocent victims from such trauma in an individual case, succumbing to this temptation, ultimately, would threaten to undermine the foundations of our criminal justice system.

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44. Rule 52(a) instructs federal courts to disregard "any error, defect, irregularity or variance which does not affect substantial rights."