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THE CRIME VICTIMS' RIGHTS MOVEMENT: HISTORICAL FOUNDATIONS, MODERN ASCENDANCY, AND FUTURE ASPIRATIONS

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Abstract

This article, which serves as the keynote address for the 2025 University of Pacific Law Review Symposium, explores the past, present, and future of America's crime victims' rights movement—one of the most successful social movements in modern history.

Historically, crime victims played a central role in criminal justice processes through private prosecutions—i.e., the ability of victims to initiate or participate in criminal prosecutions. Today, while private prosecutions have been largely supplanted by public prosecutions, the victims' rights movement has successfully restored the victims' voice in criminal processes. The movement has reformed contemporary American criminal justice so that criminal processes now often include participatory rights for victims. As a result of state victims' bills of rights, along with the federal Crime Victims' Rights Act, victims play an important role in criminal cases. Because these rights for victims are participatory rights rather an entitlement to substantive case outcomes, the victims' rights movement is not a "carceral rights movement," aimed solely at securing punitive sentences. Instead, the movement focuses on giving a voice to crime victims in their own criminal cases. This laudable effort has drawn broad support across the country. Efforts to expand and amplify victims' voices in criminal proceedings are justified and likely to continue into the future.

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TABLE OF CONTENTS

I. INTRODUCTION

The crime victims' rights movement is one of the most important social movements in modern American history. As the leading criminal procedure treatise reports, "Although hardly restored to the central position he once occupied, the victim is now recognized to be not simply a source of evidence, but an interested third party whose concerns must be considered (though not necessarily vindicated) by police, prosecutor, and judge. This development is largely the product of what came to be known as the 'victims' rights' movement."[1] This article aims to describe the history, successes, and future prospects of this multi-pronged social movement—aptly described as one of the most successful "civil liberties movements of recent times."[2]

Recent advances in crime victims' rights can be traced to a crime victims' rights movement that developed around the 1970s. This movement was driven by the view that crime victims were too often overlooked in the criminal justice processes. Justice Scalia observed that a "public sense of justice" had come to be reflected in "a nationwide 'victims' rights' movement."[3] The movement has now successfully advocated for victims' bills of rights, state constitutional amendments, federal legislation, and other enactments allowing victims to participate in criminal proceedings, such as by delivering victim impact statements at sentencing.

Interestingly, while the crime victims' rights movement is often alluded to, no definitive history has yet been written.[4] Perhaps this is because, at least among legal academics, relatively little interest exists in victims' rights.[5] But whatever the reason, this absence of a clear description of the movement has had important consequences.

With the victims' rights movement inadequately described, some critics have tried to paint the movement as nothing other than a "carceral rights

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[1] 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.5(k) (4th ed. 2020).

[2] John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 689–90 (2002); *accord* Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQ. 1111, 1136 (2000) (calling the movement "one of the most important social movements of our time, comparable in its influence on our political culture to the civil rights movement").

[3] Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring); *see also* Kelly v. California, 555 U.S. 1020 (2008) (statement of Stevens, J., respecting denial of certiorari petitions) (describing victim impact statements as "a phenomenon of recent origin, arising out of the victims' rights movement of the late 1970's") (citing Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 8 (Symposium 1984); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 670 (1975); U.S. v. Papagno, 639 F.3d 1093, 1096 (D.C. Cir. 2011) (referring to the "victims' rights movement that had picked up steam in the 1970s) (citing Gillis & Beloof, *supra* note 2; Syed v. Lee, 322 A.3d 578, 588 (Md. 2024) ("the victims' rights movement began to receive national attention in the 1980s."); *Ex parte* Storey, 584 S.W.3d 437, 459 (Tex. Ct. Crim. App. 2019) (Walker, J., dissenting) (noting "the Victims' Rights Movement") (citing Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims Into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861) [hereinafter Cassell, *Treating Victims Fairly*]; *Ex parte* Littlefield, 540 S.E.2d 81, 83 (S.C. 2000) ("In the early 1970s, a victims' rights movement emerged in this country.").

[4] *See* MICHAEL VITIELLO, THE VICTIMS' RIGHTS MOVEMENT: WHAT IT GETS RIGHT, WHAT IT GETS WRONG 23 (2023).

[5] *See* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 534–35 [hereinafter Cassell, *Barbarians at the Gates?*]. Vitiello's recent book, mentioned in the previous note, stands as an important (and readable) exception.

movement"[6]—a thinly veiled, retributive effort to lock up as many criminals as possible for as long as possible. Because the movement is broadly based, these academics have been free to cherry-pick a few victims' initiatives and argue that they constitute the movement's general, punitive thrust.

The victims' rights movement has also drawn fire from other quarters. For example, some detractors (particularly those inside the criminal justice system) claim that victims have no role to play in a criminal justice process that is the exclusive province of "the State." Under this conception, criminal justice decisions belong exclusively to the professionals—state officials who act on behalf of the "public interest" rather than the parochial interest of someone harmed by a crime.[7] Here too, the absence of a recognized history of victim involvement in criminal justice decisions has allowed the critics to seize the higher ground. If the general (mis)understanding is that victims have traditionally been left outside of criminal justice processes, then it is institutionally and properly "conservative" to oppose the movement's reform efforts to give victims some sort of new-fangled participatory role in criminal justice.

This article will not attempt to comprehensively catalogue all parts of the vast and sprawling victims' rights movement in the United States. Nor will it attempt to compare American legal advancements in crime victims' rights to those in other countries[8]—an exercise usefully performed by several other contributors to the symposium of which this article is a part.[9] But this article will try to develop responses to the critics who have capitalized on the void in scholarship to unfairly critique the movement's aims and policy successes. Contrary to the simplistic portrait often drawn, the movement's primary goals do not focus on criminal case outcomes, such as increasing the number of death sentences or extending the average length of prison terms. Instead, the movement is concerned with the procedural objective of ensuring that victims' voices are heard throughout the criminal justice process. The movement contends that criminal justice procedures should incorporate victims without regard to any changes in outcomes that may

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[6] *See* Jessica Jackson, *Clemency, Pardons, and Reform: When People Released Return to Prison*, 16 U. ST. THOMAS L.J. 371, 381 (2020) (discussing what she calls the "carceral victims' rights movement").

[7] *See generally* Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U.L. REV. 805 (2020).

[8] As the modern crime victims' rights movement developed in the U.S., similar movements arose in other countries. *See* Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing*, 107 MARQ. L. REV. 862, 944–46 (2024) (collecting examples of victim impact statements in other countries) [hereinafter Cassell & Erez, *Victim Impact Statements*]; Béatrice Coscas-Williams et al., *Victims Participation in an Era of Multi-Door Criminal Justice*, 56 CONN. L. REV. 511, 518–25 (2004) (noting convergence of continental and common-law jurisdictions on rights for victim participation in criminal processes). *See generally* Marie Manikis, *Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process*, 2017 PUB. L. 63 (2017); MATTHEW HALL, VICTIMS AND POLICY MAKING: A COMPARATIVE PERSPECTIVE (2010); BRIANNE MCGONIGLE LEYH, PROCEDURAL JUSTICE? VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS (2011), TYRONE KIRCHENGAST, VICTIMOLOGY AND VICTIM RIGHTS: INTERNATIONAL COMPARATIVE PERSPECTIVES (2017); ROBYN HOLDER, JUST INTERESTS: VICTIMS, CITIZENS AND THE POTENTIAL FOR JUSTICE (2018); STEPHEN J. STRAUSS-WALSH, A HISTORY OF VICTIMS OF CRIME: HOW THEY RECLAIMED THEIR RIGHTS (2023); *see also* Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French* Cour D'Assises, 2001 U. ILL. L. REV. 791, 821 (discussing victim's prominent role in French criminal procedures).

[9] *See* Gian Marco Caletti, *Victims in European Criminal Law: An Overview of What Happens Across the Pond*, __U. PAC. L. REV. __ (2025); Matteo L. Mattheudakis, *Crime Victims' Rights in European Constitutions and the Scale Metaphor: Focus on the Recent Proposal to Amend the Italian Constitution*, __ U. PAC. L. REV. __ (2025); Kolis Summerer, *Beyond Victims: Exploring Restorative Justice*, __ U. PAC. L. REV. __ (2025).

result. And the movement can powerfully argue that, properly understood, American history supports this procedural inconclusion.

This article proceeds in five steps. Part II begins by describing the conventional orthodoxy that modern criminal justice processes are the exclusive domain of the state—a view that leaves no room for crime victims.

Part III then challenges this conventional wisdom from an historical perspective. For most of American history, and continuing even through today in some jurisdictions, crime victims could launch their own private prosecutions. The practice of private prosecution poses an unsurmountable challenge for those who contend that victims must necessarily be excluded from criminal procedures.

Part IV turns to more recent times. It traces the ascendancy of the modern crime victims' rights movement, from its roots in the late1960s through today. In both the federal and state systems, the movement has succeeded in creating clear victim interests in criminal justice processes, interests independent of the State's. Victims' bills of rights and similar enactments are now a standard feature of American criminal justice. To speak of the American criminal justice system is now to inevitably to speak about a system that includes victim participation.

Finally, Part V forecasts how the movement might progress. It sketches out various theoretical defenses of the modern recognition of victims' rights, including a model—the Victim Participation Model—that accurately captures the victims' expanding role. The victims' rights movement is not simply a triumph of popular conceptions of justice; strong theoretical grounds exist for recognizing victims' rights to participate in the criminal justice system. In the future, the movement is well positioned to argue for further reforms related to victim participation, such as securing legal counsel for crime victims and, ultimately, advocating for a federal constitutional amendment protecting crime victims' rights.

A short conclusion, in Part VI, summarizes how history, practice, and theory all now combine to produce a compelling case for a robust crime victims' rights movement.

Before diving into the substance of these issues, a few notes on scope and terminology may be helpful. In discussing the history of the crime victims' *rights* movement, this article's aim is to review legal rights and related claims within the criminal justice process—that is, victims' participatory rights. Because of this focus on process, this article does not discuss such important issues as how to reduce crime or how to treat victims' mental traumas resulting from crimes. Nor does this article focus on efforts to protect subsets of victims, such as those victimized on account of race, national origin, gender, gender identity, sexual orientation, disability, or socio-economic status, as important as those efforts may be. The focus here is general victims' rights.[10]

Also, many victim support organizations prefer the term "survivor," rather than "victim," to describe those recovering from traumatizing crimes.[11] This law

[10] This limitation to the article means, for example, that the article does not review applications of non-victim-specific bodies of law—such as the Americans with Disabilities Act, and state law analogs, which have been used to protect crime victims with disabilities. *See, e.g., In re* McDonough, 930 N.E.2d 1279 (Mass. 2010) (recognizing victim has right to reasonable accommodation on communicating in criminal trial under Massachusetts Equal Rights Act).

[11] *See, e.g., Key Terms and Phrases*, RAINN, https://www.rainn.org/articles/key-terms-and-phrases [https://perma.cc/BCD3-6BP8]. *Cf.* ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 49-50 (2020) (discussing "survivorology").

review article uses the term "victim," which is the legally accurate term for describing someone who has been harmed by a crime. The term is commonly used in legal writing and court decisions.[12] The term "victim" has also been precisely defined in many victims' rights enactments.[13]

Some scholars have criticized using the term "victim" in the criminal justice process, arguing that until there is a criminal conviction, "victim" status does not functionally exist.[14] To be sure, in American criminal justice, a defendant is (quite properly) entitled to a presumption of innocence unless and until proven guilty beyond a reasonable doubt at trial. But that procedural device for organizing criminal trials hardly precludes recognizing "victim" status for other purposes. The law today, both in this country and elsewhere, appropriately recognizes that criminals often leave in their wake individuals who have been harmed and that responding to that victimization need not await formal adjudication of guilt at trial.

And a final note on grammar: Professor Meg Garvin has written an interesting article entitled *Giving Meaning to the Apostrophe in Victim[']s Rights*.[15] She argues that victim's rights enactments should be construed as singular possessive, because ownership of those rights belongs to a particular victim in a particular criminal case.[16] While her argument is interesting, this article will follow convention by treating the victims' rights movement as involving millions of victims across the country. Thus, the article uses the plural possessive in discussing the expansive victims' rights movement.

II. THE ALLEGED STATE MONOPOLY OVER CRIMINAL JUSTICE PROCESSES

This article considers the crime victims' rights movement, which seeks to improve the plight of victims entangled in criminal justice processes. But at the outset, it will be helpful to consider whether victims have any proper role to play in criminal justice. Of course, legal theorists have written extensively about the purposes of criminal law.[17] The conventional story is that criminal law has a distinct public purpose, as distinguished from civil law's private objectives. On this view, criminal law is concerned with forbidding certain conduct on behalf of

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[12] *See, e.g.*, BLACK'S LAW DICTIONARY 1798 (10th ed. 2014) (defining "victim" as a "person harmed by a crime . . . ."). *See generally* Paul G. Cassell & Michael Ray Morris, Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 61 AM. CRIM. L. REV. 329 (2024) [hereinafter Cassell & Morris, *Defining "Victim"*]. *See* Nat'l Crim Victim L. Inst., *Use of the Term "Victim" In Criminal Proceedings* 1 (2009), https://law.lclark.edu/live/files/21940-use-of-the-term-victim-in-crim-proc11th-edpdf [https://perma.cc/V6TV-HTCT] (explaining why "victim" is a "legal status term" and a "legal term of art"); Jennifer A. Brobst, *The Revelatory Nature of COVID-19 Compassionate Release in an Age of Mass Incarceration, Crime Victim Rights, and Mental Health Refor*m, 15 U. ST. THOMAS J.L. & PUB. POL'Y 200, 202 n.5 (2021) (using the term "victim" because of its "consistent with related victim rights legislation" while acknowledging alternative term "survivor"); *see also* Inga N. Laurent, *Addressing the Toll of Truth Telling*, 88 BROOK. L. REV. 1073, 1076 n.23 (2023) (noting that the choice between "victim" and "survivor" is generally left to individual preference).

[13] For extended discussion of how the term "victim" is defined in victims' rights enactments, see Cassell & Morris, *Defining "Victim," supra* note 12.

[14] *See, e.g.*, Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1454–55 (2021).

[15] Margaret Garvin, *Giving Meaning to the Apostrophe in Victim[']s Rights*, 87 BROOKLYN L. REV. 1109 (2022).

[16] *Id.* at 1114.

[17] For leading hornbooks on the subject, see, e.g., WAYNE R. LAFAVE & JENS DAVID OHLIN, CRIMINAL LAW (7th ed. 2023); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (9th ed. 2022); GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978). For an excellent recent article explaining this topic, see Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89 (2024).

society.[18] Criminal law operates to condemn that behavior and then to prescribe punishment that may be attached to that behavior. Civil law, in contrast, is designed not for public benefit but rather to provide compensation to individuals harmed by wrongdoing—the victims of that behavior. Thus, the narrative goes, while criminal law imposes punishment solely for society's benefit, it is left to separate civil law processes to mete out compensation solely for an individual's benefit.

This conventional public/private distinction is recounted in what may be the leading hornbook on criminal law—*Criminal Law* by Professor Wayne R. LaFave (and his recent co-author, Jens David Ohlin). As they see things, criminal law and civil law (e.g., tort law) are "two quite different" matters:

> Criminal law and the law of torts (more than any other form of civil law) are related branches of the law; yet in a sense they are two quite different matters. The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct or at least situations (not yet resulting in actual harm) which are likely to result in harm if allowed to proceed further. The function of tort law is to compensate someone who is injured for the harm he has suffered. With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages (or perhaps to enjoin the defendant from causing further damage).[19]

Other commentators have provided similar descriptions of the function of criminal law, describing crimes as "public wrongs" to be answered by the state punishing the criminal rather than by attempting to compensate the victim.[20] On this view, a criminal prosecution is brought to protect the public interest, rather than to compensate the victim. As Professor Kaufman has recently explained in an important article, under this conception "[c]rimes are prosecuted by government officials, who have a monopoly on charging and settling criminal disputes. . . . Crime, in short, is the government's domain, and criminal law is a form of public law because concerns relations between citizens and the state."[21]

If criminal law falls exclusively within the "government's domain," it can be argued that victims have no legitimate role in criminal proceedings. If criminal law belongs solely to the state, victims need not—and should not—play any part in the proceedings, other than making a brief appearance at trial as a government witness. And if the jury convicts, a state actor (a prosecutor) will then exclusively argue before the sentencing judge about the appropriate punishment, addressing

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[18] *See* Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 932 (1975) ("A theoretical underpinning of the American system of criminal justice is the notion that a criminal misdeed is a wrong against the entire society.").

[19] LAFAVE & OHLIN, *supra* note 17 at § 1.3(b) at 17.

[20] Kelse Moen, Note, *A Choice in Criminal Law: Victims, Defendants, and the Option of Restitution*, 22 CORNELL J.L. & PUB. POL'Y 733, 738 (2013); *see also* Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 233 (Randy E. Barnett & John Hagel eds. 1977).

[21] Kaufman, *supra* note 17, at 91 (describing and then critiquing this view).

such issues as deterring crime through an appropriately stiff penalty and exacting retribution for the breach of the peace that a crime necessarily implies.[22] This view is often taught in America's law schools, where law students learn to "think like lawyers" in classes such as criminal law and criminal procedure, where victims' interests receive little, if any, discussion.[23]

Illustrating the absence of crime victims in much conventional criminal law analysis is the LaFave and Ohlin treatise. The treatise's stark distinction between criminal law and civil law permits victims to be shunted off to separate civil proceedings to pursue justice. Such treatment leaves no reason to even discuss victims' interests. Indeed, even though the LaFave and Ohlin treatise spans some 1,448 pages, it contains little specific discussion of crime victims. The term "victim" is even absent from the treatise's index.

In fairness to these leading criminal law scholars, the notion that victims have no role to play in criminal proceedings has also been reflected, to some degree, in American caselaw. Most prominently, in 1973, the U.S. Supreme Court handed down *Linda R.S. v. Richard D.*[24] There, the mother of an "illegitimate child"[25] sought to enjoin the allegedly discriminatory application of a Texas criminal law forbidding "any parent" from willfully refusing to pay child support.[26] A lower court rejected the mother's challenge, and the Supreme Court affirmed. In sweeping dicta, the Court concluded that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[27] For the dissenters, this dicta ignored the fact that the mother had alleged that she was "excluded intentionally from the class of persons protected by a particular criminal law."[28] But that argument failed to carry the day. *Linda R.S.* has since been seen as perhaps the nadir of the crime victims' rights movement in America.[29] If *Linda R.S.* was correct that victims lack any "interest" in criminal justice proceedings, a victims' rights movement could hardly make a claim to participate in those proceedings.

III. A BRIEF HISTORY OF PRIVATE PROSECUTION IN AMERICA

Linda R.S. was incorrect in concluding that private citizens lack any "judicially cognizable interest" in criminal prosecutions. The Court's opinion was

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[22] For more on the utilitarian and retributive arguments for punishment, see, e.g., LAFAVE & OHLIN, *supra* note 17 at § 1.5; Dressler, *supra* note 17, at 13-26; Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089 (2011); Paul H. Robinson, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? (2008).

[23] *See* Cassell, *Barbarians at the Gates?*, *supra* note 5, at 534; Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 229–33 (2005); *See, e.g.*, JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS (9th ed. 2021) (crime victims' interests mentioned only briefly in connection with victim impact statements). *Cf.* DOUGLAS E. BELOOF, PAUL G. CASSELL, ET AL., VICTIMS IN CRIMINAL PROCEDURE (5th ed. 2024) (law school casebook addressing victim's rights issues).

[24] 410 U.S. 614 (1973).

[25] *Id.* at 614.

[26] *Id.* at 615.

[27] *Id.* at 619.

[28] *Id.* at 621 (White, J., dissenting).

[29] *See* Kaufman, *supra* note 17, at 121 (2024); LESLIE SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 311 (1996).

extremely brief and reasoned exclusively from theoretical first principles.[30] The Court failed to consider the historical background of criminal prosecutions in this country, contravening Justice Oliver Wendell Holmes' famous observation that "a page of history is worth a volume of logic."[31] It is important to understand the victim-centered origins of the American criminal justice system—origins that *Linda R.S.* and other similar accounts have simply ignored.

The relevant history begins with America's system of private prosecution—that is, criminal prosecutions pursued by private citizens. In a world of private prosecution, crime victims' rights become a redundancy. Because historically crime victims could initiate and pursue their own prosecutions, their rights were automatically protected. In light of this history of private prosecution, the recent efforts to protect victims' interests in the criminal justice system are "a throwback to time past."[32]

In reviewing the history of private prosecution, we are fortunate to have four recent scholarly endeavors shedding light on the practice. First, in 2020, Professor Bennett Capers published his provocative article—*Against Prosecutors*—which critiqued the overwhelming power of prosecutors in modern criminal justice. Capers sought to show that private prosecution is "part of our collective cultural DNA."[33] Indeed, Capers concluded that the American public prosecutor is a "historical latecomer," whose arrival was not inevitable.[34] The public prosecutor's ascendancy meant that "[v]ictims have lost power," particularly victims who were "already disadvantaged because of gender, or race, or class, or sexuality."[35] Capers noted that this shift of power is "all but absent from criminal law casebooks" but sheds important light of how a criminal justice system with more victim involvement might operate.[36]

Two years later, in 2022, two comprehensive historical reviews of private prosecution were published. In an extended law review article, historian Jonathan Barth assessed what he called the "confusion and mystery surrounding the history of the office of the public prosecutor in early America."[37] Barth noted that some historians believed that private prosecution had disappeared by the time of the Constitution's ratification. But his meticulous scholarship demonstrated that early Americans used "a hybrid system of criminal prosecution through at least the middle of the nineteenth century."[38]

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[30] For a strong argument that *Linda R.S.* only recognized preexisting prosecutorial discretion in charging decisions, see Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH U.L. REV. 1135 (2007). For criticism of the "standing" analysis in *Linda R.S.*, see Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Procedure*, 52 MISS. L.J. 515, 550–52 (1982); Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659 (1981); *see also* Nat'l Crime Victim Law Institute, Developing Victims' Rights Law: A Study of Precedent and Dicta at 2 (2005) (concluding that language about lack of a "cognizable interest" was dicta), https://law.lclark.edu/live/files/21765-developing-victims-rights-lawa-study-of-precedent [https://perma.cc/ZB5N-JLJ4].

[31] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[32] Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521.

[33] I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1573 (2020).

[34] *Id.*

[35] *Id.* at 1571–72.

[36] *Id.* at 1581.

[37] Jonathan Barth, *Criminal Prosecution in American History: Private or Public*, 67 S.D. L. REV. 119, 119 (2022).

[38] *Id.*

At the same time in 2022 as Barth's article appeared, Professor John D. Bessler published his impressive book, *Private Prosecution in America: Its Origins, History, and Unconstitutionality in the Twenty-First Century*.[39] Bessler outlined the history and use of private prosecution in the United States. Tracing its origins to medieval Europe and English common law, Bessler showed how private prosecution became a common feature of early American criminal procedure. In colonial and early America, private prosecutors pursued criminal cases on behalf of victims (and, in homicide cases, their families). But he also documented that, in more recent times, many courts continue to allow private prosecutions. Bessler provided a fifty-state survey of the status of private prosecutions,[40] along with his arguments against continuing the practice.[41]

Most recently, in 2024, Professor Emma Kaufman reviewed private prosecution. Kaufman began by describing the alleged "state monopoly of criminal law."[42] But Kaufman then explored this monopoly in light of the well-established history of private prosecution. Kaufman explained that "the government has long relied on private actors to manage criminal law, and the state's capacity for crime control has never matched its ambitions. In important and underappreciated ways, the state monopoly on criminal law has always been something of a myth."[43]

These four sources, along with a burgeoning body of other scholarship, demonstrate convincingly that private prosecutions were an important part of America's criminal justice past. In the past, criminal prosecutions were often driven by victims and their families. Thus, the modern victims' rights movement stands on well-trodden ground in urging that victims should be part of America's criminal justice present and future.

A. The Adversarial System in England

In contrast to the American criminal justice system today, "criminal justice systems in ancient times were marked by a lack of State involvement."[44] In ancient times, when a victim was harmed, the offender or the offender's family "would make personal reparations to the victim."[45] This approach dates back to the Code of Hammurabi and the Book of Exodus, which both contained provisions for restitution from offenders to victims.[46] The Twelve Tables, an early codification of Roman law, provided that an offender "could avoid retribution to himself or his family by providing compensation to the victim or the victim's family."[47]

These conceptions of victim-driven criminal justice processes carried through in England. American legal institutions often trace their roots back to the

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[39] JOHN D. BESSLER, PRIVATE PROSECUTION IN AMERICA: ITS ORIGINS, HISTORY, AND UNCONSTITUTIONALITY IN THE TWENTY-FIRST CENTURY (2022). Bessler's comprehensive book does not cite Barth; Barth's comprehensive article does not cite Bessler.

[40] *Id.* at 235–316.

[41] *Id.* at 351–423.

[42] Kaufman, *supra* note 17, at 93.

[43] *Id.*

[44] Syed v. Lee, 322 A.3d 578, 588 (Md. 2024) (citing STEPHEN SCHAFER, THE VICTIM AND HIS CRIMINAL 8 (1968)).

[45] *Id.*

[46] *Id.*

[47] *Id.*

mother country. And American criminal justice institutions are no exception. Many of the English migrants who settled in North America imported "a vast array of ideas from the Old World. They brought with them, in many cases, traditional notions of criminal justice, dating all the way back to the High Middle Ages."[48]

English criminal justice practices evolved to legitimize a system of resolving disputes between the victim and offender that maintained a central role for victims. At the dawn of the Middle Ages, criminal justice "was a wholly private system of sanction and vengeance," which was "fraught with many of the problems that we might naturally expect from a world largely absent of third-party arbiters."[49] From these primitive roots, English criminal justice developed into a system in which the state became more heavily involved. The animating theory was that the criminal had not only inflicted harm on the victim but had also violated the king's peace. From this theory, the institution of the Justice of the Peace ("JP") evolved in the thirteenth century. By the late fourteenth century, the functions of JPs included powers to arrest suspected criminals. This expansion meant that apprehending suspect offenders "was no longer the sole responsibility of the victim, family, or neighborhood, though private persons still legally and frequently engaged in powers of arrest."[50]

The importance of this background has been well put by Professor Barth, who has properly identified private prosecution as the "default position" from which American criminal justice processes arose:

> Private prosecution in England was thus the default position in the early modern period. It avoided the pitfalls of Crown-directed prosecutions, while also functioning as a civilized substitute for the older, unregulated system of purely private vengeance, where victims had formerly acted as judge, jury, and executioner. Under private prosecution, the victim—after having consulted the JP—possessed the burden of presenting a convincing case before a neutral, third-party arbiter: first, to the grand jury (consisting of private citizens, determining whether or not criminal charges should proceed), and then, to the state-run court, operated by the State because the king had an interest in preserving the peace. If the prosecution was overzealous, deceitful, or malicious, the grand jury or the court would effectively check the accuser by acquitting the accused. If the judge, on the contrary, found the defendant guilty—of larceny, for instance—restitution was the chief mode of punishment, with the State receiving its due portion and the victim the other.[51]

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[48] Barth, *supra* note 37, at 121; *accord* BESSLER, *supra* note 39, at 107 ("[N]ot surprisingly, English settlers to the New World brought various aspects of the English common law and criminal procedures with them," including private prosecution).

[49] Barth, *supra* note 37, at 121.

[50] *Id.* at 122 (citing A.J. Musson, *Sub-Keepers and Constables: The Role of Local Officials in Keeping the Peace in Fourteenth-Century England,* 470 ENG. HIST. REV. 1, 3–4 (2002); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 107 (1945)).

[51] *Id.* at 122.

This English tradition of private prosecution also clearly distinguished the English system from the Continental system in Europe. An inquisitorial system presupposed a public prosecutor.[52] But American roots did not trace to the Continental system. As historian Joan Jacoby has observed, there was "no figure like the [public] prosecutor at Jamestown or Plymouth."[53]

B. Colonial America and the Prevalence of Private Prosecution

It appears to be generally accepted that "[l]aw enforcement in colonial America was largely derived from England and incorporated the model of private prosecution."[54] Justice Abrahamson of the Wisconsin Supreme Court has described how victims proceeded in Colonial times:

> Here, as in the mother country, the victim or hired "informers" investigated the crime and identified the culprit. Once the culprit was identified, the victim paid officials to obtain an arrest. The victim then hired the attorney and paid to have the offender prosecuted. The goal of the system was to compensate the victim for a loss. If the offender was indigent, the victim was authorized to sell the offender into service. If the offender could not be sold into service, the offender would be released from custody unless the victim compensated the government for the costs of keeping the offender in jail. Government costs were kept to a minimum through victim initiative, although the state could assert the public interest in prosecution even when the victim was not interested.[55]

Of course, behind this broad sketch lie details of the practices in the thirteen Colonies over several centuries, which varied in particulars. These details are admirably explained in the recent scholarship of Barth and Bessler. Both of these accounts agree on the centrality of private prosecution in Colonial America. As Barth summarizes seventeenth-century colonial American practice:

> Not surprisingly, the first English colonists who settled in North America closely mirrored criminal justice norms in England, with minor variations. Because the custom of private prosecution derived from English common law, the various colonial governments—with the exception of West and East Jersey . . . — did not feel any need to proactively or explicitly write the practice into law. Private prosecution was simply the accepted practice, and that was that.[56]

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[52] *Id.* (citing Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 102 (1976)).

[53] JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 6 (1980), quoted in Capers, *supra* note 33, at 1574).

[54] Abrahamson, *supra* note 32, at 521; *see* BESSLER, *supra* note 39, at 117 ("By and large, Americans inherited the English system of crime and punishment, as well as the English modes of criminal procedure"); Syed v. Lee, 322 A.3d 578, 588 (Md. 2024) ("In colonial America, following English practice, private prosecutions were common").

[55] Abrahamson, *supra* note 32, at 521–22.

[56] Barth, *supra* note 37, at 124.

Similarly, after reviewing extensive use of private prosecutions, Bessler agrees that "colonists and early Americans largely took private prosecutions for granted."[57]

Barth and Bessler both provide a wealth of examples showing the primacy of private prosecution.[58] For example, Barth reports that Virginia's statutes from the seventeenth century contain numerous references to private attorneys prosecuting for a victim, including that prosecution was a matter solely "between attornie [sic] and his client," and, after 1666, convicted offenders had to "defray the charge" incurred by the victim in financing the prosecution.[59] Similarly, in Massachusetts, after the state received a new royal charter in 1691, the governor appointed Justices of the Peace, judges, sheriffs, and constables to "duly execute all warrants," but it nevertheless remained "in the liberty of every plaintiff or defendant in any of the said courts"—including criminal courts—"to plead and defend his own cause in his own proper person, or with the assistance of such other as he shall procure."[60] The only limitation for a private prosecutor was that he neither be "scandalous nor otherwise offensive to the court." Barth also reports that court records throughout colonial New England were filled with private prosecutions of assault and batteries, thefts, and other offenses.[61] There was a single case in New Hampshire when the attorney general prosecuted an assault and battery case, "but only because the accused had assaulted the Deputy Governor and a member of 'his Majesty's Council'"; in all other routine criminal cases in early New Hampshire, "the plaintiff or his attorney" remained private.[62]

Moving to eighteenth-century colonial America, Barth summarizes that the judicial system "gradually evolved to include the option of public prosecution, yet not at the expense of the private option."[63] This expansion of public prosecution occurred in varying degrees, depending on the colony. But "the fact that England never prescribed a uniform judicial system for colonial America allowed for vast experimentation."[64] Private prosecution remained commonplace, giving colonial Americans a "hybrid" system of criminal justice. Though instances of public prosecution certainly increased by 1776 when the colonies became independent from Britain, "private prosecution was still very much presumed to be the right of the victim if the victim so elected," and many victims did so.[65]

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[57] BESSLER, *supra* note 39, at 123; *accord* Kaufman, *supra* note 17, at 108; *see also* Capers, *supra* note 33, at 1575 (noting that "the public prosecutor, 'virtually unknown to the English system,' was 'an historical latecomer' to the American colonies" (quoting Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976); John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 313 (1973)).

[58] Barth, *supra* note 37, at 124–34 ; BESSLER, *supra* note 39, at 107-47.

[59] Barth, *supra* note 37, at 125 (citing 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 419 (1823)).

[60] Barth, *supra* note 37, at 125 (citing 1 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 72–79 (John H. Clifford et al. eds., 1869)).

[61] Barth, *supra* note 37, at 127 (citing, e.g., 2 RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND (Nathaniel B. Shurtleff & David Pulsifer eds., 1856)).

[62] Barth, *supra* note 37, at 128 (citing 1 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW HAMPSHIRE FROM 1692 TO 1722) at 578-81 (Nathaniel Bouton ed., 1867)).

[63] Barth, *supra* note 37, at 134.

[64] *Id.*

[65] *Id.*

Barth also attempts to estimate the frequency of private prosecutions in eighteenth-century America. He points out that this question is impossible to answer precisely because many court records fail to identify exactly who conducted the prosecution.[66] "Notwithstanding this unfortunate ambiguity," however, he concludes that "private prosecutions, in all likelihood, constituted a sound majority of criminal cases in the eighteenth century—excepting, perhaps, for capital crimes—and even when a case was publicly prosecuted, the evidence strongly indicates that the victims retained ultimate control over the prosecutorial proceedings."[67]

Bessler reaches the same conclusion as Barth about the primacy of private prosecution in colonial America. In his book, Bessler collects numerous examples of private colonial prosecutions. For example, "[i]n colonial North Carolina, crime victims had long played a key role in criminal prosecution, just as they long had in England."[68] In general, during Colonial times, "the prosecution of a crime depended first on victims or witnesses willing to describe their injury to a local justice of the peace."[69] Thus, "American private prosecutions date back to colonial times. Consequently, the history of the criminal law in early America is bound up with the then-prevailing practice of private prosecution."[70]

The recent work of Barth and Bessler corresponds with the work of others.[71] For example, historian Allen Steinberg reviewed earlier scholarship about colonial criminal justice that had highlighted the emergence of public prosecution rather than the underlying dominance of private prosecution. As Steinberg explained, earlier studies concentrated on legislation and thus naturally over-emphasized the public prosecutor's importance.[72] A background system of private prosecution, which was simply imported from English common law, would not require legislation and would not be reflected in statutory changes. Earlier scholars did not fully review the on-the-ground realities of prosecutorial practices. They focused on "the most readily accessible information relating to criminal prosecution," which "predictably concerned the exceptional, well-publicized cases conducted by public prosecutors, not the vast majority of mundane cases, involving scant paperwork and handled through the simple procedures of private prosecution."[73] Steinberg concluded that "[p]rivate prosecution dominated criminal justice during the colonial period."[74] Thus, Steinberg's research reaffirms "the persistence of a primarily private system of colonial prosecution."[75]

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[66] *Id.* at 134–35.

[67] *Id.* at 135.

[68] Bessler, *supra* note 39, at 119.

[69] *Id.* (quoting Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720-1740,* 25 AM. J. LEG. HIST. 141, 146 (1981)).

[70] BESSLER, *supra* note 39, at 423.

[71] *See, e.g.,* Capers, *supra* note 33, at 1578; Kaufman, *supra* note 17, at 109.

[72] *See* Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 571–72 (1984). The significance of Steinberg's research is helpfully reviewed in Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1072 & n.14 (1990).

[73] Dangel, *supra* note 72, at 1072 n.14.

[74] Steinberg, *supra* note 72, at 571.

[75] Dangel, *supra* note 72, at 1072.

C. The American Revolution, the Drafting of the Constitution, and the Early National Period

An important reason for exploring the history of private prosecution in colonial America is that it sheds light on the drafting of the federal Constitution. According to some historians, by the time the Framers crafted the Constitution and the Bill of Rights, private prosecutions were a thing of the past, having been superseded by a system of public prosecutors.[76] If this were true, then a criminal justice system without victims might, to some degree, be enshrined in our Nation's charter.

But the relevant history surrounding the Constitution's drafting does not allow victims to be dismissed so quickly. To the contrary, a fuller understanding of the backdrop to the Constitution's drafting shows that the Framers understood that victims would be allowed to proceed with private prosecutions, particularly in the states.

Starting with the Articles of Confederation, sent by the Second Continental Congress to the states in December 1777, no provision was made for a "system of law enforcement, leaving the subject of criminal prosecution entirely to the newly independent states, as expressed in their state constitutions."[77] Before the drafting of the Constitution in 1787, a few states established an office of the public prosecutor.[78] But "[n]owhere in any of the state constitutions was the public attorney awarded the *exclusive* right to prosecute in criminal court."[79]

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[76] Professor Barth has helpfully collected examples of such assertions (*see* Barth, *supra* note 37, at 120 n.3), including: JOANE JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 13–19, 36–37 (1980) (claiming that private prosecution had been virtually eliminated in the colonies by the time of the American Revolution); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM U.L. REV. 754, 762–63 (1976) (discussing the evolution of public prosecution in the United States, especially Virginia); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 516–17 (1994) (observing that by the time colonies gained independence, a system of public prosecution had largely replaced private prosecution); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995) (observing that by 1820 most states had instituted offices that served the purposes of public prosecution); Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 105 (1976) (explaining that the modern criminal justice system in the United States evolved from public prosecution); BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 95–96 (1998) (noting that the prosecution system rapidly evolved from private to public in the original thirteen colonies, driven in part by an effort to increase judicial revenue); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 117 (1945) (concluding that the legal history of the United States criminal justice system began mainly after the American Revolution); *see also infra* notes 272–77 and accompanying text (Sen. Feinstein responding to claims by Sen. Leahy that at the time of the Constitutional Convention "public prosecution was standard and private prosecution had largely disappeared").

[77] Barth, *supra* note 37, at 144.

[78] *Id.* at 145.

[79] *Id.* at 146. Barth also notes that several state constitutions at the time contained what are often called "open courts" provisions. *Id.* at 146 (citing Mass Const. of 1780 art. XI ("Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.")). In Barth's view, these provisions explicitly promised victims the right to initiate criminal proceedings in situations where the public attorney refused to prosecute. *Id.* at 146. But the better reading of these provisions is that they traced back to the Magna Carta and were designed to secure an independent judiciary. *See* Jonathan M. Hoffman, *By Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); *see also* Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts*

When the Philadelphia Convention met to draft the Constitution, it created a stronger national government but left many responsibilities to the states. Among the most important of these was day-to-day criminal justice. Thus, the patterns of private prosecution would have been the dominant feature of state criminal justice—and, thus, of American criminal justice.[80] As Barth has observed, "[t]he Framers (many of them lawyers) were quite obviously aware that private prosecution existed in the states, and they expected the practice to continue."[81]

To the extent that the Framers looked outside the practice of the colonies, they would also have seen private prosecutions. In looking to England, they would have been influenced by Blackstone's *Commentaries on English Law*—which specifically recognized the concept of private prosecution.[82] Blackstone explained that crimes had a dual nature, as encompassing both a private wrong and harm to the community: "In all cases . . . crime includes an injury" because "every public offense is also a private wrong, and [thus] . . . it affects the individual, and . . . likewise . . . the community."[83] Of importance here, the *Commentaries* laid out the "Several Modes of Prosecution." Among these modes was indictment, which were preferred to grand juries "in the name of the king, but at the suit of *any private prosecutor* . . . ."[84] Given this understanding, it is unsurprising that in England criminal prosecutions were typically brought in the name of the state but by the victim—a "private prosecutor"—rather than by a government agency. [85]

Clause as Found in State Constitutions, 82 ALB. L. REV. 1449 (2019) (discussing contemporary interpretations of the open courts provisions).

[80] *See* Barth, *supra* note 37, at 144–55; Steinberg, *supra* note 72, at 572.

[81] Barth, *supra* note 37, at 147.

[82] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 541 (1769) (discussed in BESSLER, *supra* note 39, at 14–18).

[83] 4 BLACKSTONE, *supra* note 82, at *5.

[84] *Id.* at *541 (emphasis added). Blackstone also discussed another mode prosecution, confusingly called an "appeal." This type of "appeal" was "an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense against the public." *Id.* at 578. This would, of course, have been a form of private prosecution. But Blackstone noted that, in England, it was little used *Id.* at 305. Bessler has collected numerous examples of the private "appeal" being used to prosecute crimes in the colonies. BESSLER, *supra* note 39, at 114–20. He concludes that "[t]he appeal of felony concept . . . was despite the procedure's relatively atypical use, also a familiar one to other early American attorneys, lawmakers, and jurists." *Id.* at 119–20.

[85] Bessler summarizes the early English practice nicely, explaining that although "'criminal prosecutions were carried on in the name of the king,' writes Allyson May in *The Bar and Old Bailey, 1750-1850,* 'there was no system of public prosecution. The state's involvement was extremely limited.'" BESSLER, *supra* note 39, at 18 (quoting ALLYSON N. MAY, THE BAR AND THE OLD BAILEY, 1750–1850, at 19–20 (2003)). Bessler concludes, quoting May, that "[v]ictims of crime bore the chief responsibility for bringing offenders to justice: A victim's pursuit and apprehension of a suspected felon and his willingness to take that person before a local magistrate were crucial to prosecution. . . . English criminal justice was thus rooted in private prosecution, and ... [a]t midcentury [in the 1700s] the presence of counsel for the prosecution was still rare.'" *Id.* at 18 (quoting May). *See also* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 361 (1986) ("In cases of serious crime, private parties prosecuted in the name of the Crown. . . . The concept of public officers with legal authorization to investigate and prosecute crime as a representative of the king did not emerge until passage of the Prosecution of Offenses Act in 1879."); JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 4, 12 (2003) ("The English perpetuated a system of private prosecution . . . into the urban industrial age."); Michael Edmund O'Neil, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 665 (2010) ("Before the early-nineteenth century, English law recognized that the victim of a crime was generally responsible for the crime's prosecution"). *See generally* 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 249 (Lenox Hill Pub. 1973) (1883). Private prosecution continues to be available under the law in England today. *See* 4 L.H. LEIGH, J.E. HALL WILLIAMS, INTERNATIONAL ENCYCLOPAEDIA OF LAWS, CRIMINAL LAW, UNITED KINGDOM (1993); O'Neil, *supra*, at 672–73.

Accordingly, to whatever model of prosecution the Framers looked, they would have seen the likelihood of victim-initiated prosecution.[86]

A good illustration of the Framers' understanding comes from the law lectures of Pennsylvania attorney James Wilson—a signer of the Declaration of Independence and the Constitution, who later became a Justice on the Supreme Court. As Bessler recounts, in his law lectures in 1789 to 1791 Wilson specifically addressed "the different steps which the law prescribes for apprehending, detaining, trying criminals."[87] Wilson explained that "[a]ll, of age, who are present when a felony is committed . . . are, on pain of fine and imprisonment . . . bound to apprehend the person who has done the mischief." If the "crime has been committed out of their view," Wilson noted, citing English legal commentators, then "[t]hey are, upon a hue and cry, obligated to pursue with the utmost diligence, and endeavor to apprehend him who has committed it."[88] Hue and cry "is the pursuit of an offender from place to place, till he is taken: all who are present when he commits the crime, are bound to raise it against him on his flying for it."[89]

As Bessler further recounts, in his law lectures Wilson addressed the "next step" for instituting a criminal prosecution after "the party is taken, and bailed or imprisoned."[90] Wilson described four methods: by appeal; by information; by presentment; or by indictment. As for the first method—appeal—Wilson explained that this was "an accusation by one private person against another for some crime." Tracking the idea that this was a hybrid action, Wilson explained that an appeal "is a private action of the party injured, demanding punishment for the injury which he has suffered: it is also a prosecution for the state, on account of the crime committed against the public."[91]

Against this backdrop of private involvement in arrest and charging, the Framers were clearly crafting a federal constitution that envisioned state prosecutions initiated by victims. But an important sidenote concerns *federal* criminal justice. As is well known, the Constitutional Convention created a system of separated powers divided among the three branches of the federal government. Some commentators have concluded that the executive branch was assigned the

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[86] The issue of whether victims could bring a prosecution in the name of the state is a separate issue from whether a prosecution has public or private character. The most notable discussion of this issue is Chief Justice Roberts' dissent in Robertson v. U.S. *ex rel.* Watson, 560 U.S. 272, 275–76 (2010) (Roberts, C.J., dissenting from dismissal of writ of certiorari as improvidently granted). There, Chief Justice Roberts noted that "Blackstone wrote that the king is 'the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law.'" *Id.* at 275–76 (citing 1 W. BLACKSTONE, COMMENTARIES *268; *see also* 4 *id.*, at *2, *8, *177). From this and other evidence, Chief Justice Roberts concluded that the federal contempt prosecution at issue in the case at hand was necessarily brought "in the name and pursuant to the power of the United States." *Id.* at 273. As explained above, the conclusion that a prosecution was brought "in the name of" the State would not necessarily preclude private prosecution. *See supra* notes 84–85 and accompanying text. And as explained below, federal practice on private prosecution is more limited than in the states. *See infra* notes 98-113 and accompanying text.

[87] BESSLER, *supra* note 39, at 113 (quoting 2 The Works of James Wilson: Associate Justice of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia 445–47 (James DeWitt Andrews, ed. 1896)). Wilson's lectures also available at https://contextus.org/James_Wilson's_Lectures_on_Law_(1789_to_1791)?tab=contents [https://perma.cc/YKS9-KW6B].

[88] BESSLER, *supra* note 39, at 113 (quoting Wilson).

[89] *Id.* (quoting Wilson).

[90] *Id.* (quoting Wilson).

[91] *Id.* (quoting Wilson).

exclusive power over criminal prosecutions—and that this assignment meant a system of exclusively public prosecutions. For example, Danielle Levine has argued that "[i]n conjunction with the emerging view during early American history that prosecutions were of an inherently public nature, the founding fathers also created a constitutional system that charged the Executive with the responsibility to 'take care that the laws be faithfully executed.'"[92] Something akin to this view was famously expressed by Justice Scalia in his solo dissent in *Morrison v. Olson* (the "independent counsel" case), where he strenuously argued that "Governmental investigation and prosecution of crimes is a quintessentially executive function."[93]

But no clear evidence supports the view that prosecution was exclusively an executive function, much less an exclusively *public* function. Indeed, so far as can be determined, the Framers never discussed prosecution in connection with federal executive power at the convention.[94] Moreover, "most state constitutions at the time of the Framing did not mention, let alone classify, the prosecutorial function."[95] As Stephanie A.J. Dangel has reported, when the Constitution was drafted, five state constitutions included the office of attorney general, but under the judicial article. Furthermore, at that time, state attorneys general acted primarily as legal advisors, not prosecutors.[96] Thus, as Professor Michael O'Neil has summarized, "[f]ollowing the Constitution's ratification in 1789, state constitutions slowly began to acknowledge offices of public prosecution, but without ending the practice of private prosecution where it had previously existed."[97]

In the Judiciary Act of 1789, Congress established the federal judiciary for the small minority of cases handled by the federal system. The Act assigned to the President the power to appoint the Attorney General.[98] In addition, the Act also established a system of federal district attorneys for each of the thirteen judicial districts, with duties including "to prosecute in such district all delinquents from crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned."[99] Thus, the federal government "adopted a public system of prosecution far earlier than many of the state and local governments . . . ."[100] Nonetheless, as discussed below, private citizens continued to be involved even in the federal process.[101]

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[92] Danielle Levine, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 339 (2010). *But see* Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 2011 NW. U.L. REV. COLLOQUY 164, 177 (2011) (responding to Levine) [hereinafter Cassell & Joffee, *Victim's Expanding Role*].

[93] Morrison v. Olson, 487 U.S. 654, 705 (1988). *But cf. infra* notes 229–31 and accompanying text (discussing Justice Scalia's recognition of the possibility of non-government prosecution).

[94] *See* Dangel, *supra* note 72, at 1077.

[95] *Id.* at 1074.

[96] *Id.*

[97] O'Neil, *supra* note 85, at 678.

[98] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789), discussed in Barth, *supra* note 37, at 147.

[99] Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (1789). *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1924).

[100] Barth, *supra* note 37, at 148.

[101] *See infra* notes 108–13 and accompanying text.

Shortly after the Constitution was drafted, Congress added the Bill of Rights. It contained two Amendments relevant to criminal prosecutions: the Fifth and Sixth Amendments. The Fifth Amendment promised defendants in serious federal criminal prosecutions (other than military prosecutions) a right to grand jury indictment before facing charges, no double jeopardy, and freedom from self-incrimination.[102] The Sixth Amendment promised defendants rights to a speedy and public trial before an impartial jury, to know the nature of the accusation, to confront witnesses, to obtain witnesses favorable to the defense, and to the assistance of counsel.[103] Some commentators have concluded that these provisions "appear[] to assume that the government is the defendant's adversary in criminal proceedings" and that they do "not anticipate third parties such as crime victims presenting a challenge to the liberty of accused defendants."[104]

But this assumption of exclusively public prosecution finds no basis in the Amendments' text, leaving open the possibility of a private prosecution being pursued in federal court. The exclusivity assumption is said to be supported by the proposition that the Amendments protect against "government conduct, not the acts of private third parties outside the litigation."[105] But the Bill of Rights provisions apply to all criminal proceedings in federal courts—promising that this governmental process will itself guarantee defendants' rights. The Amendments' language is sufficiently capacious to cover both private and public prosecutions within those proceedings.[106] And, as noted above, private prosecutions were often pursued in the name of the state,[107] a procedural posture which would have been a sufficient trigger for Bill of Rights protections.

To be sure, as a matter of practice, federal criminal prosecutions quickly became synonymous with public prosecutions. But the functional reason a right of private prosecution failed to develop in the federal system stems from the happenstance of the limited kinds of crimes within federal jurisdiction at the time. As Dangel has cogently explained, "the Supreme Court refused to recognize federal common law crimes which might have given rise to private prosecution."[108] Moreover, "federal criminal statutes during this period dealt with crimes against the Federal Government *qua* Federal Government, and thus, public officials prosecuted these public crimes."[109]

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[102] U.S. Const. amend. V.

[103] U.S. Const. amend. VI.

[104] *See, e.g.*, Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 247 (2008); Rachel King, *Why a Victims' Rights Constitutional Amendment is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 366–68 (2000) (both discussed in Barth, *supra* note 37, at 147); *see also* Levine, *supra* note 92, at 339.

[105] Blondel, *supra* note 104, at 247 & n.59 (citing John O. McGinnis & Michael B. Rappaport, *Colloquy Essay, A Pragmatic Defense of Originalism,* 101 NW. U. L. REV. 383, 393 n.44 (2007) ("With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all.")).

[106] *See* Cassell & Joffee, *Victim's Expanding Role*, *supra* note 92, at 177.

[107] *See supra* notes 84–86 and accompanying text.

[108] Dangel, *supra* note 72, at 1083 & n.84 (citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812)). As Dangel notes, however, prosecution for federal common law crimes did occur in the 1790s. Dangel, *supra* note 72, at 1083 n. 84 (citing JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 623–25 (1971)). Accordingly, it is possible that private federal prosecutions occurred during this time.

[109] *Id.*

Dangel also explains that, despite the absence of a private prosecution system, private participation continued to some degree in federal criminal prosecutions. In the early Federal period, private citizens could directly initiate federal prosecutions.[110] Indeed, in a 1794 letter, Attorney General Bradford expressed the view that

> [I]f the party injured is advised or believes that the federal courts are competent to sustain the prosecution, I conceive he ought not to be concluded by my opinion or that of the district attorney. If he desires it, he ought to have access to the grand jury with his witnesses; and if the grand jury will take it upon themselves to *present* the offense in that court, it will be the duty of the district attorney to reduce the presentment into form, and the point in controversy will thus be put in a train for *judicial* determination.[111]

In addition, Congress bolstered enforcement of federal criminal statutes with private *qui tam* actions.[112] Courts effectively treated *qui tam* actions as criminal proceedings.[113]

To be sure, just as public prosecutors became the dominant mode of federal prosecution at the start of the 1800s, state prosecutions also began moving in that direction. Historians have identified Italian criminologist Cesar Beccaria as an important figure in this development.[114] A product of the Enlightenment, Beccaria sought to separate criminal justice from God's law on earth. Beccaria argued that the measure of crime should not be the offensiveness of the act to God but rather harm to society.[115] Beccaria also disputed the idea that the primary purpose of the criminal justice system was to serve as an aid to private action in obtaining redress from the criminal. Instead, since criminal justice arose from a social contract, it should serve society's interests, not those of individual victims. Criminal punishment should serve primarily to deter the criminal, to repay his debt to society, or to deter others from committing similar acts. Accordingly, criminal punishment should not be imposed to redress private damages.[116]

For Beccaria, society was damaged by crime and, thus, the criminal justice system should seek to prevent this social damage. The victim should not be allowed to control charging decisions—that was the domain of the prosecutor.[117] In sum, Beccaria's principles evidenced the start of "the declining role of the

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[110] *See* Dangel, *supra* note 72, at 1083 (citing Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292 (1989)).

[111] 1 Op. Att'y Gen. 42 (1794) (discussed in Krent, *supra* note 110, at 294).

[112] *See* Dangel, *supra* note 72, at 1083

[113] *See id.* (citing Krent, *supra* note 110, at 300; Evan Caminker, *The Constitutionality of Qui Tam Litigation,* 99 YALE L.J. 341, 342–46 (1989)).

[114] *See, e.g.,* McDonald, *supra* note 3, at 54-56 (discussing CESAR BECCARIA, ESSAY ON CRIMES AND PUNISHMENTS (1764)). For an impressive trilogy of books discussing Beccaria's importance, see JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION (2014); JOHN D. BESSLER, CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD (2018); JOHN D. BESSLER, THE BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE (2019).

[115] *See* McDonald, *supra* note 3, at 655.

[116] *See id.* at 655–56 (summarizing BECCARIA, *supra* note 114, at 56–58, 74).

[117] *See id.* at 655–56 (summarizing BECCARIA, *supra* note 114, at 58, 87).

victim in the criminal justice system. This new system required that the victim's roles as policeman, prosecutor, and punishment beneficiary be reduced to that of informant and witness only. These ideas strongly appealed to Americans who sought to emphasize the principles of rationality and utilitarianism . . . ."[118]

In line with Beccaria's thinking, at the beginning of the nineteenth century, most states began abolishing corporal punishment, phasing out restitution, and establishing prisons.[119] Along with these developments, public prosecutors became increasingly important in the ensuing decades.[120] But if we focus on the time surrounding the advent of the Constitution, America retained a hybrid system of criminal prosecution—with both public and private prosecutions. As Professor Barth concludes, in the early nineteenth century, "[i]f public officials exercised a monopoly on prosecuting criminal cases, as so many legal commentators erroneously imply, surely it would have appeared somewhere in the statute books, yet it did not, and the many examples of private prosecution nullify the possibility in the first place."[121] In short, private prosecution "certainly remained prolific at the time of the framing of the Constitution."[122]

Professor Bessler reaches the same conclusion about the persistence of private prosecution when the Constitution was drafted. Based on his meticulous research, Bessler concludes that the U.S. Constitution (like the Articles of Confederation that preceded it) did not "specify the method of prosecution to be employed. Although the founders were clearly concerned about abuses of power, . . . because of old traditions and new approaches that arose out of experimentation in the states, both public and private prosecutions persisted on American soil after the country's founding."[123] Bessler continues, noting that "[m]any American states—out of habit, if nothing else—continued utilizing private prosecutions in the generations following America's founding despite the fact that public prosecutions became normalized and the routine federal practice."[124]

Joining Barth and Bessler in this position that private prosecutions were prevalent are the two other recent historical reviews, by Capers and Kaufman.[125] Thus, the four recent historical accounts of private prosecution all converge in agreeing—with strong supporting evidence—that private prosecutions were common in the states when (and after) the Constitution and the Bill of Rights were drafted.

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[118] *See id.* at 656; *see also* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 369 (1986) (discussing the influence of Beccaria); Bessler, *supra* note 39, at 119 (same).

[119] *See* Barth, *supra* note 37, at 150.

[120] *See* Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

[121] Barth, *supra* note 37, at 155–56.

[122] *Id.* at 121.

[123] BESSLER, *supra* note 39, at 425.

[124] *Id.* While Bessler concludes that private prosecutions continued as a descriptive matter, as a normative matter he believes such prosecutions could be "corrupted and tainted by private motives." *Id.*

[125] *See* Capers, *supra* note 33, at 1578 ("evidence makes clear that public and private prosecution continued to co-exist well into the American Revolution and the ratification of the Constitution"); Kaufman, *supra* note 17, at 110 ("The eighteenth-century history of public prosecution shows only that colonial and early American governments saw fit to hire public officials to litigate criminal cases. The shift toward a state monopoly on that function took place later-in the last quarter of the nineteenth century . . . .").

D. The Nineteenth Century

As America progressed from the early years surrounding the enactment of the Constitution through the nineteenth century, private prosecutions generally faded away as public prosecutions and public prosecutors became ascendant. But the rise of public prosecutions took place more slowly and incompletely than is generally recognized. And the transition may have been often grounded in more ignoble reasons than is generally acknowledged.

The rise of public prosecution in America has often been seen as a mystery.[126] Professor Josephine Gittler has described the rise of the American public prosecutor as "something of an historical enigma."[127] Professor William McDonald has described the development as "a puzzle."[128] And Professor Abraham Goldstein has attributed the change to "the result of a misunderstanding of history."[129]

Recent scholarship has sought to shed light on this mystery.[130] It appears to be agreed that private prosecution began to fade away in the nineteenth century. For example, Professor Barth observes that "early Americans, from the colonial period through at least the middle of the nineteenth century, if not a few decades beyond, utilized a *hybrid* system of criminal prosecution. The frequency of public prosecution—the ratio of public to private prosecutions—undoubtedly increased from the early eighteenth century to the mid-nineteenth century, albeit gradually." Nevertheless, "private prosecution remained a core tenet of American criminal justice for much longer than many legal theorists realize."[131]

The rise of the public prosecutor can apparently be traced to increased urbanization and the resulting problem of private prosecutors being inadequate to secure public safety.[132] However, the rise of public prosecutors hardly means that private prosecutions disappeared. For example, historian Robert Ireland suggests that while by 1820 "most states had established local public prosecutors," because of "deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century."[133] Indeed, one reason why private prosecutions endured for so long was because citizens did not trust the government and were concerned with its assumption of prosecutorial power.[134]

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[126] *See, e.g.*, Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH. L. REV. 1373, 1380 [hereinafter Cassell, *Balancing the Scales*].

[127] Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 127 (1984).

[128] McDonald, *supra* note 3, at 659.

[129] Goldstein, *supra* note 30, at 549. *See generally* Shima Baradaran Baughman & Jensen Lillquist, *Fixing Disparate Prosecution*, 108 MINN. L. REV. 1955, 1964 (2024) (concluding that "reasons for the shift differ").

[130] *See* Barth, *supra* 37, at 152-74; Capers, *supra* note 33, at 1573–81; BESSLER, *supra* note 37, at 189–226; and Kaufman, *supra* note 17, at 106–18.

[131] Barth, *supra* note 37, at 121.

[132] *See id.* at 164; Capers, *supra* note 33, at 1579; *see also* Cassell & Joffee, *Victim's Expanding Role*, *supra* note 92, at 179; *infra* notes 173-84 and accompanying text (discussing Philadelphia's transition to public prosecution, linked to ineffective law enforcement from private prosecution).

[133] Robert Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEG. HIST. 43, 43 (1995).

[134] *See id.* at 44–46.

Professor Barth provides a useful sketch of the historical developments. He reports that significant shift occurred in the years before the Civil War: "Though private prosecution was not altogether abandoned in the antebellum period—and though private assistance in public prosecutions still proliferated, especially in murder trials . . .—the trend clearly titled toward public prosecution, aided, in part, by the populist rhetoric of Jacksonian Democracy."[135]

Riding a wave of populist sentiment, President Andrew Jackson was elected in 1828 and reelected in 1832. Conceptions of popular democracy were a key part of his elector victories. Jacksonian Democracy championed greater rights for the common (white) man and opposed any vestiges of aristocracy. It was aided by a strong spirit of equality as the nation expanded, and many states adopted universal white male suffrage.[136]

During this "Age of Jackson,"[137] the expanding American electorate was more likely to trust a government official who would be responsive to the will of the people. As Jacksonian Democracy swept the country, judges and then prosecutors became popularly elected.[138] In contrast, private prosecutors (particularly professional lawyers pursuing private prosecutions) "were increasingly perceived as elitist, corruptible, money-hungry, and unresponsive to the people at large."[139] Accordingly, private prosecution increasingly became to be viewed as "inconsistent with the American concept of democratic process" and public prosecution by locally-elected attorneys was deemed the most acceptable "remedy for a population dedicated to a more democratic society."[140] As the country moved to a system of elected judges, elected prosecutors came along with them. Often, prosecutors were viewed as "adjuncts to the real powers of the courts."[141]

Professor Bessler has nicely catalogued this transition toward public prosecution. In 1832, Mississippi became the first American state to provide for the election of prosecutors. Other states—Ohio (1833), Maine (1842), Indiana (1843), and Iowa (1846)—swiftly followed suit.[142] In the 1850s, many more states adopted elected prosecutors, many by constitutional amendment.[143]

On the surface, one story that can be told about this move to elected public prosecutors is that it was driven by "a widespread belief in the superiority of

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[135] Barth, *supra* note 37, at 156.

[136] *See generally* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848 (2008).

[137] ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1946).

[138] *See* Barth, *supra* note 37, at 156 (citing JACOBY, *supra* note 53, at 22, 25, 37–38; Dangel, *supra* note 72, at 1074).

[139] Barth, *supra* note 37, at 156 (citing Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 699 (2004)).

[140] JACOBY, *supra* note 53, at 10, 17 (quoted in Barth, *supra* note 37, at 157).

[141] Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INT'L CRIM. JUST. REV. 190, 202 (2008). *See also* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & PUB. POL'Y 1, 8 (1993) (noting that state attorneys general have historically sometimes played judicial roles).

[142] BESSLER, *supra* note 39, at 190.

[143] *Id. See, e.g.*, N.Y. Const. of 1846, art. X, § 1 (providing for election of district attorney), discussed in Carolyn B. Ramsey. *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM CRIM. L. REV. 1309, 1327 (2002); Mich. Const. of 1848, art. V, § 28 (providing for election of state's attorney). *See generally* Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1561 (2012); Kaufman, *supra* note 17, at 111–12.

disinterested justice . . . ."[144] But as Professor Capers has explained, while such explanations have "an intuitive appeal," they may obscure "less generous reasons" for the transition to public prosecutions.[145] Capers recounts criminologist Nils Christie's observation that "[a]uthorities have in time past shown considerable willingness, in representing the victim, to act as receivers of the money or other property from the offender."[146] Capers also observes that "the rise in public prosecutors, at least in Virginia, may have had something to do with making sure money went into its coffers; one problem with private prosecutions was that it made it easy for parties to bypass paying fees to the court system."[147] And in New York, "[u]ntil the mid-nineteenth century, New York prosecutors searched for evidence, drafted legal documents, and empaneled juries upon victims paying them set fees."[148] As the public prosecutor's role expanded through the century, "American public prosecutors made their income from fees, usually based on the number of cases they brought or the number of convictions they won."[149] Looking at evidence such as this, Caper concludes that America's drift to public prosecution "may have been anything but disinterested."[150]

Criminologist Jason Tweede has also recently explicated another reason for public prosecutors displacing private prosecution, at least in the South.[151] After exploring the transition to public prosecution in Georgia, he concludes that the "picture we get . . . is one in which public prosecution protected the interests of slaveholders. While the protection of slaveholder interests may not have been the sole reason that public prosecution was initiated in Georgia, it certainly appears to be one of the primary reasons."[152]

Tweede explains that, following the ratification of the Constitution—and its compromise of leaving domestic slavery in the South intact—Congress passed the Slave Trade Act of 1794.[153] The Act prohibited importing slaves from "any foreign kingdom, place or country."[154] The Act also included a provision directing that, upon conviction, a defendant would "forfeit and pay" $200 for each slave transported, "to be recovered in any court of the United States . . . the one moiety

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[144] Joan Meir, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH U. L.Q. 85, 103 (1992); *see also* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 352 (2002) ("The responsibility of the public prosecutor dramatically altered the prosecution function. Rather than simply serving as an advocate for the victim, the public prosecutor was the representative of the government."). *Cf.* BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND THE COMMUNITY IN CRIMINAL JUSTICE 222–23 (1998) (arguing that the English crown facilitated the English move to public prosecution by removing the incentives for private person to prosecute).

[145] Capers, *supra* note 33, at 1580.

[146] *Id.* (quoting Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 4 (1977).

[147] *Id.*

[148] STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 4 (2012) (quoted in Capers, *supra* note 33, at 1580).

[149] NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT 1780–1940, at 255 (2013), quoted in Capers, *supra* note 33, at 1580.

[150] Capers, *supra* note 33, at 1580.

[151] Jason Tweede, Going Public: How the Government Assumed the Authority to Prosecute in the Southern United States, Ph.D. dissertation, Univ. of North Dakota (May 2016), available at https://commons.und.edu/theses/1975/, discussed approvingly in BESSLER, *supra* note 39, at 123, 408.

[152] Tweede, *supra* note 151, at 172.

[153] 1 Stat. 347, ch. 11, Act of Mar. 22, 1794. *See generally* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF THE INTERNATIONAL HUMAN RIGHTS LAW (2012).

[154] 1 Stat. 348 (Mar. 22, 1794)

[i.e., half] thereof to the use of the United States, and the other moiety to the use of such person or persons, who shall sue for and prosecute the same."[155] This provision created a direct financial incentive for abolitionists to sue under the Slave Act when possible.

And sue they did. For example, the first person convicted under the Act was Rhode Islander John Brown,[156] effectively prosecuted by an abolitionist society in 1797.[157] This prosecution made it clear that, where possible, abolitionist societies "were willing to prosecute cases against those participating in slavery."[158] And in Georgia, while the international slave trade was prohibited as a matter of state law, the threat of private prosecutions for other crimes connected with slavery (e.g., potential prosecution for assault on a slave) posed a problem.[159] The next year, 1798, Georgia established a system of public prosecution, which was "indirectly reactionary to the threat posed by [private] prosecutions from abolition societies."[160]

Tweede concludes that the "system for appointing public prosecutors in antebellum Georgia served as a means of assuring public prosecutors would be sympathetic to slaveholder interests."[161] As he explains, public prosecution was a key part of that strategy. For example, the law requiring the posting of a substantial bond "in order to be appointed a public prosecutor assured that only the wealthy or their chosen representatives would be public prosecutors. The large majority of those public prosecutors were slave owners—something that would have been expected in the South where slave ownership was nearly synonymous with wealth."[162] The upshot was that, with "public prosecution in place, slaveholders did not have to fear prosecution from abolitionists that pooled their resources."[163]

While Tweede focused on Georgia, he concludes that "similar trends" may have existed in other Southern states.[164] Preferential "treatment of slave owners in the criminal justice system is precisely what slave owners would have been aiming for. It appears that initiating a system of public prosecution had its desired effect."[165] Other examples of abolitionists' private prosecutions being thwarted also exist.[166]

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[155] 1 Stat. 349 (Mar. 22, 1794).

[156] This is not history's most famous John Brown, who was later involved in anti-slavery attacks that helped to precipitate the Civil War. The John Brown referenced here lived in Rhode Island and was (along with his brother Moses) one of the founders of Brown University.

[157] Tweede, *supra* note 151, at 117, citing CHARLES RAPPLEYE, SONS OF PROVIDENCE (2006). As Tweede explains, though the actual prosecution in the courthouse was handled by a district attorney, the abolition society had practical control over the decision. *Id.* at 118.

[158] *Id.*

[159] *Id.* at 121.

[160] *Id.*

[161] *Id.* at 145.

[162] *Id.* at 173.

[163] *Id.* at 173.

[164] *Id.* at 163; *see also* Ellis, *supra* note 143, at 1563–65 (noting ways in which Southern states were slow to adopt publicly elected prosecutors as means of protecting vested interests).

[165] Tweed, *supra* note 151, at 163.

[166] *See, e.g.*, BESSLER, *supra* note 39, at 598 n. 99 (recounting cases in which abolitionists had obtained the arrest of two U.S. Deputy Marshals for state charges of assault and battery in the course of apprehending a fugitive slave; riding Circuit, U.S. Supreme Court Justice Geier grant habeas corpus and declared that he would not allow a lawyer employed by the abolitionists to come into court).

Professor Darryl Brown has extended the race-based story of public prosecution more broadly to Reconstruction and beyond, explaining that a "contributing explanation for the U.S. aversion to private prosecution may lie in a familiar theme of U.S. law and history: race."[167] As Brown observes, before the Civil War, "prosecutors had become locally elected officials in nearly all states. That effectively aligned their charging monopoly with the preferences of local white majorities (or white minorities in localities in which black citizens were the majority, once Southern whites succeeded in disenfranchising black citizens)."[168] And "when private citizens could prosecute crimes, many states—and not only Southern ones—either denied African Americans legal capacity as litigants or barred them from testifying under oath on the basis of race. Among other effects, those barriers barred private prosecutions by African Americans."[169]

Following the Civil War, the race-based legal disabilities preventing private prosecutions by African Americans were abolished. It was at this time that private prosecution authority, already declining, most steeply declined.[170] The States "that retained a formal litigation role for crime victims did so by allowing privately funded attorneys to assist in prosecutions filed and controlled by public prosecutors, thus ensuring that public officials [were] the exclusive gatekeepers of criminal law enforcement."[171] Brown concedes that the

> [e]vidence for the relationship between race and the demise of private prosecution is correlative rather than causal, but it nonetheless suggests a reason for why state justice systems took a different path from other common-law jurisdictions and abolished private charging. Local white majorities had little need for a structural check on prosecutors they elected, and they likely did not want a way for African American citizens to challenge prosecutors and independently pursue their interests in criminal courts.[172]

One of the most detailed accounts about the shift from public to private prosecution during this time comes from Philadelphia. Professor Steinberg's historical review of nineteenth century prosecution reveals that direct victim prosecution of some types of crimes continued in Philadelphia until at least 1875.[173] Steinberg found that victims routinely prosecuted cases themselves during

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[167] Darryl Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 872 (2018).

[168] *Id.* at 873.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *See, e.g.*, ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 92 (1989); *see also* Allen Steinberg, *"The Spirit of Litigation": Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. SOC. HIST. 231 (1986); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568 (1984). The Supreme Court has also noted that as of around 1870, "it was common for criminal cases to be prosecuted by private parties." Rehberg v. Paulk, 566 U.S. 356, 364 (2012) (citing *Stewart v. Sonneborn,* 98 U.S. 187, 198 (1879) (Bradley, J., dissenting) ("[E]very man in the community, if he has probable cause for prosecuting

the early- to mid-1800s, and that the public prosecutor did not typically interfere. Instead, in most cases, the public prosecutor took "a stance of passive neutrality. He was essentially a clerk, organizing the court calendar and presenting cases to grand and petit juries. Most of the time, he was either superseded by a private attorney or simply let the private prosecutor and his witnesses take the stand and state their case.[174]

Interestingly, Steinberg found that this system of private prosecution benefitted disadvantaged groups, such as the poor, Blacks, and women. Private prosecution was "a major form of dispute resolution among the lower classes."[175] Even though a fee system was used to enter the system, by all accounts this did not prevent anyone from participating in the system: "Grand jurors, judges, and journalists frequently commented on the ease with which the poorest of Philadelphians, and those otherwise excluded from public life, made use of this system."[176]

Steinberg viewed the Philadelphia system of "citizen-prosecutors" quite favorably.[177] Quoting earlier descriptions, Steinburg explained that it was a mode of criminal justice "that was 'easily accessible and close to the everyday affairs of ordinary citizens'; 'a popular participatory form of government'; 'a democratic form of law enforcement and criminal justice, involving in great numbers citizens of all social and economic groups . . . [and] a practical aspect of the democratic spirt" that were part of the general sentiment in the early nineteenth century.[178]

Steinberg also reported that Blacks and women were "frequent participants in private prosecution" and that the system allowed them to "mobilize the criminal law on their own behalf."[179] For example, journals would write stories about criminal cases with titles like "the colored people love the law."[180] And for women, victims of domestic violence were often able to obtain convictions and, in some cases, prison for their abusers.[181]

Philadelphia's private prosecution system, however, also suffered from problems. Most notably, private prosecution was "an ineffective means of law enforcement in the matter of breaches of public order."[182] Problems with public order arose in Philadelphia in the 1840s and 1850s, leading to the development in Philadelphia (as in other major cities) a professional police force.[183] Gradually over

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another, has a perfect right, by law, to institute such prosecution, subject only, in the case of private prosecutions, to the penalty of paying the costs if he fails in his suit")).

[174] *Id.* at 82. Steinberg's research discussed approvingly in Barth, *supra* note 37, at 162-54; BESSLER, *supra* note 39, at 149–51; Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 486–87 (2005) [hereinafter Beloof & Cassell, *Victim's Right to Attend*].

[175] STEINBERG, *supra* note 173, at 2.

[176] Steinberg, *From Private Prosecution to Plea Bargaining*, *supra* note 72, at 574.

[177] STEINBERG, *supra* note 173, at 3, 25, 231, as assessed in Barth, *supra* note 37, at 164.

[178] Barth, *supra* note 37, at 164 (quoting Steinberg, *Spirit of Litigation, supra* note 173, at 244; STEINBERG, *supra* note 173, at 3, 231).

[179] Barth, *supra* note 37, at 165 (quoting Steinberg, *Spirit of Litigation, supra* note 173, at 241; STEINBERG, *supra* note 173, at 25).

[180] Steinberg, *From Private Prosecution to Plea Bargaining*, *supra* note 173, at 574.

[181] *See* STEINBERG, *supra* note 173, at 55, 69, 262 n.42, discussed in Carolyn B. Ramsey, *Against Domestic Violence: Public and Private Prosecution of Batterers*, 13 CAL. L. REV. ONLINE 4552–53 (2022).

[182] Steinberg, *From Private Prosecution to Plea Bargaining*, *supra* note 173, at 579.

[183] *See id.*

the next several decades, "officers of the state (the police and the public prosecutor), not the individual citizen, were at the center; they [became] the dominant actors of criminal justice."[184]

The same story occurred in other areas. In New York City, for example, the private prosecution model "waned slowly. Starting in the mid-nineteenth century, counsel retained by the victim disappeared from court; that function began to be performed exclusively by the District Attorney and his assistants. By the late 1800s, the private complainant could do no more than call the government's attention to the crime and appear as a witness."[185]

Along with the gradual demise of victim-driven prosecutions, toward the end of the nineteenth century, some courts began to question private assistance in public prosecutions (i.e., private funding for public prosecutors).[186] Accompanying the earlier system of victims prosecuting their own cases, a system had developed of victims (and family members) providing support for public prosecutors.[187] This was due, in part, to the need for victims and their families to secure legal representation commensurate with that of defendants.[188] For example, "[t]he presence of able defense attorneys whose collective talent clearly surpassed that of the public prosecutor often deepened the dilemma of victims of crime or their survivors who desired legal retribution."[189] Specifically, "[t]his imbalance almost compelled those who sought criminal convictions to hire private attorneys to help prosecute if the prosecution was to have any chance to secure a conviction."[190] Because of this dynamic, privately funded attorneys were most commonly sought in murder cases and cases involving sexual assault.[191]

In 1875, the Michigan Supreme Court became the first court to declare unconstitutional the practice of private attorneys being retained to help public prosecutors. In *Meister v. People*,[192] the Court concluded that the "mischief which the law aims to avoid is prosecution by interested parties." While the law does not "assume that there is anything dishonorable in such employment," it does "assume that it is not proper to entrust the administration of criminal justice to anyone who will be tempted to use it for private ends . . . ."[193] A decade later, in 1888,[194] the Wisconsin Supreme Court reached the same conclusion. In *Biemel v. State*, the court reasoned that the "fair, just, and impartial administration of the criminal law" make it "the duty of the courts to exclude the paid attorneys of private persons from appearing as prosecutors."[195]

But this negative view of providing private assistance to public prosecutors remained the minority view. In 1895, the North Dakota Supreme Court

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[184] *Id.* at 582.

[185] *See* Ramsey, *supra* note 143, at 1327–30.

[186] *See* Ireland, *supra* note 76.

[187] *See* BESSLER, *supra* note 39, at 154–63.

[188] *See* Ireland, *supra* note 76, at 45–46.

[189] *Id.* at 45.

[190] *Id.* at 45–46.

[191] *See id.* at 46 & n.7.

[192] 31 Mich. 99 (1875).

[193] *Id.* at 106.

[194] 37 N.W. 244 (Wis. 1888).

[195] *Id.* at 247.

provided the "century's most elaborate defense of the practice of privately funded prosecution."[196] In *State v. Kent* , the court explained that it was:

> one thing to have the prosecution entirely in the hands of one who may be influenced, because of a retainer, by the strong desire of his client to secure a conviction; but it is an entirely different thing to allow such an interested counsel to aid in the prosecution one who stands affected by no other motive than that of securing the punishment of guilt, and who has absolute control over the case.[197]

These views of *Kent* prevailed. By the end of the nineteenth century, the highest courts in not only North Dakota but also Alabama, Florida, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New Jersey, Texas, Utah, Vermont, and Virginia had upheld the legality of private funding for public prosecutors.[198] Most of the decisions "did not weigh the equities, but simply stated that the practice had been well-established and it was up to the legislature to change the law."[199]

E. The Twentieth Century Through Today

Turning now to the story of private prosecutions over the last century to today, many accounts simply skim over this period.[200] The story commonly told is that private prosecution died out by the Civil War, if not earlier, and so little needs to be said about private prosecution in the twentieth century and beyond.[201] But the vast story of the last century-and-a-quarter across fifty states and the federal system is much more interesting. As Professor Kaufman has recently summarized, "[p]rivate prosecution continued well after government prosecutors claimed control of the criminal docket, and it exists in various forms to this day."[202] To be sure, the vast majority of prosecutions since the start of the twentieth century have been public prosecutions. But private prosecution remains a recognized institution in many states.

It appears to be generally agreed that, by the end of the nineteenth century, "[f]ully-private prosecutions . . . had almost entirely disappeared, save for a few rural areas out west where private protection societies still operated."[203] But while "fully" private prosecutions were not a common feature of the American criminal

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[196] Ireland, *supra* note 76, at 50.

[197] 62 N.W. 631, 633 (N.D. 1895).

[198] Ireland, *supra* note 76, at 49.

[199] *Id. See* Barth, *supra* note 37, at 171–72 n.479 (collecting case citations).

[200] *See, e.g.,* Capers, *supra* note 33, at 1579.

[201] *See* Kaufman, *supra* note 17, at 122 ("In the standard account of American legal development, private prosecution used to exist, and then it disappeared.").

[202] *Id.* at 122.

[203] Barth, *supra* note 37, at 174. For more on private protection societies, see Terry L. Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The* Not *So Wild, Wild West,* 3 J. LIBERTARIAN STUD. 9, 15–1 (1979); Craig B. Little & Christopher P. Sheffield, *Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries,* 48 AM SOCIO. R. 796, 797 (1983); BESSLER, *supra* note 39, at 194; Kaufman, *supra* note 17, at 114–15. For history of a related phenomenon—private policing—see David Sklanksy, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

justice system at the start of the twentieth century, they still existed in certain jurisdictions and cases more frequently than is commonly acknowledged.

On this point, Professor Bessler has done interesting work by collecting newspaper reports of private prosecutors operating in the early twentieth century. Bessler concludes that "[d]espite the creation and funding of early American public prosecutors' offices, newspaper reports make clear that the common-law practice of private prosecution persisted—and, in some places, continued to thrive in spite of the presence of public prosecutors handling many criminal matters."[204] Bessler cites, for example, a 1906 editorial in the *Philadelphia Inquirer* reporting that the "criminal law of the Commonwealth contemplates that there shall be a private prosecutor in every criminal action . . . ."[205] Bessler assembles similar accounts of private prosecutors operating in more than twenty states.[206] He also collects illustrations of private prosecutions for dozens of different offenses, ranging from the most serious crimes such as murder, manslaughter, rape, arson, rioting, kidnapping, robbery, and burglary, to other crimes such as interfering with logging, illegally promoting a prize fight, disturbing a religious meeting, killing game out of season, selling liquor at a speakeasy, and peddling shoes without a license.[207] Relying on these reports, Bessler concludes that in the early twentieth century the practice of private prosecution "continue[d] amidst the growth of public prosecutors' offices."[208]

Other research confirms that private prosecution continued through the twentieth century. For example, Columbia Law School professor Raymond Moley published a 1929 book on criminal prosecution in the United States. He reported that, on any given day that year,

> [a] . . . vast range of prosecuting activities [were] conducted by private agencies. The legal representative of a human society [appeared] to ask for indictments of deserting husbands and fathers, the retail merchants' board present[ed] evidence of forgeries, "better business commissions" ask[ed] for "blue sky indictments," automobile clubs present[ed] prepared prosecutions against automobile thieves, banks ask[ed] for the indictment of dishonest employees, and many other special interest ask[ed] for approval of what [was] really a private prosecution.[209]

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[204] BESSLER, *supra* note 39, at 195 (collecting newspaper reports of private prosecutors of various types in more than twenty states).

[205] *Id.* at 196 (citing *The Position of District Attorney Bell*, Philadelphia Inquirer, July 21, 1906); *see also* "Needed Legislation," Pittsburgh Post, Sept. 2, 1906, at 8).

[206] *Id.* at 195 (collecting examples from Arizona, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Utah).

[207] BESSLER, *supra* note 39, at 203.

[208] *Id.* at 195.

[209] RAYMOND MOLEY, POLITICS AND CRIMINAL PROSECUTION (1929), as quoted in Kaufman, *supra* note 17, at 127–28.

As time marched on, in 1935, a New York court found it "absurd" and "manifestly unconscionable" to require public prosecutors to try all petty cases.[210] In 1939, private prosecutors were "trying cases and participating in criminal appeals in Texas."[211] In 1941, the Massachusetts Legislature "created a new process for screening private criminal charges and acknowledged that private parties have a right to file applications for criminal complaints, which magistrate judges cannot ignore."[212]

After World War II, private prosecutions "remained a mainstay in places such as Pennsylvania and North Carolina."[213] A 1955 Comment in the *Yale Law Journal* reported that "[d]espite widespread belief that criminal actions are conducted exclusively by public officials, private prosecutors in fact play an extensive role in criminal law enforcement. In thirty jurisdictions appellate courts have decided that privately employed attorneys may assist the public prosecutor, while only three have said they may not."[214] Summarizing things in 1972, another legal commentator wrote that "[d]espite statutory provisions requiring a public prosecutorial system and judicial repudiation of the procedure in some jurisdictions, private prosecution remains well entrenched."[215] And toward the end of the century, "many jurisdictions across the United States still permitted, and continue to permit, victims or their families to hire private attorneys to assist the district attorney, directing and controlling the bulk of the prosecution, though the private attorney was and is theoretically subordinate to the public prosecutor."[216] Indeed, a majority of states "still recognized the right of private assistance in prosecutions, with varying restrictions."[217]

Bessler agrees that, toward the end of the twentieth century and through today, private prosecution continues to be allowed in many American states. Bessler reports a variegated legal landscape. "Many American states," he writes, including Alabama, Arkansas, Colorado, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia, "continue to allow the appointment of private attorneys to assist or take charge of criminal prosecutions to one degree or another."[218] Bessler supports his assertions with a fifty-state survey of the relevant caselaw on private prosecution, spanning more than eighty pages in his book.[219]

Professor Kaufman similarly reports significant persistence of private prosecution. In her article, she concludes that "if one looks hard enough, there

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[210] People v. Black, 156 Misc. 516, 519-20 (N.Y. County. Ct. 1935), cited and discussed in Kaufman, *supra* note 17, at 128.

[211] Kaufman, *supra* note 17, at 128 (citing LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 221 (1939)).

[212] Kaufman, *supra* note 17, at 128 (citing Victory Distribs. v. Ayer Div. of the Dist. Ct. Dep't, 755 N.E.2d 273, 277 (Mass. 2001) (discussing the history of Mass. Gen. Laws Ann. Ch. 218 § 35A (2001)).

[213] BESSLER, *supra* note 39, at 218.

[214] Comment, *Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction*, 65 YALE L.J. 209 (1955).

[215] John A.J. Ward, Note, *Private Prosecution: The Entrenched Anomaly*, 50 N.C. L. REV. 1171, 1171 (1972).

[216] Barth, *supra* note 37, at 179; *see also* Ireland, *supra* note 76, at 55.

[217] Barth, *supra* note 37, at 179.

[218] BESSLER, *supra* note 39, at 230–31.

[219] *See id.* at 235-316 (developing a "fifty-state survey" showing a "wide range of rules and practices").

appears to be a steady history of private prosecution in the twentieth century."[220] She also reports the results of her recent review of every state's criminal statutes, criminal procedure rules, and criminal court dockets, along with accompanying interviews of criminal prosecutors and court employees.[221] She details that, as of 2024, private prosecution was clearly legal in seven states: Delaware, Massachusetts, New Hampshire, New Jersey, Oklahoma, Pennsylvania, and Rhode Island.[222] This tabulation was based on a narrow definition of "private prosecution" as "any legal system that permits non-governmental parties to initiate and litigate criminal cases."[223] If one expands the definition slightly to include allowing private parties to assist and effectively supplant public prosecutors, the practice was legal in another twenty states.[224]

One significant point about American private prosecutions is the distinction between the state and federal systems. The examples recounted above come exclusively from the states. In the federal system, public prosecutors (e.g., U.S. Attorneys and other Justice Department prosecutors) have completely displaced almost any hint of private prosecution.[225]

The issue of whether private prosecutors could play any role in the federal system reached the U.S. Supreme Court in 1987 in a procedurally complex case, *Young v. U.S. ex rel. Vuitton et Fils S.A.*[226] The case involved Louis Vuitton, a high-end French leather goods manufacturer, who civilly sued individuals for manufacturing imitation Vuitton goods. The federal civil suit resulted in a permanent injunction barring the individuals from trading in goods bearing any imitation of Vuitton's registered trademarks. When the individuals went back to their old tricks, Vuitton's attorneys asked that the district court, which had entered the injunction, appoint them to prosecute a criminal contempt action. The district court did so, over objections, and the individuals (now criminal defendants) were convicted.[227]

In the Supreme Court, the defendants argued that the federal district court had violated their constitutional rights by appointing an interested prosecutor. The Court rejected their claim that federal trial courts were powerless to appoint a private attorney, reasoning that the courts must have some way to address disobedience to their orders. But, the Court cautioned, such judicial "self-protection" must be used only as a last resort. Courts should first ask federal prosecutors to pursue such contempt actions.

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[220] Kaufman, *supra* note 17, at 128.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 129.

[224] *Id.; see also* Caroline L. Ferguson, Note, *Actualizing Justice: Private Prosecution Regimes for Modern Social Movements,* 56 COLUM. J.L. & SOC. PROBS. 557, 581 (2023) ("nearly twenty states permit—to varying degrees—private citizens to engage in some form of criminal prosecution.").

[225] *See generally* Young v. U.S. ex rel. Vuitton et Fils, 481 U.S. at 817 (Scalia, J., concurring) ("I am unaware, however, of any private prosecution of federal crimes."); BESSLER, *supra* note 39, at 232 (concluding that, in contrast to state practice, federal courts generally do not allow private prosecutions). *Cf.* Kaufman, *supra* note 17, at 138–39 (conceding that federal private prosecutions are hard to find but discussing contempt and or qui tam actions as illustrations of possible areas of quasi-criminal power remaining in private hands).

[226] 481 U.S. 787 (1987).

[227] *Id.* at 790–93.

Turning to the case at hand, the Court concluded that the appointment of the private prosecutors for an interested party (Vuitton) created the potential for a conflict of interest. Accordingly, exercising its "supervisory power" over lower federal courts, the Supreme Court held that the appointment of Vuitton's attorneys was inappropriate and reversed the convictions.[228]

Because the Supreme Court elected to use its supervisory power to invalidate the appointment, it did not reach the question of whether appointment of a private prosecution would violate a defendant's constitutional rights.[229] But Justice Scalia, while joining the majority, wrote separately to underscore his view that the problem in the case was that prosecution was an executive function, not a judicial one. Justice Scalia also noted in a footnote that at "the time of the Constitution, there existed in England a longstanding custom of private prosecution . . . ."[230] He concluded, however, that it was unnecessary to decide whether Congress could confer "prosecuting authority on private persons," because no such authority was in play in the case.[231]

In 2009, the Supreme Court seemed poised to clarify the federal legal landscape when it granted certiorari to review the issue of "[w]hether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States."[232] But following oral argument, the Court dismissed the case as having been improvidently granted. While this left the case without any precedential force, Chief Justice Roberts and three other Justices dissented. They argued that "[t]he terrifying force" of the federal criminal justice system "may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government."[233]

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[228] *Id.* at 802–09, 814.

[229] *See id.* at 808–09.

[230] *Id.* at 817 n.2 (Scalia, J., concurring).

[231] *Id.* at 817 n.2 (Scalia, J., concurring). In the next Term, Justice Scalia famously dissented in *Morrison v. Olson*, the "independent counsel" case, concluding that law enforcement functions are what have "always and everywhere—*if conducted by the government at all*—been conducted never by the legislature, never by the courts, and always by the executive." 487 U.S. at 706 (Scalia, J., dissenting) (emphasis added). As Professor Kaufman points out, this qualifier appears to leave open the possibility, for Justice Scalia at least, of non-governmental prosecution. *See* Kaufman, *supra* note 17, at 126–27.

[232] Robertson v. U.S. *ex rel.* Watson, 560 U.S. 272, 273 (2010) (Roberts, C.J.., dissenting from dismissal).

[233] *Id.* Perhaps the reason that the Court dismissed the case was its unusual procedural posture. The case involved an assault on a victim, Watson, by her then-boyfriend, Robertson. Watson obtained a civil restraining order against Robertson. After Robertson violated that order by another assault on Watson, the Government indicted Robertson for the first assault and then reached a plea agreement with him resolving the charge. Later, Watson initiated criminal contempt proceedings against Robertson for violating the civil protective order. Robertson then argued that her contempt proceedings had to be dismissed because he had resolved the issue with the Government. The lower courts rejected Robertson's argument, concluding that Watson's contempt proceedings were conducted as a private action, brought in the name and interest of Watson rather than the Government. Robertson was found guilty of contempt and ordered to pay restitution. *Id.* at 273–74.

As discussed earlier, *see supra* notes 84–86 and accompanying text, private prosecutors will typically proceed "in the name of" the Government, making this case something of an outlier—which is perhaps why the Supreme Court declined to decide questions of pure "private" prosecution. *Cf.* Jonathan Remy Nash, *Nontraditional Criminal Prosecutions in Federal Court*, 53 ARIZ. ST. L.J. 143, 198 (2021) (arguing that interpreting Chief Justice Roberts' dissent as expressing a preference for public prosecution is "a narrow[] reading" that is certainly "consistent with the strong history of private prosecutions across the United States."). Interestingly, after the Supreme Court dismissed the case, the District of Columbia Court of Appeals reheard the case and "correct[ed]

A private prosecution for federal contempt prompted two Justices on the Court to urge review of the practice. Relying on the language in *Young* allowing the appointment of a private prosecutor for contempt as a "last resort," a federal district judge in New York appointed a private prosecutor to pursue a contempt charge, a conviction resulted, and the Second Circuit affirmed. The defendant—attorney and environmental activist Steven Donziger—sought review of his conviction. The Supreme Court denied certiorari, but Justices Gorsuch and Kavanaugh dissented. They argued that "[i]n this country, judges have no more power to initiate a prosecution of those who come before them than prosecutors have to sit in judgment of those they charge."[234] The Court chose not to review the unusual case, perhaps because examples of federal private prosecutions remain few and far between.[235]

F. The Lessons from History

In light of the extensive record of private prosecution in America, the question naturally arises whether this "dusty history"[236] tells us anything useful for our day and age. Joining several other recent articles, this article contends that the history demonstrates that victims could usefully play an important role in criminal processes today.[237]

Perhaps most important, the well-established tradition of private prosecution undercuts the notion that victims lack any interest in criminal cases. As discussed earlier, in the 1973 case *Linda R.S.*, the Supreme Court stated in broad dicta that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[238] But that conclusion ignored the entrenched history of private prosecution, leaving the persuasiveness of the *Linda R.S.* dicta in doubt.[239]

In addition, the history of private prosecution shows that any belief in a state "monopoly" on the prosecution functions lacks historical foundation. In her recent article surveying the history, Professor Kaufman makes this point powerfully. She cites the "country's unbroken record of outsourcing criminal prosecution," concluding that in "important and underappreciated ways, the state monopoly on criminal law has always been something of a myth."[240] It is truly hard

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the assertion in [its] original opinion that the criminal contempt action . . . was conducted in the name [of] and pursuant to the power of a private person." *In re* Robertson, 19 A.3d 751, 758 (D.C. 2011). The court clarified that Watson's contempt case had actually been "brought in the name of the United States." *Id.* at 760. The court nonetheless rejected Robertson's challenge to his conviction, concluding that the contempt prosecution properly derived from judicial power. *Id.* at 761. *See* Kaufman, *supra* note 17, at 104 n.56.

[234] Donziger v. United States, 598 U.S. --- (Mem.), 143 S. Ct. 868, 870 (2023) (Gorsuch, J., dissenting from denial of cert.).

[235] *See supra* note 225.

[236] Capers, *supra* note 33, at 1581.

[237] *See, e.g., id.*; Barth, *supra* note 37, at 181–93; *see also* Kaufman, *supra* note 17, at 148–49 (calling for further exploration of the issue). *But see* BESSLER, *supra* note 39, at 361–422 (questioning the constitutionality of private prosecution)

[238] 410 U.S. at 619, discussed at *supra* notes 24–31 and accompanying text.

[239] *See* Kaufman, *supra* note 17, at 126–27 (reaching this same conclusion). As will be discussed below, even if the Court's dicta were accurate in 1973, victims now have newly created "interests" in criminal prosecutions, as such restitution and a right to speak at sentencing. *See infra* notes 483–530 and accompanying text.

[240] Kaufman, *supra* note 17, at 93.

to see how the concept of a state "monopoly" can be squared with more than two hundred years of private actors facilitating and, in some cases initiating, criminal prosecutions—as the recent scholarship by not only Kaufman, but also Capers, Barth, Bessler, and others recounts.[241]

One path available to the crime victims' rights movement in the future is to try to reinvigorate the private-prosecution power of victims. The history recounted here suggests that reforms relying on private prosecution remain constitutionally viable and potentially useful. As Professor Capers concludes, private prosecutions are "in our collective cultural DNA."[242] And the past could become prologue if we begin to consider, as Capers' widely discussed paper does, what the world might look like if crime victims could initiate criminal cases:

> What might it mean to allow a victim of theft, for example, to not only initiate a prosecution but also to prioritize, via prosecution, a return of the stolen item or financial damages? Or a hate crime victim to decide what is more important to him, punishment or an apology? Or a victim of domestic violence to decide whether to pursue charges or not, to decide whether incarceration of her partner is best for her or their children, and to decide whether mandating anger management classes or substance abuse classes might benefit her more?[243]

Professor Barth likewise urges reviving the victim's voice in criminal justice processes. Barth concludes that "[l]egal historians have "vastly overstated the extent to which public prosecution replaced private participation in the American criminal justice system prior to the twentieth century."[244] Building on the tradition of victim involvement, Barth concludes that "[g]reater inclusion of the victim . . . is desperately needed. Indeed, the notion that the victim is a non-party in criminal cases is only a very recent assumption—an illogical deviation from common law and historic conceptions of justice."[245] Barth calls for a return to the historical model of a hybrid, public-private system, writing that "a functioning hybrid system existed earlier in American history and also far later than many legal theorists have previously recognized. This rich historical precedent provides us a working example of how to reform and creatively innovate for the twenty-first century."[246]

Joining the chorus, Professor Kaufman intriguingly presses the broad point that history suggests that "private" prosecution might be expanded to include not just victims but others as well. Kaufman explains that the "long history of private prosecution shows that the state has a looser grip on criminal power than many

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[241] For other thoughtful discussions of these issues, see, e.g., Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 412 (2009); Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161 (2017).

[242] Capers, *supra* note 33, at 1581.

[243] *Id.* at 1587.

[244] Barth, *supra* note 37, at 181.

[245] *Id.* at 182.

[246] *Id.* at 193.

assume," an insight that might lead to broader discussion of possible reforms.[247] But Kaufman cautions against the "misconception" that private prosecution necessarily means prosecution solely by victims. Kaufman explains that discussions about private prosecution often center on whether to "return" power to victims. For Kaufman, this "frame skews the debate—those wary of victims' rights line up instinctively against private prosecution—and obscures the fact that nineteenth-century criminal law adopted a more capacious and in some ways much more radical notion of standing than one that simply allows victims to prosecute crimes."[248] She reminds us that, in "the heyday of private prosecution, anyone could lay claim to criminal law, on the theory that 'all are interested in the preservation of public order.'"[249] Thus, the "common law theory of the right to prosecute treated criminal law as a joint enterprise among members of a polity, each of whom had an affirmative duty to one another and an entitlement to enforce a shared legal code. This vision of criminal law was downright communitarian."[250] While Kaufman does not advance precise policy recommendations, she argues that "it is worth remembering that the government monopoly on criminal charging power is a contingent product of late nineteenth-century history and that there is no clean division between public and private in criminal law."[251]

While Capers, Barth, and Kaufman are all sympathetic to the idea of strengthening private prosecution, Professor Bessler takes a different tack. Indeed, Bessler contends that, in modern America, private prosecution has become unconstitutional.[252] In important ways, however, his entire book is at war with this proposition.

As with the other scholars discussed here, Bessler convincingly shows that the private prosecution is long-established feature of American criminal justice. Bessler concedes that "[t]he prevalence of private prosecutions in the past is a historical fact" and private prosecutions "occurred in droves" in the United States.[253] Even today, he acknowledges, a wide range of practices exists, with "some states barring private prosecutions while others permit them, albeit often with certain restrictions or limitations."[254]

Against that backdrop of an established tradition of private prosecution, the Supreme Court could declare the practice unconstitutional only through an ahistorical interpretation of the open-ended provisions in the Constitution guaranteeing due process and equal protection. But for the current Supreme Court, which looks to "constitutional text and history" in deciding constitutional questions[255] (particularly at the time that the text was added to the Constitution[256]),

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[247] Kaufman, *supra* note 17, at 139.

[248] *Id.* at 93.

[249] *Id.* (quoting Stewart v. Sonneborn, 98 U.S. 187, 198 (1878) (Bradley, J., dissenting)).

[250] *Id.* at 143.

[251] *Id.* at 148.

[252] BESSLER, *supra* note 39, at 361–422.

[253] *Id.* at 426.

[254] *Id.* at 235.

[255] *See, e.g.*, United States v. Rahimi, 602 U.S. 680, 691 (2024); *see also id.* at 717 (Kavanaugh, J., concurring) ("History, not policy, is the proper guide" to interpreting constitutional text).

[256] *See, e.g., id.* at 737 (Barrett, J., concurring) (under an originalist approach, "the meaning of constitutional text is fixed at the time of its ratification and that the discoverable historical meaning . . . has legal significance and is authoritative in most circumstances") (internal quotation omitted). *See generally* Randy E. Barnett & Lawrence

the well-established tradition of private prosecution would likely be dispositive. In the arena of criminal procedure in particular, the Court has been reluctant to extend "constitutional protection to an asserted right or liberty interest," because doing so places "the matter outside the arena of public debate and legislative action."[257] As recent scholarship suggests, the appropriate scope for private prosecution remains very much a matter of public debate.

This article need not tease out the precise constitutional limits, if any, on private prosecution. The next section turns to the history of the crime victims' rights movement. To foreshadow that history, the movement's efforts have focused on expanding victims' rights within a system of public prosecution. Within that framework, even Bessler concedes that "[v]ictims and their families are undeniably legitimate participants in the criminal justice system, and the protection of victims' rights is incredibly important . . . . The voices of victims must be heard . . . ."[258] Because the movement's focus has been on rights within a system of public prosecution, the exact constitutional limits that might be imposed on a system of expanded private prosecution can be left to another day.

Nonetheless, it is "somewhat surprising"[259] that crime victims' rights advocates have failed to push more strongly for returning to historically based models of private prosecution. Obviously, objections can be made to private prosecution—even including (as just noted) constitutional objections. Underlying these objections is the concern that private prosecution by victims would allow "vengeance-seeking" by interested parties in the process.[260] But it is not immediately clear that the risk of vengeance in a system of private prosecution is necessarily "a more corrupting motive than political ambition" in a system of public prosecution.[261] And even if vindictiveness is arguably involved, to some degree, in private prosecution, "a judicial process seems the proper outlet for vindictiveness," because the court "would [remain] the ultimate arbiter of both guilt and punishment. Due process under the adversary system would continue, but with a change in the identity of the adversary."[262]

Moreover, modern advocates of private prosecution do not propose handing over criminal prosecutions to crime victims without restraint. Instead, as Professor Barth's proposal illustrates, tracking much of American history, a "hybrid" system of private prosecution could be restored. As Barth explains, a "hybrid system of criminal prosecution existed in this country for arguably as long, if not longer, than the public monopoly, and history demonstrates that corruption and rank abuse is just as likely, if not more likely, under a centralized, public monopoly than under a decentralized system of citizen prosecutors."[263] Under a

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B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 118 NW. U.L. REV. 434 (2023) (concluding that there is "a history and tradition" of the Supreme Court resolving cases by looking to "history and tradition").

[257] D.A.'s Office v. Osborne, 557 U.S. 52, 73 (2009).

[258] BESSLER, *supra* note 39, at 427.

[259] *See* SEBBA, *supra* note 29, at 310.

[260] *See, e.g.*, BESSLER, *supra* note 39, at 426.

[261] Yale Comment, *supra* note 214, at 228–29.

[262] SEBBA, *supra* note 29, at 308.

[263] Barth, *supra* note 37, at 191; *see also* Kaufman, *supra* note 17, at 147 (discussing a "hybrid" system of prosecution and noting that it was proposed even by Jeremy Bentham); Goldstein, *supra* note 30, at 554–555, 567–68 (criticizing the "passive" role of the judiciary in allowing unchecked prosecutorial discretion). *Cf.* Capers,

hybrid system, a public prosecutor could be given the opportunity to move to dismiss or issue a writ of nolle prosequi (i.e., not wish to prosecute) if it appeared the victim was acting maliciously.[264] Or judges or grand jurors could screen victims' requests for charges.[265] And the fact that private prosecution would be a supplement to, rather than replacement for, public prosecution would ensure that the problems associated with under-prosecution of offenses would be avoided.[266]

But however the details of such a system might be crafted, the crime victims' right movement has focused on the expanding the victims' role in a system of public prosecution—a less aggressive and, arguably, less effective way of protecting victims' interests. As Professor Barth has argued, the federal Crime Victims' Rights Act was "only a very moderate response to the question of victim participation in criminal proceedings. It neither overturned the public monopoly over prosecution nor challenged the notion that prosecutors represent the State alone and not the actual victim."[267]

But while the movement has not often pressed specific private prosecution initiatives, the underlying historical record has important consequences in shaping the terms of engagement over the desirability of crime victims' rights. This is perhaps best illustrated by the congressional debate over a proposed constitutional amendment protecting victims' rights.[268] In 2000, senators propounded competing views about private prosecution centuries ago. For example, Senator Patrick Leahy (a Democratic from Vermont) took to the Senate floor in opposition to the proposed amendment. He argued that it "was England that had a system of private prosecution in the 18th and 19th centuries, not the United States, not even New England in the United States."[269] Senator Leahy reviewed the academic literature, as he saw it, and inferred that public prosecutors "were the rule, not the exception, by the time Mr. Madison and Mr. Hamilton and all the other framers of our Constitution got together in Philadelphia in 1787 to draft our Nation's founding charter."[270] Thus, he concluded, if "the Bill of Rights, which was written a few years later, makes no specific mention of crime victims, it is not because the framers thought victims were protected by a system of private prosecutions."[271]

A few days later, Senator Dianne Feinstein (a Democrat from California) took to the floor to respond directly to Senator Leahy. She explained that because "the Senator's comments contradict the clear weight of American history, I feel compelled to respond."[272] Senator Feinstein then offered "some additional evidence demonstrating that private prosecutions had not only not largely disappeared in the late 18th century but in fact were the norm."[273] Senator Feinstein

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supra note 33, at 1580–81 (suggesting that the state has an interest in maintaining control over prosecution as a means of collective fines for the government rather than restitution for victims).

[264] *See* Barth, *supra* note 37, at 191.

[265] *See* Capers, *supra* note 33, at 1587.

[266] *See* SEBBA, *supra* note 29, at 309.

[267] Barth, *supra* note 37, at 190.

[268] The proposed federal constitutional amendment is discussed at greater length in *infra* notes 577–95 and accompanying text.

[269] 146 Cong. Rec. S2966, S2997 (Apr. 27, 2000) (remarks of Sen. Leahy).

[270] *Id.*

[271] *Id.*

[272] 146 Cong. Rec. S3249, S3249 (May 2, 2000) (remarks of Sen. Feinstein).

[273] *Id.*

cited the research of Professors Steinberg and Dangel (recounted above[274]) about how some scholars had conflated the *existence* of the office of the public prosecutors with the *prevalence* of public prosecutions.[275]

Senator Feinstein's concluded her historical disquisition by arguing that a federal victims' rights amendment would return victims to the important position that they held in criminal justice at the time the Constitution was drafted:

> The historical evidence is clear: Because victims were parties to most criminal prosecutions in the late 18th century, they had basic rights to notice, to be present, and to participate in the proceedings under regular court rules. Today, victims are not parties to criminal prosecutions, and they are often denied these basic rights. Thus, a constitutional victims' rights amendment would restore some of the rights that victims enjoyed at the time the Framers drafted the Constitution and Bill of Rights.[276]

The recent scholarship collected here demonstrates that Senator Feinstein's assessment of American history was undoubtedly correct.[277] Participating in a system of private prosecution, victims played a prominent role in American criminal justice when the Constitution was drafted. Since then, the system has moved in the direction of public prosecution. The crime victims' rights movement has largely taken this public prosecution system as a given—and sought to restore the victim's voice within those processes. It is to that important and interesting story that this article now turns.

IV. THE MODERN CRIME VICTIMS' RIGHTS MOVEMENT

Against the historical backdrop of the victims' role in criminal justice, this section explores the modern crime victims' rights movement. The movement has tapped into not only that history but also widely shared views about how criminal justice processes should be organized. The movement has been remarkably successful in the past half-century. Today in America, all fifty states and the federal system recognize significant crime victims' rights to participate in criminal justice. The movement can claim credit for a true transformation of criminal justice.

A. Origins of the Crime Victims' Rights Movement

The modern victims' rights movement began to stir in the late 1960s, coalesced in the 1970s, and gained momentum in the early 1980s. The movement has continued ever since "as one of the most significant and successful forces for reshaping the criminal justice process."[278]

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[274] *See, e.g., supra* notes 71–80, 94–66, 108–12, 138, 173–81 and accompanying text.

[275] 146 Cong. Rec. S3249, S3249 (May 2, 2000) (remarks of Sen. Feinstein).

[276] *Id.*

[277] *See supra* note 125 and accompanying text (summarizing the scholarship).

[278] 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.5(k) (4th ed. 2020).

Determining the exact starting point of the modern crime victims' rights movement is difficult. A good account of the history is laid out by Dr. Marlene Young and John Stein, who were the founding directors of the National Organization for Victim Assistance (NOVA) throughout the movement's early years.[279] In an oral history project for the Justice Department's Office for Victims of Crime, they credit the movement's birth to the confluence of five developments: (1) the creation of an academic field of victimology; (2) the introduction of state victim compensation programs; (3) the rise of the women's movement; (4) an increase in crime and an accompanying dissatisfaction with the criminal justice system's response; and (5) the growth of victim activism. Each development is important and worth separate discussion.

1. The Development of a Field of Victimology

The academic underpinnings for interest in crime victims traces back to the development of an academic discipline known as victimology, a subfield within criminology.[280] In the first half of the twentieth century, criminologists were primarily interested in criminal offenders and why they chose to violate the law. By mid-century, victims began to appear in this literature. As Professor Andrew Karmen recounts, "Eventually, perhaps through a process of elimination, several criminologists searching for solutions to the crime problem were drawn to—or stumbled upon—the potentially decisive role played by victims."[281]

In the 1940s and 1950s, Benjamin Mendelsohn, a defense attorney in Romania, spoke about how victims were ignored and abused in criminal justice processes.[282] He proposed ways to help victims and campaigned for victims' rights—earning the sobriquet "the father of victimology."[283] The first (English) use of the term "victimology" to refer to the study of people harmed by criminals appeared in 1949.[284]

Early victimologists tried to identify the vulnerabilities of certain kinds of people that led to them being victimized.[285] This strand of study is exemplified by Marvin Wolfgang's 1958 research on homicide, which concluded that as many as

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[279] Marlene Young & John Stein, The History of the Crime Victims' Movement in the United State: A Component of the Office for Victims of Crime Oral History Project (Dec 2004), available at https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4c.html [https://perma.cc/DRY9-WEAD] (visited 12/3/24); *see also* Marie Manikis, *Contrasting the Emergence of the Victims' Movements in the United States and England and Wales*, 9 SOCIETIES 1, 5 (2019). Another excellent account is Steve Derene, Steve Walker & John Stein, History of the Crime Victims' Rights Movement in the United States, NVAA Track 1, available at https://corpora.tika.apache.org/base/docs/govdocs1/352/352080.pdf [https://perma.cc/VH6B-2BJZ]. I rely on these sources heavily in this section.

[280] *See generally* ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION VICTIMOLOGY 43–79 (10th ed. 2020); *see also* WILLIAM G. DOERNER & STEVEN P. LAB, VICTIMOLOGY 3–22 (9th ed. 2021); YOSHIKO TAKAHASHI & CHADLEY JAMES, VICTIMOLOGY AND VICTIM ASSISTANCE: ADVOCACY, INTERVENTION, AND RESTORATION 2–4 (2019); Andrew L. Giacomazzi & Christopher Beattie, *An Introduction to Victimology*, in VICTIMOLOGY: CRIME VICTIMIZATION AND VICTIM SERVICES 23 (2017).

[281] KARMEN, *supra* note 280, at 43.

[282] BENJAMIN MENDELSOHN, THE VICTIMOLOGY: ETUDES INTERNATIONALE DE PSYCO-SOCIOLGIE CRIMINELLE (1956), discussed in KARMEN, *supra* note 280, at 43; DOERNER & LAB, *supra* note 280, at 7.

[283] KARMEN, *supra* note 280, at 43; DOERNER & LAB, *supra* note 280, at 7; Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HAST. L.J. 457, 479 (2006).

[284] KARMEN, *supra* note 280, at 43 (citing FREDRIC WERTHAM, THE SHOW OF VIOLENCE (1949)).

[285] *Id.*

26% of homicides (in Philadelphia) resulted from "victim precipitation."[286] In 1968, Stephen Schafer wrote the first textbook about victims, looking at the what he called the "functional responsibility" of victims for crimes.[287] More controversially, in 1971, Menachem Amir argued that nineteen percent of all forcible rapes were "victim-precipitated."[288]

Some of these efforts to identify victim precipitation (particularly Amir's) came to be viewed as inappropriate "victim blaming,"[289] and the field's mainstream—what was called "general victimology"—began examining more broadly the prevention of and responses to victimization.[290] In 1967, an important government report by the President's Commission on Law Enforcement and Administration of Justice provided impetus in that direction.[291] The Commission's Task Force on Assessment called for more study of crime victims:

> One of the most neglected subjects in the study of crime is its victims: the persons, households, and businesses that bear the brunt of crime in the United States. Both the part the victim can play in the criminal act and the part he could have played in preventing it are often overlooked. If it could be determined with sufficient specificity that people or businesses with certain characteristics are more likely than others to be crime victims, and that crime is more likely to occur in some places rather than in others, efforts to control and prevent crime would be more productive. Then the public could be told where and when the risks of crime are greatest. Measures such as preventative police patrol and installation of burglar alarms and special locks could then be pursued more efficiently and effectively. Individuals could then substitute objective estimation of risk for the general apprehensiveness that today restricts—perhaps unnecessarily and at best haphazardly—their enjoyment of parks and their freedom of movement on the streets after dark.[292]

As Professor Karmen has summarized, when the Task Force called for research, it stressed potential practical benefits in crime control that could come from studying crime victims. Over the years, additional goals have been added, such as reducing victims' suffering, making the criminal justice system more responsive to their

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[286] MARVIN E. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (1958), discussed in DOERNER & LAB, *supra* note 280, at 9. *See generally* Edna Erez & Leslie Sebba, *From Individualization of the Offender to Individualization of the Victim: An Assessment of Wolfgang's Conceptualization of a Victim-Oriented Criminal Justice System*, in THE CRIMINOLOGY OF CRIMINAL LAW (William Laufer and Freda Adler eds. 1999).

[287] STEPHEN SCHAFER, THE VICTIM AND HIS CRIMINAL (1968). *Cf.* HANS VON HENTIG, THE CRIMINAL AND HIS VICTIM (1948) (describing a victim as an agent provocateur).

[288] *See* MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE (1971), discussed and critiqued in DOERNER & LAB, *supra* note 280, at 9-10.

[289] *See* Giacomazzi & Beattie, *supra* note 280, at 28–29.

[290] DOERNER & LAB, *supra* note 280, at 10–14; Giacomazzi & Beattie, *supra* note 280, at 28–29.

[291] For a description of the Commission's work, see Warren Lehman, *Crime, the Public, and the Crime Commission: A Critical Review of* The Challenge of Crime in a Free Society, 66 MICH. L. REV. 1487 (1968).

[292] Task Force on Assessment, The Victims of Crime, in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact—An Assessment 80 (1967), quoted and discussed in KARMEN, *supra* note 280, at 43–44.

concerns, and restoring victims to the financial position they were in before the crime.[293]

Soon, a consensus began to develop about victims' needs. During the late 1960s and 1970s, criminologists and criminal justice reformers argued that criminal offenders were "victims too"—victims of poverty, dysfunctional families, failing school systems, unemployment, discrimination, police brutality, and other social problems.[294] But many people wondered about the obvious response: What about the flesh-and-blood individuals harmed by crimes, who could often equally claim to have suffered from social problems and with a stronger moral claim to attention? Reformers came to recognize "that persons targeted by criminals were being systematically abandoned to their fates and that institutionalized neglect had prevailed for too long. A consensus began to emerge that people harmed by illegal acts deserved better treatment."[295]

In academia, the journal *Victimology* appeared. In the first pages of the first volume, Benjamin Mendelsohn justified a new journal because "it appears that the field has matured and expanded enough to make it possible and advisable to provide a forum for the exchange of theories, concepts, methodologies and practices concerning the victim . . . ."[296] He also urged victimology to "move out of the provincial backwaters of criminology and into its own rightful domain."[297]

Academic interest in crime victims began to expand in the U.S. and elsewhere. In 1973, the first international conference of victimologists convened in Jerusalem. Successive international symposia on victimology were organized in Boston in 1976 and Munster in 1979, where the World Society of Victimology was founded. The Society has hosted symposia ever since then in all major regions of the world.[298] The Society brought together a network of victimologists, which worked to advance academic research regarding victims' problems.[299]

In the 1970s, victimology became a recognized field of study throughout the United States. Courses in victimology sprang up on many college campuses.[300] By the end of the 1990s, more than 240 colleges and universities offered classes in the subject.[301] Victimology had arrived as a serious academic field,[302] helping to lay the groundwork for a victims' rights movement.

2. State Victim Compensation Programs

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[293] *See* KARMEN, *supra* note 280, at 44.

[294] *See id.* at 44 (citing, e.g., WILLIAM RYAN, BLAMING THE VICTIM (1971)); *see also* Edna Erez, *The Impact of Victimology on Criminal Justice Policy*, 3 CRIM. JUST. POL'Y REV. 236, 237 (1989) (recounting such arguments).

[295] KARMAN, *supra* note 280, at 44; *see also* Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 21, 27 (1999).

[296] Benjamin Mendelsohn, *From the Editor: Victimology: The Study of the Victim*, 1 VICTIMOLOGY 1 (1976).

[297] *See* DOERNER & LAB, *supra* note 280, at 12, citing Benjamin Mendelsohn, *Victimology and Contemporary Society's Trends,* 1 VICTIMOLOGY 8–28 (1976)).

[298] World Society of Victimology website, www.worldsocietyofvictimology.org/about-us/ [https://perma.cc/QTD7-6LKN].

[299] TAKAHASHI & JAMES, *supra* note *supra* note 280, at 4.

[300] KARMEN, *supra* note 280, at 44.

[301] *Id.*

[302] Indeed, the field of victimology has even spawned a sub-field: critical victimology. *See* DOERNER & LAB, *supra* note 280, at 12–14. *See generally* TOWARDS A CRITICAL VICTIMOLOGY (ed. Ezzat A. Fattah 1992).

Another important strand in the emergence of the victims' rights movement was victim compensation programs.[303] Compensation for crime victims is a concept with venerable roots. Historically, victim compensation existed in places such as "ancient Greece and Rome, biblical Israel, Teutonic Germany, and Saxony England."[304] Modern interest in the idea traces back to the advocacy of Margery Fry, an English magistrate who successfully urged the adoption of victim compensation laws in New Zealand in 1963 and Great Britain in 1964.[305]

Serious discussion of victim compensation appears to have reached American shores in February 1964. Then, Supreme Court Justice Arthur J. Goldberg delivered a lecture at New York University on issues relating to equality and government action. One of the ideas he raised was compensation for crime victims, which would be akin of government assistance for criminal defendants:

> Whenever the government considers extending a needed service to those accused of crime, the question arises: But what about the victim? We should confront the problem of the victim directly; his burden is not alleviated by denying necessary services to the accused. Many countries throughout the world, recognizing that crime is a community problem, have designed systems for government compensation of victims of crime. Serious consideration of this approach is long overdue here. The victim of a robbery or an assault has been denied the "protection" of the laws in a very real sense, and society should assume some responsibility for making him whole.[306]

Shortly thereafter, apparently inspired by Goldberg's speech (and, perhaps, the follow-on press coverage), Texas Senator Ralph Yarborough introduced the first federal victim compensation law in Congress in 1965.[307] He attacked the unfairness of a criminal justice system that, while "weeping over the criminal," showed "no such concern, indeed no concern, for the victim of his crime."[308] He proposed providing government compensation for "innocent victims" (those not involved in provoking violence) for the physical injuries they suffered. He also proposed

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[303] Marlene Young & John Stein, The History of the Crime Victims' Movement in the United States: A Component of the Office for Victims of Crime Oral History Project (2004), https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4c.html [https://perma.cc/VH6B-2BJZ].

[304] DOERNER & LAB, *supra* note 280, at 69, citing Bruce R. Jacob, *The Concept of Restitution: An Historical Overview*, in RESTITUTION IN CRIMINAL JUSTICE (J. Hudson ed. 1976); STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME (1970).

[305] *See* DOERNER & LAB, *supra* note 280, at 69, citing HERBERT EDELHERTZ & GILBERT GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME (1974); Margery Fry, *Justice for Victims*, 8 J. PUB. L. 191 (1959); *see also* Mimi Kim & Carina Gallo, *Victim Compensation: A Child of Penal Welfarism or Carceral Policies*, 106 NORDISK TIDSSKRIFT FOR KRIMINALVIDENSKAB (Nordic Journal of Crime Sciences) 54 (2019).

[306] Arthur J. Goldberg, *Equality and Governmental Action*, 39 NYU L. REV. 205, 224 (1964), discussed in Jeremy R. Levine & Kelly L. Russell, *Crime Pays the Victim: Criminal Fines, the State, and Victim Compensation Law – 1964-1984*, 128 AM. J. SOCIOLOGY 1158, 1170-71 (2023); *see also* Arthur J. Goldberg, *Preface: Symposium: Governmental Compensation for Victims of Violence*, 43 S. CAL. L. REV. 1 (1970).

[307] Levin & Russell, *supra* note 306, at 1171. *See* S. 2155 (1965), reprinted in 111 Cong. Rec. 14032 (June 17, 1965).

[308] 111 Cong. Rec. 14032 (June 17, 1965).

establishing a commission to determine the appropriate size of compensation awards.[309]

The federal effort to establish a government compensation program was unsuccessful,[310] primarily because of concerns about cost.[311] But states quickly picked up the idea.[312] The basic rationale was that victims lacked any other remedies for compensation after a crime.[313] Accordingly, society had an obligation to fill the gap.

California initiated the first state victim compensation program in 1965,[314] followed swiftly by New York the next year.[315] By 1980, about 30 states had adopted victim compensation programs.[316] In response to the concern about costs, states often increased criminal fines and fees as funding sources.[317]

In 1982 President's Task Force on Victims of Crime made victim compensation a priority.[318] In 1984, with the passage of the federal Victims of Crime Act (VOCA), significant federal funding became available for state compensation programs, which expanded even further.[319] Today, victim compensation programs across the country pay out close to $500 million annually to more than 200,000 victims for crimes such as rape, assault, child sex abuse, drunk driving, and domestic violence.[320] Many observers have identified the rapid development of these victim compensation programs as "a major contributing factor in the evolving victims' movement in the 1970s."[321]

3. The Rise of the Women's Movement

The crime victims' rights movement also benefitted from the parallel advance of the women's movement. As Young and Stein conclude, "There is little

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[309] *See* Hon. Ralph W. Yarborough, *We Should Compensate the Victims of Crime*, STUDENT LAWYER J., at 6 (Apr. 1966).

[310] *See generally* Ralph W. Yarborough, *The Battle for a Federal Violent Crimes Compensation Act: The Genesis of S. 9*, 43 S. CAL. L. REV. 93 (1970).

[311] Levine & Russell, *supra* note 306, at 1173.

[312] *See* VITIELLO, *supra* note 4, at 29–31; ROBERT ELIAS, VICTIMS OF THE SYSTEM 19–38 (1984); Goldstein, *supra* note 30, at 523–24; *see also* Lynn Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 944 (1985) (noting concern for victims of violent crimes was "on the liberal agenda and took the form of advocacy of 'victim's compensation' statutes . . . .").

[313] *See* LeRoy L. Lamborn, *Remedies for Victims of Crime*, 43 S. CAL. L. REV. 22 (1970).

[314] *See* Willard Shank, *Aid to Victims of Violent Crimes in California*, 43 S. CAL. L. REV. 85 (1970).

[315] *See* Young & Stein, *supra* note 303; *see also* Gov. Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENTARY 1, 5–7 (1992) (discussing California and New York programs).

[316] PEGGY TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 197 (3d ed. 2016); *see also* Young & Stein, *supra* note 303; Appx. – Statutes Providing Governmental Compensation for Victims of Violence, 43 S. CAL. L. REV. 157 (1970) (collecting statutes from California, Hawaii, Maryland, Massachusetts, and New York and other jurisdictions providing for victim compensation); SEBBA, *supra* note 29, at 20 (noting that "most" states had victim compensation programs).

[317] Levin & Russell, *supra* note 306, at 1174–75.

[318] *See infra* notes 427-48 and accompanying text (discussing Task Force).

[319] DOERNER & LAB, *supra* note 280, at 69–75; *see also infra* notes 539–46 and accompanying text.

[320] Nat'l Assoc. of Crime Victim Compensation Boards, Victim Compensation: An Overview, https://nacvcb.org/victim-compensation/ [https://perma.cc/E54T-PML2] (visited Dec. 5, 2024).

[321] *See, e.g.*, TOBOLOWSKY ET AL., *supra* note 316, at 197 (citing Robert J. McCormack, *Compensating Victims of Violent Crime*, 8 JUST. Q. 329, 331 (1991)); Marlene A. Young, *Victim Rights and Services: A Modern Saga*, *in* VICTIMS OF CRIME 194, 195 (Robert C. Davis et al. eds. 2d ed 1997).

doubt that the women's movement was central to the development of a victims' movement. Their leaders saw sexual assault and domestic violence—and the poor response of the criminal justice system—as potent illustrations of a woman's lack of status, power, and influence."[322]

The contributions of the women's movement to the victims' rights movement are striking. The women's movement preceded the victims' rights movement by a few years. The beginning of the women's movement—or, more precisely, second-wave feminism[323]—is often pegged to the 1963 publication of Betty Friedan's book, *The Feminine Mystique*.[324] A few years later, the National Organization for Women (NOW) was founded. NOW sought to end discrimination against women, particularly regarding educational and employment opportunities.[325] Significantly, in addition, NOW (along with others in the women's movement) sought to raise awareness of and provide assistance to victims of rape and battering, who were often women.[326]

The prevailing view of those who have studied the issues carefully is that the women's movement "greatly influenced the growth and orientation of the victims' movement"[327] and that "[o]ne of the most influential movements for [crime] victims was the women's movement."[328] Indeed, although the victims' rights movement "was influenced by the predecessor civil rights, anti-war, and other grassroots movements, it emerged more directly from the evolving women's movement."[329] Many of the early proponents of crime victims' rights were concerned about how the criminal justice system treated the (predominantly female) victims of sexual assault and domestic violence.[330] These proponents

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[322] Young & Stein, *supra* note 303.

[323] *See* Martha Weinman Lear, *The Second Feminist Wave: What Do These Women Want?*, N.Y. TIMES (Mar. 10, 1968). "First-wave" feminism concerned efforts to secure appropriate legal status for women, such as the right to vote, and occurred in the 19th and early 20th century in the Western world. *See generally* ROSEMARIE TONG, FEMINIST THOUGHT: A MORE COMPREHENSIVE INTRODUCTION (2018).

[324] *See* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

[325] Lisa M. Growette Bostaph et al., *History of the Victims' Rights Movement*, in VICTIMOLOGY: CRIME VICTIMIZATION AND VICTIM SERVICES 45, 47–48 (2017).

[326] *Id.*

[327] *See, e.g.*, KARMEN, *supra* note 280, at 54.

[328] LEAH E. DAIGLE & LISA R. MUFTIC, VICTIMOLOGY: A COMPREHENSIVE APPROACH 9 (2d ed. 2020); *accord* Sue Anna Moss Cellini, T*he Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 852–53 (1997) ("Although the exact origins of the victims' rights movement are still obscure, numerous commentators have suggested that the 'women's rights' efforts to protect rape victims were central to the beginning of the movement."); Karen Oehme et al., *Unheard Voices of Domestic Violence Victims: A Call to Remedy Physician Neglect*, 15 GEO. J. GENDER & L. 613, 626 (2014) (noting intersection between feminist movement and victim rights movement); SEBBA, *supra* note 29, at 6 ("even though not all feminists identify their exploited gender as 'victims,' there can be little doubt that the wider movement in favor of assisting victims generally . . . benefits from this highly motivated special interest group"); *accord* Manikis, *supra* note 279, at 4-5; DOERNER & LAB, *supra* note 280, at 14-15; Bostaph et al., *supra* note 325, at 47–48; SHELLY CLEVENGER ET AL., UNDERSTANDING VICTIMOLOGY: AN ACTIVE-LEARNING APPROACH 41 (2018); ELLEN G. COHN, EXPLORING VICTIMOLOGY: THE EFFECTS AND CONSEQUENCES OF VICTIMIZATION 287 (2016); JAN YAGER, ESSENTIAL OF VICTIMOLOGY: CRIME VICTIMS, THEORIES, CONTROVERSIES, AND VICTIMS' RIGHTS 54-55 (2022); *see also* VITIELLO, *supra* note 4, at 18–21 (discussing and critiquing the role of women's movement in the crime victims' rights movement); Mills, *supra* note 283, at 480 (concluding that "gender victimologists" have "successfully lobbied for legal reforms, including rape shield laws [and] mandatory arrest and prosecution policies in domestic violence cases . . . .").

[329] TOBOLOWSKY ET AL., *supra* note 316, at 8.

[330] *Id.*

attributed what they viewed as "inadequate system response to these crimes as symptomatic of women's lack of status and power."[331]

In the late 1960s and early 1970s, feminists launched both antirape and antibattering campaigns.[332] For example, in 1972, the antirape movement set up the first rape crisis centers in Berkeley, California, and Washington, D.C.[333] These centers provided aid and comfort in a time of "pain and confusion. They also were rallying sites for outreach efforts to those who were suffering in isolation, meeting places for consciousness-raising groups exploring the patriarchal cultural traditions that encouraged males to subjugate females, and hubs for political organizing to change law and policies."[334]

This concern about female victims of sexual assault crimes helped to propel the victims' rights movement forward. As Wisconsin Supreme Court Justice Shirley Abrahamson explained in her 1985 description of the movement:

> In many respects, the victims' rights movement resembles other social movements of the 1960s. From its inception, the victims' rights movement has been the expression of several voices. The early voices were frequently feminine and their tones were more those of anger than of fear. Their concern was for a particular victim, the victim of rape. The advocates sought to humanize treatment of the rape victim and to free the criminal justice system of sex role stereotypes which frequently resulted in blaming the rape victim for the crime. The advocates spoke out for rape crisis centers and victim counselors-protections for the victim before she entered the court. And eventually the advocates also spoke out for change in the rules of evidence.[335]

Other activists helped to organize battered women's shelters. Like antirape advocates, the antibattering advocates sought to empower women "by confronting established male authority, challenging existing procedures, providing peer support and advocacy, and devising alternative places to turn to in time of needs."[336] The work of women's organizations, such as NOW, in combatting rape and battering is "probably one of the reasons that today's victims' assistance programs and organizations are [often] populated by women professionals."[337]

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[331] *Id.*

[332] KARMEN, *supra* note 280, at 54; FRANK J. WEED, CERTAINTY OF JUSTICE: REFORM IN THE CRIME VICTIM MOVEMENT 12–18 (1995).

[333] KARMEN, *supra* note 280, at 54–55.

[334] *Id.* at 55; *see also* DOERNER & LAB, *supra* note 280, at 15; Bostaph et al., *supra* note 325, at 48.

[335] Abrahamson, *supra* note 32, at 524.

[336] Karmen, *supra* note 280, at 55.

[337] Bostaph et al., *supra* note 325, at 48. Professor Aya Gruber has written a book about modern feminism and its role in the "war on crime," which contends that the victims' rights movement is essentially about only punitive, criminal control initiatives. *See* AYA GRUBER, THE FEMINIST WAR ON CRIME—THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020). As this article attempts to demonstrate, Gruber's account simplistically fails to capture the true, participatory focus of the modern victims' rights movement.

4. Increasing Crime and Dissatisfaction with the Criminal Justice System

Rising crime rates also helped propel the victims' right movement forward. As is well known, crime rates rose during the 1960s and first part of the 1970s.[338] As fear of crime increased, a common political response was to take the side of crime victims and mobilize for "a war against crime."[339]

In 1965, President Johnson created the President's Commission on Law Enforcement and Administration of Justice to examine both the extent and causes of crime and ways to address them.[340] In 1966, the Commission created the first national household victimization survey, which revealed that the estimated victimization rates were substantially higher than the official crime rates reported by the FBI's Uniform Crime Reports.[341] This survey also revealed that a significant percentage of crime victims did not report their victimization to the authorities. The Commission's work resulted in increased victim compensation efforts[342] as well as a new federal agency, the Law Enforcement Assistance Administration (LEAA). The LEAA provided block grants to states to improve law enforcement.[343] The LEAA also funded research, which found that victims often declined to cooperate with the prosecution of criminal cases because of, among other things, "secondary victimization" in the process.[344]

One person who helped to accelerate a response to victims' concerns was Donald E. Santarelli.[345] He had read studies documenting that the largest cause of failed prosecutions was the loss of once-cooperative witnesses, who simply stopped participating in the justice system. This catalyzed Justice Department funding for three demonstration projects in 1974 to provide better notification and support to victims and witnesses. "We were the prototype for the victim/witness programs in District Attorneys' offices," recalled Norm Early of the Denver D.A.'s Office. "Back then, everything was very rudimentary. It was basically notification, setting up waiting rooms for people so that you wouldn't have 'World War III' in the hallway between the defendant's family and the victim's family as we often did back in the old days."[346]

Victim/witness service programs began developing, often based in prosecutors' offices.[347] Some of the staff for these programs received training in crisis intervention, and a few offered on-scene crisis services to victims.[348] Most

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[338] *See, e.g.*, BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA (2016); John J. Donohue, *Understanding the Time Path of Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1423 (1998).

[339] *See* Manikis, *supra* note 279, at 3.

[340] *See supra* notes 289–93 and accompanying text.

[341] *Id.*

[342] *See supra* notes 303–21 and accompanying text.

[343] LEIGH GLENN, VICTIMS' RIGHTS: A REFERENCE HANDBOOK 13–15 (1997).

[344] Manikis, *supra* note 279, at 3.

[345] Young & Stein, *supra* note 303, at 6.

[346] *Id.*

[347] *See* Cuomo, *supra* note 315, at 7 (discussing the "advent of victim services"); Goldstein, *supra* note 30, at 524-28. For discussion of an example of such programs in Alameda County, California, see Nancy E. O'Malley & Harold Boscovich, *Victims' Rights in California: A Historical Perspective to Modern Day*, 18 CAL. LEG. HIST. 91, 94–97 (2023).

[348] Young & Stein, *supra* note 303, at 7.

began making referrals to other social service and victim compensation programs. They also created notification systems that went beyond merely informing victims about their next court date, including establishing on-call systems and "considering victims' views on bail determinations, continuances, plea bargains, dismissals, sentences, restitution, protective measures, and parole hearings."[349]

Law enforcement began thinking more seriously about how to respond to and interact effectively with victims.[350] One prominent example was Dr. Morton Bard. A psychologist who taught at New York University, and also a one-time member of "New York's finest," Bard studied the reactions of crime victims to their victimization.[351] With a federal grant, he published two volumes on domestic violence and crisis intervention. He laid the foundation for presenting victim-focused training in many law enforcement academies and the FBI National Academy.[352] His *Crime Victim's Book*, published in 1979 with co-author Dawn Sangrey,[353] was "the first book-length primer on identifying and meeting victims' needs and was considered a 'bible' for many advocates and crime victims alike."[354]

By the end of the 1970s, "many states had at least a few victim assistance programs, and 10 states had networks of programs. There grew a common understanding of the basic elements of service: crisis intervention, counseling, support during criminal justice proceedings, compensation and restitution."[355]

A notable example of these programs is the Victims of Crime Assistance Program, created at McGeorge School of Law at the University of the Pacific in 1977. As explained by Mariam El-menshawi in this symposium, the Program assisted victims in asserting their (then-limited) rights in criminal processes, along with helping them to pursue civil remedies.[356] At around the same time, other similar programming to address crime victims' needs was developed by California cities, counties, and government agencies.[357]

Along with these victim services programs, a "law-and-order" movement also developed, advocating crime control initiatives.[358] Some have argued that this law-and-order movement is identical to the victims' rights movement. For example, Professor Emilio Viano contends that "although the call for victim's rights has been described as a populist movement reacting to perceived or real injustices in the processing of cases, in reality the victim's movement agenda has been co-opted by that of the supporters of the crime control model of criminal justice."[359] And, writing in this symposium, Professor Michael Vitiello maintains

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[349] *Id.*

[350] *See* Derene et al., *supra* note 279, at 2–9.

[351] Young & Stein, *supra* note 303, at 8.

[352] *Id.*

[353] MORTON BARD & DAWN SANDREY, THE CRIME VICTIM'S BOOK (1979); *see also* MORTON BARD & DAWN SANDREY, THE CRIME VICTIM'S BOOK (2d ed. 1986).

[354] Young & Stein, *supra* note 303, at 8.

[355] *Id.* at 5; *see also* O'Malley & Boscovich, *supra* note 347, at 104–05.

[356] Mariam El-menshawi, *The History of the McGeorge School of Law's California Victims Resource Center*, __ U. PAC. L. REV. __, __ (2025).

[357] *Id.* at [__].

[358] *See* KARMEN, *supra* note 280, at 54; Derene et al, *supra* note 279, at p. 2–9.

[359] Emilio Viano, *Victims' Rights and the Constitution: Reflection on a Bicentennial*, 33 CRIME & DELINQ. 438, 444 (1987); *see also* Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 7 (1999).

that the crime victims' rights movement's "origins can be found" in what he describes as "the Law-and-Order wing of the movement."[360]

But conflating the victims' rights movement with mere law-and-order initiatives or crime control advocacy is simplistic.[361] For example, Professor Vitiello's linkage of the movement's origins to its "Law-and-Order wing" fails to effectively explain how a crime victims assistance program came to be established at his law school as early as 1977, not to mention the proliferation of victims' services elsewhere throughout California around this time.[362] These efforts were separate from direct crime control concerns.[363]

To be sure, some advocates for victims' rights also pressed crime control initiatives—and this was one significant component of the developing, multi-strand victims' rights movement.[364] A notable example is Frank Carrington, who in 1975 published an influential book, *The Victims*.[365] As Carrington described in his book's preface, he was writing "for the average citizen—rich or poor, white or black—in order to emphasize" just how "sorry … [the] status" of crime victims was in the criminal justice system.[366] Carrington argued that society "must recognize that crime victims are a class of people with rights that must be protected."[367] But, at the same time, Carrington explained that his premise was "that the victim's rights can be recognized and protected without doing violence to concepts of fundamental fairness to the accused and of fundamental humanity to the convicted criminal."[368]

Carrington also advanced detailed arguments for improving the administration of criminal justice to ensure effective crime control. For example, Carrington argued that Warren Court decisions such as *Miranda* had diverted courts away from the search for truth.[369] And he supported the death penalty.[370]

This is getting a bit ahead of the story, but when Frank Carrington and others in the victims' rights movement pressed crime control issues (in contrast to what might be called purely "victims' rights" issues), it became clear to the movement's leaders that a shared understanding of the "victim's rights" agenda would be needed. During the late 1980s and following, some of the key institutional players in the victims' rights movement developed an informal understanding of the boundary of the movement's agenda—sometimes referred to as the "Carrington rule," because Carrington first proposed the idea.

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[360] Michael Vitiello, *Race, Class, and the Victims' Rights Movement*, __ U. PAC. L. REV. __, __ (2025).

[361] *See* Edna Erez et al., *From Cinderella to Consumer: How Crime Victims Can Go to the Ball*, in VICTIMOLOGY: RESEARCH, POLICY, AND ACTIVISM 321, 330 (Pamela Davis and Jacki Tapley eds. 2020) ("it is simplistic to see victims themselves as the vanguard of what are much broader social forces").

[362] *See supra* note 357 and accompanying text.

[363] *Cf.* VITIELLO, *supra* note 23, at 23 (acknowledging that the victims' rights movement "has consisted of a loose coalition of groups often spanning a broad political spectrum").

[364] *See* KARMEN, *supra* note 280, at 54; Giacomazzi & Beattie, *supra* note 280, at 48–49. *Cf.* Jill Lepore, *The Rise of the Victims'-Rights Movement*, THE NEW YORKER (May 14, 2018) (arguing that "victims' rights grew out of an unlikely marriage of conservatism and feminism").

[365] FRANK G. CARRINGTON, THE VICTIMS (1975).

[366] *Id.* at xxiii (discussed in Justice George Nicholson, *Frank Carrington: A Brilliant Lawyer, A Caring Man*, 23 PACIFIC L.J., DEDICATION (1992)).

[367] *Id.* at 236.

[368] *Id.* at xxiv.

[369] *Id.* at 79–119.

[370] *Id.* at 182–99.

The shared approach was that the victims' rights movement—as a movement—would stay out of political issues that were not directly related to crime victims' rights. The goal was to keep the movement broadly based by focusing on areas of general agreement. This understanding meant, for example, that "conservatives" remained free to argue for such things as abolishing the exclusionary rule or imposing capital punishment, just as "liberals" remained free to argue for such things as "gun control" and expanding national health care services.[371] But because these kinds of issues were not directly related to crime victims' rights to participate in criminal justice proceedings, they were not part of the movement's agenda. In other words, the movement would focus on criminal justice procedures, not substantive outcomes in criminal justice cases or broader social causes.

The Carrington Rule was used as guidance for the National Organization for Victim Assistance (NOVA), where Carrington served as Director until his untimely death in 1992.[372] Other leading organizations also informally followed this approach, including the National Center for Victims of Crime (NCVC) and the National Crime Victim Law Institute (NCVLI).[373] The movement's focus on procedural rights for victims is also reflected in the state constitutional victims' rights amendments adopted in the 1980s and following. With only isolated exceptions,[374] the state amendments focused exclusively on procedural rights for crime victims within existing criminal justice structures. For example, Florida's Marsy's Law amendment to the Florida Constitution in 2020 contains a list of rights for victims, such as the right to be heard at pleas and sentencing and the right to restitution. In line with the Carrington rule, that Amendment does not call for tougher sentences or gun control measures—leaving those kinds of issues to be handled by other advocates.[375]

Returning to the historical narrative, the same year as Carrington published his book (1975), the Justice Department called together leading victim activists to discuss how to improve victims' rights.[376] The major result of the meeting was the

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[371] *Cf.* VITIELLO, *supra* note 4, at 149–63 (urging that the victims' rights movement should focus on these types of initiatives).

[372] Email to author from Steve Derene, member of the board of NOVA.

[373] Emails to author from NCVLI and NCVC.

[374] In 1982, California passed Proposition 8, which included both an expansion of crime victims' rights as well as provisions that were aimed at facilitating criminal prosecutions. *See* Hank Goldberg, *Proposition 8: A Prosecutor's Perspective*, 23 PACIFIC L.J. 947 (1992). In 2008, California updated its constitutional protections for victims' rights with a new, "Marsy's Law". *See infra* notes 660–67 and accompanying text. The new Mary's Law contained several provisions concerning victims' rights in parole hearings that might lead to parole denials. *See* Marsy's Law provisions in life prisoner hearings, https://www.cdcr.ca.gov/bph/marsys-law/ (describing expanding victims' rights in certain parole hearings). *See generally* BELOOF, CASSELL ET AL., *supra* note 23 (discussing procedural victims' rights); TOBOLOWSKY ET AL., *supra* note 316 (same).

[375] *See* Paul G. Cassell & Margaret Garvin, *Protecting Victims' Rights in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99 (2020) [hereinafter Cassell & Garvin, *Marsy's Law*]. *Cf.* Jennifer A. Brobst, *The Revelatory Nature of Covid-19 Compassionate Release in an Age of Mass Incarceration, Crime Victim Rights, and Mental Health Reform*, 15 U. ST. THOMAS J.L. & PUB. POL'Y 200, 205–06 (2021) (arguing that while "fierce public policy debates about the causes and effectiveness of mass incarceration continue, the quiet and modest progress of the crime victim rights movement has continued to proceed relatively independently.").

[376] U.S. Dept. of Justice, Office for Victims of Crime, 2002 National Victim Assistant Academy, available at https://www.ncjrs.gov/ovc_archives/nvaa2002/chapter1.html [https://perma.cc/URL8-M9M8].

founding of NOVA.[377] The following year, several dozen leaders met in Fresno, California, for what has been called the first victim assistance conference.[378]

Many advocates in the crime victims' rights movement believed that the movement should focus not on repealing defendants' rights but rather on expanding crime victims' rights. A good illustration is the 1976 Cardozo Lecture by former Attorney General Herbert Brownell.[379] He began by quoting Justice Cardozo's famous statement in a 1934 Supreme Court case, *Snyder v. Massachusetts*, that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[380] Brownell went on to observe that the Supreme Court had handed down rules creating defendants' rights in cases such as *Miranda v. Arizona*.[381] But Brownell did not call for scaling back *Miranda* requirements; instead he proposed extending "an informal *Miranda*-like program of actions designed to protect the crime victim in his role as complaining witness."[382] Brownell then recounted his work on a special judicial advisory committee in New York on the efficient processing of criminal cases, which had been focusing on victims. Brownell explained that victims were not receiving basic information about "their" cases. This resulted in many victims not cooperating with the process.[383]

Another important articulation of dissatisfaction with the victims' limited role was Professor William F. McDonald's article, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim.*[384] Published in 1976, McDonald was one of the first to recount the history of private prosecution as a reason for returning the crime victim to a more prominent role in criminal justice. After describing the history, McDonald penned a much-quoted description about how victims had been forgotten:

> Today, the situation is quite different. The victim's role in the criminal justice process has been reduced to a minimum. He is seen at best as "the forgotten man" of the system and, at worse, as being twice victimized, the second time by the very system to which he has turned for justice . . . . In contemporary criminal justice the victim serves only as a means to an end, namely, a piece of evidence to be used by the state to obtain a conviction. The only concern that the state has for the victim is his willingness to cooperate and his ability to be a convincing witness.[385]

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[377] *Id.*

[378] *Id.*

[379] *See* HON. HERBERT BROWNELL, THE FORGOTTEN VICTIMS OF CRIME: THIRTY-SECOND ANNUAL BENJAMIN N. CARDOZO LECTURE DELIVERED BEFORE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 10 (Mar. 4, 1976).

[380] *Id.* at 9–10 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

[381] *Id.* at 10 (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

[382] *Id.* at 10.

[383] *Id.* at 13–20 (recounting studies showing lack of victim cooperation).

[384] McDonald, *supra* note 3.

[385] *Id.* at 650.

McDonald also endorsed the ongoing reforms that were aimed at improving the plight of the "forgotten man." These included expanding victim compensation and counseling programs, along with creating victims' advocates and awarding restitution at sentencing.[386] McDonald concluded that "[t]he recent efforts to provide victims with personal support, and to clarify and expand their role in the prosecutorial process, reflect a growing awareness that a just and humane society cannot ignore the toll which crime exacts upon individual victims."[387]

5. Victim Activism

As general interest in the "forgotten" persons in the criminal justice system increased, the victims' rights movement received "a jolt of energy" from activism by crime victims and survivors pressing for more recognition of victims.[388] The civil rights movement of the 1950s and 1960s was the precursor to these efforts. Many of the early pioneers of "the crime victims' movement were influenced by the cultural environment created by the civil rights and antiwar movements."[389] In fact, "the victims' rights movement was a direct response to the changes garnered by the civil rights movement."[390] The civil rights movement spotlighted racism in society, including racism in law enforcement.[391] But it also highlighted the failures of law enforcement to effectively prosecute crimes against racial minorities.[392]

It is generally acknowledged that the civil rights movement—along with the feminist movement and the "law and order" movement—influenced the crime victims' rights movement.[393] As Professor Karmen has explained, "The civil rights movement questioned the way that white authorities treated minority victims of Klan terrorism, segregationist mobs, and brutal police officers."[394] More broadly, the civil rights movement "challenged society to acknowledge the dignity of all persons as paramount to their existence . . . . This emphasis on dignity that should be afforded all members of our society, regardless of their race or ethnicity, later

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[386] *Id.* at 669–73.

[387] *Id.* at 673.

[388] Young & Stein, *supra* note 303.

[389] Derene et al., *supra* note 279, at 1.

[390] Giacomazzi & Beattie, *supra* note 280, at 47 (citing Viano, *supra* note 359, at 442).

[391] The works on modern civil right movement are legion. For an interesting contribution that includes voices of victims, see HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980s (1991). For an interesting contribution to the legal issues surrounding the fight for racial justice, *see* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

[392] Giacomazzi & Beattie, *supra* note 280, at 47; KARMEN, *supra* note 280, at 55; Goldstein, *supra* note 30, at 517.

[393] *See, e.g.*, Wikipedia, "Victim's Rights," https://en.wikipedia.org/wiki/Victims%27_rights [https://perma.cc/FC97-UZND]. Critics of the movement tends to downplay or ignore this strand of the movement. *See, e.g.*, VITIELLO, *supra* note 4 (book-length discussion of the victims' rights movement that does not discuss linkage to civil rights).

[394] Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEG. COMMENT. 157, 160 (1992); *see, e.g.* Mihailis E. Diamantis, *Invisible Victims*, 2022 WISC. L. REV. 1, 2–3,39–40 (discussing victims of the Tulsa Race Massacre).

influenced the arguments surrounding what it means to make a person 'whole' after they have been victimized by crime."[395]

In her 1985 address describing the movement, Wisconsin Supreme Court Justice Abrahamson[396] noted this concern about inadequate law enforcement advanced by civil rights leaders:

> If women were angry about what happened to rape victims after the crime, spokespersons for other groups—blacks and the poor—voiced anger about the probability of becoming victims in the first instance, a probability increased by where they lived and by the majority's indifference to crime in those areas. The advocates contended that "[t]he 'war on crime' ha[d] been one of the few battles . . . in which the black community ha[d] not been enlisted."[397]

These advocates highlighted "a war on black children and a war between street gangs and witnesses."[398] Because of this "shared experience of oppression and vulnerability," the champions of "the Civil Rights Movement and the Feminist Movement coalesced around an understanding of criminal justice that emphasized victims' rights. Crucially, calls for reform from progressive quarters were joined by similar ones from the conservative law and order movement, which urged renewed attention on the failings of the criminal justice system to combat rising crime rates."[399]

As described above, the women's movement was surfacing issues surrounding violence against women.[400] Rape survivors and battered women often tried to turn their victimization into a catalyst for social change by founding programs and shelters for similar victims.[401] As a result of feminists' efforts, in

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[395] Giacomazzi & Beattie, *supra* note 280, at 47.

[396] Abrahamson served for more than four decades on the Wisconsin Supreme Court and was close friend of Justice Ruth Bader Ginsburg. When she retired in 2019, she was "widely regarded as one the country's finest legal minds and legal scholars . . . ." Judith Davidoff, *The Legacy of Shirley Abrahamson: Wisconsin's Pioneering Supreme Court Justice Praised for Courage, Smarts and Warmth*, ISTHMUS (Dec. 21, 2020), https://isthmus.com/news/news/the-legacy-of-shirley-abrahamson/ [https://perma.cc/39QQ-YVZ8]. Justice Abrahamson's 1985 description of the movement's origins has the advantage of being developed much closer to the time of the events than other, later accounts.

[397] Abrahamson, *supra* note 32, at 524 (quoting Kovler, *Black on Black Crime, A Taboo Broken*, 223 NATION 390, 390 (1976) (quoting Robert Woodson of the Nat'l Urban League)).

[398] *Id.* (citing, *e.g.*, Browning, *Life on the Margin,* PROGRESSIVE, Sept. 1981, at 34; Klein, *The Mystery of Atlanta's Murdered Children,* ROLLING STONE, Mar. 5, 1981, at 26; Kovler, *supra* note 397; Viviano, *What's Happening in "Murder City",* PROGRESSIVE, Sept. 1981, at 38).

[399] Laurence Banville, Victim's Role in Criminal Proceedings: Past, Present, and Future, Pace Criminal Justice Blog (Dec. 16, 2016), https://pcjc.blogs.pace.edu/tag/crime-victims-rights-movement/ [https://perma.cc/EER8-PAR8].

[400] *See supra* notes 322–37 and accompanying text. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975), discussed in Derene, *supra* note 279, at 2–8.

[401] Young & Stein, *supra* note 303, at 4; Giacomazzi & Beattie, *supra* note 280, at 47–48; KARMEN, *supra* note 280, at 54–55.

1978, the Federal Rules of Evidence were amended to add a "rape shield" rule, protecting rape victims from unwarranted inquiries about prior sexual history.[402]

Another strand in the movement began developing in the 1970s, as crime victims and family members banded together to create support and advocacy organizations.[403] There are too many organizations to catalogue them all, but a few prominent organizations will illustrate the point.[404]

In 1975, a group of survivors of homicide victims in Washington organized the Families and Friends of Missing Persons and Violent Crime.[405] The initial purpose was to provide support to others whose loved ones were missing or murdered. It later evolved into one of the first victim advocacy organizations in the country.[406]

In 1977 in Indiana, Protect the Innocent became a force for victim advocacy, when Betty Jane Spencer joined after she was attacked in her home and her four boys executed.[407]

In 1978, Charlotte and Robert Hullinger founded Parents of Murdered Children (POMC) in the aftermath of the murder of their daughter by her ex-boyfriend.[408] The work of groups like POMC can be illustrated by the experience of John W. Gillis, who later served as the Director of the Office for Victims of Crime in the Justice Department. Gillis was a Los Angeles police lieutenant, and in 1979 a gang member murdered his daughter, Louarna, to gain status in the gang hierarchy. Gillis recounted that:

> [q]uite frankly, POMC saved my life . . . because it gave me an opportunity to talk about what had happened . . . . So I attended their meetings. They started asking me questions about law enforcement and why cases were handled certain ways. This was really helpful to me because then I found out I was providing help and information to others who were really hurting so much.[409]

In 1980, Mothers Against Drunk Driving (MADD) was co-founded by Candy Lightner, whose daughter was killed by a repeat offender drunk driver, and

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[402] Fed. R. Evid. 412; *see* Banville, *supra* note 399. *See generally* Deborah Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245 (1989); SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1988).

[403] Young & Stein, *supra* note 303, at 4; Derene, *supra* note 279, at 2–13.

[404] For other accounts, *see also* Abrahamson, *supra* note 32, at 528–29; Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 5–6 (1983); George Nicholson, *The Roots of America's Crime Victims' Legal Rights Movement, 1975-2023: A Personal Retrospective and Memoir*, 18 CAL. LEG. HIST. 115 (2023); Frank J. Weed, *Grass-Roots Activism and the Drunk Driving Issue: A Survey of MADD Chapters*, 9 LAW & POL'Y REV. 259 (1987); WEED, *supra note* 332, at 18–21. For an oral history collection maintained at the University of Akron, which includes interviews with individual activists, see https://web.archive.org/web/20151027062014/http://vroh.uakron.edu/index.php [https://perma.cc/6LC7-N2FP].

[405] *Id.* See https://victimsupportservices.org/about-us/history/ [https://perma.cc/4WQF-7TU6].

[406] The organization is currently known VSS (Victim Support Services). *See* https://victimsupportservices.org/ [https://perma.cc/CM6L-ZL88].

[407] Young & Stein, *supra* note 303; *see* IRVIN WALLER, RIGHTS FOR VICTIMS OF CRIME: REBALANCING JUSTICE 4 (2011)

[408] Young & Stein, *supra* note 303.

[409] *Id.* *see* John Gillis Interview, https://web.archive.org/web/20151023010725/http://vroh.uakron.edu/transcripts/Gillis.php [https://perma.cc/NNB6-E3LJ].

Cindi Lamb, whose infant daughter Laura was rendered a quadriplegic by a repeat offender drunk driver. Victims' advocates tried to capitalize on the news media to spread their stories and encourage reform. According to Lamb, "Probably one of the foremost strategies is giving the victim a face, and [in my case] the face of the victim was Laura. She was the poster child for Mothers Against Drunk Driving, because even though she couldn't move, she moved so many people."[410]

Many of these organizations were support groups for victims and their families. But most were also crime victims' advocacy groups, "whose power was undeniable."[411] As one example, Edith Surgan, whose daughter was killed in New York City in 1976, moved to New Mexico and founded the New Mexico Crime Victim Assistance Organization, the driving force behind establishing victim compensation legislation in that state. She later recounted how the majority leader of the state senate hid from her "until she confronted him and asked why he was hiding. He said simply that he could not deal with such a horrible issue."[412]

B. The President's Task Force on Victims of Crime

If there is a single red-letter date in the history of the modern victims' rights movement, it is at the end of 1982—when the President's Task Force on Victims of Crime published its final report. The 144-page document laid out the case for victims' rights in the criminal justice system and contained dozens of recommendations for legislators, judges, police, and prosecutors. Today many of those recommendations have become part of the fabric of American criminal justice.

The Task Force grew out of the burgeoning victims' rights movement described in the previous section. For example, by 1980, NOVA served as "a national clearinghouse of information for, and coordination of, the hundreds of state and local victim assistance and advocacy organizations."[413] NOVA incorporated the growing demand for victims to have legitimate access to the justice system into a new policy platform on victims' rights and a National Campaign for Victim Rights, which included a proposed National Victims' Rights Week.[414]

On April 8, 1981, newly-elected President Ronald Reagan proclaimed "Victims' Rights Week, 1981"—ironically just eight days after being shot and becoming the nation's most prominent crime victim.[415] Reagan's proclamation echoed Professor McDonald's article, observing that "[f]or too long, the victims of crime have been the forgotten persons of our criminal justice system. Rarely do

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[410] Cindi Lamb Interview, https://web.archive.org/web/20151022211611/http://vroh.uakron.edu/transcripts/Lamb.php [https://perma.cc/GKS3-Q4EA].

[411] Young & Stein, *supra* note 303, at 4.

[412] *Id.*

[413] Carrington & Nicholson, *supra* note 3, at 5–6.

[414] Marlena A. Young, History of the Victims Movement in the United States 3 (2009), https://victimsofcrime.org/wp-content/uploads/2019/02/History-of-the-Victims-Movement-in-the-United-States.pdf [https://perma.cc/2LW8-RZ5C].

[415] Nicholson, *supra* note 404, at 132.

we give victims the help they need or the attention they deserve."[416] The proclamation urged "a renewed emphasis on, and an enhanced sensitivity to, the rights of victims. These rights should be a central concern of those who participate in the criminal justice system, and it is time all of us paid greater heed to the plight of victims."[417]

This largely symbolic act was swiftly followed by a more substantive one: President Reagan appointed a diverse, nine-member Task Force to address the plight of victims in the criminal justice process.[418] The Task Force held hearings around the country to obtain input from professionals working with victims and from victims themselves.[419]

In December 1982, the Task Force released its pathbreaking report.[420] Beginning with a moving description of the plight of "victims of crime in America,"[421] the Report explained that "[v]iolent crime honors no sanctuary. It strikes when least expected, often when the victim is doing the most commonplace things."[422] The Report gave examples of victimization based on testimony from various victims, asking readers to place themselves in the shoes of a victim who had gone through the criminal justice system: "Now, in addition and by yourself, you must try to repair all that [the criminal's] crime has destroyed; and what you cannot repair, you must endure."[423]

The Task Force went on to provide sixty-eight recommendations for federal and state reforms, as well as actions by criminal justice agencies (police, prosecutors, the judiciary, and parole boards) and other organizations (hospitals, the ministry, the bar, schools, the mental health community, and the private sector).[424] In its most sweeping recommendation, the Task Force called for amending the United States Constitution to protect victims' rights.[425] Because the Task Force recommendations have provided the blueprint for much of the victims' rights movement in the ensuing decades, it is worth describing them in detail.[426]

The Task Force began by setting out proposals for legislation providing that:

- Addresses of victims and witnesses would generally be kept confidential;

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[416] Proclamation 4831 — Victims Rights Week, 1981, available at. https://www.reaganlibrary.gov/archives/speech/proclamation-4831-victims-rights-weeks-1981 [https://perma.cc/L2KL-TE5D].

[417] *Id.*

[418] TOBOLOWSKY ET AL., *supra* note 316, at 10; *see also* Nicholson, *supra* note 404, at 136–38. The Task Force was chaired by Lois Haight Herrington, and the other members were Garfield Bobo, Frank Carrington, James P. Damos, Doris L. Dolan, Kenneth O. Eikenberry, Robert J. Miller, Pat Robertson, and Stanton E. Samenow. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT iii (1982), available at https://www.ojp.gov/pdffiles1/ovc/87299.pdf [https://perma.cc/8EY8-HL4A].

[419] TOBOLOWSKY ET AL., *supra* note 316, at 10.

[420] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418.

[421] *Id.* at 1–14.

[422] *Id.* at 2.

[423] *Id.* at 13.

[424] *Id.* at 15–112.

[425] *Id.* at 113–16.

[426] *See generally* Melissa Hook & Anne Seymour, A Retrospective of the 1982 President's Task Force on Victims of Crime (2004), available at https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4d.html [https://perma.cc/9NDL-U8ZL].

- Victim counseling information would be protected;
- Hearsay statements from victims could be used at preliminary hearings;
- Bail and pre-trial release for defendants would be more cautiously considered;
- The Fourth Amendment exclusionary rule would be eliminated;
- Parole would be abolished and judicial discretion would be limited at sentencing;
- School officials would be required to report crimes on school grounds;
- Victim impact statements would be allowed at sentencing;
- Restitution would be provided to victims in all cases unless there was a strong countervailing reason; and
- Sexual assault victims would not be required to pay for rape kits.[427]

The Task Force also made recommendations specifically for federal action, including making federal funding available to assist state crime victim compensation programs.[428]

The Task Force then turned to criminal justice agencies, making recommendations for police, prosecutors, the judiciary, and parole board. For the police, the Task Force called for greater training on victims' issues as well as communication from the police to victims about the status of their cases.[429]

For prosecutors, the Task Force recommended that prosecuting agencies assume the ultimate responsibility for providing information to victims about their cases "from the time of the initial charging decision to determination of parole."[430] Prosecutors should also bring to the court's attention the views of violent crime victims on "bail decisions, continuances, plea bargains, dismissals, sentencing, and restitution."[431] The Task Force also called on prosecutors to aggressively pursue cases of witness intimidation and to establish victim-witness programs to facilitate communication with victims.[432]

For the judiciary, the Task Force recommended expanding training on the needs and legal interests of crime victims. At trials, the Task Force urged that victims and family members should be able to attend, even if identified as witnesses, unless a compelling need for exclusion existed. At sentencings, judges should allow for, and give appropriate weight to, sentencing input from violent crime victims; and judges should order restitution to victims in all cases involving a financial loss, unless a compelling contrary reason was proven.[433]

For parole boards, the Task Force called for victims and their families to be given advance notice of parole hearings and an opportunity to be heard.[434]

The Task Force also made recommendations for hospitals, the ministry, the bar, school systems, the mental health community, and the private sector.[435]

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[427] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418, at 16–36.

[428] *Id.* at 37.

[429] *Id.* at 57.

[430] *Id.* at 63.

[431] *Id.*

[432] *Id.*

[433] *Id.* at 72–73.

[434] *Id.* at 83.

[435] *Id.* at 88–111.

The Task Force's most far-reaching proposal came in its last two pages: The Task Force called for amending the U.S. Constitution to protect crime victims. Dr. Marlene Young, then the Executive Director of NOVA, recounted the origins of the idea, attributing it to Task Force member Ken Eikenberry, who was then serving as Washington's Attorney General:

> I will always remember sitting next to Ken at the lunch break during the first Task Force hearing and listening to him say, "I don't know why everyone is so anxious about the status and treatment of victims." I sighed, thinking that he just didn't get it, when he added, "All we have to do is pass a constitutional amendment that gives them the right to be present and heard in the criminal justice process." I was stunned by the idea.[436]

In recommending a constitutional amendment, the Task Force concluded that:

> the criminal justice system has lost an essential balance. It should be clearly understood that this Task Force wishes in no way to vitiate the safeguards that shelter anyone accused of crime; but it must be urged with equal vigor that the system has deprived the innocent, the honest, and the helpless of its protection.[437]

The Task Force argued that "[t]he victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."[438]

The Task Force proposed adding a single sentence to the Sixth Amendment. Following the enumeration of defendants' rights, the "Eikenberry" Amendment"[439] would have added:

> Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.

The Task Force concluded it did not recommend a constitutional amendment lightly, but its investigation revealed "that an essential change must be undertaken; the fundamental rights of innocent citizens cannot adequately be preserved by any less decisive action."[440]

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[436] Young & Stein, *supra* note 303, at 7.

[437] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418, at 114.

[438] *Id.*

[439] Young & Stein, *supra* note 303, at 7–8.

[440] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418, at 115. Notably, the President's Task Force Report did not recommend efforts to reinvigorate private prosecution as a means of protecting victims' rights. The issue was simply not discussed. This omission may be one reason why private prosecution has been largely absent for the movements' reform efforts.

C. The Growth and Acceptance of Victims' Rights in the Wake of the President's Task Force Report

1. Expanding Victims' Rights and Services

The Report of the President's Task Force on Victims of Crime catalyzed crime victims' rights efforts across the country. The Task Force's revolutionary recommendations produced rapid changes on multiple fronts. Indeed, the Task Force Report and other similar recognitions of victims triggered "a literal explosion of federal and state action to increase crime victim access to and participation in the criminal justice process."[441]

In 1986, four years after the Task Force released its report, the Justice Department surveyed changes in the criminal justice landscape concerning victims. The Department found that nearly seventy-five percent of the proposals had been implemented to some degree, including the creation of a new Office for Victims of Crime in the Department to help implement the reforms.[442]

According to the Justice Department's survey, the number of states enacting significant victims' rights reforms had soared between 1981 and 1986. For example, before 1982, only four States had enacted laws protecting victims' interests in the court process. By 1986, thirty-one states had passed major legislation to improve the treatment of crime victims.[443] Similar increases had occurred in the number of states requiring victim impact statements at sentencing (from eight states to thirty-nine), mandating restitution to victims as part of sentencing (from eight states to twenty-nine), providing funds for services to crime victims (from seven states to twenty-eight), and requiring that victims be notified of important case developments (from two states to twenty-seven).[444]

With increased public support for victims' issues, numerous programs and victims' initiatives started. While the following section more fully discusses the federal initiatives,[445] some of the other highlights of this stage were a National Conference of the Judiciary on Victims of Crime (1983), as well as a National Institute of Mental Health (NIMH) and NOVA national colloquium, "Aftermath of Crime: A Mental Health Crisis" (1985).[446] In 1984, the National Center for Missing and Exploited Children was established to help locate missing children and provide support for their families.[447]

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[441] Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 21, 22 (1999). Interest in victims' rights also expanded internationally. *See* TAKAHASHI & JAMES, *supra* note 280, at 4 (noting U.N. adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985); Young & Stein, *supra* note 303, at 8.

[442] U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FOUR YEARS LATER: A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME (May 1986), available at https://www.ojp.gov/pdffiles1/ovc/102834.pdf [https://perma.cc/H7M6-U87V] [hereinafter FOUR YEARS LATER]; Derene, *supra* note 279, at 2–14.

[443] *Id.* at 2–3.

[444] *Id.* at 4.

[445] *See infra* notes 531–644 and accompanying text.

[446] Derene et al., *supra* note 279, at 2–15.

[447] Young & Stein, *supra* note 303, at 8.

That same year, the Victims Legal Resource Center (VLRC) was created at the University of the Pacific's McGeorge School of Law.[448] The VLRC operated a confidential, toll-free hotline for crime victims: 1-800-VICTIMS (842-8467). The hotline provided (and continues to this day to provide) information to callers about their legal rights. Using the law school's students for support, the Center has provided advocacy and support for crime victims.[449]

In 1985, the National Victim Center (now the National Center for Victims of Crime (NCVC)) was founded in honor of murder victim Sunny von Bulow. The NCVC emphasized media and public awareness of victims' rights and concerns, research on the impact of crime on victims, civil litigation on behalf of victims, and training for organizations providing victim assistance.[450]

Of particular interest for the legal history of the victims' rights movement, the American Bar Association (ABA) became involved in supporting victims' interests. In 1976, the ABA established a Victims Committee as part of its Criminal Justice Section to identify victims' concerns and make recommendations regarding the victim's role in the criminal justice system.[451] Initial ABA policies addressing victim interests in the criminal justice process included Recommendations for Reducing Victim/Witness Intimidation (1980), Fair Treatment Guidelines for Crime Victims and Witnesses (1983), and Case Continuance Guidelines for Crime Victims (1986).[452] The ABA also incorporated victim-related policies into its Criminal Justice Standards, including its standards addressing the prosecution function, guilty pleas, and sentencing.[453]

Victims' rights continued to expand through the 1980s and 1990s. In 1999, the Justice Department reported that the number of state laws addressing victims' rights, services, and financial reparation had gone from several hundred in the 1970s to 27,000 by the turn of the century.[454] Similarly, the country had gone from a handful of victim assistance programs in the 1970s to 10,000 victims assistance programs by 1999, including over 2,000 rape crisis centers, over 2,000 programs assisting battered women, and countless other community-based and justice system-based programs serving victims, including child victims, survivors of homicide victims, and drunk driving crash victims.[455] The Department concluded,

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[448] *See* El-menshawi, *supra* note 356, at [2]; *see also* Carrington & Nicholson, *supra* note 3, at 9–10. The center is currently known as the California Victims Resource Center (CVRC). *See* https://www.pacific.edu/law/victims-rights [https://perma.cc/4PFL-325Q].

[449] *See* El-menshawi, *supra* note 356, at [2-4];

[450] *See* Young & Stein, *supra* note 303, at 8; Derene, *supra* note 279, at p. 2–15; https://victimsofcrime.org/wp-content/uploads/2021/08/NCVC-history_JW_v01-1.pdf.

[451] *See* Victims Comm., Crim. Just. Section, American Bar Asso., The Victims in the Criminal Justice System 3 (2006).

[452] *See id.*

[453] *See id.*

[454] *See* U.S. Dept. of Justice, Office of Justice Programs, Office for Victims of Crime, New Directions from the Field: Victims' Rights and Services for the 21st Century ix (1999), available at https://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf [https://perma.cc/W7ZM-8ULU].

[455] *Id.* at xiv. SEBBA, *supra* note 29, at 23 (estimating that the number of victim/witness programs had gone from 280 in 1980 to an estimated 5,000 in 1990) (citing R.C. Cronin & B.B. Bourque, Am. Inst. of Research/National Technical Info Service, Nat'l Evaluation Program: Phase 1 Assessment of Victim/Witness Assistance Projects: Final Report (1980); W.G. Skogan et al., R.G. Davis & A.J. Lurigio, Victims' Needs and Victim Services, Final Report to the Nat'l Inst. of Justice (1990)).

with considerable understatement, that these were "extraordinary accomplishments for a movement that started less than three decades ago."[456]

2. Institutionalizing Victim Impact Statements

It is worth separately discussing one of the President's Task Force's most important recommendations: that victims be allowed to deliver impact statements at sentencing.[457] The Task Force concluded that "[v]ictims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim."[458] Tracking that conclusion, most states began allowing victim impact evidence at sentencings, including sentencings in capital cases. States requiring victim impact statements at sentencing went from eight states in 1981 to thirty-nine states in 1986.[459] By 1999, every state had provided for victim input at sentencing in some form or another.[460]

But the use of such evidence in capital cases attracted constitutional scrutiny from the U.S. Supreme Court. In the highly controversial 1987 decision, *Booth v. Maryland*, the Supreme Court held that the Eighth Amendment's prohibition of cruel and unusual punishment barred victim impact evidence at the sentencing phase of a capital case.[461] For the five justices in the majority, a death penalty was to be determined solely on the basis of moral guilt, and any reference to harm to the victim might "be wholly unrelated to the blameworthiness of a particular defendant."[462] But for the four dissenters, this legal principle did not exist—"neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court."[463] The dissenters went on recognize the widespread support for the victims' rights movement:

> Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights"—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and *not* moral guilt alone) is one

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[456] NEW DIRECTIONS FROM THE FIELD, *supra* note 454, at xiv.

[457] *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418, at 18.

[458] *Id.* at 76–77.

[459] FOUR YEARS LATER, *supra* note 442,at 4.

[460] *See* NEW DIRECTIONS FROM THE FIELD, *supra* note 454, at 107–08; TOBOLOWSKY ET AL., *supra* note 316, at 101–03.

[461] *See* Booth v. Maryland, 482 U.S. 496 (1987).

[462] *Id.* at 504.

[463] *Id.* at 520 (Scalia, J., dissenting).

> of the reasons society deems his act worthy of the prescribed penalty.[464]

After an intervening decision in 1989,[465] the *Booth* dissenters gained the upper hand in 1991. In *Payne v. Tennessee*, the Court overruled *Booth* and held that the Eighth Amendment did not automatically bar the use of victim impact evidence in a capital sentencing.[466] The Court explained that by "turning the victim into a faceless stranger at the penalty phase of a capital trial, *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."[467] In a concurring opinion, Justice Scalia added that "*Booth's* stunning *ipse dixit,* that a crime's unanticipated consequences must be deemed 'irrelevant' to the sentence, conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement.'"[468]

Writing in this symposium, Professor Vitiello criticizes *Payne*. Vitiello suggests that victim impact evidence "skews the imposition of the death penalty along racial lines."[469] This is, of course, an empirical argument. Vitiello commendably recognizes that he does not have direct empirical proof of his claim,[470] but contends it is supported by a study done by Professor David Baldus.[471] But the Baldus study is essentially irrelevant to any debate over the impact of victim impact evidence on capital sentences. The study relied on data from Georgia homicide prosecutions during 1973 to 1978.[472] Georgia did not begin allowing victim impact statements at sentencing until much later.[473] Accordingly, none of the cases in the study contain victim impact evidence. To the extent that the study shows a statistically valid race-of-the-victim effect on capital sentences,[474] that

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[464] *Id.* (Scalia, J., dissenting). For other criticism of *Booth*, *see, e.g.*, Mark G. Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 604-05 (1988); Jean Marie Shieler, *Booth v. Maryland: Silencing the Victim in the Sentencing Proceeding*, 3 ST. JOHN'S J. LEG. COMMENTARY 56 (1987).

[465] In *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court reaffirmed *Booth* by a 5–4 margin. The case is interesting because its facts demonstrate that victim impact evidence is not limited to well-to-do victims. In that case, the murderer's victim was Richard Haynes, an unemployed person with mental difficulties who was known on the street as "Reverand." The prosecutor referred to the victim as "a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along." *Id.* at 809. The Supreme Court held that these sorts of references to the victim violated *Booth*.

[466] 501 U.S. 808 (1991).

[467] *Id.* at 825 (internal quotations omitted).

[468] *Id.* at 834 (Scalia, J., concurring).

[469] Vitiello, *supra* note 360, at [5].

[470] *Id.* at [17] (acknowledging that his discussion "does not prove empirically that the death penalty as administered bakes in inappropriate racial and class factors").

[471] *Id.* at [5] (citing Davd C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983)).

[472] Baldus, *supra* note 471, at 680.

[473] *See* Georgia State Univ. Law Rev., *Criminal Procedure: Crime Victims' Bill of Rights*, 27 GA. ST. U.L. REV. 29, 33 (2010) (Georgia law "continued to disallow victim impact statements as late 1992") (citing Muckle v. State, 211 S.E.2d 361, 363 (Ga. 1974); Sermons v. State, 417 S.E.2d 144 (Ga. 1992)).

[474] Baldus likely found (at most) a spurious correlation between race-of-the-victim and death sentences. *See* Paul G. Cassell, *In Defense of the Death Penalty*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT 183, 204 (Hugo Bedau and Paul Cassell eds. 2004). *Cf.* Stephen Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 443 (1988) (the Baldus study suggests "when victims happen to be black, the culture rationalizes the seeming contradiction by denying that there has been a crime"). In any event, since the Baldus study was published in the 1980s, two Harvard professors (and empiricists)—James Greiner and

effect would necessarily have been caused by factors apart from victim impact statements.

To demonstrate empirically that the victim impact statements allowed by *Payne* have contributed to alleged racial bias in capital sentencing, it would be necessary to compare capital cases without such statements to those with such statements. Professor Vitiello commendably concedes that he has not proven such an empirical case.[475] And the only empirical effort that looked specifically at *Payne*'s real-world effects (not cited or discussed by Vitiello) concluded that no firm evidence exists that *Payne* even increased the number of capital sentences, let alone contributed to an increase in race-based capital sentences.[476] The lack of an effect from impact statements in the very unusual situation of death penalty sentencings is consistent with the evidence regarding lack of an effect on the vast majority of criminal sentencings. For the hundreds of thousands of non-capital sentencings where victim impact statements are allowed, no clear evidence exists that that such statements produce harsher sentences.[477]

The *Payne* holding favoring victim impact evidence has stood the test of time.[478] As a matter of federal law for capital sentencing, the decision remains good law today.[479] And most states with the death penalty allow victim impact evidence as a matter of state constitutional law.[480] In non-capital cases, victim impact statements have become a near-universal feature of American criminal cases.[481] Thus, the victims' right "to be heard regarding sentencing, as adopted by state constitutional and statutory law and interpreted judicially in the state systems,

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Donald Rubin—have indisputably shown the study's methods to be invalid. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 587–88 & n.109 (2008); *accord* D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 REV. ECON. & STATS. 775, 781–83 (2011) (concluding that "there is no causal question under the potential outcomes framework answerable with datasets such as are available from the Baldus study"); *see also* Johann Gaebler et al., *A Causal Framework for Observational Studies of Discrimination*, 9 STATS. & PUB. POL'Y 26 (2022) (generally endorsing Greiner and Rubin's methodological approach without specific discussion of Baldus); Tyler J. VanderWeele, *Invited Commentary: Counterfactuals in Social Epidemiology—Thinking Outside of "the Box"*, 189 AM. J. EPIDEMIOL. 175, 175 (2019) (same). Yet surprisingly, Professor Vitiello and other legal scholars who are not empiricists continue to cite the study favorably, apparently unaware of the fundamental methodological flaw identified by Greiner and Rubin. *See, e.g.,* Scott Phillips & Justin Marceau, *When the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020) (supporting Baldus study without reference to Greiner and Rubin's methodological refutation).

[475] *See* Vitiello, *supra* note 360, at [8]. The evidence on victim impact evidence and sentence severity in non-capital cases does not show any effect. *See infra* note 477 and accompanying text.

[476] *See* Cassell, *Barbarians at the Gates?*, *supra* note 5, at 540–44.

[477] *See* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 949–54; *see also* VITIELLO, *supra* note 4, at 951 (discussing victim impact statements generally and conceding that the "[e]mpirical evidence may leave one uncertain about the extent to which victim impact statements increase criminal sentences").

[478] *Cf.* Ian Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 BRIT. J. CRIMINOLOGY 967 (2004) (calling for greater clarity regarding the role that victim information plays in court decisions).

[479] *See, e.g.,* Andrew v. White, ---S. Ct. --, 2025 WL 247502 (2025) (applying limitations found in *Payne*). The Supreme Court has, however, continued to conclude that the Constitution requires the exclusion in capital cases of evidence regarding the victim's family's opinion about the proper sentence. *See* Bosse v. Oklahoma, 580 U.S. 1 (2016).

[480] *See* TOBOLOWSKY ET AL., *supra* note 316, at 108; *see also* Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157 172 (1997) (*Payne* has become a touchstone for state court decisions regarding victim impact statements, allowing state courts to uphold victim impact statement language in state constitutions and statutes.").

[481] *See* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 867. *See, e.g.,* Commonwealth v. McGonagle, 88 N.E.3d 1128 (Mass. 2018) (upholding use of victim impact statements in Massachusetts criminal cases).

remains one of the most widely adopted victim rights since the President's Task Force on Victims of Crime."[482]

3. Creating Specific Victims' Rights

Perhaps the most important change sparked by the President's Task Force was establishing specific crime victims' rights in criminal justice processes. Before 1982, the victims' rights movement had spoken generally about protecting victims' "rights" in criminal cases. It appears that the first modern recognition of crime victims' rights in a U.S. criminal justice system came on the Navajo Nation. On April 10, 1975, the Navajo Tribal Council adopted a resolution, calling for a "Navajo Victims' *Rights* Commission [that] would continue that tradition of giving aid and counsel to the numerous victims of crime who are now too often bewildered and left out of the criminal justice system."[483]

Beginning in 1980, states began establishing specific victims' rights by enacting statutory and constitutional victims' bills of rights. Wisconsin was the first state to create a specific list of victims' rights. In 1980, it adopted the "Basic Bill of Rights for Victims and Witnesses," enumerating rights for victims and witness of crimes:

> (1) To be informed by local law enforcement agencies and the district attorney of the final disposition of the case. If the crime charged is a felony . . ., the victim shall be notified whenever the defendant or perpetrator is released from custody.
> (2) To be notified that a court proceeding to which they have been subpoenaed will not go on as scheduled, in order to save the person an unnecessary trip to court.
> (3) To receive protection from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available.
> (4) To be informed of financial assistance and other social services available as a result of being a witness or a victim of a crime, including information on how to apply for the assistance and services.
> (5) To be informed of the procedure to be followed in order to apply for and receive any witness fee to which they are entitled.
> (6) To be provided, whenever possible, a secure waiting area during court proceedings that does not require them to be in

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[482] TOBOLOWSKY ET AL., *supra* note 316, at 113.

[483] Joint Resolution of the Police Comm. and Jud. Comm. of the Navajo Tribe (June 18, 1975) (on file with author) (emphasis added). Among those who participated in drafting the resolution were Steve Twist, who would later be a driving force behind Arizona's crime victims' constitutional bill of rights. *See* U.S. Dept. of Justice, Office for Victims of Crime, Steve Twist: 2020 National Crime Victims' Service Award, available at https://ovc.ojp.gov/gallery/award-recipients/2020/steve-twist [https://perma.cc/AVJ5-TUGB]. Nearly fifty years later, during a special session of the 25th Navajo Nation Council, the Navajo National Victim Rights Act of 2023 was enacted, strengthening the rights of victims of sexual assault and rape, domestic violence, and other violent assaults. *See* 2024 Landmarks in Victims' Rights and Services, https://ovc.ojp.gov/ncvrw2024/helpful-resources-outreach/landmarks-victims-rights-and-services [https://perma.cc/3U9B-GB2E].

> close proximity to defendants and families and friends of defendants.
> (7) To have any stolen or other personal property expeditiously returned by law enforcement agencies when no longer needed as evidence. . . .
> (8) To be provided with appropriate employer intercession services to ensure that employers of victims and witnesses will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearances.
> (9) To be entitled to a speedy disposition of the case in which they are involved as a victim or witness in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.
> (10) To have the family members of all homicide victims afforded all of the rights under [the Act] . . . .[484]

In 1981, four more states followed suit, and, by 1989, forty-two states had enacted statutes called a "victim bill of rights" and most of the remaining states had adopted similar statutory protections.[485]

States also began to add protection for victims' rights in their constitutions.[486] In 1982, California passed Proposition 8, which was the first state constitutional victims' bill of rights.[487] The California amendment had a crime control emphasis. Its preambulatory language explained that "[t]he rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance."[488] The California amendment also included specific provisions giving victims not only participatory rights in the process and the right to restitution, but also the rights to safe schools, to "truth-in-evidence," and to have public safety be the primary consideration in bail determinations.[489]

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[484] 1979 Assembly Bill 1043 (published May 7, 1980), amending Wis. Stat. § 885.05 and creating Wis. Stat. § 20.455(5), 59.07(100), 103.87, 885.05(1), and ch. 950.

[485] *See* WEED, *supra* note 332, at 22; TOBOLOWSKY ET AL., *supra* note 316, at 12–13.

[486] *See generally* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 261–73 [hereinafter Beloof, *Third Wave*]; Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, at app. A [hereinafter Beloof, *Third Model*]; Mary Boland & Russell Butler, *Crime Victim's Rights: From Illusion to Reality*, 24 CRIM. JUST. 4, 7 (2009); Cassell *Balancing the Scales*, *supra* note 126, at 1381–83.

[487] For history of the drafting of the amendment, see J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come +From and How Much Did It Do?*, 23 PAC. L.J. 843 (1992).

[488] Cal. Const. art. I, § 28(a) (1982).

[489] Cal. Const. art. I, § 28(b)-(e) (1982). *See* Kelso & Bass, *supra* note 487, at 845–65; Jeff Brown, *Origins and Impact—A Public Defenders Perspective*, 23 PAC. L.J. 881 (1992); Hank M. Goldberg, *Proposition 8: A Prosecutor's Perspective*, 23 PAC. L.J. 947 (1992); *see also* Justice George Nicholson, *Campus Crime and Violence, and the Right to Safe Schools*, DEFENSE COMM. 5, 6 (Summer 2018) (discussing safe schools provision).

The California amendment's crime control provisions, however, did not serve as the template for other amendments. Instead, consistent with the Carrington Rule discussed above,[490] all subsequent victims' rights amendments focused on procedural protections for crime victims in the criminal justice process.[491] This procedural approach stemmed from a 1984 ad-hoc gathering of national victims' rights groups.[492] There, crime victims' rights advocates formally resolved to first seek constitutional protection for victims' rights in the states before undertaking the significant effort that would be required to pass a federal constitutional amendment.[493] This "state-first approach" drew the support of many victim advocates. Adopting state amendments for victims' rights would use the great "laboratory of the states"[494] by testing varying formulations of victims' rights amendments to find the most effective and appropriate language.[495]

The next six amendments were adopted in Rhode Island (1986), Florida and Michigan (1988), Texas and Washington (1989), and, perhaps most important, Arizona (1990). These six amendments exhibit a trend from largely aspirational language (Rhode Island's) to more specific guarantees of rights for victims (Arizona's).

The Rhode Island General Assembly initially adopted a statutory "Victim's Bill of Rights" in 1983.[496] Three years later, in 1986, delegates to Rhode Island's 1986 Constitutional Convention overwhelmingly approved an amendment to the state's constitution—article I, section 23, entitled "Rights of Victims of Crime."[497] The three-sentence-long amendment required the State to treat victims with "dignity, respect, and sensitivity." It also gave victims the right to receive "financial compensation" for any injury or loss from the perpetrator of the crime, as well as the right to deliver a victim impact statement at sentencing.[498] Unfortunately for victims' rights advocates, during the drafting process, the Convention eliminated specific enforcement language, purportedly due to "economy of language."[499] This deletion would later prove to be the source of controversy, with a majority of the Rhode Island Supreme Court concluding that enforcement issues were to be left exclusively to the legislature.[500]

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[490] *See supra* notes 371–75 and accompanying text.

[491] For a helpful collection of all state constitutional amendments protecting victims' rights, see https://www.nvcap.org/states/utah.htm [https://perma.cc/QRL2-P9WX].

[492] Crime Victims' Rights in America: An Historical Overview, OFFICE FOR VICTIMS OF CRIME, https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pg4b.html [https://perma.cc/C7MQ-JEYC] ("The ad-hoc committee on the [victims' rights] constitutional amendment formalizes its plans to secure passage of amendments at the state level.")

[493] Sen. Jud. Comm. Hearing 40 (Apr. 23, 1996) (citing Cassell, *Balancing the Scales*, *supra* note 126, at 1381–83).

[494] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting). *See generally* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VALPO. U.L. REV. 475 (1996). *Cf.* Wendy J. Murphy, *"Federalizing" Victims' Rights to Hold State Courts Accountable*, 9 LEWIS & CLARK L. REV. 647 (2005) (arguing for creating a federal forum to protect state victims' rights).

[495] *See, e.g.*, Senate Jud. Comm. Hearing 40 (April 23, 1996) (statement of Robert E. Preston), quoted in S. Rep. 105–409 at 3 (Oct. 12, 1998).

[496] *See* Bandoni v. State, 715 A.2d 580 (R.I. 1998) (citing G.L.1956 chapter 28 of title 12).

[497] *Bandoni*, 715 A.2d at 591–92.

[498] R.I. Const. art. I, § 23 (1986).

[499] *See Bandoni*, 715 A.2d at 591-92.

[500] *Compare Bandoni*, 715 A.2d at 589-96 (concluding amendment's language was not self-executing and required legislative action for enforcement) with *Bandoni*, 715 A.2d at 601 (Flanders, J., dissenting) ("This is a dark day

Two years later, in 1988, Florida and Michigan adopted short state constitutional victims' rights amendments. Florida's amendment (approved by ninety percent of the voters) was just a single sentence long:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.[501]

Here as well, specific enforcement mechanisms were lacking, a defect that Florida would remedy three decades later.[502]

Michigan's 1988 amendment was approved by eighty percent of voters and expanded on statutory protections found in the earlier William Van Regenmorter Crime Victim's Rights Act of 1985.[503] Michigan's state constitutional amendment was the first state amendment to set out of a list of victims' rights throughout the criminal justice process, specifically:

- The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
- The right to timely disposition of the case following the arrest of the accused.
- The right to be reasonably protected from the accused throughout the criminal justice process.
- The right to notification of court proceedings.
- The right to attend trial and all other court proceedings the accused has the right to attend.
- The right to confer with the prosecution.
- The right to make a statement to the court at sentencing.
- The right to restitution.
- The right to information about the conviction, sentence, imprisonment, and release of the accused.[504]

The Amendment also provided for enforcement by legislative action and for a possible assessment against a convicted defendant to pay for crime victims' rights.[505]

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for state constitutional law and judicial independence in Rhode Island. For crime victims in particular, this day will doubtless live in legal infamy.").

[501] Fla. Const. art. I, § 16(b) (1988). Two leaders in the Florida amendment efforts were Bob Preston and Greg Novak, whose family members were murdered. They co-founded Justice for Victims, which successfully lobbied for the Florida Amendment. Preston went on to co-chair the National Victims' Constitutional Amendment Network. *See* Young & Stein, *supra* note 303, at 4; *see also* Bob Preston, *Statement from the Author*, 5 PHOENIX L. REV. 393.

[502] *See infra* notes 688–90 and accompanying text.

[503] Mich. C.L. 780.751 et al. (1985), discussed in Michigan Legislature, William Van Regenmorter Crime Victim's Rights Act and Constitutional Amendment (2013), available at https://www.legislature.mi.gov/Publications/Crime%20Victims.pdf [https://perma.cc/Z3DH-2EA6].

[504] Mich. Const. art. I, § 24(1) (1988).

[505] Mich. Const. art. I, § 24(2) & (3) (1988).

The following year, 1989, Texas and Washington joined the list of states with state constitutional amendments. The Texas amendment contained a list of rights for crime victims, including the rights (upon request) to confer with prosecutors and to receive restitution.[506] In a notable omission, the Texas amendment did not extend to victims any rights to be heard. It also left enforcement in the hands of the legislature and the prosecutor.[507] However, these omissions might not have been as significant as they seem on paper, as Texas already had statutory provisions protecting certain victims' rights.[508]

Washington's amendment was adopted the same year. It extended to victims (and, in homicide cases, their families) the rights "to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered . . .."[509] The amendment was supported by Washington's Attorney General Ken Eikenberry, who had served earlier on the President's Task Force for Victims of Crime.[510] The amendment built on Washington's earlier legislation, reflected in a crime victim compensation program enacted in 1973 and a crime victims' statutory "Bill of Rights" enacted in 1985.[511]

The next state to adopt a state constitutional victim's rights amendment was Arizona in 1990. A key proponent of the Arizona amendment was lawyer Steven J. Twist, who had worked earlier to help put in place crime victims' rights for the Navajo Nation.[512] The Arizona amendment was the most expansive of the state amendments that had been adopted. It also contained several innovations, such as specific "standing" and enforcement language. These innovations made it a model for follow-on state amendments,[513] as well as for the later-proposed federal constitutional amendment, co-sponsored by Arizona Senator Jon Kyl.[514]

Arizona's amendment began with important language that has since been incorporated in other state amendments.[515] The amendment stated that "to preserve and protect victims' rights to justice and due process, a victim of crime has a right" to various enumerated rights.[516] This language plainly indicated that Arizona victims were to have overarching rights to "justice and due process" throughout

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[506] Texas Const. art. I, § 30(a) & (b).

[507] Texas Const. art. I, § 30(c) & (d).

[508] *See* Alyssa Linares & Taylor D. Robinson, The History of Victim Rights and Services (College of Crim. Just. Sam Houston St. U. Apr. 2024) (citing Tex. H.B. 235 (1985), adding Ch. 56 to the Code of Criminal Procedure), available at https://dev.cjcenter.org/_files/cvi/The%20History%20of%20Victim%20Rights%20and%20Services.pdf_1712759747.pdf [https://perma.cc/QM5H-F9FM].

[509] Wash. Const. art. I, § 35.

[510] *See* Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19 (1989).

[511] *Id.* (citing Wash Rev. Code Ann. § 7.68 (Supp. 1989) & Wash Rev. Code Ann. § 7.69 (Supp. 1989).

[512] *See supra* note 483 and accompanying text.

[513] *See, e.g.*, Cassell, *Balancing the Scales*, *supra* note 126, at 1386 n.62 (noting that the 1990 Arizona amendment served as the "model" for the 1994 Utah amendment).

[514] *See infra* notes 579–99 and accompanying text.

[515] *See* Steven J. Twist & Vanessa Kubota, *The Crime Victim's Right to Justice*, __ ARIZ. ST. L.J. __ (forthcoming 2025) (noting that, in addition to Arizona, eleven states have adopted similar language).

[516] Ariz. Const. art. II, § 2.1.

criminal proceedings.[517] The amendment then listed twelve specific rights for victims:

> 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
> 2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
> 3. To be present at, and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
> 4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
> 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
> 6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
> 7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
> 8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
> 9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
> 10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
> 11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
> 12. To be informed of victims' constitutional rights.[518]

The amendment also contained a definition of the protected "victims" under the amendment and gave the legislature and the people (via referendum) the authority to enact "substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section. . . ."[519]

These early victims' rights amendments spurred other states to action.[520] In 1991, New Jersey added a state constitutional amendment.[521] In 1992, Colorado,

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[517] *See* Twist & Kubota, *supra* note 515 (explaining why a textual reference to "preserving and protecting" victims' "rights to justice and due process" necessarily presumes the existence of such rights).

[518] Ariz. Const. art. II, § 2.1(A). *See generally* Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 ARIZ. ST. L.J. 531 (2002); Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 ARIZ. ST. L.J. 421 (2015).

[519] *See* Ariz. Const. art. II, § 2.1(C) & (D).

[520] *See* WEED, *supra* note 332, at 23 (charting the number of states adopting victims' bills of rights through state statute and constitutional amendment).

[521] N.J. Const. art. I, ¶ 22. *Cf.* R.E. Wegryn, *New Jersey Constitutional Amendment for Victims' Rights: Symbolic Victory?*, 25 RUTGER L.J. 183 (1993) (arguing that this amendment was only a "symbolic" achievement).

Illinois, Kansas, Missouri, and New Mexico followed suit.[522] In 1993, Wisconsin joined.[523] In 1994, Alabama, Alaska, Idaho, Maryland, Ohio, and Utah approved amendments.[524] In 1996, Connecticut, Indiana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, and Virginia did the same.[525] Oregon passed an amendment that same year, only to see the Oregon Supreme Court overturn it on technical grounds surrounding the initiative process.[526] The court ruling led Oregon's voters to swiftly reenact an amendment in 1999.[527] In 1998, Louisiana, Mississippi, Montana, and Tennessee approved amendments.[528] Thus, at the turn of the century, thirty-two states had state constitutional amendments protecting crime victims' rights.[529] As victims' rights advocates had hoped, the state amendments had set the stage for a push to amend the United States Constitution to add a victims' rights provision.[530]

D. Federal Crime Victims' Rights, the Proposed Federal Constitutional Amendment, and the Crime Victims' Rights Act

1. Federal Legislation and Other Actions Protecting Victims' Rights

Alongside burgeoning recognition of victims' rights in the states, the federal system also paid increasing attention to victims. Just as the President's Task Force Report had sparked state action, it also sparked federal action. Beginning in the 1980s, Congress enacted a series of crime victims' statutes—including the landmark Victims of Crime Act of 1984 (VOCA). The expansion of state victims' rights amendments also led to a renewed effort to pass a federal Victims' Rights Amendment in the latter half of the 1990s, continuing into the early 2000s and beyond. Ultimately, these efforts to pass a federal constitutional amendment led to what is perhaps the most important American victims' rights enactment: the federal Crime Victims' Rights Act of 2004 (CVRA). In the years since, the CVRA has paved the way for significant protection of crime victims' interests in the federal criminal justice system.

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[522] Colo. Const art. II, § 16a; Ill. Const. art. I, § 8.1; Kansas Const. art. 15, § 15; Mont. Const. art. I, § 32; N.M. Const. art. II, § 24. For discussion of the Illinois amendment and its later revision, see Lawrence Schlam, *Enforcing Vitim's Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VALPO. U.L. REV. 597 (2015).

[523] Wisc. Const. art. I, § 9m.

[524] Ala. Const. amend. 557; Alaska Const. art. 2, § 24; Idaho Const. art. I, § 22; Ind. Const. art. I, § 13(b); Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.C. Const. art. I, § 37; Okla. Const. art. II, § 34; S.C. Const. art. I, § 24; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A. For analysis of the Utah amendment, see Cassell, *Balancing the Scales*, *supra* note 126.

[525] Or. Const. art. I, § 42 (Ballot Measure 40 (1996), effective 1997).

[526] *See* Armatta v. Kitzhaber, 959 P.2d 49 (Or. 1998) (invalidating the amendment because it did not address a "single subject").

[527] Or. Const. art. I, § 31 (1999).

[528] La. Const. art. I, § 25; Miss. Const. § 26(a); Mont. Const. art. II, § 28; Tenn. Const. art. I, § 35.

[529] As discussed below, since then four states have added victims' rights amendments (Georgia, Kentucky, North Dakota, and South Dakota), bringing the current (2025) total to 36 states. *See* https://www.nvcap.org/states/stvras.html [https://perma.cc/TRE5-VA4P].

[530] *See* Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Cause Analysis*, 5 PHOENIX L. REV. 301, 303-08 (2012) [hereinafter Cassell, *Clause-by-Clause Analysis*]; *see also infra* notes 577-644 and accompanying text (describing federal amendment efforts).

As with state enactments, the federal CVRA traces its roots back to the President's Task Force on Victims of Crime. The Task Force recommended improving the victims' treatment in the federal criminal justice system,[531] and the victims' rights movement capitalized on those proposals.[532] In 1982, Congress passed the first federal victims' rights legislation, the Victim and Witness Protection Act (VWPA).[533] The VWPA had three primary goals: first, to expand the role of victims in the criminal justice process; second, to ensure that the federal government used all available resources to assist victims, without infringing the constitutional rights of defendants; and third, to provide a model for state and local legislation.[534] Senator Heinz asked victims' rights advocates to assist in drafting the legislation, telling them: "Help me find the most imaginative and effective tools ensuring victims' rights in the states, and I'll put them in the federal bill."[535] The resulting VWPA required that victim impact information be included in federal pre-sentencing reports[536] and expanded restitution.[537] But the Act's limited scope meant that it was just a "first step toward comprehensive federal action."[538]

Congress continued to be active in the crime victims field. The most significant legislation for victim services was the Victims of Crime Act of 1984 (VOCA).[539] VOCA established the Crime Victims Fund, which provided funding for local victim assistance and state victim compensation programs, as well as services for federal crime victims. The fund came from money collected through federal criminal fines, penalties, and bond forfeitures.[540] Since 1984, VOCA has been amended several times to support additional victim-related activities, including federal, state and Tribal victim-service programs and discretionary grant programs for local victim service providers.[541]

When Congress first authorized the Crime Victims Fund in 1984, it placed a cap on how much could be deposited into the fund in its first eight years. During this time, the annual cap varied from $100 million to $150 million.[542] In 1993, Congress lifted the cap, allowing all criminal fines, bail forfeitures, penalties, and special assessments covered by VOCA to be deposited into the fund to support crime victim programs. For the first fifteen years of the fund, the total deposits for each fiscal year were simply distributed the following year to support crime victim

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[531] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418, at 37–55.

[532] *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 840-50 [hereinafter Cassell, *Recognizing Victims*].

[533] Pub. L. No. 97–291, 96 Stat. 1248 (1982).

[534] *Id.*

[535] Young & Stein, *supra* note 303, at 6.

[536] Amendment to Rule 32(c) of the Fed. R. Crim. P., 96 Stat. 1249.

[537] 96 Stat. 1253-54.

[538] Young & Stein, *supra* note 303, at 6; *see also* Cassell & Morris, *Defining "Victim*," *supra* note 12 at 341.

[539] Pub. L. No. 98–473, 98 Stat. 2170 (1984). *See generally* U.S. Dept. of Justice, Office of Justice Programs, Celebrating 40 Years of the Victims of Crime Act, 1984–2024 (2024) [hereinafter Forty Years of VOCA], available at https://ojp.gov/safe-communities/from-the-vault/a-brief-history-of-the-victims-of-crime-act [https://perma.cc/RPF8-ZNPP]. *See also* Justice Today Podcast, *The Impact of 40 Years of VOCA: Conversations with the Field* (Nov. 2024), available at https://www.ojp.gov/news/podcast/impact-40-years-of-VOCA-episode-1 [https://perma.cc/88TK-JWHJ].

[540] Derene, *supra* note 279, at 2–14.

[541] Forty Years of VOCA, *supra* note 539.

[542] *Id.*

services.[543] However, in response to large fluctuations in deposits, starting in Fiscal Year 2000, Congress placed a cap on the moneys available for distribution. These annual caps were intended to stabilize the fund as a source of support for future victim services.[544] The cap stayed between $500 to $700 million between 2000 and 2014 before tripling to more than $2.3 billion in 2015. The cap has remained in the billions to this day, although actual distributions are somewhat lower.[545] In (fiscal year) 2022, for example, $1.4 billion in VOCA funds (below the $2.6 billion cap for the year) were distributed to the states for demonstration projects, evaluations, training and technical assistance, compliance programs, fellowships/internships, support for victims of federal crimes. The statute was amended in 2016 to include "victim services."[546]

In addition to VOCA, Congress also passed other important federal legislation addressing crime victims' issues, including the Victims Compensation and Assistance Act of 1984,[547] the Victims' Rights and Restitution Act of 1990 (VRRA),[548] the Violent Crime Control and Law Enforcement Act of 1994,[549] the Violence Against Women Act of 1994 (VAWA),[550] the Antiterrorism and Effective Death Penalty Act of 1996,[551] and the Victim Rights Clarification Act of 1997.[552] Congress also enacted other federal statutes to deal with specialized victim situations, such as child victims and witnesses as well noncitizens who report crimes.[553] These statutes also spawned guidelines by the Attorney General for how Executive Branch employees should treat crime victims.[554]

Among the various federal victims' statutes, the 1990 VRRA is worth highlighting. The VRRA provided a comprehensive list of victims' rights in the federal criminal justice process. These included a victim's right to "be treated with

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[543] *Id.*

[544] *Id. See* Aileen Adams & David Osborne, *Victims' Rights and Services: A Historical Perspective and Goals for the Twenty-First Century*, 33 MCGEORGE L. REV. 673, 680 (2002).

[545] Forty Years of VOCA, *supra* note 539.

[546] Office for Victims of Crime, 2023 Report to the Nation, Helping Crime Survivors Find Their Justice (2023), https://ovc.ojp.gov/2023-report-nation/formula-grants-voca-compensation-assistance [https://perma.cc/3TWH-LF8W].

[547] Pub. L. No. 98–473, 98 Stat. 1837 (1984).

[548] Pub. L. No. 101–647, 104 Stat. 4820 (1990). *See* Cassell & Morris, *Defining "Victim"*, *supra* note 12 at 342.

[549] Pub L. No. 103–322, 108 Stat. 1796 (1994).

[550] Pub. L. No. 103–322, 108 Stat. 1902 (1994). VAWA packaged multiple grant programs and provided close to $1 billion aimed at the scourge of domestic violence. *See* Young & Stein, *supra* note 303, at 11. By some accounts, VAWA is "the most significant [federal] legislation in the victims' rights field, other than VOCA." Derene, *supra* note 279, at 2–22.

[551] Pub. L. No. 104–132, 110 Stat. 1269 (1996). *See* Adams & Osborne, *supra* note 544, at 682.

[552] Pub. L. No. 105–6, 111 Stat. 12 (1997) (discussed in *infra* notes 575–76 and accompanying text).

[553] *See, e.g.*, 18 U.S.C. § 3509 (protecting rights of child victim-witnesses); 8 U.S.C. § 214.14 (extending visa to non-citizens who reports crimes). *See generally* Alison J. Coutifaris, *Surviving Crime and Facing Deportation: U Visas as a Defense Against Removal in a System of Divided Agency Jurisdiction*, 36 Georgetown Immigration L.J. 909 (2022) (calling for expansion of the U-Visa program).

[554] U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTY. GENERAL, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (1995). The Guidelines have since been revised several times. *See* U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTY. GENERAL, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 31-37 (2000). U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTY. GENERAL, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2011 ed., rev. May 2012); U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTY. GENERAL, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2022 ed., eff. Mar. 31, 2023).

fairness and with respect for the victim's dignity and privacy,"[555] to "be notified of court proceedings,"[556] to "confer with [the] attorney for the Government in the case,"[557] and to attend most court proceedings.[558] The Act also directed the Justice Department to make "its best efforts" to ensure that victims received their rights.[559] Yet this federal statute never successfully integrated victims into the federal criminal justice process and came to be generally regarded as something of a dead letter.[560] Because Congress would later pass the CVRA specifically to remedy the VRRA's problems, it is worth reviewing why the earlier law was largely unsuccessful.

The prime illustration of the VRRA's ineffectiveness comes from a notorious crime: the Oklahoma City bombing.[561] While one might think victims' rights would have been fully protected in the high-profile trials of the bombing's perpetrators, in fact, victims' rights were sidelined. During a pre-trial motion hearing, the district court *sua sponte* precluded any victim who wished to provide victim impact testimony at sentencing from observing any proceeding in the case.[562] The court based its decision on Rule 615 of the Federal Rules of Evidence—the so-called "rule on witnesses," which provides for sequestration of trial witnesses.[563] Thirty-five victims and survivors of the bombing then filed a motion for reconsideration.[564] The motion explained that the district court had apparently overlooked the VRRA, which extended to victims the right "to be present at all public court proceedings" unless the court determined that the victims' testimony would be "materially affected."[565] The district court denied the motion for reconsideration.[566] The court concluded that any victims who watched court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question."[567] Unlike the original ruling, which was explicitly premised on Rule 615, this later ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence.[568]

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[555] 42 U.S.C. § 10606(b)(1).

[556] 42 U.S.C. § 10606(b)(3).

[557] 42 U.S.C. § 10606(b)(5).

[558] 42 U.S.C. § 10606(b)(4).

[559] 42 U.S.C. § 10606(a).

[560] *See* Cassell, *Recognizing Victims*, *supra* note 532, at 844–45.

[561] *See generally* Cassell, *Barbarians at the Gates?*, *supra* note 5, at 515–22 (discussing this case in greater detail); *see also* Cassell, *Recognizing Victims*, *supra* note 532, at 845-47; Adams & Osborne, *supra* note 544, at 681–82 (describing victim services response to the bombing). For a chilling account of the crime, see LOU MICHEL & DAN HERBECK, AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING (2001).

[562] *See* United States v. McVeigh, No. 96-CR-68, 1996 WL 366268, at *2 (D. Colo. June 26, 1996).

[563] *Id.* at *2–*3 (discussing application of FED. R. EVID. 615). For a review of the application of witness sequestration rules to crime victims, see Beloof & Cassell, *Victim's Right to Attend, supra* note 174.

[564] Motion of Marsha and Tom Kight et al. and the National Organization for Victim Assistance Asserting Standing to Raise Rights Under the Victims' Bill of Rights and Seeking Leave to File a Brief as *Amici Curiae*, *United States v. McVeigh*, No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Sept. 30, 1996). Disclosure: The present author represented a number of the victims on a pro bono basis, along with able co-counsel Robert Hoyt et al. from Wilmer, Cutler, and Pickering.

[565] 42 U.S.C. § 10606(b)(4) (1994).

[566] *See id.* at *25.

[567] *Id.* at *24.

[568] *See id.*

The victims then petitioned for a writ of mandamus from the Tenth Circuit.[569] Three months later, the Circuit rejected the victims' claims.[570] The Circuit found "a number of problems with the excluded witnesses' reliance on the Victims' Rights Act."[571] Indeed, the Circuit even found that the VRRA imposed no obligations on courts:

> The statute charily pledges only the "best efforts" of certain executive branch personnel to secure the rights listed. The district court judge, a judicial officer not bound in any way by this pledge, could not violate the Act. Indeed, the Act's prescriptions were satisfied once the government made its arguments against sequestration—before the district court even ruled.[572]

Efforts by both the victims and the Justice Department to obtain rehearing were unsuccessful,[573] even with the support of forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims' groups in the nation.[574]

In the meantime, the victims, supported by the Oklahoma Attorney General's Office, sought remedial legislation in Congress. A bill was introduced to provide that watching a trial in a capital case would not constitute grounds for denying the chance to provide an impact statement. In a matter of weeks, the Victims' Rights Clarification Act of 1997[575] passed, but even that narrow statute was unsuccessful in protecting the bombing victims' rights. The district court dubiously found that the law raised unspecified constitutional concerns.[576]

2. Efforts to Pass a Federal Constitutional Amendment

Because of problems like these with statutory protection of victims' rights, in 1995 victims' advocates decided the time had come to press for a federal constitutional amendment. They argued that the statutory protections could not sufficiently guarantee victims' rights, because they frequently failed "to provide meaningful protection whenever they [came] into conflict with bureaucratic habit,

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[569] Petition for Writ of Mandamus, Kight et al. v. Matsch, No. 96–1484 (10th Cir. Nov. 6, 1996) (on file with author).

[570] *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997), *overruled by statute* 18 U.S.C. § 3510.

[571] *Id.* at 334.

[572] *Id.*

[573] *See* Order, United States v. McVeigh, No. 96–1469, 1997 WL 128893, at *3 (10th Cir. Mar. 11, 1997

[574] *See* Brief for Amici Curiae Washington Legal Foundation and United States Senators Don Nickles and 48 Other Members of Congress, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469); Brief for Amici Curiae States of Oklahoma, Colorado, Kansas, New Mexico, Utah, and Wyoming Supporting the Suggestion for Rehearing and the Suggestion for Rehearing En Banc by the Oklahoma City Bombing Victims and the United States, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 14, 1997) (No. 96-1469); Brief for Amici Curiae National Victims Center, Mothers Against Drunk Driving, the National Victims' Constitutional Amendment Network, Justice for Surviving Victims, Inc., Concerns of Police Survivors, Inc., and Citizens for Law and Order, Inc., in Support of Rehearing, United States v. McVeigh, 106 F.3d 325 (10th Cir. Feb. 17, 1997) (No. 96–1469).

[575] Pub. L. No. 105–6, 111 Stat. 12 (1997). For a critical review of the Act, see Jennifer K. Wood, *Justice as Therapy: The Victim Rights Clarification Act*, 51 COMMUNICATION Q. 296 (2003).

[576] *See generally* Cassell, *Barbarians at the Gates?*, *supra* note 5, at 519–20 (recounting problems).

traditional indifference, [or] sheer inertia."[577] Their concerns were echoed in a Justice Department report, which concluded that efforts short of a federal constitutional amendment had proven inadequate:

> Victims' rights advocates have sought reforms at the state level for the past twenty years, and many states have responded with state statutes and constitutional provisions that seek to guarantee victims' rights. However, these efforts have failed to fully safeguard victims' rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims' rights.[578]

To place victims' rights into the federal Constitution, the National Victims Constitutional Amendment Network[579] and other advocates approached the President and Congress.[580] In 1996, Senators Jon Kyl (a Republican from Arizona) and Dianne Feinstein (a Democrat from California) introduced a federal victims' rights amendment, with the backing of President Bill Clinton.[581] The Amendment was designed to "restore, preserve, and protect, as a matter of right for the victims of violent crimes, the practice of victim participation in the administration of criminal justice that was the birthright of every American at the founding of our Nation."[582]

In 1997, on the opening day of the next session of Congress, Senators Kyl and Feinstein reintroduced the amendment,[583] and both the House and the Senate held hearings on it.[584] The amendment was reintroduced in 1998.[585] While the Senate again held a hearing[586] and passed the proposed amendment out of committee,[587] the full Senate did not consider the Amendment.

In 1999, Senators Kyl and Feinstein again proposed the Amendment.[588] The Senate Judiciary Committee again voted to send the amendment to the full Senate.[589] But after three days of floor debate in April 2000, the amendment was shelved when it became clear that its opponents had the votes to sustain a filibuster

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[577] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

[578] 1997 Sen. Judiciary Comm. Hearings at 64 (statement of Att'y Gen. Reno).

[579] *See* www.nvcap.org [https://perma.cc/AV8G-VAVL]. *See generally* The Hon. Jon Kyl et al, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 589–90 (2005).

[580] For a history of victims' efforts to pass a constitutional amendment, see *id.* at 588–91; *see also* S. Rep. 106–245 at 2–6 (Apr. 4, 2002); Cassell, *Clause-by-Clause*, *supra* note 530, at 306–08.

[581] S.J. Res. 52, 104th Cong., 2nd Sess. (1996). A companion resolution was introduced in the House of Representatives. H.J. Res. 174, 104th Cong., 2d Sess. (1996).

[582] S. Rep. 108-191 at 1–2 (2003); *see also* S. Rep. 106-254 (2000).

[583] S.J. Res. 6, 105th Cong., 1st Sess. (1997).

[584] *See, e.g., Victims' Rights Amendment: Hearings Before the Sen. Judiciary Comm.* (April 15, 1997).

[585] S.J. Res. 44, 105th Cong., 2d Sess. (1998).

[586] *Victim's Rights Amendment: Hearings Before the Sen. Judiciary Comm.* (Apr. 28, 1998).

[587] *See* 144 CONG. REC. S11010 (Sept. 28, 1998).

[588] S.J. Res. 3, 106th Cong., 1st Sess. (1999).

[589] 146 Cong. Rec. S2986 (Apr. 27, 2000).

and prevent a vote on the Amendment.[590] At the same time, the House held hearings on the companion measure there.[591]

In 2002, Senators Kyl and Feinstein again introduced the Amendment.[592] President George W. Bush announced his support.[593]

At the beginning of the 2003 congressional session, Senators Kyl and Feinstein proposed the amendment as S.J. Res. 1. The Senate Judiciary Committee held hearings in April,[594] followed by a written report supporting the Amendment.[595] Shortly thereafter, a motion to proceed to consideration of the measure was withdrawn when proponents determined they did not have the 60 votes necessary to obtain cloture (a prerequisite to the 67 votes needed to pass the amendment).

3. The Crime Victims' Rights Act

The Crime Victims' Rights Act (CVRA) resulted from a decision by Senators Kyl and Feinstein to seek a more comprehensive and enforceable federal statute rather than immediately pushing for a federal constitutional amendment. In April 2004, victims' advocates met with Senators Kyl and Feinstein. The Senators decided to press for a far-reaching federal statute protecting victims' rights, and the movement supported their tactical decision.[596] In exchange for backing off from the federal amendment in the short term, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[597] This "new and bolder" approach not only created a string of victims' rights but also remedies for violations of victims' rights and funding for victims' legal services.[598] The victims' movement could then evaluate how this statute worked before deciding whether to renew a push for a federal amendment.[599]

The CVRA built on the long history of private prosecution in America, a history to which the sponsors of the CVRA frequently alluded.[600] The CVRA gave

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[590] 146 Cong. Rec. S2966 (Apr. 27, 2000).

[591] H.J. Res. 64, 106th Cong., 2d Sess.

[592] S.J. Res. 35, 107th Cong., 1st Sess. A companion measure was also introduced in the House. H.J. Res. 91, 107th Cong., 2d Sess.

[593] 149 CONG. REC. S67 (Jan. 7, 2003) (statement of Sen. Kyl).

[594] *Hearings Before the Sen. Judiciary Comm.: A Proposed Constitutional Amendment to Protect Crime Victims, S.J. Res. 1*, S. Hrg. 108–189.

[595] S. Rep. No. 108–1.

[596] Kyl et al., *supra* note 579, at 592.

[597] *Id.* at 592–93.

[598] 150 Cong. Rec. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[599] *See* 150 Cong. Rec. S4260 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl); *see also* Prepared Remarks of Attorney General Alberto R. Gonzales, Hoover Inst. Board of Overseers Conference (Feb. 28, 2005) (indicating the passage of a federal victim's rights amendment remained a priority for President Bush).

[600] *See, e.g.*, 146 Cong. Rec. S3249-01 (May 2, 2000) (remarks of Sen. Feinstein) (concluding that "the weight of historical evidence on this subject—a subject which has been extensively researched and reviewed by some of our country's most distinguished legal historians and other scholars—suggests that private prosecutions were dominant" at the time of the framing of the Constitution). *See also supra* notes 268–77 and accompanying text (recounting congressional debate on private prosecution's history).

victims "the right to participate in the system."[601] Specifically, the CVRA extended to victims eight rights in federal criminal proceedings:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.[602]

In extending these rights to victims, Congress intended to make victims "independent participant[s]" in the criminal justice proceedings.[603] The CVRA specifically gave victims standing to assert their rights.[604] Congress viewed these provisions as establishing a victim's right "to participate in the process where the information that victims and their families can provide may be material and relevant."[605] The CVRA is thus best understood as part of a decades-long "civil rights movement" that sought to "end the unjust treatment of crime victims by reforming the culture of the criminal justice system."[606] Congress has since built on the CVRA by expanding rights for victims several times.[607] And Congress also

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[601] 150 Cong. Rec. S4263 (daily ed. Apr. 22, 2004) (statement of Senator Feinstein); *see* Cassell & Morris, *Defining "Victim"*, *supra* note 12 at 344–45.

[602] Pub. L. 108-405, codified at 18 U.S.C. § 3771(a) (2004).

[603] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[604] *Compare* 18 U.S.C. § 3771(d)(1) (2006), *with* Susan Bandes, Victim Standing, 1999 UTAH L. REV. 331, 345 (1999) (illustrating the debate surrounding victim standing before the CVRA's adoption). *See generally* Margaret Garvin, *The (Human) Victims' Rights Movement in the Twenty-First Century United States*, in ANIMALS AS CRIME VICTIMS 40, 44 (forthcoming 2025) (discussing the CVRA and standing).

[605] 150 Cong. Rec. S4262 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[606] Kyl et al., *supra* note 579, at 583.

[607] The next year, 2005, U.S. House of Representatives established the first congressional Victims' Rights Caucus, co-chaired by Representatives Ted Poe (R-TX) and Jim Costa (D-CA). *See* 2024 Landmarks in Victims' Rights and Services, *supra* note 483. In 2006, Congress extended the CVRA to apply to state habeas proceedings. Pub. L. 109-248, title II, § 212 ((2006). In 2008, the Government Accountability Office submitted a report to Congress on the CVRA, making recommendations for (largely technical) legislative and executive actions to improve the Act., GAO, Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act (2008), https://www.gao.gov/products/gao-09-54 [https://perma.cc/NSW9-KL4Q]. In 2015, Congress added two additional rights to the CVRA, the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement, and the right to be informed of victim services. 18 U.S.C. 3771(a)(9) & (10). And in 2016, Congress passed the Survivors' Bill of Rights,

hoped that the CVRA would help create a model that could serve to improve state victims' rights enactments.[608]

4. CVRA Enforcement Litigation

Since the CVRA's enactment in 2004, victims have increasingly asserted rights in federal cases. And, when their rights have not been respected, some victims have used the CVRA provisions allowing enforcement actions in trial and appellate courts. The CVRA's effects are perhaps best illustrated by reviewing these notable cases. Considered together, these cases demonstrate that, over the last two decades, the CVRA has created a functional (albeit imperfect) system of enforceable victims' rights for federal criminal cases.[609] Of course, it is important to bear in mind that this litigation involves atypical examples of the system's failures. The general federal landscape appears to be one increasingly attuned to protecting crime victims' interests, although significant challenges remain.

The first prominent CVRA litigation concerned enforcing the CVRA's right to be "reasonably heard" at sentencing. A 2006 case, *Kenna v. U.S. District Court for the Central District of California,* involved a father-son team of swindlers, who cheated scores of victims out of almost $100 million. At the father's sentencing, more than sixty victims submitted impact statements. Several victims spoke about the crime's harms—retirement savings lost, businesses bankrupted, and lives ruined.[610]

Three months later, the son came up for sentencing. As required, the district judge heard from the prosecutor and the defendant. But the judge then denied the victims any opportunity to speak. The judge said that he had "listened to the victims the last time" and "quite frankly, I don't think there's anything that any victim could say that would have any impact whatsoever."[611] The judge imposed a lengthy prison sentence on the son.

One of the victims filed a timely petition for review in the Ninth Circuit, seeking an order vacating the son's sentence and commanding the district court to reopen proceedings to allow the victims to speak. The Circuit agreed.

The Circuit explained that "[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process."[612] The Circuit then addressed the CVRA's right to be "reasonably heard," explaining

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creating rights for sexual assault survivors under federal jurisdiction to have access to sexual assault forensic exams and information about the testing and results of that evidence. *See* 2024 Landmarks, *supra*.

[608] *See, e.g.*, Comment, Kathryn Merrill, *Shielding Crime Victims from the Witness Exclusion Rule's Sword: Amending California's Constitution to Protect Crime Victim-Witnesses' Right to be Present*, 55 U. PAC. L. REV. 55, 63-66 (2023) (arguing that California's protection of victims' rights to attend falls short compared to the CVRA).

[609] *See generally* Paul G. Cassell, *Expanding Enforcement of Crime Victims' Rights: The United States Example*, in RESEARCH HANDBOOK ON COMPARATIVE CRIME VICTIMS' RIGHTS (Robyn Holder et al. eds. forthcoming 2025) [hereinafter Cassell, *Enforcement of Rights*]. Of course, the CVRA applies only to federal cases, and vast bulk of American criminal cases are state cases.

[610] Kenna v. U.S. Dist. Ct. for C.D. Cal., 435 F.3d 1011, 1013 (9th Cir. 2006).

[611] *Id.*

[612] *Id.*

that the phrase could be interpreted either as protecting a right to speak to the sentencing judge or as protecting only a right to bring to the judge's attention information relevant to the proceedings. Agreeing with another district court that had previously considered this issue,[613] the Circuit concluded that the CVRA's legislative history disclosed "a clear congressional intent to give crime victims the right to speak at proceedings covered by the CVRA."[614]

The Circuit elaborated that this interpretation furthered the CVRA's purposes. Allowing victims to speak at sentencing was important to "ensure that the district court doesn't discount the impact of the crime on the victims" as well as "to force the defendant to confront the human cost of his crime and . . . to allow the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed."[615]

In addition to agreeing with the merits of the victims' claims, the Circuit also announced an important procedural rule. The victims had reached the appellate court by filing a petition for a writ of mandamus, the procedure the CVRA provides.[616] Ordinarily a writ of mandamus is available only to a litigant who can demonstrate an extraordinary error. But, the Ninth Circuit concluded, the CVRA "contemplates active review of orders denying victims' rights claims even in routine cases."[617] The Ninth Circuit's holding that the CVRA provides regular appellate review of victims' rights claims would be disputed by other Circuits, but was ultimately ratified by Congress in 2015 amendments to the statute.[618] In *Kenna*, the Circuit remanded to the district court for a re-sentencing, during which the victims' right to be heard would be protected.[619]

The Ninth Circuit's expansive interpretation of the CVRA in *Kenna* paved the way for other federal crime victims to assert rights throughout the federal criminal justice process. An example of a successful challenge comes from a 2012 environmental crime case, *United States v. CITGO Petroleum Corp.* There, a jury convicted CITGO of various environmental crimes connected with releasing potentially dangerous pollutants from an oil refinery. As sentencing approached, the district judge declined to find that residents in the surrounding community were "victims" of the crime, concluding that the residents had failed to medically documented physical injuries directly stemming from CITGO's releases. When the residents' counsel argued that other, less serious injuries were sufficient to trigger "victim" status, the district court found that argument untimely. After a reversal by the Fifth Circuit, the district court concluded that such injuries as sore throats,

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[613] *See* United States v. Degenhardt, 405 F.Supp.2d 1341, 1345–49 (D. Utah 2005) (Cassell, J.) (CVRA grants victims a right to speak).

[614] 435 F.3d at 1014 (citing legislative history that the Senate Judiciary Committee "does not intend that the right to be heard be limited to 'written' statements, because the victim may wish to communicate in other appropriate ways").

[615] *Id.* at 1016 (citing Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)). *See generally* Douglas E. Beloof, *Judicial Leadership at Sentencing under the Crime Victims' Rights Act: Judge Kozinski in Kenna and Judge Cassell in Degenhardt*, 19 FED. SENT. RPTR. 36 (2006).

[616] 18 U.S.C. § 3771(d)(3).

[617] 435 F.3d at 1017.

[618] *See* Pub. L. 114-22, title I, § 113(a), 129 Stat. 240 (May 29, 2015), amending 18 U.S.C. § 3771(d)(3) (2015) ("In deciding such applications, the court of appeals shall apply ordinary standards of appellate review."). *See generally* Paul G. Cassell, *Protecting Crime Victims in Federal Appellate Courts: The Need to Broadly Construe the Crime Victims' Rights Act's Mandamus Provision*, 87 DENV. L. REV. 599 (2010).

[619] 435 F.3d at 1017.

nosebleeds, dizziness, and other health complaints, while not life-threatening, were sufficient to trigger "victim" status and, thus, allowed the residents to be heard at sentencing.[620]

A more recent and high-profile example of a successful CVRA challenge is *United States v. Boeing*. There, federal prosecutors filed a conspiracy charge against a U.S. aircraft manufacturer, the Boeing Company, for deceiving the Federal Aviation Administration (FAA) about the safety of one of Boeing's aircraft, the 737 MAX. To resolve the charge, the prosecutors reached a secret (and controversial) deferred prosecution agreement with Boeing. But the prosecutors failed to confer about the agreement with 346 families around the world who had lost loved ones in two crashes of 737 MAX aircraft. The prosecutors claimed that Boeing's conspiracy crime was committed solely against the FAA. But following an evidentiary hearing, the district court rejected that position, finding that Boeing's lies to the FAA directly and proximately led to the two plane crashes, meaning the families represented "crime victims" under the CVRA.[621] In later proceedings, the district court rejected a proposed plea agreement struck between the prosecutors and Boeing.[622] Issues relating to how to resolve the prosecution of Boeing are ongoing as of this writing.

Even after "victim" status has been properly determined, examples of failures to provide victims' CVRA rights exist—along with victims' efforts to enforce their rights. A high-profile illustration is the Jeffrey Epstein case, which involved a sex trafficking conspiracy run by a well-heeled and politically connected financier. When Epstein's sex trafficking was detected by police, his high-powered legal team arranged a guilty plea to a low-level state crime along with a federal non-prosecution agreement (NPA) providing immunity from federal prosecution to him and his co-conspirators. As in the *Boeing* case just discussed, however, the federal prosecutors failed to confer with the victims.[623] While the U.S. Attorney's Office in Florida was negotiating the NPA with Epstein, it kept Epstein's victims in the dark about what was happening. Indeed, the prosecutors' efforts graduated from passive nondisclosure to active misrepresentation.[624]

After the Epstein NPA was made public, the victims challenged it in federal district court in Florida, arguing that the prosecutors had reached the deal in violation of their CVRA right to confer. After years of litigation, the district court agreed with the victims that the CVRA applied pre-charging[625] and later found that the prosecutors had violated the victims' right to confer.[626]

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[620] *See* In re: Allen, 701 F.3d 734 (5th Cir. 2012) (granting mandamus), on remand, United States v. CITGO Petroleum Corp., 893 F.Supp.2d 848, 853–54 (S.D. Tex. 2012). *See generally* Cassell & Morris, *supra* note 12 at 378–79. Disclosure: I represented the victims in this case.

[621] *See* United States v. Boeing, No. 4:21-cr-5-O, 2022 WL 1389875 (N.D. Tex. Oct. 21, 2022); *see also In re* Ryan, 88 F.4th 614 (5th Cir. 2023) (implicitly affirming the "victim" finding of the district court). Disclosure: I represented the victims' families in this case.

[622] *See* United States v. Boeing, No. 4:21-cr-5-0, Dkt. 282 (Dec. 5, 2024) (rejecting proposed plea agreement).

[623] *See* Paul G. Cassell et al., *Circumventing the Crime Victims' Rights Act: A Critical Analysis of the Eleventh Circuit's Decision Upholding Jeffrey Epstein's Secret No-Prosecution Agreement*, 2021 MICH. ST. L. REV. 211. Disclosure: Along with victims' rights attorney Brad Edwards, I represented the victims in this case. *See generally* BRADLEY J. EDWARDS & BRITTANY HENDERSON, RELENTLESS PURSUIT: MY FIGHT FOR THE VICTIMS OF JEFFREY EPSTEIN (2020).

[624] *See id.* at 216-19.

[625] Does v. United States, 817 F. Supp. 2d 1337, 1341 (S.D. Fla. 2011).

[626] Doe 1 v. United States, 359 F. Supp. 3d 1201, 1222 (S.D. Fla. 2019).

This case might be regarded as a successful illustration of CVRA enforcement. But shortly after the parties had filed briefs on the appropriate remedies for the violation of the victims' right to confer in Florida, the FBI arrested Epstein in New York. There, he apparently committed suicide. The Florida district court then dismissed the Florida CVRA case as moot.[627] After the victims sought appellate review concerning their CVRA rights against other potential defendants, the Eleventh Circuit (and later the Eleventh Circuit en banc) affirmed the district court's dismissal. The Circuit held that the victims could not challenge the violation of their rights in a free-standing civil action.[628] Proposed legislation was introduced in Congress to overturn this result.[629]

Another example of an apparent violation of victims' CVRA rights during a case disposition comes from a case involving a defendant's enticement of a minor to engage in sexual activity. After filing an indictment, the Government later moved to dismiss the charges in a one-sentence motion. The district court judge ruled that he would not act on the motion until the Government consulted with the victim on the dismissal and filed a statement of the victim's position regarding the dismissal.[630]

Crime victims have also asserted CVRA rights during the plea bargaining process. In one case, the prosecutor and defendant had reached an agreement under which the defendant would plead guilty to distributing heroin under an agreement that failed to acknowledge that the defendant's crime resulted in the death of a victim. A federal district court judge refused to approve the proposed plea bargain, finding that the prosecutors had violated the victim's family's right to confer under the CVRA.[631]

In another federal case, victims of an explosion at an oil refinery operated by a corporate defendant challenged a plea bargain. The prosecutors and defense counsel had obtained a district court order allowing them to keep the plea deal secret until it was consummated in court. When the victims found out about the deal, they challenged it based on a violation of their CVRA right to confer. On review, the Fifth Circuit agreed that the prosecutors had violated the victims' CVRA rights and sent the case back to the district court for further proceedings.[632]

The CVRA also provides victims with a right to "full and timely restitution as provided in law."[633] This CVRA right incorporates other bodies of federal law, such as the Mandatory Victims' Rights Act and other restitution provisions.[634] Federal decisions involving restitution to victims are legion, including a few appellate actions by victims seeking to enforce their restitution rights[635] along with

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[627] Doe 1 v. United States, 411 F. Supp. 3d 1321, 1325–26 (S.D. Fla. 2019).

[628] *See In re* Wild, 955 F.3d at 1199–1200, aff'd on other grounds, *In re* Wild, 994 F.3d 1244 (11th Cir. 2021) (en banc).

[629] H.R. 4729, Courtney Wild Crime Victims' Rights Reform Act of 2019, 116th Cong. (Oct. 17, 2019). *See generally* Cassell, *supra* note 623 (criticizing the Eleventh Circuit's decision); Jessica Phipps, *Victims' Rights Moving Forward After the Epstein Case*, 22 NEV. L.J. 405 (2021) (same).

[630] *See* United States v. Heaton, 458 F.Supp.2d 1271 (D. Utah 2006) (Cassell, J.).

[631] *See* United States v. Stevens, 239 F.Supp.3d 417 (D. Conn. 2017).

[632] *In re* Dean, 527 F.3d 391 (5th Cir. 2008). Disclosure: I represented the victims in this case.

[633] 18 U.S.C. 3771(a)(6).

[634] 18 U.S.C. § 3663A; *see also, e.g.,* 18 U.S.C. 3663; 18 U.S.C 2259(b).

[635] *See, e.g.,* In re Doe, 57 F.4th 667 (9th Cir. 2023) (granting victims' petition and remand for further restitution proceedings), cert denied sub nom. Alexander v. Doe, 144 S. Ct. 279 (2023); *see also* In re Doe, 50 F.4th 1247

several Supreme Court decisions setting the parameters for restitution awards.[636] Federal crime victims now receive about $1 billion in restitution every year, although this is only about ten percent of the amount of restitution ordered by judges against defendants.[637]

An illustration of victims enforcing a CVRA right to restitution comes from litigation involving restitution for victims of crimes involving child sex abuse materials (CSAM[638]), which ultimately reached the U.S. Supreme Court.[639] Providing restitution to victims of such crimes has proven to be a challenge for courts across the country. CSAM is often widely disseminated via the internet by countless thousands of criminals who have a prurient interest in such materials. Although the victims of these crimes often suffer significant financial losses from the crimes (such as the need for long-term psychological counseling), assigning a particular victim's losses to any one criminal defendant raises complicated allocation issues.

In 2014, the Supreme Court gave its answer on how to resolve this issue in *Paroline v. United States*.[640] Interpreting a restitution statute enacted by Congress, the Court concluded that in a CSAM prosecution, a restitution award from a particular defendant is only appropriate to the extent that it reflects "the defendant's relative role in the causal process that underlies the victim's general losses."[641]

In the ensuing years, lower courts struggled to implement this holding. In 2018, Congress stepped in to try to ensure that victims would receive appropriate restitution. Congress passed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (or AVAA for short).[642] The law provides for a simplified procedure for determining fixed amounts of restitution to go to victims of such crimes. In November 2024, the Justice Department promulgated regulations creating the Defined Monetary Assistance Victims Reserve, which provides for one-time payments to certain victims of CSAM crimes.[643]

In sum, more than four decades after the President's Task Force Report, the plight of victims of the federal criminal justice system has improved. Victims now have enforceable rights in the federal system, as a body of caselaw recognizes

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(9th Cir. 2022) (clarifying CVRA procedures for victim challenges to restitution awards). Disclosure: I served as counsel for the victim in this case.

[636] *See, e.g.,* Hughey v. United States, 495 U.S. 411 (1990); Dolan v. United States, 560 U.S. 605 (2010).

[637] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED, GAO-18-203, at 22 (Feb. 2018); *see also* CONGRESSIONAL RESEARCH SERVICE, RESTITUTION IN FEDERAL CRIMINAL CASES (2019).

[638] CSAM is the more appropriate term for materials that were previously commonly referred to a child "pornography". *See, e.g.,* Eva Langvik et al., *Public Perception of Individuals Who Commit Child Sex Abuse Material Offences: Exploring the Impact of Demographic Variables and Cross-National Differences*, Child Abuse & Neglect (June 26, 2024), https://doi.org/10.1016/j.chiabu.2024.106922.

[639] *See generally* Paul G. Cassell et al., *The Case for Full Restitution for Child Pornography Victims,* 82 GEO. WASH. L. REV. 61 (2014); Paul G Cassell & James R Marsh, *Full Restitution for Child Pornography Victims: The Supreme Court's* Paroline *Decision and the Need for a Congressional Response*, 13 OHIO ST. J. CRIM. L. 5 (2015).

[640] Paroline v. United States, 572 U.S. 434 (2014). Disclosure: I represented the victim, "Amy," in this case.

[641] *Id.* at 458,

[642] *See* Pub. L. 115-299, 132 Stat. 4386 (2018) (amending § 18 U.S.C. § 2259 et seq.), discussed in Paul G. Cassell & James R. Marsh, *The New Amy, Vicky, and Andy Act: A Positive Step Toward Full Restitution for Child Pornography Victims*, 31 FED. SENT. RPTR. 187 (2019).

[643] *See* 18 U.S.C. § 2259; https://www.justice.gov/dmavr [https://perma.cc/Z39R-J43H].

those rights. But challenges remain, particularly in securing legal counsel. When seeking restitution, victims can sometimes retain legal counsel through contingency fees or other fee-based arrangements. But for issues involving enforcement of rights apart from restitution, victims must generally find pro bono legal counsel, who are few and far between. This problem of securing legal counsel also exists in the states.[644]

E. Recent State Developments and the Cultural Acceptance of Victims' Rights

The narrative now returns to the story of victims' rights over the last several decades in the states. After the federal CVRA was enacted in 2004, victims' advocates began to look at how to improve state enactments. As with federal enactments, a primary concern was the enforcement of victims' rights. Modern victims' rights enactments known as "Marsy's Law" were part of the story. But, more broadly, another part was the widespread cultural acceptance of victims' rights. By 2025, the victims' rights movement had made progress in the states, but more remained to be done—particularly in connection with providing legal services for victims.

1. Marsy's Law

With the CVRA in place for improving victims' rights in federal courts, victims' advocates began to focus on enhancing state laws and state constitutional amendments. Professor Douglas Beloof's 2005 article, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, was an important development.[645] Beloof was a victims' rights advocate and law professor at Lewis and Clark Law School, where he wrote articles about crime victims as well as a law school casebook on crime victims' rights.[646] He was also the founder of the National Crime Victim Law Institute (NCVLI). In 1997, Beloof conceived NCVLI to serve as a national resource for crime victims and their lawyers in asserting victims' rights.[647] In 1998, NCVLI received its first (bipartisan) congressional appropriation. In the decades since, under Beloof's leadership (and, later, that of Margaret Garvin), NCVLI has provided technical support to pro bono victims legal clinics and victims lawyers advancing victims' rights.[648]

The federal CVRA not only improved federal rights enforcement but also funded legal representation of crime victims in the states.[649] With this federal funding, NCVLI helped to create a network of clinics around the country to provide pro bono representation for crime victims asserting their rights. Sadly, in around 2011, funding for clinics diminished, leading to the closure of six clinics—

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[644] *See infra* notes 916–29 and accompanying text.

[645] Beloof, *Third Wave*, *supra* note 486.

[646] *See, e.g.*, Beloof, *Third Model*, *supra* note 486; DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE (1st ed. 1999). The casebook has been updated periodically and is currently in its fifth edition. *See* BELOOF, CASSELL et al., *supra* note 23.

[647] NCVLI, NCVLI and the Victims' Rights Movement (visited Dec. 22, 2024), available at https://ncvli.org/history-strategy/ [https://perma.cc/HG4E-B5YM].

[648] *Id.*; *see also* ROBERT C. DAVIS ET AL, SECURING RIGHTS FOR VICTIMS: A PROCESS EVALUATION OF THE NATIONAL CRIME VICTIM LAW INSTITUTE'S VICTIMS' RIGHTS CLINICS (2009).

[649] *See* Cassell, *Clause-by-Cause Analysis*, *supra* note 530, at 311–12.

with clinics remaining open in Colorado, Maryland, New Jersey, Arizona, Utah, and Oregon.[650] In the years since, federal funding (and related state funding) for clinics has been variable. NCVLI was recently working with about nine clinics through its RISE Project—Rights in Systems Enforced—although funding ended last year.[651] Clearly one goal of the CVRA—to develop a full network of clinics supporting crime victims' rights—has yet to be achieved.

Because Beloof was at the center of directing NCVLI efforts on rights enforcement, he was well-positioned to critique the landscape surrounding victims' rights in the states. In his 2005 article, Beloof described two previous waves of victims' rights: the early 1980s efforts to pass state statutory victims' rights and the follow-on efforts to pass state constitutional victims' rights amendments.[652] Beloof argued that, while these efforts had established impressive beachheads for victims' rights, all too often these efforts failed to create "real" rights.[653] Because of limitations on standing, remedy, and review, victims frequently were unable to enforce their rights. Beloof contended that it was time for the victims' rights movement to "advance from its beachheads" and "move inland."[654]

Beloof catalogued various examples of victims being unable to protect their rights in criminal processes. For example, in *Bandoni v. State* in 1998, the Rhode Island Supreme Court held that a victim who had been denied an opportunity to speak at a defendant's sentencing lacked any remedy to enforce her state constitutional right to be heard. As the court saw things, the Rhode Island victims' amendment was not self-enabling, and the Rhode Island legislature had failed to provide an enforcement mechanism.[655] As another example, in 2002 in *Ford v. State*, a victim in Florida sought to vacate a plea and restitution order that a trial court had entered in violation of the victim's right to be present and heard. The Florida Fourth District Court of Appeals, while allowing correction of the restitution order, refused to reopen the plea agreement, hinting at (doubtful) double jeopardy concerns.[656] As a final example, in *Ex Parte Littlefield*, in 2000, the South Carolina Supreme Court held that once a criminal case was resolved, an alleged victim lost her status under the South Carolina Bill of Rights to re-open the case, even to challenge a violation of victims' rights.[657] Professor Beloof cited many other examples of victims unsuccessfully attempting to asserting their rights in court.[658] The failures were so disquieting that Beloof called for a "third wave" of

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[650] *Id.* at 312.

[651] Rights in Systems Enforced (RISE) Project, NCVLI, https://ncvli.org/what-we-do/rise-rights-enforcement-clinics/ [https://perma.cc/X6MW-S7PJ] (visited Dec. 24, 2024); Email from Meg Garvin to author (Dec. 30, 2024).

[652] *See supra* notes 483–530 and accompanying text.

[653] Beloof, *Third Model*, *supra* note 486, at 258.

[654] *Id.*

[655] *Id.* at 291–95 (critiquing Bandoni v. State, 715 A.2d 580 (R.I. 1998)).

[656] *Id.* at 307–07 (critiquing Ford v. State, 829 So.2d 946 (Fla. Dist. Ct. App. 2002)). The court hinted that double jeopardy prohibitions attached when the defendant pled guilty, but the authority it cited allowed a plea to be set aside for "legal cause." 829 So.2d at 948 (citing Pettis v. State, 803 So.2d 903 (Fla. 1st DCA 2002). Rectifying a violation of state constitutional rights would appear to be "legal cause," an issue the court did not address.

[657] Beloof, *Third Model*, *supra* note 486, at 315–16 (critiquing *Ex Parte* Littlefield, 540 S.E.2d 81 (S.C. 2000)).

[658] *See id.* at 273–326.

victims' rights—enactments that provided standing, meaningful remedies, and appellate review.[659]

The new "third wave" of victims' rights enactments began to materialize in 2008 in California. Twenty-six years earlier, in 1984, California had been the first state to enact a "victims' rights" amendment—although many of the provisions had targeted crime control issues rather than victims' procedural interests.[660] California, the nation's most populous state, was ripe for a new amendment incorporating modern victims' rights language, along with corresponding standing and enforcement provisions. The effort came in the form of a citizen's initiative known as "Marsy's Law for California."

The namesake for this effort was Marsy Nicholas, a 21-year-old senior at the University of California, Santa Barbara. She was home for the Thanksgiving holiday in 1983 when she was stalked and killed by an ex-boyfriend. One week later, as her family returned from Marsy's funeral services, they stopped at the neighborhood market, where Marsy's mother, Marcella, was confronted by her daughter's murderer inside the store. The family had not received notification that he had been released on bail days after the murder. It was the first of many instances where the criminal justice system served to escalate the pain and trauma of Marsy's family.[661]

Like many other surviving families unexpectedly thrown into the criminal justice system, Marsy's family suffered from a lack of communication about the case. Through Marsy's brother, Dr. Henry T. Nicolas, this tragedy gave birth to the Marsy's Law initiative—Proposition 9, the California Victims' Bill of Rights Act of 2008.[662] The initiative sought to enshrine substantive and enforceable victims' rights in the California Constitution.[663] When voters approved the initiative in November 2008, it became the nation's most comprehensive constitutional victims' rights enactment.[664]

California's Marsy's Law[665] contains language calling for a victim's right to justice along with a list of seventeen enumerated rights for victims, which are worth recounting because they set out the main issues that the modern victims' rights movement seeks to address. Specifically, the initiative created victims' rights: (1) to be treated with fairness, (2) to be reasonably protected from the accused, (3) to have the safety of the victim considered when a court considers release conditions for a defendant, (4) to prevent the release of confidential

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[659] *Id.* at 337–48.

[660] *See supra* notes 487–89 and accompanying text.

[661] *See* "About Marsy's Law," available at https://www.marsyslaw.us/about-marsys-law [https://perma.cc/PK4M-HDV7].

[662] Nicholas was the successful co-founder of Broadcom Corporation and has funded Marsy's Law efforts in California and elsewhere to honor his sister and secure victims' rights throughout the country. *See* Frank Mickadeit, *On Victims' Day, Henry Nicholas Recalls Sister*, Orange County Reg. (Apr. 20, 2010), available at https://archive.ph/20120710173629/http://articles.ocregister.com/2010-04-20/crime/24635277_1_henry-nicholas-murder-victim-marsy-s-law [https://perma.cc/T5WU-LX6D].

[663] Disclosure: I served as a (pro bono) advisor to advocates for Marsy's Law for California and continue to serve as an unpaid policy advisor for Marsy's Law for All.

[664] *See generally* Geoffrey Sant, *"Victimless Crime" Takes on a New Meaning: Did California's Victims' Rights Amendment Eliminate the Right to be Recognized as a Victim?*, 39 J. LEG. 43 (2013).

[665] Speaking precisely, in legal terminology a state constitutional amendment should not be referred to as a "law." But the common usage appears to be "California Marsy's Law." *See, e.g.*, Michael L. Fell & Elizabeth N. Jones, *Understanding Utilizing Marsy's Law*, 55 ORANGE CTY. LAWYER 24 (Nov. 2013).

information, (5) to refuse an interview by the defendant, (6) to confer with the prosecutor, (7) to receive notice of court and parole proceedings, (8) to be heard at important proceedings (involving bail, plea, sentence, and parole), (9) to receive a speedy trial, (10) to provide information for a pre-sentence report, (11) to review the pre-sentence report, (12) to be informed of the release or escape of a defendant, (13) to receive restitution, (14) to have property promptly returned that is no longer needed as evidence, (15) to be informed of parole procedures, (16) to have the safety of the victim considered in parole hearings, and (17) to be informed of these rights.[666] Today, law enforcement agencies throughout California leave a Marsy's Law card with victims, informing them of their rights early in the criminal process.[667]

Along with its extensive list of rights, California's Marsy's Law also added mechanisms to protect those rights. Specifically, victims were given the power to "enforce" the rights in the amendment "in any trial or appellate court with jurisdiction over the case as a matter of right."[668] Under this amendment, victims have successfully protected their rights in California criminal processes.[669] But in a 2012 report, victims' rights leaders noted the need for a statewide strategic plan to address all aspects of victims' rights and services.[670] In particular, the leaders were concerned about the lack of clarity in California's Marsy's Law, the need for improved funding and training surrounding victims' rights, and the need for victims' rights attorneys. The report noted that "[m]any victims may not be able to retain a private attorney to assist in asserting his or her Marsy's rights, and there are currently very few sources of this type of pro bono legal assistance available."[671]

After success in expanding victims' rights in California, a newly created organization—Marsy's Law for All—set out to provide meaningful and enforceable victims' rights in all other states and, ultimately, to amend the federal Constitution to enshrine victims' rights.[672] In the minority of states without constitutional amendments, this meant elevating victims' rights to constitutional status on par with those of criminal defendants. Constitutional protection would ensure that victims' rights could not be easily ignored by judges or other actors in the criminal justice system. For the majority of states with constitutional amendments, this meant improving, where necessary, victims' rights enforcement mechanisms.[673] In other words, Marsy's Law for All would campaign for "equal

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[666] Cal. Const. art. I, § 28(b).

[667] An exemplar Marsy's Law card, prepared by then-California Attorney General Kamala Harris, is reproduced in Appendix A.

[668] Cal. Const. art. I, § 28(c)(1).

[669] *See, e.g.*, People v. Plains All American Pipeline, L.P., 101 Cal.App.5th 872 (Cal. App. 2024) (remanding for further determination of restitution and holding that right to be heard at sentencing requires a right to orally address the court); Crump v. Superior Court of L.A. Cty., 37 Cal.App.5th 222 (Cal. App. 2019) (granting petition by victim, in part, to allow victim to pursue additional restitution claims in the trial court). *Cf.* People v. Harris, 105 Cal.App.5th 623 (Cal. App. 2024) (affirming trial court decision to reconsider a sentence imposed without proper notice to victim).

[670] *See* Heather Warnken, Real Justice: Victims' Rights Delivered: Report and Recommendations July 2012) (summarizing recommendations that emerged from a statewide conference on Marsy's law), https://www.courts.ca.gov/documents/BTB_XXII_IIIE_4.pdf [https://perma.cc/T8V6-MAXS].

[671] *Id.* at 13.

[672] *See generally* "About Marsy's Law", *supra* note 661.

[673] *See generally* "Marsy's Law", https://www.marsyslaw.us/ [https://perma.cc/H8XX-JTAH].

rights" for victims—"nothing less, nothing more."[674] Working through local grassroots organizations, Marsy's Law for All brought life to the crime victims' rights movement in specific states, by providing education, legal expertise, and funding for political action in pursuing state constitutional protection for victims' rights, all with an eye to the ultimate goal of enacting a federal constitutional amendment.[675]

In 2014, Marsy's Law for Illinois successfully campaigned for an amendment designed to strengthen Illinois' previously adopted state constitutional victims' rights amendment from 1992.[676] The new amendment was approved by seventy-eight percent of voters and expanded Illinois' earlier list of victims' rights by adding a new right to be "free from harassment, intimidation, and abuse" throughout the criminal justice process. The amendment also gave victims the right to be heard when their rights were at stake or when victim-related information might be released, and to have the safety of the victim considered whenever a court decided whether to release a defendant. Perhaps most important, the amendment also added specific language providing that the "victim has standing to assert the rights enumerated" in the constitutional amendment "in any court exercising jurisdiction over the case."[677]

In the next election cycle—2016—Marsy's Law for All went to the northern plains, successfully advocating for Marsy's Law amendments in North Dakota, South Dakota, and Montana. While the Montana amendment was later struck down on dubious procedural grounds,[678] the amendments adopted in both the Dakotas (by fifty-four percent and sixty percent approvals, respectively) contained lengthy enumeration of rights along with specific enforcement language.[679]

In November 2017, Ohio voters approved their state's version of Marsy's Law, with more than eighty-two percent of voters in favor.[680] Ohio's list of rights was somewhat shorter than other amendments, but still impressive. The list included a broad right to be "treated with fairness and respect for the victim's safety, dignity, and privacy," as well as rights to be heard, to be reasonably protected from the accused, to receive notice of a defendant's release or escape, to

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[674] *Id.*

[675] *See* "What is the difference between Marsy's Law and previous national crime victims' acts?" https://www.marsyslaw.us/faqs# [https://perma.cc/J437-D3BF].

[676] Ill. Const. art. 8.1(a) (2014). The specific amendments are available at https://ballotpedia.org/Illinois_Marsy%27s_Law_Crime_Victims%27_Bill_of_Rights_Amendment_(2014) [https://perma.cc/9GLM-E6AU].

[677] Ill. Const. art. 8.1(b); *see* Lawrence Schlam, *Enforcing Victims' Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VAL. U. J. L. REV. 597 (2015).

[678] After two-thirds of Montana's voters had approved a Marsy's Law initiative in the 2016 election, in 2017, the Montana Supreme Court held that packaging the victims' rights provisions together violated the "separate vote" requirement of the Montana Constitution. Mont. Const. art. 14, § 11 ("If more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.") According to the majority, the initiative contained multiple provisions that were "both substantive and not closely related." Montana Asso. of Counties v. State by and through Fox, 404 P.3d 733, 747 (Mont. 2017). But for the dissenters, the Court applied a "deeply flawed test for application of the submission requirement of Article XIV, Section 11, of the Montana Constitution, which is not rooted in the text of the Constitution. The effect of this decision may be to significantly undermine, if not eliminate, the right of Montanans to amend the Constitution by initiative." *Id.* at 748 (Rice, J., dissenting)

[679] N.D. Const. art. I, § 25 (20160; S.D. Const. art. VI, § 29.

[680] Ohio Const. § 10a.

refuse a defendant's interview request, to obtain full and timely restitution, to have proceeding free from unreasonable delay, to confer with the prosecutor, and to be informed of the rights in the amendment.[681] The Ohio amendment also contained specific enforcement language.[682]

In 2018, an Oklahoma Marsy's Law passed by with seventy-eight percent approval, with a long list of rights and specific enforcement language.[683] It updated a previously adopted amendment from 1996. The same year, Nevada updated its 1996 amendment with a Marsy's Law. The new amendment also created a long list of rights and added enforcement language.[684]

In 2018, Kentucky's voters also approved a Marsy's Law. But a few months later, the Kentucky Supreme Court struck down the enactment on a technicality, concluding that the Secretary of State had not "strictly complied" with a requirement to publish the amendment's entire text ninety days in advance of the election.[685] In 2020, the Kentucky General Assembly (again) proposed a Marsy's Law to the Kentucky voters, and the voters (again) approved the amendment[686]—with more than sixty-two percent of voters voting yes. This time, the Kentucky Supreme Court rejected challenges to the procedures used to adopt the amendment.[687]

In 2018, Marsy's Law went to Florida, where a state constitutional revision commission convenes every twenty years to consider updating the state's constitution.[688] The commission recommended a new Marsy's Law amendment to modernize Florida's earlier victims' rights amendment from 1988. The new Florida amendment, with a lengthy list of rights and specific enforcement language, cleared the super-majority (sixty percent) approval requirement in the 2018 election.[689] In the same year, versions of Marsy's Law were adopted in Georgia (the first victim's rights amendment for the state) and North Carolina (updating a 1996 amendment).[690]

In the summer of 2019, the Pennsylvania Legislature set a proposed Marsy's Law for a statewide referendum on the November 2019 ballot.[691] However, a week before the election, a judge ruled that the ballot question violated the requirement that separate amendments receive separate votes and granted a preliminary injunction preventing formally counting the votes. In the election, nearly three-fourths of voters (seventy-four percent) approved the amendment. But in January 2021, the Pennsylvania Commonwealth Court, in a 3-2 decision,

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[681] Ohio Const. § 10a(A).

[682] Ohio Const. § 10a(B). Interestingly, Ohio's judiciary has promulgated an informative bench book for judges on how to implement Ohio's Marsy's Law. *See* Ohio Supreme Court, Understanding Marsy's Law: Judicial Guide to Protecting the Rights of Crime Victims (2024), https://www.supremecourt.ohio.gov/docs/JCS/courtSvcs/MarsysLaw/Toolkit.pdf [https://perma.cc/4X73-4H44].

[683] Okla. Const. art. II, § 34.

[684] Nev. Const. § 23.1.

[685] *See* Westerfield v. Ward, 599 S.W.3d 738 (Ky. 2019) (concluding that while the question presented to the voters on the ballot may have presented the amendment's substance it did not provide the amendment's full text).

[686] Ky. Const. § 26A.

[687] Ward v. Westerfield, 653 S.W.3d 48 (Ky. 2022).

[688] *See* Cassell & Garvin, *Marsy's Law*, *supra* note 375.

[689] Fla. Const. art. I, § 16(b). *See generally* Cassell & Garvin, *Marsy's Law*, *supra* note 375.

[690] Ga. Const. art. I, § 1, ¶ XXXX; N.C. Const. art. I, § 37.

[691] *See* League of Women Voters of Penn. v. Boockvar, 247 A.3d 1183 (Pa. 2021).

blocked the election results from being counted pending further legal proceedings. On December 21, 2021, the Pennsylvania Supreme Court ruled 6-1 that the amendment violated Pennsylvania's Constitution's requirement that amendments address a single subject.[692]

In 2020, Wisconsin joined the ranks of the Marsy's Law states, with an amendment approved by seventy-five percent of the voters. The amendment contained a long list of rights[693] and also declared it was "self-executing."[694] The Wisconsin Supreme Court upheld the amendment (6-1) against a procedural challenge.[695]

The most recent Marsy's Law efforts are ongoing in Arkansas and Tennessee. As of this writing, a victims' rights amendment is pending in the Arkansas Legislature.[696] And in Tennessee, in 2023, a Marsy's Law was approved by Tennessee Legislature for the first time. For a constitutional amendment to be placed on the ballot in Tennessee, it must be passed in two legislative sessions. The Marsy's Law proposal now awaits a second legislative approval to be placed on the 2026 ballot.[697]

In sum, from 2008 to today, Marsy's Law for All efforts have succeeded in placing modern and enforceable crime victims' rights into the state constitutions of twelve states (California, Illinois, North Dakota, South Dakota, Ohio, Oklahoma, Nevada, Kentucky, Florida, Georgia, North Carolina, and Wisconsin).[698] Because these include some of the nation's most populous states, one in three Americans now lives in a state with Marsy's Law protections. Marsy's Law has created model language for state constitutional amendments,[699] which will likely serve as the template for future victims' rights enactments. Of course, in some other states, effective and enforceable victims' rights enactments already exist.[700] Thus, while a "third wave" of victims' rights does not yet cover the entire country, the tide is rising.[701]

2. The Cultural Acceptance of Victims' Rights

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[692] League of Women Voters v. Degraffenreid, 265 A.3d 207 (Pa. 2021). Justice Mundy dissented on the grounds that the "changes in the proposed amendment are specifically and narrowly tailored to fulfill the singular common objective of establishing for victims of crime justice and due process in the criminal and juvenile justice systems, and do not substantively change any other existing provisions of the Constitution." *Id.* at 242 (Mundy, J., dissenting).

[693] Wis. Const. art. I, § 9m(2).

[694] Wis. Const. art. I, §9m(3) & (4).

[695] Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n, 2023 WI 38, ¶ 7, 990 N.W.2d 122, 127 (Wis. 2023).

[696] H.J. Res. 1009, 95th Gen. Assembly (Ark. Reg. Sess. 2025).

[697] *See* "State Victims' Rights Amendments: Tennessee," https://www.nvcap.org/states/tennessee.htm [https://perma.cc/XMP3-Z9MZ].

[698] As noted above, in two other states (Montana and Pennsylvania) the voters have approved of Marsy's Law rights, only to see their decision overturned by the courts. Specific Marsy's Law efforts are proceeding in two states (Arkansas and Tennessee).

[699] *See* Appendix B.

[700] *See, e.g.,* Ariz. Const. art. II, § 2.1.

[701] *See* Paul G. Cassell, *The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1,2 (2015) ("The last decade has witnessed a third wave of victims' rights reform.").

While the victims' rights movement succeeded in enacting many enforceable victims' rights laws, perhaps even more important was its success in changing the culture. In the last several decades, the public has come to generally accept victims' rights. Today, as a criminal case moves forward, the public expects that victims will participate in the process. The often-overlooked current cultural acceptance of victims' rights can be illustrated with two examples: victim impact statements and restitution.

The victims' rights movement has successfully enshrined in the nation's criminal justice system a crime victim's right at sentencing to give a "victim impact statement." These statements have been discussed at several points in this history of the movement.[702] But it will be useful to step back to fully appreciate the remarkable progress of victim impact statements from an innovation in the 1970s to a criminal justice fixture today.

Victim impact statements (VIS) appear to have been first developed in 1976 by the probation office in Fresno County, California. This early version provided only "an objective inventory of victim injuries and losses."[703] From there, the President's Task Force propelled VISs onto the national stage. The Task Force concluded that "[v]ictims, no less than defendants, are entitled to have their views considered" during sentencing.[704] The Task Force called for legislation requiring VISs at sentencing,[705] with such statements containing information "concerning all financial, social, psychological, and medical effects [of the crime] on the crime victim."[706] In a VIS, a crime victim (or, in a homicide case, a victim's representative) would, as the term suggests, describe the crime's impact. Thus, a victim could go beyond merely recounting the immediately apparent aftereffects of a crime and explain all the physical, psychological, financial, and other harms ultimately suffered.[707] For example, a sexual assault victim might describe the ways in which the crime has changed her outlook on life, her approach to intimacy, or her daily activities.[708]

VISs have become part of America's criminal justice architecture, at both the federal and state levels. In the federal system, the CVRA specifically provides for a victim's right "to be heard" at sentencing.[709] In the various state systems, as of 1981 (shortly before the President's Task Force), only eight states required a victim impact statement at sentencing and only three states allowed victim

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[702] *See, e.g., supra* notes 457–82 and accompanying text.

[703] 153 Cong. Rec. E2227 (daily ed. Oct. 24, 2007) (statement of Rep. Jim Costa). *See* BELOOF, CASSELL, ET AL., *supra* note 23, at 733–34 (recounting origins of the victim impact statements).

[704] *Id.* at 76.

[705] *Id.* at 33, 77.

[706] *Id.* at 33.

[707] Chadley James, *Victim Impact Statements*, *in* THE CRIMINAL JUSTICE SYSTEM 825–26 (Michael K. Hooper & Ruth E. Masters eds., 2d ed. 2017); *see also* Chadley James, *Victim Impact Statements: Understanding and Improving Their Use*, *in* ROUTLEDGE HANDBOOK ON VICTIMS' ISSUES IN CRIMINAL JUSTICE 189 (Cliff Roberson ed., 2017).

[708] *See* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 877–906 (analyzing 150 victim impact statements delivered at Larry Nassar's sentencing for sex abuse); RHIANNON DAVIES & LORANA BARTELS, THE USE OF VICTIM IMPACT STATEMENTS IN SENTENCING FOR SEXUAL OFFENCES: STORIES OF STRENGTH 27–32 (2021); MARY ILIADIS, ADVERSARIAL JUSTICE AND VICTIMS' RIGHTS: RECONCEPTUALISING THE ROLE OF SEXUAL ASSAULT VICTIMS 48–50 (2020).

[709] 18 U.S.C. § 3771(a)(4).

allocution at sentencing.[710] Today it appears that every state extends to victims a statutory or constitutional right to be heard at sentencing.[711]

But not only did the victims' rights movement change the formal legal landscape at sentencing; it also transformed the general understanding about how criminal sentencings should proceed. The public now regards VISs as an important part of the fair administration of criminal justice.

Multiple illustrations could be provided to prove the general approval of victim impact statements. A prime illustration comes from Chanel Miller's victim impact statement in the Stanford swimmer sexual assault case. As is widely known, following a fraternity party at Stanford University, Brock Turner sexually assaulted Miller while she was unconscious. Two graduate students were cycling on the campus and saw the assault. They attended to Miller and detained Turner for police.[712]

At the resulting criminal trial, Turner alleged that Miller had consented to sex. Unsurprisingly, a jury found him guilty of three felonies, including assault with intent to rape an intoxicated woman.[713] At sentencing on June 3, 2016, Miller delivered an oral VIS, asking the judge for a tough sentence. Nonetheless, the judge imposed a lenient sentence. (The judge was later recalled from office as a result.[714])

The next day, *BuzzFeed* published Miller's 7,137-word-long victim impact statement. The statement powerfully described the aftermath of the brutal crime and its continuing harm to Miller.[715] Driven by widespread sharing on social media, the statement quickly went "viral," ultimately being read by more than eleven million people in four days.[716] A week-and-a-half later, a bipartisan group of eighteen members of the House of Representatives took turns reading the impact statement on the House floor.[717]

Then-Vice President Joe Biden also wrote to Miller (then known pseudonymously as "Emily Doe") to commend her for her statement. Vice President Biden wrote: "I do not know your name—but your words are forever

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[710] FOUR YEARS LATER, *supra* note 442, at 4.

[711] *See* Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CANADIAN CRIM. L. REV. 149, 175–96 (2011) (fifty-state survey of laws relating to victim impact statements); TOBOLOWSKY ET AL., *supra* note 316, at 102 ("Every state has statutory provisions authorizing some type of crime victim right to be heard by the court regarding sentencing either orally or in writing"). Tobolowsky et al. cited one state as restricting victims to a written submission at sentence: Kentucky. *Id.* at 102 n.20. But recently, Kentucky passed a Marsy's Law amendment extending victims a right to be heard at sentencing. *See supra* notes 685–87 and accompanying text.

[712] *See generally* AMOS N. GUIORA, THE CRIME OF COMPLICITY: THE BYSTANDER IN THE HOLOCAUST 183-88 (2017).

[713] *See* Hannah Knowles, *Brock Turner found guilty on three felony counts,* The Stanford Daily (Mar. 30, 2016), https://stanforddaily.com/2016/03/30/brock-turner-found-guilty-on-three-felony-counts/ [https://perma.cc/GZP8-JVHH].

[714] *See* Michael Vitiello, *Brock Turner: Sorting Through the Noise*, 49 U. PAC. L. REV. 631, 659 (2018) (noting and critiquing the judicial recall).

[715] *See id.* at 646 (conceding that "[o]ne cannot read the victim's statement without pain and a good bit of empathy for her").

[716] *Stanford Sexual Assault: Chanel Miller Reveals Her Identity*, BBC (Sept. 4, 2019), https://www.bbc.com/news/world-us-canada-49583310 [https://perma.cc/CDE9-5VET].

[717] *See* 162 Cong. Rec. H3905-09 (June 15, 2016). *See* Jasmine Aguilera, *House Members United to Read Stanford Rape Victim's Letter*, N.Y. Times (June 16, 2016), https://www.nytimes.com/2016/06/17/us/politics/congress-stanford-letter.html [https://perma.cc/GN9G-GJAG].

seared on my soul. Words that should be required reading for men and women of all ages."[718] Biden went on to write that "[i]t must have been wrenching — to relive what he did to you all over again. But you did it anyway, in the hope that your strength might prevent this crime from happening to someone else. Your bravery is breathtaking."[719] Biden concluded that the distribution of the Miller's statement was a positive development: "[I]f everyone who shared your letter on social media, or who had a private conversation in their own homes with their daughters and sons, draws upon the passion, the outrage, and the commitment they feel right now the next time there is a choice between intervening and walking away—then I believe you will have helped to change the word for the better."[720]

Miller wrote a bestselling book—*Know My Name: A Memoir*[721]—which drew further attention to her statement. Stanford University later installed a plaque on campus with a passage from the impact statement on it.[722]

The point in recounting the wide distribution of Miller's victim impact statement is to show how accepted such statements have become. It is difficult to find anyone beyond a couple of skeptical academics who questioned giving Miller the opportunity to speak at sentencing.[723] Outside the academy, millions of people seem to have recognized the statement as a proper part of a criminal proceeding.

Another prime illustration of the acceptance of VISs comes from the January 2018 sentencing of former USA Gymnastics team doctor, Larry Nassar. The nation was riveted as Judge Rosemarie Aquilina allowed 168 direct and indirect victims of Nassar's sexual abuse to deliver victim impact statements.[724] The proceedings were nationally televised, to what appears to have been widespread public endorsement of the victims' opportunity to speak.[725]

Miller's and Nassar victims' statements were also noteworthy as an outgrowth of an important social movement involving crime victims, the #MeToo Movement.[726] This is not to claim that #MeToo should be regarded as part of the

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[718] Travis M. Andrews, *"I am filled with furious anger": Biden writes letter to Stanford sexual assault victim*, Wash. Post (June 10, 2016), https://archive.ph/20231003231929/https://www.washingtonpost.com/news/morning-mix/wp/2016/06/10/i-am-filled-with-furious-anger-vice-president-biden-writes-letter-to-stanford-sexual-assault-victim/ [https://perma.cc/GAU2-C7GZ].

[719] *Id.*

[720] *Id.*

[721] CHANEL MILLER, KNOW MY NAME: A MEMOIR (2019).

[722] Elena Kadany, *Facing public pressure, Stanford decides to install plaque with Chanel Miller's words*, Palo Alto Online (Nov. 12, 2019), https://www.paloaltoonline.com/news/2019/11/12/facing-public-pressure-stanford-decides-to-install-plaque-with-chanel-millers-words/ [https://perma.cc/S6XB-Q2RM].

[723] *See* VITIELLO, *supra* note 4, at 43–47 (questioning whether Miller benefitted from delivering the statement); Susan A. Bandes, *What are Victim Impact Statements for?*, 87 BROOK. L. REV. 1253, 1268 (2022) (same). *But see* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 930–32 (responding that Miller herself concluded that delivering the statement was a positive experience).

[724] Cassell & Erez, *Victim Impact Statements, supra* note 8, at 872–75.

[725] *See, e.g.*, NPR Podcast: Believed, Larry Nassar's Survivors Speak, and Finally The World Listens – and Believes ((Dec. 10, 2018); Tracy Connor, *"Army of Women" Fights Gymnastics Doctor Larry Nassar with Words*, NBC News (Jan. 24, 2018), available at https://www.nbcnews.com/news/us-news/army-women-fights-gymnastics-doctor-larry-nassar-words-n840481 [https://perma.cc/8DC7-J4VR].

[726] *See* Béatrice Coscas-Williams et al., Victims' Participation in an Era of Multi-Door Criminal Justice, 56 Conn. L. Rev. 415-5 (2024) (citing Jamie R. Abrams & Amanda Potts, *The Language of Harm: What the Nassar Victim Impact Statements Reveal About Abuse and Accountability,* 82 U. PITT. L. REV. 71, 75 (2020)); Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice,* 2019 U. ILL. L. REV. 45, 49–50.

crime victims' rights movement, although as "survivor-led movement against sexual violence"[727] it certainly has direct connection to crime victims. Rather, the point here is that #MeToo victims could use the victim-impact-statement platform created by the victims' rights movement to raise awareness of sexual abuse. Miller, for example, drew worldwide attention to the plight of sexual assault survivors in criminal justice proceedings. And the Nassar victims were able to not only address Judge Acquilina and Nassar inside the courtroom but also other institutions that had enabled the abuse (e.g., USA Gymnastics and Michigan State University).[728] In other words, a marginalized community—women and girls who suffered sexual abuse a the hands of a high-status doctor—could make their voices heard.[729]

Another illustration of the public's acceptance of victim impact statements comes from the sentencing of police officer Derek Chauvin for murdering George Floyd. There, Terrence Floyd (the brother of George Floyd) asked for the maximum possible sentence. Terrence Floyd said, "My family has been given a life sentence. We will never be able to get George back."[730] George Floyd's seven-year-old daughter, Gianna, also gave a heartbreaking statement, which was presented to the judge by video: "I ask about him all the time. I was asking, 'How did my dad get hurt.' I want to play with him, have fun, go to the playground."[731] Here again, it is hard to find any suggestion that the public thought that allowing Floyd's family an opportunity to provide victim impact statements was somehow unfair or improper.[732] Even prisoners in various prisons watched the victim impact statements, seemingly without seeing anything unusual about the process.[733]

Yet another example of a victim impact statement involving a police crime comes from Chicago, where former Chicago police officer Jason Van Dyke was sentenced to prison for the second-degree murder of African American teen Laquan McDonald. Reverend Marvin Hunter (McDonald's great uncle) gave a

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[727] https://metoomvmt.org/ [https://perma.cc/Q62S-R7UW]. *Cf.* Aya Gruber, *A Tale of Two Me Toos*, 2023 U. ILL. L. REV. 1675 (2023) (critiquing #MeToo's "tough-on-crime discourses").

[728] *See* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 898-900. *See generally* AMOS N. GUIORA, ARMIES OF ENABLERS (2020).

[729] Interestingly, some information suggests that women are more likely to make victim impact statement than men. *See* Edna Erez, Peter R. Ibarra & Daniel M. Downs, *Victim Participation Reforms in the United States and Victim Welfare: A Therapeutic Jurisprudence Perspective*, *in* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 15, 27 (Edna Erez et al. eds. 2011) (finding that most professionals surveyed agree that women . . . are more likely to verbalize and submit a VIS" than men); Jeanna M. Mastrocinque, *Victim Personal Statements: An Analysis of Notification and Utilization*, 14 CRIMINOLOGY & CRIM. JUST. 216, 226 (2014) (finding the odds of women providing a victim impact statement in Britain, referred to as a victim personal statement, were eighty percent higher for female victims than male; Asian victims were also more likely to provide a statement).

[730] *Floyd's Brother: "My Family Has Been Given a Life Sentence,"* Associated Press (June 25, 2021), https://apnews.com/article/george-floyd-family-victim-impact-statements-86ee0a97ead87c40b7d804b323dd97e6 [https://perma.cc/WTG6-GQRZ].

[731] Associated Press, *"Miss You." Floyd's Daughter Speaks at Chauvin's Sentencing*, Associated Press (June 25, 2021), https://apnews.com/article/george-floyd-daughter-chauvin-trial-3ce9f49b88805a21cd9673cae2497d8c [https://perma.cc/M2LS-9CMJ].

[732] *See* Jay Croft, *George Floyd's Daughter, Other Family Members Speak at Chauvin's Sentencing*, CNN (June 25, 2021) (routinely recounting that "George Floyd's family spoke in a Minnesota court Friday during the sentencing hearing for his killer"), available at https://www.cnn.com/2021/06/25/us/derek-chauvin-george-floyd-sentencing-statements/index.html [https://perma.cc/7WTZ-LDLM].

[733] *See, e.g.*, Candie Scott et al., *Roundup: Views on Derek Chauvin Sentencing From Women in Prison*, Prison Journalism Project (June 28, 2021), https://prisonjournalismproject.org/2021/06/28/views-on-derek-chauvin-sentencing-from-women-in-prison/ [https://perma.cc/49FD-5JPS].

victim impact statement from McDonald's perspective in court. "I am a victim of murder in the second degree," the statement read. "I am unable to speak with my own voice," Reverend Hunter continued, going on to describe the crime's impact.[734] Here again, it seems important to underscore that a member of a marginalized community (a victim of a law enforcement crime) was able to be heard in the process, through a representative reading a VIS.[735]

While many other examples of victim impact statements could be cited, the overarching point is that such statements are now commonplace and seemingly uncontroversial. Indeed, as discussed below, the American Law Institute's Model Penal Code provides for victim impact statements.[736] And while a handful of academics like Professor Vitiello appear poised to pounce on any empirical evidence that victim impact statements increase sentencing severity, they remain disappointed: the available empirical evidence does not support the conclusion that victim impact statements lead to harsher sentences, much less harsher sentences based on race or other impermissible factors.[737]

From the public's perspective, the widespread use of victim impact statements is as it should be. No longer can it be accurately said (if it ever could) that victims lack "any interest" in criminal proceedings. Instead, victims now clearly possess a recognized interest in the proceedings: a right to present information relevant to sentencing.

In addition to embedding victim impact statements in the system, the victims' rights movement has also made restitution conventional. In the federal system, the CVRA specifically gives victims the right "to full and timely restitution as provided in law."[738] In the various state systems, as of 1981 (shortly before the President's Task Force Report), only eight states mandated restitution to victims at sentencing.[739] Four years after the Task Force, twenty-nine states required restitution.[740] Today, many states extend victims a state constitutional right to restitution and every state has statutory restitution provisions.[741]

As with victim impact statements, this sea change in criminal justice processes has met with broad public approval. It is difficult to find objections to restitution in criminal cases, and victim restitution provisions are now featured in

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[734] Emily Shapiro & Alex Perez, *Former Chicago Police Officer Jason Van Dyke Sentenced to 81 Months in Prison for Laquan McDonald Murder*, ABC News (Jan. 19, 2019), https://abcnews.go.com/US/chicago-police-officer-sentenced-laquan-mcdonald-murder/story?id=60466991 [https://perma.cc/FWR8-EENT].

[735] For another example of victim impact statements being used powerfully by a minority community, see Kevin Sack & Alan Blinder, *At Dylann Roof's Trial, a Question of How Many Tears Are Too Many*, N.Y. Times (Jan. 8, 2017) (discussing victim impact statements at Dylann Roof's federal sentencing for a murderous rampage at an African American church). *Cf.* Ekow N. Yankah, *Should Racially Vulnerable Victims Show Mercy?*, 102 TEXAS L. REV. 1515, 1515–16 (2024) (discussing whether society too readily expects African-American victims to offer forgiveness for racially motivated crimes).

[736] *See also infra* notes 883–87 and accompanying text (American Law Institute's Model Penal Code now provides for victim impact statements).

[737] Cassell & Erez, *supra* note 8, at 949–54

[738] 18 U.S.C. § 3771(a)(6).

[739] FOUR YEARS LATER, *supra* note 442, at 4.

[740] *Id.*

[741] TOBOLOWSKY ET AL., *supra* note 316, at 171; NCVLI, Restitution Law & Practice: An Overview (July 2022), https://ncvli.org/wp-content/uploads/2022/11/Restitution-Law-and-Practice-An-Overview-_11-16-22.pdf [https://perma.cc/CD5Y-9MGW]. For a helpful collection of state restitution statutes see Matthiesen, Wickert & Lehrer, *Subrogation of Criminal Restitution in all 50 States* (Jan. 13, 2022), https://www.mwl-law.com/wp-content/uploads/2018/02/CRIMINAL-RESTITUTION-CHART.pdf [https://perma.cc/NQ7W-G2NU].

the Model Penal Code.[742] Of course, a victim's right to restitution does not guarantee victims will be made whole. Many defendants in the criminal system lack the financial wherewithal to pay significant restitution. But even nominal restitution awards can help to inform a defendant of the consequences of his crime. And judges are always free to set extended payment schedules for restitution that reflect a defendant's financial circumstances while providing some measure of compensation to victims.[743]

Restitution appears to be commonly awarded in state criminal cases. While it is hard to find precise statistics, a report from the U.S. Department of Justice found that, in 2006, restitution was imposed in state sentences for felons in twenty-seven percent of property offenses, eighteen percent of violent offenses, fourteen percent of drug offenses, thirteen percent of miscellaneous non-violence offenses, and eight percent of weapons offenses.[744] Applying these percentages across the millions of cases that move through America's criminal justice system, hundreds of thousands of restitution orders are now entered every year—yet another accomplishment of the victims' rights movement that appears widely accepted.[745]

Finally, while the focus of this article is on victims' rights, it is important not to ignore the parallel growth in victim service providers—another marker of public acceptance of the need to accommodate victims' interests in criminal processes. While victims generally have no right to services,[746] the availability of such services has expanded significantly over the last several decades. In 2017, the Department of Justice published its first national census of victim service providers (VSPs). The census found that about 12,200 victim service providers operated in the U.S.[747] Almost ninety percent were non-profit or faith-based organizations (forty-five percent) or governmental agencies with staff or programs to serve crime victims (forty-three percent). Many governmental VSPs operated in prosecutors' offices (eighteen percent of all VSPs) or law enforcement agencies (fifteen percent). Hospital, medical, or emergency facilities with dedicated victim programs made up three percent of VSPs. About two percent of VSPs were located on university or college campuses or in other educational institutions.[748] Nonetheless, parts of the country remained underserved, and the overall rate of victim service providers (3.7 per 100,000 U.S. residents) remained low,[749] a problem to address in the future.

Like the expansion in victims' rights, the expansion in victim service providers signals broad cultural acceptance of a crime victims' role in criminal justice processes. The crime victims' rights movement has clearly succeeded in returning victims to playing an important role in criminal justice. Having considered the victims' rights movement's past and present, this article can now

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[742] *See infra* notes 876–82 and accompanying text.

[743] *See* TOBOLOWSKY ET AL., *supra* note 316, at 172.

[744] SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006, at 8 (2009). https://bjs.ojp.gov/content/pub/pdf/vspus17.pdf [https://perma.cc/XRE9-7VJL].

[745] *Cf.* VITIELLO, *supra* note 4, at 30 ("At least insofar as a sentencing judge can [reconcile restitution obligations for a defendant with other sentencing objectives], efforts to expand laws allowing for restitution are worth of support").

[746] In some jurisdictions, victims have the right to notice of available services. *See, e.g.,* 18 U.S.C. § 3771(a)(10).

[747] U.S. DEPT. OF JUSTICE, VICTIM SERVICE PROVIDERS IN THE U.S., 2017 (2019).

[748] *Id.*

[749] *Id.* at 5.

turn to how the movement might press for the victim's role to continue to expand in the future.

V. THE FUTURE OF THE VICTIM'S ROLE IN CRIMINAL JUSTICE

The issue of the victim's future role in criminal justice requires returning to the question posed at the outset: Does the victim have a legitimate claim to participate in a criminal justice process that has sometimes been described as the government's "exclusive" domain?[750] The reader will recall that, in 1973, the U.S. Supreme Court stated in expansive dicta that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[751] Whatever the validity of that conclusion in 1973, more than a half-century later it is no longer valid. Even at that time, the Court's assertion ignored this country's long history of private prosecution, where victims frequently directed and even initiated criminal prosecutions. And in the last several decades, the crime victims' rights movement has created specific victims' interests in criminal prosecutions, with victims' bills of rights and other enactments giving victims a clear right to participation.

This section of the article considers the future implications of this new landscape of American criminal justice. Part A begins by reviewing the theoretical grounding for a victim's role in criminal justice processes—a role that necessarily defeats any claim that the state possesses a monopoly on the processes of criminal justice. Part B describes a model that encapsulates this role for crime victims: the victim participation model. This model properly describes the current landscape and recognizes that victims have an important—and quite legitimate—role to play in criminal processes. Part C then turns to an important, but often overlooked, recognition of the victim's participatory role: recent victim revisions to the Model Penal Code. The Code is an influential restatement of American criminal law principles. The Code now clearly articulates a role for victims in criminal cases, defeating any claim that victims must remain outsiders to criminal justice. Finally, Part D concludes by considering how the victim's role in criminal processes might evolve in the future in a system of predominantly public prosecutions. Important goals remain for the movement, including securing legal counsel for victims and, ultimately, a federal constitutional amendment protecting crime victims' rights.

A. Theoretical Grounding for a Victim's Role in Criminal Justice

In considering the victim's role in criminal justice processes, as a matter of first principles it seems incongruous that criminal law could simply give a monopoly to the state without meaningful acknowledgement of those harmed by the crimes. Against the backdrop of a well-established history of private prosecution and a modern and ascendant crime victims' rights movement, the criminal law requires a place for victims' voices.[752]

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[750] *See supra* notes 17–29 and accompanying text.

[751] Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

[752] *See, e.g.*, Kaufman, *supra* note 17, at 139–48; Barth, *supra* note 37, at 192–93; *see also* O'Hara, *supra* note 23, at 239–47.

One straightforward way to reveal the inadequacy in assuming a state monopoly is to drill into the claim that criminal law does not aim to compensate crime victims. This is the claim made (for example) by the LaFave and Ohlin criminal law treatise. As noted earlier, this leading treatise articulates the dogmatic view that the criminal law's purpose is "to protect the public interest but not to compensate the victim."[753] But then, in an attached footnote, the treatise grudgingly acknowledges the possibility of restitution to victims in at least some criminal cases:

> [I]n practice, restitution of property obtained by theft is sometimes, with or without statutory authority, made a condition of probation . . . . It is also common, even absent specific statutory authority, for plea bargains to include a requirement that the defendant pay specified restitution to the victim. . . . Some states have statutes allowing a much broader resort to restitution as a sentencing option.[754]

The point is worth further consideration. If some states allow a "broader resort" to restitution for crime victims, then that fact would disprove the notion that criminal law does not aim to compensate victims—and thus, more expansively, would suggest that the door is open for victims to play a role in criminal justice processes.

The LaFave-Ohlin treatise's stingy recognition of the possibility of restitution appears to have been written decades ago, when restitution was not a common feature of American criminal justice.[755] To quickly recap the relevant history of restitution, at the time of the nation's founding, victims played a prominent role in criminal justice and restitution to the victim was an important criminal justice outcome.[756] But then, during the nineteenth century, American criminal justice largely transitioned away from a system of private prosecution to one of a system of public prosecution. In that transition, the role of restitution for victims faded away.[757] Consequently, restitution was largely ignored as a criminal sentence through the first half of the twentieth century.

Beginning around the 1970s, the crime victims' movement returned the restitution issue to the public's attention.[758] By 1982, eight states had legislation requiring restitution as part of a criminal sentence. Concurrently with the release that year of the Final Report of the President's Task Force on Victims of Crime,[759] Congress adopted the Victims and Witness Protection Act of 1982 significantly

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[753] *See supra* note 19 and accompanying text, discussing LAFAVE & OHLIN, *supra* note 17, at § 1.3(b) at 17.

[754] *See id.* at 17 n.91.

[755] While the footnote remains in the current, 7th edition (published in 2023), the footnote originated in the 1st edition (published in 1972). *See* WAYNE R. LAFAVE, CRIMINAL LAW (1st ed. 1972), at 11 n.3.

[756] *See, e.g., supra* notes 51, 119 and accompanying text.

[757] *See* TOBOLOWSKY ET AL., *supra* note 316 at 167.

[758] *Id.*; *see* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 57 (1982); Alan T. Harland, *One Hundred Years of Restitution: An International Review and Prospectus for Research*, 8 VICTIMOLOGY 190, 192 (1983); Joe Hudson et al., *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 JUDICATURE 312, 313 (1977); ARTHUR J. LURIGIO & ROBERT C. DAVIS, *Does a Threatening Letter Increase Compliance with Restitution Orders?: A Field Experiment*, 36 CRIME & DELINQ. 537, 538 (1990).

[759] *See supra* notes 4124–40 and accompanying text.

expanding restitution in the federal system.[760] By 1995, every state had adopted some form of restitution, with 29 states adopting some form of mandatory or presumptive restitution statutes.[761]

In the years since, restitution has become increasingly available in the federal and state systems.[762] In 2004, the Victims Committee of the Criminal Justice Section of the American Bar Association published a "national strategy" for restitution for crime victims.[763] About twenty states now make restitution available as a matter of state constitutional right.[764] And, as discussed below, the influential Model Penal Code was amended to add procedures for providing restitution as a standard part of criminal sentencings.[765]

Against the current backdrop of the widespread availability of a "right" to restitution for crime victims, any dogma about a criminal case's purpose being solely to protect the public interest is inaccurate. Restitution, of course, goes directly to crime victims and is designed to compensate them for injuries suffered from the crime. Additionally, in many cases, victims now possess a "judicially cognizable interest" in restitution, as victims have been able to appeal inadequate restitution awards.[766]

Critics of a victims' role in criminal law might argue that restitution is some sort of one-off example.[767] More broadly, Professor Markus Drubber, a well-known criminal law theorist, has attacked crime victims' rights in criminal processes as unjustified. In a 1999 article, Dubber argued that the crime victims' rights movement has showed "little interest in any kind of theory, punishment or otherwise."[768] In Dubber's view, the "rise of the so-called victims' rights movement in the United States" is based on little more than lust for vengeance.[769] As he put it:

> This movement, after all, began as and always remained a political movement, fueled by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition, which eventually—and predictably—reached arational proportions before finally showing signs of letting up in the late 1990s, after three decades of criminalization, incarceration, and execution.[770]

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[760] Pub. L. No. 97-291, 98 Stat. 1248, codified in relevant part at 18 U.S.C. § 3663.

[761] TOBOLOWSKY ET AL., *supra* note 316, at 168.

[762] *See id.* at 171–72.

[763] Victims Committee, Criminal Justice Section, American Bar Ass'n, Restitution for Crime Victims: A National Strategy (2004).

[764] TOBOLOWSKY ET AL., *supra* note 316, at 171. *See, e.g.*, Fla. Const. art. I, § 16(b)(9) (discussed in Cassell & Garvin, *Marsy's Law*, *supra* note 375, at 129–31.

[765] *See infra* notes 876–82 and accompanying text.

[766] *See supra* note 635 and accompanying text.

[767] *Cf.* VITIELLO, *supra* note 4, at 30–31 (praising restitution while going on to critique other aspects of the victims' rights movement).

[768] Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 6 (1999). In later writing, Dubber offered a more nuanced view, as discussed below.

[769] *Id.* Dubber seems to recognize that the qualifier "in the United States" is necessary to his argument, as many other countries have expansive and established victims' rights that are difficult to explain as linked to vengeance. *See* Cassell & Edna, *Victim Impact Statements*, *supra* note 477, at 944–46.

[770] Dubber, *supra* note 768, at 6.

Dubber's argument is refuted by the rich history of the victims' rights movement detailed above. Far from being a mere "lust for vengeance," the movement has sought to enhance victims' participatory rights in criminal cases. As reflected in the federal Crime Victims' Rights Act and recent Marsy's Law enactments in the states, the movement's goal has been to ensure that victims' interests are protected, not to dictate particular outcomes for criminal cases.

Interestingly, Dubber himself seems to have retreated somewhat from his broadly critical conclusion. A few years later, in 2002, he wrote an entire book about victims' rights. There he offered his opinion that "[t]he victims' rights movement has a legitimate core that, once properly excavated, can point the way to the much needed revision of the fundamental principles of American criminal law."[771]

Dubber's revised position is elaborate and, in summarizing it, some of the details will necessarily be lost. And he undoubtedly remains skeptical of the extended list of rights that the movement seeks in criminal cases. But the central point remains that even a strong critic of victims' rights ultimately had to concede that at least some participatory rights for persons harmed by crimes were appropriate.

Dubber describes his project in his book as "vindicating victims' rights for its own sake, rather than as a weapon in the war against criminals."[772] Dubber goes on to explain that "[f]or too long, American criminal law has been run by the state in the name of ill-defined 'public interest' or even 'public safety.'" For Dubber, "[t]he victims' rights movement was right to insist that we identify with victims of crime."[773] And Dubber ultimately concludes that victims are entitled to some rights in the process: "In case a state response in the form of criminal law is necessary, the victim is, at least prima facie, entitled to whatever rights are consistent with the vindication of her right to autonomy, since that's why the criminal process was in motion in the first place."[774] With Dubber's concession in mind, the question to ask about victims' rights is not whether such rights should exist but instead how far such rights should extend.

Other theorists have likewise developed a role for victims to play. For example, Professor Gail Heriot (among others) has observed the only propositions that follow from the purported criminal/civil distinction is that the criminal law needs an alleged wrongdoer while the civil law needs an alleged victim.[775] That distinction does not require that victims be excluded from criminal law processes. If criminal law aims to impose punishment, then there must be a specific, identifiable person who needs to be punished. But that punishment process could be instigated by an individual rather than the state.[776] Indeed, as discussed earlier,

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[771] *See* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 2 (2002).

[772] *Id.* at 2.

[773] *Id.* at 5.

[774] *Id.* at 336.

[775] Gail Heriot, *An Essay on the Civil Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMPORARY LEGAL ISSUES 43 (1996).

[776] *See id.* at 49 (observing that "in the criminal law, it is not conceptually necessary to vest sole authority to initiate and direct the proceedings in the state. The purpose of punishment could be carried out without the state").

American criminal justice historically began with a system of "private" prosecution in which victims initiated and pursued criminal cases.[777]

Even if the state is responsible for initiating the prosecution and imposing punishment, it is hard to understand why victims would need to be excluded from this process. To be sure, recompense to victims could be provided (and often is provided) through a civil justice system. But the civil trial "can be a hollow, antiseptic, and therefore inappropriate forum for serving the emotional needs of the victim."[778] Moreover, as the recent rise of criminal restitution demonstrates, compensation could also be provided (and often is provided) through the criminal justice system. From a theoretical perspective, if restitution is an important part of a criminal sentence, then the victim should likewise become an important part of the sentencing process.

Professor Randy Barnett pioneered a theory along these lines, described as the "restitutionary theory of justice."[779] In important essays published in 1976 and following, Barnett and others argued that the failures in the American criminal justice system could be traced to its myopic focus on punishment.[780] Instead, the focus should be on restoring the victim, returning the victim to the extent possible to the position the victim was in before the crime was committed. As Barnett explained:

> This [proposed shift to a restitution-based system] represents the complete overthrow of the paradigm of punishment. No longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of reparations paid to the victim. No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required.[781]

Just as in tort law, under this conception of criminal justice, a specific victim who suffered cognizable harm is a necessary feature of the system. Indeed, as Barnett concluded, "Restitution recognizes rights in the victim, and this is a principal source of its strength."[782]

Barnett's approach was elaborated by others, who built out strong defenses for restitution to victims as an important part of criminal justice. As examples, Charles Abel and Frank Marsh argued that restitution was a "workable, efficient, and fair alternative" to current criminal justice approaches, especially imprisonment. They explained that a restitutionary approach was better because it focused directly on the victim and the damage done by a crime. They also proposed

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[777] *See supra* notes 54–75 and accompanying text

[778] O'Hara, *supra* note 23, at 234.

[779] *See* Moen, *supra* note 20, at 740–42.

[780] *See generally* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (Randy E. Barnett & John Hagel III eds., 1977) [hereinafter ASSESSING THE CRIMINAL]. *See* Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in ASSESSING THE CRIMINAL, *supra*, at 349. Barnett's important article is more readily available at Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 289 (1977).

[781] Barnett, *supra* note 780, at 364.

[782] *Id.* at 367. *See* Moen, *supra* note 20, at 744.

expanding the scope of the people defined as "victims" and using prison sentences only as an exception rather than the rule.[783] Political philosopher Murray Rothbard agreed that criminal justice could not dispense justice without providing compensation to victims.[784] And criminologist Sveinn Thorvaldson explicated how a crime is "a breach of a moral principle" and that to "bring home to citizens such ideals, the court must construct some sort of bridge between individual and social harm" by interpreting the concrete "harms to victims in a way that manifestly demonstrates their social and moral significance."[785]

Around the time that the victims' rights movement began to coalesce, criminal law theorists also began to recognize a need to expand the victim's role in areas beyond merely collecting restitution—so that the victim did not become unmoored from the criminal justice process. For example, Niels Christie famously argued that the criminal law should not "steal the conflict" between victims and offenders.[786] In Christie's critique, modern adversarial criminal justice made the victim a "particularly heavy loser." Not only had the victim "suffered, lost materially or become hurt, physically or otherwise"; and "not only does the state take the compensation" (e.g., a fine). But "above all [the victim] has lost participation in his own case."[787]

Other theorists began highlighting the retributive role victims should play in criminal sentences. For example, Jean Hampton argued that punishment helps to vindicate victims by defeating wrongdoers. According to Hampton, the criminal law is appropriately deployed when a wrongdoer violates a standard in a way that is "an affront to victim's value or dignity."[788] As a result, retributive punishment is the defeat of the wrongdoer at the hands of the victim (either directly or indirectly through an agent of the victim, e.g., the State) that symbolizes the correct relative value of wrongdoer and victim. It is a symbol that is conceptually required to reaffirm a victim's equal worth in the face of a challenge to it.[789]

Other scholarship developed the related theory of "corrective justice," which is based on the intuition that a person who causes wrongful harm to another should be obligated to correct it.[790] Under this approach, certain corrective harms violate the interest the victim has in the property of personal goods. Corrective wrongs target victims as owners of their personal goods, including their personal

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[783] *See* CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION: A RESTITUTIONARY APPROACH TO CRIME AND THE CRIMINAL (1984); *see also* Edna Erez, *Book Review*, 77 J. CRIM. L. & CRIMINOLOGY 501, 501 (1986).

[784] *See* MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 51–61, 77–95 (1982).

[785] *See* Sveinn A. Thorvaldson, *Restitution and Victim Participation in Sentencing: A Comparison of Two Models*, in Criminal Justice, Restitution, and Reconciliation 23, 34 (Burt Galaway and Joe Hudson eds. 1990); *see also* BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 227–59 (1998) (developing a theory of restitution in a rights-based approach to criminal policy).

[786] *See* Christie, *supra* note 143.

[787] *Id.* at 7. *See* Cassell & Erez, *supra* note 8, at 948 (discussing Christie); Capers, *supra* note 33, at 1581 (same).

[788] Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659, 1666 (1992).

[789] Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 124–43 (1988) (discussed in Theo van Willigenburg & Eduardus Van der Borght, *Attacking Punitive Retribution at Its Heart – A Restorative Justice Thrust*, 15 INT'L J. PUBLIC THEOLOGY, 401, 413 (2021), available at https://doi.org/10.1163/15697320-01530007).

[790] *See* ERNEST WEINRIB, CORRECTIVE JUSTICE (2012); Andrei Poama, *Corrective Justice as a Principle of Criminal Law: A Prolegomenon*, 12 CRIM. L. & PHIL. 605 (2017).

bodily integrity. For instance, when an offender steals, she wrongfully undermines the victim's interest in the property of her stolen good. What makes theft wrong is the thief acting in a way that disregards the victim being the exclusive owner of that particular good and, thus, the criminal law is properly deployed.[791] Resting criminal law on corrective justice premises supports recent procedural measures that have expanded crime victims' rights throughout the criminal justice process. As one commentator has explained, "Given its focus on the relationship between offender and victim, corrective justice is particularly well placed for explaining this recent procedural dynamic in criminal law."[792]

By bringing attention back to crime victims, the victims' rights movement has also helped to create new legal norms in the area of restorative justice.[793] As Professor Thalia González has explained, beginning in the 1970s, restorative justice gained attention with reformists seeking more holistic remedies to address harm, conflict, and crime, while simultaneously increasing individual accountability without reliance on conventional (e.g., exclusively punitive) approaches in the criminal justice system.[794] This approach gained theoretical momentum in the 1990s, when criminologist Howard Zehr published his widely read book, *Changing Lenses: A New Focus for Crime and Justice*.[795] Zehr argued that a need existed to fundamentally reconceptualize criminal justice not as a conflict between the individual and the state but rather as a conflict between individuals—i.e., offenders and crime victims.

In 2019, based on a fifty-state survey of criminal justice policies, Professor González reported that restorative justice has now moved beyond mere theoretical salience and is internalized in criminal justice practices throughout the nation. She examined statutes and court rules in all the states, searching for the presence of restorative justice concepts, such as victim-offender mediation. She found that, as of 2019, forty-five states had codified the term "restorative justice" into state law.[796] She also traced the use of restorative justice practices in statutory law, which first occurred in 1975. González found that the use of such concepts has steadily increased since then. For example, in 2001 there were twenty-one state laws that formalized restorative justice, increasing to seventy-nine in 2009, 178 in

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[791] *See* Poama, *supra* note 790, at 613–14.

[792] *Id.* at 622.

[793] *See* Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Survey*, 2019 UTAH L. REV. 1027; Livia Luan, *Making Victims Whole Again: Using Restorative Justice to Heal Hate Crime Victims, Reform Offenders, and Strengthen Communities*, 37 TEMP. INT'L & COMP. L.J. 161 (2022); Dena M. Gromet et al., *A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments*, 36 L. & HUM. BEHAV. 375 (2012); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 10.1 (2007); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205; Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43 (2003); *see also* Thalia González, *Restorative Justice from the Margins to the Center: The Emergence of a New Norm in School Discipline*, 60 HOW. L.J. 267 (2016). *See generally* BELOOF, CASSELL ET AL., *supra* note 23, at 597–600. For criticism of restorative justice concepts, see Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX L. REV. 1385 (2007).

[794] González, *supra* note 793, at 1028.

[795] *See* HOWARD ZEHR: CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES (25th anniversary ed. 2015) (current edition); *see also* Howard Zehr & Harry Mika, *Fundamental Principles of Restorative Justice* (1998), reprinted in HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 64 (2002).

[796] González, *supra* note 793, at 1049.

2015, and at the time of the publication of her article (2019), 229 such applications.[797]

These various theories about criminal processes provide grounds to justify significant crime victims' rights. But relatedly, significant practical and instrumental arguments can be made for an important role for victims.

One of the best articulations of this view comes from then-professor (now U.S. Third Circuit Judge) Stephanos Bibas. In his 2012 book *The Machinery of Criminal Justice*, Bibas powerfully critiqued the notion of a state "monopoly" on criminal justice.[798] Bibas explained that the monopoly view necessarily precludes considering factors that are commonly thought to be relevant to criminal cases. With regard to deterrence, for example, the state "exacts its justice quickly and impersonally to incapacitate the dangerous criminal and to deter him and others. All that seems to matter to the state is the bottom-line number of years in prison and, to an extent, accuracy in discerning guilt."[799] The state's focus on deterrence leaves "little reason to give remorse, apology, and forgiveness much of a role . . . ."[800]

Considering state-centered retributivism, Bibas saw similar limitations. For the state, "the objective moral seriousness of the crime and the actor's culpability determine the punishment, not any later remorse, apology, or forgiveness."[801] From the state's perspective, such things "are irrelevant to the state's mechanical exercise of control."[802]

Bibas explained why a state monopoly conflicts with public conceptions of justice, noting that the state-centered model "assumes that cold reason should dominate criminal-justice decisions and exclude human emotions. But the cool logic of State-monopolized justice, to the exclusion of victims, conflicts with many people's moral intuitions."[803] Why, Bibas asked, "should the right to punish belong *exclusively* to the State? Disputes are not simply impersonal occasions for the government to control dangerous threats. They wrong both the state and the victims."[804] Bibas elaborated that crime has "a human face, and that face deserves standing and a say in the matter. The victim or his representative seems naturally to deserve at least a partial right to pay back the wrongdoer."[805] Thus, "[t]o a victim the notion that crimes are committed against society, making the community the injured party, can seem both bizarre and insulting; it can make them feel invisible, unavenged, and unprotected."[806]

Bibas also observed that victims' rights laws have been adopted across the country because "many if not most voters think victims deserve larger roles in their own cases. Empirical evidence confirms this intuition. When surveyed about

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[797] *Id.* at 1057.

[798] *See* BIBAS, *supra* note 148.

[799] *Id.* at 84.

[800] *Id.*

[801] *Id.*

[802] *Id.* at 85.

[803] *Id.*

[804] *Id.* (emphasis in original).

[805] *Id.*

[806] *Id.* (quoting WENDY KAMINAR, IT'S ALL THE RAGE: CRIME AND CULTURE 75 (1995)). *See also* Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND L. REV. 737 (2012).

concrete punishment scenarios, many people give great weight to the victim's attitude and wishes, particularly for crimes involving property or personal injury."[807] Bibas argued that a "democracy ought to do more to incorporate this widespread intuition about justice."[808]

Bibas acknowledged the obvious point that criminal cases differ from civil cases in some ways. But he cautioned that "the state-monopoly model masks the legitimate interests and emotions of real human beings: the victims, wrongdoers, and citizens who have personal stakes."[809] As he put it, "Victims need our solidarity; wrongdoers merit our anger, but also empathy for their plight and reasons for breaking the law. This rainbow of emotions is central to appreciating and responding to all the parties' stakes in crime."[810]

Bibas also reported that "[u]nfortunately, while the victims' rights movement has much to teach us, it has become confused with law-and-order rhetoric."[811] He explained that

> In Europe, victims' rights movements often emphasize supporting victims. And American academic supporters often focus on procedural rights of victims to receive information and participate. But particularly in America, politicians use victim rhetoric to dress up generic tough-on-crime measures. Put another way, politicians have hijacked outsider rhetoric to advance insiders' pet schemes. . . . On this view, criminal justice is a zero-sum game, as if the only way to make victims happier is to punish defendants more.[812]

Bibas argues for a different understanding of victims' rights. He explains that "[t]here are of course plenty of tradeoffs in criminal cases, and victims and defendants may desire quite different outcomes. But to reduce it all to a zero-sum contest over the amount of punishment ignores criminal justice's positive ability to heal. Remorse, apology, forgiveness, and reintegration offer more reasons to be optimistic than [politicians'] victims' rights rhetoric would suggest."[813]

Bibas reasoned that while criminal justice will necessarily be a lawyer-driven system to some degree, it is time for returning power to the public, including victims. He concluded that "it is time to breach the wall that separates insiders from outsiders." With respect to victims, they constitute

> a discrete, identifiable group who already know about the crimes they have endured and are motivated to take part. Because of their background knowledge, they do not need to be brought up to speed, can speak with authority, and will not automatically defer to insiders' assessments. They also have palpable interests in the

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[807] BIBAS, *supra* note 148, at 85.

[808] *Id.*

[809] BIBAS, *supra* note 148, at 88.

[810] *Id.*

[811] *Id.* at 92.

[812] *Id.* at 92–93.

[813] *Id.* at 94.

> process and outcomes, which can counterbalance insiders' own stakes and preferences. Precisely because they are not repeat players, they can counteract insiders' jading and mellowing as well as their (over)emphasis on pragmatic concerns.[814]

Bibas argued for specific reforms, such as providing greater opportunities for victims to receive information about the process and participate in criminal justice proceedings.[815] For example, Bibas contends that victims could orally allocute at sentencing, and also "speak with, question, and respond to defendants and lawyers at trials and at plea and sentencing hearings."[816] Bibas also called for free-wheeling "restorative sentencing juries," where victims could "*see* justice done by doing justice themselves. In essence, we would re-create short, intelligible, lawyer-free colonial trials at sentencing . . . ."[817]

Bibas ended by observing that "[t]he gap between historical ideals and criminal-justice reality has never been starker. Expectations are high and disappointments great. Reforming a system so broken seems hopeless, but we must keep hope alive."[818]

B. The Victim Participation Model of Criminal Justice

In light of all these discussions about criminal law theories, how should we understand the victim's role in criminal processes? Fortunately, a model exists that encapsulates victims' interests while leaving room for other dimensions of criminal law. Focusing directly on the victims' rights movement, in 1999 law professor Douglas Beloof proposed modifying Herbert Packer's famous description of the criminal justice system as a competition between two models: the crime control model and the due process model.[819] Packer had argued that the two normative models—and only two—were needed to explain the value choices underlying criminal justice.[820] In his important article *The Third Model of Criminal Process: The Victim Participation Model*, Beloof proposed adding a competing model to describe criminal justice values.[821] Beloof explained at length how Packer's two models could not account for the victims' rights provisions found throughout the country, which rested on neither crime control nor due process premises. To fully describe American criminal justice, it was necessary to add a victim participation model. This model reflected the participatory rights of crime victims, enshrined in state constitutional amendments and other enactments, such as the right to deliver victim impact statements. Only by considering victims'

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[814] *Id.* at 133.

[815] *Id.* at 151

[816] *Id.* at 151.

[817] *Id.* at 157.

[818] *Id.* at 164.

[819] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–53 (1968).

[820] *See id.* at 163, 165. There is a rich literature discussing Packer's two models. *See, e.g.*, Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 389 (1999).

[821] *See* Beloof, *Third Model*, *supra* note 486. Like Packer's model, Beloof's model was intended to be a heuristic device to explain value choices made by the criminal justice system, not a formal policy proposal for specific legislation.

interests to participate in the process could such features of the modern American criminal justice system be explained.[822]

What Beloof's third model captures is the strong public support underlying the crime victims' rights movement. The public has increasingly demanded that victims play an important role in criminal processes. This view was well described in a Justice Department report regarding victims' rights: "When a person is harmed by a criminal act, the agencies that make up our criminal and juvenile justice systems have a moral and legal obligation to respond. It is their responsibility not only to seek swift justice for victims but to ease their suffering in a time of great need."[823]

Exactly how the criminal justice system should respond to crime victims and their suffering remains an evolving work in progress, with differences evident from jurisdiction to jurisdiction. But the basic contours of these responses are similar—as captured in Beloof's victim participation model. Today, the criminal justice processes in the federal system and all fifty states extend rights to crime victims, although the enforcement of these rights varies from state to state. Generally speaking, for felony and other important criminal cases, crime victims can be heard at appropriate points in the process, most commonly at sentencing through victim impact statements. Victims also are generally entitled to notice of court proceedings and to be able to attend court proceedings. Victims are also frequently given the right to confer with prosecutors and can sometimes shape a prosecutor's decision to file (or not file) criminal charges. Thus, victims now possess the right to participate in the criminal justice process.[824]

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[822] *See id.* at 326–27.

Contemporaneously with the publication of Professor Beloof's article, Professor Kent Roach published a similar critique of the Packer's two-model description of criminal justice. *See* Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 673 (1999). For Roach, too, Packer's two models failed to explain, among other things, why crime victims could claim rights in the criminal justice system. Roach proposed two additional models, which he called the "punitive" and "non-punitive" forms of victims' rights. Roach's punitive model focused on crime control and more victim-sensitive prosecutions as a means to protect crime victims and potential crime victims. His non-punitive model sought to avoid exclusive reliance on punishment "by treating people fairly and as responsible citizens in non-adversarial proceedings, and by seeking to reconcile the interests of offenders, victims, and their communities through restorative justice and crime prevention." *Id.* at 326–27. I focus on the "non-punitive" model in this article, because Roach's 1999 suggestion of a "punitive" model does not reflect recent efforts of the crime victims' movement, such as Marsy's Law, that lack a purely "punitive" component.

[823] *See* NEW DIRECTIONS FROM THE FIELD, *supra* note 454, at xi.

[824] *See generally* Cassell & Garvin, *Marsy's Law*, *supra* note 375; BELOOF, CASSELL ET AL., *supra* note 23.

Writing in this journal, Professor Robinson has supported crime victims' rights generally but criticized giving crime victims a role in determining the specific punishment in their particular cases. For example, Robinson believes that victim impact statements should be allowed at sentencing but limited to conveying to the judge the harm from the crime rather than including a specific sentencing recommendation. *See* Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication*, 33 MCGEORGE L. REV. 749, 756–57 (2002). Robinson is concerned that victims' rights might undermine "the moral credibility" of the process if it embraces things that conflict with the public view of a just process. *Id.* at 756–57. But the widespread expansion of victims' rights in recent years suggests that, if anything, the system's moral credibility is enhanced when victims' voices are heard in the process—just as defendant's voices are heard. *See* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 943–45 (explaining how victim impact statements improve the perceived fairness of sentencing); *see also supra* notes 702–49 and accompanying text (discussing the cultural acceptance of victim impact statements).

On this point, it is interesting to consider Robinson's later-published and intriguing empirical research on "extralegal punishment factors." Based on public survey data regarding hypothetical case scenarios, Robinson et al. find that victims' views on punishment affect public opinion on the appropriate level of punishment in a

To be sure, American criminal justice is not moving toward replacing public prosecution with a victim-centered system, such as returning to the historic model of private prosecution or a new system of restitutionary justice. Instead, victims' rights are being grafted onto an underlying system that relies on public institutions to instigate and pursue criminal cases. Professor Beloof's victim participation model nicely captures how victims' rights supplement, rather than replace, public prosecution. If criminal justice can be seen as a factory assembly line (as Packer's models suggest), then the victim participation model is one of victims "following their own case down the assembly line."[825] Under this model, while victims have a voice in the process, they do not dictate critical decisions in the process. For example, victims cannot require that a grand jury return an indictment, that a prosecutor accept (or reject) a plea bargain, that a jury convict a defendant, or that a judge impose a particular sentence. Instead, these decisions ultimately are made by other actors in the system—but only after considering the views of the victim at appropriate points.[826] Beloof's model, crafted in 1999, captures almost perfectly the general approach to crime victims' rights today.

Restitution powerfully illustrates victims' rights being embedded into existing criminal justice processes. Over the last several decades, American criminal justice has moved from largely ignoring restitution to routinely imposing it. This move did not involve restitution replacing other criminal justice sentences (such as prison sentences), as some theorists had hoped.[827] Instead, restitution became a supplement to other criminal justice sentences. In the federal criminal code, for instance, victims are given a "right to full and timely restitution as provided in law."[828] And then, the code lays out options for federal district court

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minority of cases. For situations where the victim wanted less or no punishment, twenty-seven percent of the public would take that view on the sentence into account; for situations where the victim wanted more punishment, twenty percent would take that into account. *See* Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 789 tbl. 8 (2012). These percentages were lower but within hailing distance of the situation where a defendant made a public acknowledgment of guilt and an apology, which thirty percent would take into account. Given that a defendant's opportunity to present views on punishment (a so-called right of "allocution") is an entrenched part of the criminal justice system, the fact that victim's views on punishment appear to have only slightly lower public salience supports similar treatment for both views. And, in current sentencing processes, defendants often arrange for multiple letters (known as "character" or "sentencing" letters) to be sent to the judge by family and friends. These letters often make explicit or implicit sentencing recommendations. *See, e.g.*, Varghese/Summersett (a defense law firm), "How to Write a Character Letter for a Judge" (advising that letter writers for defendants should know their "ask," such as "asking for a minimum sentence or even a sentence under the recommended guideline range"), https://versustexas.com/blog/character-letter-for-a-judge/ [https://perma.cc/S4GS-76YG] (visited 11/22/24). In a system where defendants are commonly allowed to submit extralegal information about a recommended sentence, both directly and indirectly, it is unfair to prevent victims from likewise recommending a sentence.

[825] Beloof, *Third Model*, *supra* note 486, at 296.

[826] *See id.*

[827] *See supra* notes 779-85 and accompanying text.

[828] 18 U.S.C. § 3771(a)(6).

judges in imposing a sentence, which include probation, fines, forfeiture, imprisonment[829]—and, in a separate, "miscellaneous" section, restitution.[830]

This move of supplementing existing criminal sentences with restitution bypasses the objection that that criminal justice cannot be organized exclusively around victims. For example, a common argument that critics advance against victims controlling criminal prosecutions is that victims might lack the interest or wherewithal to effectively pursue criminal cases. If victims were put in charge, the argument runs, then society's interest in safety might be undercut if a victim abandoned an effort to prosecute.[831] Instead of a victim-controlled system today, prosecutors remain the primary engine of criminal prosecutions, with victims having the right to insert themselves into that prosecution at critical junctures. Regarding restitution, for example, victims typically possess a "right" to restitution, which they can choose to exercise or not.

The victim participation model also helps lay bare the fallacy in equating the crime victims' rights movement with crime control issues. Professor Vitiello's recent book, and his contribution to this symposium, are perhaps the best (and best written) illustrations of this problem. For Vitiello, victims' participatory rights are little more than efforts to use "headline cases to push excessively punitive measures."[832] And, no doubt, Vitiello can point to examples of victims' advocates pressing for punitive measures that may (or may not) be excessive.

But these efforts are not properly categorized as part of the modern victims' rights agenda.[833] Instead, as clarified by Packer's two models—supplemented by Beloof's third model—these efforts would best be described as part of a separate crime control agenda. As Beloof explains, the victim participation model recognizes each victim as an individual and allows that individual's voice to be heard.[834] But whether to be heard—that is, whether to participate and exercise rights—is left to each individual victim. And what the victim says is likewise left to the individual victim. For example, the victim may seek a punitive sentence or a lenient one. But the point of the crime victims' rights movement is that the victim is heard, not that the victim achieves a punitive or merciful objective.[835] It is for this reason that mandatory minimum sentences, for

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[829] 18 U.S.C. §§ 3551–3585. The federal criminal code also authorizes death sentences for certain serious offenses. 18 U.S.C. §§ 3591–3599. Recently, President Biden commuted the death sentences of most federal death row inmates.

[830] 18 U.S.C. §§ 3663-3664. Presumably the reason that restitution is listed separately from other aspects of a criminal sentence is that serves remedial rather than punitive purposes. *See* United States v. Visinaiz, 344 F. Supp. 2d 1310, 1320-21 (D. Utah 2004), *aff'd*, 428 F.3d 1300 (10th Cir. 2005).

[831] *See, e.g.*, Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1014 (1986).

[832] VITIELLO, *supra* note 4, at 22.

[833] *See also supra* notes 371–75 and accompanying text (discussing the "Carrington rule" as a limit on the victims' rights movement's agenda).

[834] *See* Beloof, *Third Model*, *supra* note 486, at 296-98; *see also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282 (2003).

[835] *See generally* Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEX. L. REV. 1381 (2024) [hereinafter Cassell, *Merciful Victims*]. *Cf.* ARIE FREIBERG & ASHER FLYNN, VICTIMS AND PLEA NEGOTIATIONS: OVERLOOKED AND UNIMPRESSED 115 (2021) (concluding, based on interviews of Australian crime victims that, as with other research, "victims are not seeking punitive outcomes, but rather recognition and input" and that the victims studied "sought validation, advice, understanding and voice—a voice that should be heard across the criminal justice system").

example, are not part of the victims' rights movement's agenda.[836] And in capital cases, victims' rights advocates have urged that victim family members should be able to offer a victim impact statement opposing a death sentence.[837]

The victim participation model has also received what might be described as "friendly fire" from victims' rights advocates. Most notably, in an important recent essay, Professor Edna Erez and colleagues have discussed Beloof's model and argued that pursuing such an approach is "likely to be ineffective for much the same reasons as all previous efforts to recalibrate the balance of rights between victims and defendants."[838] In their view, grafting victims' rights onto a two-party, adversarial system amounts to little more than an "add victims and stir" approach, which does "little to challenge the foundations of adversarial proceedings."[839] They explain that

> [v]ictim integration reforms over the last four decades attempted, often in an abrupt and ad hoc manner, to graft a host of victim rights on to a system which, by design and express ideology, had denied victims standing and deliberately excluded them from proceedings. It is therefore not surprising that victim rights, "added on" to a tightly honed adversarial legal structure, remain problematic. Although some victim rights advocates view the new privileges and powers of the victim as evidence of progress toward the goal of full participation in the criminal process, for many in the criminal justice system, victim rights still present a major threat to the core values of the adversarial model.[840]

In contrast to a victim participation model, Professors Edna Erez, Jize Jiang, and Kathy Laster argue for reconceptualizing crime victims as "consumers of the justice system." This view, they contend, provides an alternative, theoretical, and practical framework which "avoids casting victims as the problematic 'third wheel' in the adversarial dyad of the State vs. the Offender."[841] And they provide concrete examples of how this approach might be used, such as conducting victim surveys and adopting customer focus in developing a "user-centered design" of the criminal justice system.[842] They conclude that "victims' rights activists have much

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[836] *See* Beloof, *Third Model*, *supra* note 486, at 303 ("mandatory minimum sentences conflict with the primacy of the individual victim"); *see also* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 68 (2010) (mandatory minimums can send a message that victim suffering is not considered); *cf.* United States v. Angelos, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004) (Cassell, J.) ("crime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract 'war on drugs'").

[837] *See* Robert Bernheim, Lynn v. Reinstein: *Limiting Victims' Rights to Recommend Sentences in Capital Cases*, 46 ARIZ. L. REV. 581 (2004) (discussing Lynn v. Reinstein, 68 P.3d 412 (Ariz. 2003) (husband of murder victim denied opportunity to provide a sentencing recommendation of life in prison rather than death sentence), cert denied, 124 S. Ct. 1037 (2004)).

[838] Erez et al., *supra* note 361, at 334.

[839] *Id.*

[840] *Id.* at 334–35.

[841] *Id.* at 337.

[842] *Id.* at 334.

to gain by associating themselves with the growing power of the consumer movement, especially the enhanced status of the 'consumer' in the Digital Age."[843]

The approach of Erez and her colleagues is an interesting way of reconceiving how we can better include victims in the criminal justice system. They are certainly on to something as a matter of rhetorical strategy. And, of course, their consumer-of-justice approach does not exclude other reform endeavors and models but rather is complementary to them.

But questions can be raised about how reconceptualizing victims as consumers will ultimately resolve important victims' rights questions. For example, as discussed below, in the future the victims' rights movement is likely to seek greater involvement in the criminal investigative and charging process.[844] It seems likely that victim surveys would show dissatisfaction with existing structures. But that fact alone might not provide sufficient justification for change, which would require careful consideration of the costs and benefits of proposed modifications. And such cost-and-benefit calculations will almost necessarily need to be made within the conventional understanding of criminal justice processes.[845]

C. The Model Penal Code's Recognition of the Victim's Participatory Role

While other models are worthy of attention, the victim participation model now reflects the conventional understanding in America. A strong illustration of how deeply embedded crime victims now are in American criminal law comes from the American Law Institute's (ALI's) influential Model Penal Code—often called "the MPC." Because of the MPC's impact, the MPC's victim provisions are worth considering at some length.

Since its release in 1962, the MPC's systematic explication of principles of criminal liability has proven quite influential.[846] As Professor Vitiello has commented, for example, the MPC "remains a remarkable effort to professionalize

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[843] *Id.* at 346–47.

[844] *See infra* notes 935-54 and accompanying text.

[845] In response to my position, Professor Erez and her colleague Kathy Laster respond that theoretical or paradigm shifts in thinking can be extremely important. They point out that the idea of having a survey about victims' experiences in the criminal justice process was raised over a decade ago by David Wexler as part of his therapeutic jurisprudence approach to law and legal processes. *See* David B. Wexler, *Victim Legal Clinics and Legal System Victim Impact Statements: Addressing the Therapeutic Aspects of Victim Participation in Justice*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 89 (2011). And Erez and Laster are actually looking to move beyond such limited projects and victim surveys to more effective mechanisms that gauge views and, in particular, inform us about reactions to, say, specific interventions over time. This is much more than just "rhetorical strategy"—or at least is "rhetoric as metaphor," which is much more influential. *See, e.g.*, GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1981). A different paradigm or reconceptualization enables us to reconceive old problems. And such approaches as Design Thinking and User-Centered Design are gaining traction in other areas. In sum, they contend that "being familiar with the rich research on the intractable problems victims experience in the criminal justice system, and how the prevailing conception underlying the system is applied by those who work it, and the less-than-successful solutions offered so far, we think that the consumer approach may help. We need to find another way as the rationale for our system was initially to address victims/victimization in the best and fairest way for all involved, but particularly victims and the public as potential victims." Email to Paul Cassell from Edna Erez and Kathy Laster (Feb. 2, 2025) (on file with author).

[846] On the influence and structure of the MPC, see Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594 (1963); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007).

criminal law."[847] One of the MPC's opening provisions provides "general purposes" for criminal sentencing. As originally promulgated in 1962, the MPC made no mention of crime victims, focusing instead on issues relating to the state's administration of criminal justice and the interests of offenders.[848] But, since then, the MPC has changed. Forty-five years later, in 2007, the MPC's sentencing provisions were updated, making specific reference to crime victims in a revised "purposes" provision:[849]

> (2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:
>
> (a) in decisions affecting the sentencing of individual offenders:
>
> (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, *the harms done to crime victims*, and the blameworthiness of offenders;
>
> (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, *restitution to crime victims*, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in Subsection (2)(a)(i);
>
> (iii) to render sentences no more severe than necessary to achieve the applicable purposes in Subsection (2)(a)(i) and (a)(ii); and
>
> (iv) to avoid the use of sanctions that increase the likelihood the offender will engage in future criminal conduct.[850]

As the emphasized language above indicates, the MPC now specifically recognizes crime victims in two provisions concerning the purposes of criminal sentencing. The first provision makes "the harms done to crime victims" a relevant sentencing factor. The second provision makes "restitution to crime victims" an explicit goal of sentencing. Then later, the MPC builds off of the sentencing purposes provision to include additional provisions providing procedures for victim impact statements and victim restitution.[851]

These new MPC provisions are not widely known. For example, in the chapter in his book criticizing victim impact statements, Professor Vitiello cites older MPC provisions, which he believes are inconsistent with victim impact statements, but does not mention the new MPC provisions specifically approving such statements.[852]

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[847] VITIELLO, *supra* note 4, at 2.

[848] *See* Model Penal Code § 1.02 (1962).

[849] *See* Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1110 (2010) (discussing revisions).

[850] Model Penal Code: Sentencing § 1.02(2) (approved 2007) (emphases added).

[851] *See* MPC: Sentencing § 6.07 (restitution) (approved 2017); MPC: Sentencing § 10.08 (victim impact statements (approved 2017).

[852] *See* VITIELLO, *supra* note 4, at 97–101 (citing MPC §§ 2.02 & 2.05 (1985)).

These new provisions reflect the ALI's current view that crime victims should have protected interests in criminal proceedings.[853] As explicated in the Comment attached to the sentencing-purposes provision, the 2007 revision makes the "harms done to crime victims" an important consideration at sentencing: "Under the new Code's scheme, no crime-reductive or other utilitarian purpose of sentencing may justify a punishment outside the 'range of severity' proportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender . . . ."[854] The revision also "adds [the] goal[] of 'restitution to crime victims' . . ., not included in the original Code."[855] This is an "important utilitarian goal[] independent of [its] effects on future criminal behavior."[856]

Because crime victims have interests in the criminal justice process under the MPC's sentencing-purposes provision, a follow-on question becomes how those interests should be implemented. In 2017, the MPC supplemented the substantive "purposes" provision with two important procedural provisions pertaining directly to victim's rights—the first (§ 6.07) providing procedures for making restitution part of a criminal sentence and the second (§ 10.08) providing procedures for victims delivering "victim impact statements" at sentencing.

In understanding why the nation's "model" criminal code now contains specific victims' rights provisions, it is useful to review the Reporter's Memorandum presented in 2017 along with the new MPC revisions.[857] The reporters (law professors Keven Reitz and Cecelia Klingele) explained that strong theoretical and practical reasons support including crime victims in criminal code provisions.

The reporters began by broadly asserting that "[f]rom both policy and practitioner perspectives, the ascendancy of the crime victim was one of the most important developments in American criminal justice in the late 20th century."[858] In the last several decades, "[n]umerous victims advocacy groups grew to prominence and influence across the nation, there has been tremendous growth in victims services in the courts and via other organizations, and it has become commonplace for new criminal legislation to be named after individual crime victims."[859]

The reporters explained that these developments in crime victims' rights "reflected deep political, professional, and cultural changes of perspective about crime, responsibility, and punishment."[860] In the 1960s, the focus of criminal law reform had been on issues such as defendants' rights; "[i]n the last several decades, while advocacy in favor of defendants' interests has not disappeared,

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[853] It is an interesting issue as to whether the ALI should simply try to describe current American legal principles or reform them. But in the sentencing provisions discussed here, it is clear that ALI is taking a normative stance. *See* Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing: Workable Limits on Mass Punishment*, 48 Crime & Just. 255, 255 (2019) (reporters for the revisions explaining that they give "state legislators broad advice on how they can reform their systems as a whole, while improving decisions in each case").

[854] Model Penal Code: Sentencing § 1.02 cmt.

[855] Model Penal Code: Sentencing § 1.02 cmt.

[856] Model Penal Code: Sentencing § 1.02 cmt. (citing Model Penal Code: Sentencing § 6.07 (victim restitution)).

[857] *See* Model Penal Code: Sentencing, Appx. D (2017) (Victims' Roles in the Sentencing Process – Reporters' Memorandum) [hereinafter MPC Reporters' Memo].

[858] *Id.*

[859] *Id.*

[860] *Id.*

counterbalancing attention to the moral claims of past and prospective crime victims has become a prominent dimension of legal and policy debate."[861]

The Reporters' Memorandum was attached to MPC revisions specifically connected to criminal sentencing. But the reporters explained that in at least a dozen other procedural contexts "victims may be said to have participatory or other interests—that is, junctures at which a role for victims is at least debatable. These include prosecutorial charging, bargaining, and diversion decisions, deferred adjudications, appellate review of sentences, trial-court modifications of sentences (of different kinds, including modifications of prison terms, victim compensation orders, or conditions of community supervision), probation and parole violations hearings, the several mechanisms for prison-release decisions contained in the Code, and forums that offer offenders relief from collateral sanctions."[862] Such interests were not reflected in the initial 1962 Code. As the reporters recounted, when "the original Code was prepared in the 1950s and 1960s, the American 'victims' rights' period had not yet dawned. In the spirit of the times, the Code's first edition made no provision for the participation of victims at sentencing or any other stage of the criminal-justice process."[863]

Interestingly, the reporters specifically considered the issue of whether victims should be limited to civil processes and thus excluded from criminal cases. The reporters noted that one "commonly heard dictum, usually offered to close down discussion, is that America has a 'public' system of criminal justice and not a 'private' one." But, they commented, this "statement is a conclusion rather than an argument—and an ill-supported conclusion at that."[864] This issue of the public-versus-private character of criminal law "has shifted appreciably over time, and appears to be an issue that is resolved according to the tenor of the times."[865] As the reporters noted (and, as discussed at length above), "private prosecutions brought directly by crime victims were the norm in this country through most of the 19th century."[866] To be sure, for much of the 20th century, victims were moved out of the center stage of criminal litigation, which came to be directed by public prosecutors. But "for the last 45 years the historical trend has inclined in the opposite direction. The public-versus-private character of the system is a matter of pendulum swings, not stone tablets."[867]

On the other side of the coin, the reporters addressed what they called the "shibboleth" that crime victims must be given "equal rights" to those of defendants. This approach was "not a workable hallmark for system design. … [V]ictims and defendants have entirely distinct interests in the criminal-justice process, so a principle of equality cannot sensibly be applied."[868] In other words,

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[861] *Id.*

[862] *Id.*

[863] *Id.*

[864] *Id.*

[865] *Id.*

[866] *Id.*

[867] *Id.*

[868] *Id.* (citing Michael M. O'Hear, *Plea-Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326–327, 329 (2007)).

there was "no metaphorical 'pie' of procedural rights that may be divided neatly in half."[869]

The reporters then articulated two ways in which victims could contribute to the pursuit of sentencing-system goals. The first was by playing an "informational role." In most cases, "victims possess information relevant to sentencing authorities' decisions about sanctions that will be best tailored to further retributive or utilitarian objectives." Because victims uniquely possess such relevant information, a well-designed system should receive and make use of that information.[870]

The second way victims could contribute to sentencing goals was by playing an "agency role"—i.e., acting as agents who help the criminal justice system achieve its goals. For example, a victim who delivers a victim impact statement might help promote rehabilitation by driving home to the offender the gravity of his crime. Or a victim might help a judge craft an appropriate no-contact order, by explaining the specific safety concerns that might exist. To be sure, a victim should not be forced to participate in criminal justice processes to help the system. Whether to play an "agency" role should be the victim's choice. But victims who want to participate in the system in appropriate ways should be allowed to do so.[871]

The reporters also developed a framework for evaluating when free-standing interests of crime victims should be embraced in procedural sentencing rules. In reviewing "the national conversation" about crime victims' rights, they found that some claims were articulated again and again. Advocates argued that

> victims have entitlements to be treated with respect and dignity, to be compensated for their losses, to be healed and restored, to be taken seriously, to have themselves and their experiences recognized as important, to receive recognition of their suffering, to be notified, to be present, to participate, and to be heard in proceedings that affect them, and (alternatively) to elect not to participate in the process if that is their choice.[872]

Other asserted victims' interests included "privacy, confidentiality, satisfaction, recovery, restoration, closure, reconciliation with the offender (when that is a victim's choice), therapy, primacy, empowerment, equal rights with defendants, vindication, and expeditious prosecution of their cases."[873]

Deciding which of these claims should be recognized and the extent to which they should be implemented in criminal justice procedures will require discussion, debate, and, ultimately, decision by the appropriate policymakers. In making such decisions, the reporters recommended that close consideration be

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[869] *Id. Cf.* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 943–44 (2024) (arguing that victims deserve the right to speak at sentence not merely because the defendant get to speak but for the *same reason* as defendants have the right to speak: enhancing the legitimacy of the process).

[870] MPC Reporters' Memo., *supra* note 857.

[871] *Id.*

[872] *Id.*

[873] *Id.* (citing, inter alia, Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 622–623 (2009)).

given to the ways in which claims would support recognized sentencing policies and whether the victims' claims would conflict with other considerations. In particular, for "zero-sum cases" where recognizing victims' rights might conflict with defendant's or other interests, policymakers should proceed with caution.[874]

The reporters concluded that crime victims would benefit from a rigorous values analysis of their claims in criminal-justice processes to help overcome opposition in appropriate areas:

> In the context of victims' rights, the result [of opposition] can be thin efforts in public relations—enough to generate the appearance of solicitude toward victims—without any genuine follow-through. . . . For a functioning law of victims' rights to be a reality, those rights should be concentrated on the most important of victims' concerns, and those with strongest justification for inclusion in the criminal-justice process.[875]

The MPC Reporter's Memorandum regarding victims' rights justified (at least) two specific provisions in the sentencing provisions of the MPC: one dealing with restitution for victims and the other dealing with victim impact statements. The MPC revisions added provisions in these two areas.

Turning first to the restitution provision, the MPC sentencing provisions now contain specific procedures for making victim restitution part of a criminal sentence.[876] Under the restitution provision, "the sentencing court may order that the offender make restitution to the victim for economic losses suffered as a direct result of the offense of conviction, provided the amount of restitution can be calculated with reasonable accuracy."[877]

In justifying the provision, the attached comment noted that "[a]ll states now authorize victim-restitution orders as criminal sentences."[878] The comment also explained that the MPC "prioritizes restitution over all other economic sanctions . . . ."[879] The comment acknowledged that "[c]rime victims have a strong moral claim to restitution from those who brought about their injuries." Even though victims could pursue a civil claim, the provision "does not create new entitlements for crime victims so much as it spares them the transaction costs and delays that attend civil litigation."[880] When criminal-restitution orders can reasonably satisfy the claims of victims, the judicial system is also spared the burden of a separate civil case.

The comment further justified restitution by observing that it can "promote offenders' rehabilitation and reintegration into the law-abiding community through the making of amends to crime victims."[881] This approach aligned with "restorative

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[874] *Id.*

[875] *Id.*

[876] MPC: Sentencing § 6.07 (victim restitution).

[877] *Id.*

[878] *Id.*, § 6.07 cmt.

[879] *Id.*

[880] *Id.*

[881] *Id.*

justice" concepts, which have been shown to reduce recidivism rate and lead to other positive outcomes.[882]

Turning to the new provision on victim impact statements, the MPC set out procedures for victims to deliver such statements at sentencing.[883] Of course, victims cannot provide a statement at sentencing unless they know when the sentencing will occur and are allowed to attend. Accordingly, the provision gives victims "the right to receive timely notice of and be present at any sentencing hearing in their case."[884] In addition to extending a right to notice and to attend, the MPC now contains an opportunity for a victim to provide the court with a written "victim impact statement" before sentencing and an "oral victim impact statement of reasonable length" at the sentencing hearing itself.[885] The Comment attached to the provision explains that the "majority of states allow victims to provide input to the sentencing court orally, in writing, or both. [The provision] permits either form of communication, or some other format if allowed by the court. As a practical matter, in most cases in which victim input is provided to sentencing courts, it is transmitted in writing as part of the presentence report."[886]

The MPC provision also contains certain limitations on victim impact statements. For example, the victim impact statement "shall relate solely to the impact of the crime on the victim and the victim's family. The impact statement may not include a recommendation concerning the sentence to be imposed on the defendant."[887]

These limitations can be disputed. For example, in many states, victims are allowed to make sentencing recommendations, at least in non-capital cases.[888] More broadly, the wisdom of some of the limited approaches to victims' rights charted by the Model Penal Code has not been universally accepted. For example, Professor Lynn Branham has argued that the MPC effectively casts restorative justice to the sidelines of sentencing and fails to meet victim-survivor's stated needs.[889]

But there can be little doubt about the influence the MPC has in both describing existing practices in American criminal law and recommending approaches for the future.[890] And the important point for present purposes is that the crime victims' rights movement has clearly succeeded in enshrining victims' rights into the common understanding of what criminal proceedings should include. In that sense, the movement has created a victim participation model of criminal justice that is ascendant.

D. The Future of Victim Participation in Criminal Justice Processes

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[882] *Id.*

[883] MPC: Sentencing § 10.08.

[884] MPC: Sentencing § 10.08(4).

[885] MPC: Sentencing § 10.08(5).

[886] MPC: Sentencing § 10.08, cmt.

[887] MPC: Sentencing § 10.08(6)

[888] *See* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 870.

[889] Lynn Branham, *Pointing the Way . . . in the Wrong Direction: The* Model Penal Code: Sentencing's *Errant Approach to Restorative Justice and Its Role in Sentencing*, 33 CORN. J.L. & PUB. POL'Y 313 (2024).

[890] *Id.* at 351 (calling the MPC: Sentencing an "instructional and drafting feat, providing much-needed guidance to states and the federal government grappling with complex sentencing-related issues").

Against the backdrop of the advances in victims' rights, victims will undoubtedly continue to play an important role in American criminal proceedings in the future. But it is interesting to consider how the victim's role might continue to evolve.[891] This section attempts to forecast ways in which victims' rights might develop in years to come. The victims' rights movement will, no doubt, work to shore up weaknesses in existing victims' rights mechanisms, such as a lack of legal counsel for victims and inadequate enforcement mechanisms. The movement also seems likely to continue efforts to develop alternatives to adversarial criminal justice proceedings. And finally, the movement seems ready to return to efforts to achieve its long-sought goal: adding a victims' rights amendment to the U.S. Constitution.

1. Conditions Favoring Expanding Victims' Rights.

In considering the future trajectory of crime victims' rights, the MPC Reporters have usefully pointed out that further expansion of victims' rights seems most likely—and is easiest to justify—in situations where two conditions exist: first, where victims' claims will not interfere with recognized and legitimate interests of criminal defendants; and, second, where the cost is not prohibitive. If so, the future will likely bring significant expansions of crime victims' rights. Victims' rights do not generally interfere with defendants' rights. And victims' rights are generally not costly.

Regarding potentially harming defendants' interests, the bulk of the victims' rights agenda seeks procedural protection of victims' rights to be heard—to have a "voice, not a veto."[892] Victims can be given a voice without harming the rights of criminal defendants. Setting aside for a moment issues surrounding a criminal trial, defendants do not have a legitimate interest in silencing victims in other criminal proceedings. For example, at sentencing, it has long been the law that a judge is free to consider *all* information that might have some bearing on the appropriate sentence. As the U.S. Supreme Court explained in 1949, historically, sentencing judges "could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."[893] The Court also explained that unlike the trial, in which rules of evidence confine information to that "strictly relevant" to the issue of guilt, a sentencing judge's must have the "fullest information possible

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[891] *Cf.* Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015) (arguing that Canadian development of victims' rights has moved more slowly than in the U.S.). My focus here is on considering the victims' procedural role in criminal proceedings. For an interesting argument that victims' interests need to be considered as part of reform of substantive criminal law, see Mary Graw Leary, *The Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139 (2015) (arguing for a restricting of criminal law to reflect digital victimization).

[892] *See, e.g.*, Hon. Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005) ("this cry for justice, for a voice, not a veto, is heard throughout the country still"); Cassell, *Merciful Victims, supra* note 835, at 1391 ("Victims have consistently sought a 'voice, not a veto' over criminal justice decisions."); United States v. Turner, 367 F. Supp. 2d 319, 331 (E.D.N.Y. 2005) (the Crime Victims' Rights Act "gives crime victims a voice but not a veto"); *see also* Canadian House of Commons, Report of the Standing Committee on Justice and Human Rights, Victims Rights—A Voice, Not a Veto 2 (1998) (". . . [V]ictims ask for a voice in, not a veto over, what happens at each stage of the criminal justice process.").

[893] Williams v. New York, 337 U.S. 241, 246 (1949).

concerning the defendant's life and characteristics."[894] Accordingly, victims can be given a right to speak at sentencing without interfering with any recognized right of defendants.[895] And, as a result, it is unsurprising that today, in virtually all states and the federal system, victims have a right to speak at sentencing.[896] And further expansions of rights for victims to speak at other proceedings seem likely.

More broadly, the growth of victims' rights over the last several decades demonstrates that victims' rights need not come at the expense of defendants' rights.[897] As the modern victims' rights movement began in the 1970s and 1980s, empirical research generally supported this conclusion:

> [S]tudies show that there "is virtually no evidence that the victims' participation is at the defendant's expense." For example, one study, with data from thirty-six states, found that victim-impact statutes resulted in only a negligible effect on sentence type and length. Moreover, judges interviewed in states with legislation granting rights to the crime victim indicated that the balance was not improperly tipped in favor of the victim. One article studying victim participation in plea bargaining found that such involvement helped victims "without any significant detrimental impact to the interests of prosecutors and defendants." Another national study in states with victims' reforms concluded that: "[v]ictim satisfaction with prosecutors and the criminal justice system was increased without infringing on the defendant's rights."[898]

In the 1990s, a federal victims' rights amendment to the U.S. Constitution was under consideration—and supported by some strong defenders of defendants' rights. Professor Laurence Tribe, for example, concluded that the proposed federal victims' rights amendment would "add[] victims' rights that can coexist side by side with defendants'."[899] Similarly, then-Senator Joseph Biden reported in 1999 that he was "convinced that no potential conflict exists between the victims' rights

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[894] *Id.* at 247; *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person conviction of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence"). *See generally*, WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(b) (noting the "sweeping" description of evidence a judge can consider at sentencing); § 26.5(a) (judge allowed to broadly receive information at sentencing).

[895] Special considerations might apply in death penalty cases. But even there, the Supreme Court has concluded that victim impact statements (by a victim's family member) are permissible. *See* Payne v. Tennessee, 501 U.S. 808 (1991) (discussed in *supra* notes 466–82 and accompanying text).

[896] Cassell & Erez, *supra* note 8, at 863 (citing Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CANADIAN CRIM. L. REV. 149, 175–96 (2011) (fifty-state survey of laws relating to victim impact statements)).

[897] Cassell, *Barbarians at the Gates?*, *supra* note 5, at 484–85.

[898] Chief Justice Richard Barajas & Scott A. Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 18–19 (1987) (quoting Deborah P. Kelly, *Have Victim Reforms Gone Too Far—or Not Far Enough?*, 5 CRIM. JUST., Fall 1991, at 28, 28; Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH U. L.Q. 301, 355 (1987) (internal footnotes omitted)).

[899] Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5; see also *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on HJ. Res. 173 & HJ. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong., 2d Sess. at 238 (1996) (letter from Prof. Tribe in support of the amendment).

enumerated in [the proposed amendment] and any existing constitutional right afforded to defendants . . . ."[900] While some of the amendment's opponents contended defendants' rights could theoretically be violated, the main opposition was on the grounds that a federal amendment unnecessary or otherwise inappropriate.[901]

Professor William Pizzi has powerfully explained why "the supposed battle between victims' rights and defendants' rights is largely a chimera, because a trial system that fails to treat victims well will often end up treating most defendants poorly too."[902] Pizzi observes that, as power has shifted toward public prosecutors, they have been able to force defendants to waive their rights and to plead guilty even when a credible defense exists. Pizzi notes that in many European trial systems, victims possess much stronger rights to participate in the process.[903] Given that these systems can accommodate victims' interests without apparent problems, he concludes that victims can be given rights in the American criminal justice system without harming defendants' interests.

In recent years, victims' rights have proliferated around the country in both the federal and state systems. One of the most remarkable things about that expansion is the dog that didn't bark[904]—that is, the relative lack of litigation by defendants challenging victims' rights enactments. To be sure, one can find examples of challenges—and even an occasional successful attack—by defendants.[905] But by and large, defense-initiated litigation has not challenged most of the victims' rights agenda, much less succeeded in establishing constitutional defects.[906]

One obvious explanation is that defendants' recognized interests are simply not harmed by victims' rights.[907] A related explanation is that the victims' rights movement has generally steered clear of the most important procedure for protecting defendants' rights: the criminal trial. The only right that the movement

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[900] S. Rep. No. 105-409, at 82 (1998) (additional views of Sen. Biden).

[901] *See, e.g.*, Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 443. *See generally* Cassell, *Barbarians at the Gates?*, *supra* note 5 (reviewing arguments against the proposed amendment).

[902] William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 365.

[903] *Id.* at 360; *see also* William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COLUM. J. EUR. L. 369 (1995) (contrasting European "soccer" with American "football" and finding parallels to our different trial systems); WILLIAM T. PIZZI: TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (2000).

[904] *Cf.* ARTHUR CONAN DOYLE, THE MEMOIRS OF SHERLOCK HOLMES (1892) (referring to the "curious incident" of the dog that "did nothing in the nighttime").

[905] *See, e.g.*, State v. Murtagh, 169 P.3d 602 (Alaska 2007) (finding provisions limiting defense contact with victims to violate defendants' rights). *But cf.* Arizona Attorneys for Crim. Justice v. Mayes, --- F.4th – (9th Cir. 2025) (upholding similar Arizona statute against facial constitutional challenge). Of course, within particular cases, defendants may sometimes prevail in limiting restitution awards or otherwise defeating case-specific arguments of victims. *See, e.g.*, Paroline v. U.S., 572 U.S. 434 (2014) (defendant successfully challenging victim's broad restitution claim in child sex abuse image case).

[906] *See generally* BELOOF, CASSELL, ET AL., *supra* note 23 (law school casebook collecting litigation involving crime victims' rights; relatively few examples of successful defense challenges). Defense-oriented organizations have had some success in making procedural objections to the way in which victims' rights reforms have been enacted, including several successful "single subject" challenges to the enactment of Marsy's Law provisions. *See supra* notes 678–92 and accompanying text.

[907] *See, e.g.*, State v. Romero, 2010 WL 4060313 (N.M. Ct. App. 2010) (summarily rejecting defendant's argument that trial judge's appointment of victim's counsel in rape case violated defendant's rights).

has generally sought in trial proceedings is a victim's right to attend the trial. That right has been widely recognized, without any apparent harm to defendants' interests.[908]

And finally, even when a defendant faces an assertion of a victim's right in court, judges often find that victims' rights can be enforced in reasonable ways that accommodate competing concerns.[909] For example, when a plea bargain is proposed, it has long been the case in many jurisdictions that the judge has broad discretion to decide whether to accept or reject the proposed plea based on opened-ended considerations such as whether the plea is in the "public interest."[910] Such approaches leave ample room for allowing a victim's role in plea bargaining, and the expansion of victims' involvements in plea negotiations seems likely to continue.[911]

With regard to the costs of victims' rights, most rights that victims seek can be provided relatively inexpensively.[912] An example is notice of court proceedings. With the rise of electronic docketing and email communication, informing victims (along with defendants and lawyers) of court hearings does not appear to have been particularly challenging. Many states, including some very large ones, now require that crime victims receive notice of hearings in their cases—without apparent difficulty.[913]

Other victims' rights impose costs by consuming the time of state actors (such as prosecutors and judges), which might be used to focus on other matters. For example, a victim's right to confer about plea bargains means that prosecutors will need to devote some time to that task. But here again, it is hard to see how the time expended would be a significant burden. Presumably prosecutors (and their agents, such as police officers) are already often communicating with victims in connection with charging, bail, and trial issues. Adding plea bargaining to the agenda of discussions already occurring creates only a modest incremental burden. Indeed, an analysis by the Congressional Budget Office (CBO) of the costs of protecting victims' rights in federal criminal justice concluded that the "CBO does not expect any resulting costs to be significant."[914] And the existence of many state

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[908] *See generally* Beloof & Cassell, *Victim's Right to Attend*, *supra* note 174.

[909] *See, e.g., State v. Waldner*, 2024 S.D. 67 (2024) (concluding that a victim's right to privacy was not absolute in considering whether to grant motion to quash subpoena for victim's diaries and journals). *See generally* Beloof, *supra* note 30.

[910] *See, e.g.*, United States v. Bean, 564 F.2d 700 (5th Cir. 1977) (affirming district court decision to reject plea that was "contrary to the manifest public interest);

[911] *See generally* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 395 (2016) (discussing ways in which victim confidence in plea processes can be protected); Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea Bargaining and Beyond*, 117 W. VA. L. REV. 97, 112–28 (2014) (discussing how victims' role in plea processes is expanding); Welling, *supra* note 898, at 345-52 (arguing that victims should have a right to participate in plea bargaining).

[912] *See* Cassell, *Barbarians at the Gates?*, *supra* note 5, at 504–07.

[913] *See, e.g.*, Fla. Const. art. I, § 16(b)(6)(a) (grant victims the right, upon request, to "reasonable, accurate, and timely notice of … all public proceedings involving" the crime); Cal. Const. art. I, § 28(b)(7) (similar); Tex. Const. art. I, § 30(2)(b)(1) (similar). *See generally* Cassell & Garvin, *Marsy's Law*, *supra* note 375, at 109–11 (discussing victim notification provisions in Florida and elsewhere).

[914] Congressional Budget Office Cost Estimate, S.J. Res. 44, *reprinted in* S. Rep. No. 105-409, at 39–40 (1998).

laws requiring prosecutors to confer with victims[915]—without significant reports of undue burden—proves that victims' rights need not be expensive.

2. Expanding Victims' Access to Legal Counsel.

The future seems likely to bring attention to one important area where crime victims' rights could impose costs: the victim's right to legal counsel. In America today, a serious obstacle to victims' rights enforcement, even in states with strong victims' rights protections, is the difficulty victims have in securing legal counsel. Indigent criminal defendants have been promised legal assistance ever since the Supreme Court's 1963 decision in *Gideon v. Wainwright*.[916] In contrast, crime victims are generally not provided legal counsel at state expense. Indeed, many state enactments specifically exclude such a possibility, presumably because of political compromises by victims' advocates to move victims' enactments forward.[917]

Lack of legal counsel for victims has long been a problem.[918] Writing in this journal in 2002, John Gillis and Douglas Beloof attempted to locate a lawyer enforcing victims' rights in California, the most populous state in the union. They were unable to identify even a single one.[919] At the same time, roundtable discussions with victims' advocates around the country identified the need for legal counsel as a major obstacle to enforcing victims' rights.[920] A later, 2012 report in California continued to identify the need for legal counsel as a significant unmet need.[921]

More recently, an analysis of California caselaw on the victim's right to attend trials reported that formal motions seeking to allow victims to remain in the courtroom were "rare." [922] While, in theory, prosecutors could advocate for victims, as a practical matter, such advocacy was very limited. Judges were also reluctant to intercede to enforce victims' rights.[923] The result of this lack of advocacy for victims was that California's provision concerning victims attending trial was hardly ever considered in court cases.[924]

Law professors Margaret Garvin and Douglas Beloof have written an important article about the need to provide legal representation for victims. They reviewed an innovation in the military justice system, where the Special Victim Counsel (SVC) program was created to provide lawyers for sexual assault

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[915] *See, e.g.,* TOBOLOWSKY ET AL., *supra* not *supra* note 316, at 69–98.

[916] 372 U.S. 335 (1963).

[917] *See, e.g.,* Utah Const. art. I, § 28(2) (nothing in the amendment "shall be construed as creating a cause of action for . . . attorney's fees . . . .").

[918] *See generally* Judith Rowland, *Illusions of Justice: Who Represents the Victim?*, 8 ST. JOHN'S J. LEGAL COMMENT. 177 (1992).

[919] *See* Gillis & Beloof, *supra* note 2, at 691.

[920] *See id.* at 692.

[921] *See* Warnken, *supra* note 670, at 13.

[922] *See* Comment, Kathryn Merrill, *Shielding Crime Victims from the Witness Exclusion Rule's Sword: Amending California's Constitution to Protect Crime Victim-Witnesses' Right to be Present*, 55 U. PAC. L. REV. 55, 65 (2023).

[923] *Id.*

[924] *Id.*

victims.[925] Garvin and Beloof explained that, under the program, victims received detailed advice on how to navigate the challenges of the military's criminal justice process. They concluded that sexual assault victims in the civilian criminal justice system must likewise "have independent lawyers representing them in exercising and enforcing their legal options. The alternative, leaving protection of victims' rights to the parties, gives only the parties control over the existence and the scope of victims' rights and utterly eviscerates victim agency."[926] Other commentators have reached similar conclusions about the importance of legal counsel for victims.[927]

It is one thing to have strong victims' rights included in state laws or even the state constitutions. But given the complexity of modern criminal justice processes, victims will often need legal advocacy to protect their rights. While counsel may step in to represent victims in certain high profile criminal cases,[928] in day-to-day criminal justice in America, representation often remains elusive. Thus, making counsel more readily available remains a priority of the movement. Providing legal counsel appears to be one area where expanding victims' rights will impose costs, but the costs appear to be more than justified by the results achieved. And perhaps innovations in delivering legal services (e.g., artificial intelligence) may help to make legal services more accessible to victims.[929]

3. Improving Enforcement of Victims' Rights.

Other significant targets for improving victims' rights also exist, particularly in the area of enforcing victims' rights. While Marsy's Law and other state efforts have helped to improve the enforcement of crime victims' rights, those efforts have not comprehensively guaranteed protections for crime victims throughout the country. Of course, the current landscape of victims' rights in the United States—which developed against the backdrop of federalism and varying state practices—is a patchwork quilt. Some states have effective regimes in place, while others do not. It continues to be straightforward to find examples of victims who are unable to enforce their rights in state (and federal) criminal processes.[930]

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[925] *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015).

[926] *Id.* at 85.

[927] *See, e.g.,* Note, Madelyn Hayward, *A Right to Be Heard: A Proposal for Independent Victim's Counsel for Sexual Assault Survivors*, 49 S. ILL. U. L.J. 101 (2024).

[928] *See, e.g.,* Ksenia Matthews, *Who Tells Their Stories? Examining the Role, Duties, and Ethical Constraints of the Victim's Attorney Under Model Rule 3.6*, 90 FORD. L. REV. 1317, 1319–20 (2021) (discussing victims' counsel in "celebrity" criminal cases).

[929] *See generally* Cas Laskowski et al., Generative Artificial Intelligence and Access to Justice: Possibilities, Concerns, Best Practices, and How to Measure Success (Dec. 1, 2023), available at https://nacmnet.org/wp-content/uploads/AI-and-Access-to-Justice-Final-White-Paper.pdf [https://perma.cc/X2MJ-49XR].

[930] One (infamous) example is the Jeffrey Epstein case. *See, e.g.,* Doe 1 v. U.S., 359 F.Supp.3d 1201 (S.D. Fla. 2019) (finding that the Government violated the Jeffrey Epstein victims' CVRA right to confer); Doe 1 v. U.S., 411 F.Supp.3d 1321 (S.D. Fla. 2019) (concluding that victims could not seek a remedy for the violation of their rights in light of Epstein's apparent suicide); *In re* Wild, 955 F.3d 1196, 1200 (11th Cir. 2020) (rejecting effort by victims to overturn district court ruling by concluding that the CVRA was never triggered because the government reached a non-prosecution agreement); *In re* Wild, 994 F.3d 1244 (11th Cir. en banc 2021) (concluding that the CVRA did not allow victims the opportunity to file a stand-alone civil action to enforce victims' rights), cert. denied, 142 S. Ct. 1188 (2022)—all discussed in Paul G. Cassell et al., *Circumventing the Crime Victims' Rights Act: A Critical Analysis of the Eleventh Circuit's Decision Upholding Jeffrey Epstein's*

A related point is that many victims' rights enactments contain broad language that has yet to be fully interpreted. For example, twelve states have constitutional provisions that "preserve and protect" the crime victim's "right[] to justice."[931] Many other states (and the federal CVRA) have promised victims that they have expansive rights, such as the rights to "be treated with fairness, respect, and dignity"; to be "free from intimidation, harassment, or abuse;" and "to privacy."[932] The meaning of these open-ended provisions remains largely undeveloped.[933] But a strong argument can be made that these provisions "function as substantive right[s]" that are broadly applicable in criminal justice proceedings.[934] The victims' rights movement needs to litigate the meaning of these provisions to ensure that these capacious rights are generally respected.

Another area of likely attention in the future is how crime victims can challenge the underenforcement of criminal laws. A serious issue arises because many victims never report crimes. And, even when victims do report crimes, police may be unable to solve them. As law professor Shima Baradaran Baughman has sagely observed, the victims' rights movement has not effectively "addressed low clearance or conviction rates at all, or the large group of individuals affected by unsolved crimes. The largest group of victims of crime are those who never reach the police to get help ...."[935] She illustrates her point with this revealing chart:

Secret Non-Prosecution Agreement, 2021 MICH. ST. L. REV. 211. Another example is the on-going litigation in U.S. v. Boeing, involving a secret deferred prosecution deal between Boeing and the U.S. attempting to resolve Boeing's criminal liability for killing 346 people in two deadly 737 MAX crashes. *See* U.S. v. Boeing, 617 F.Supp.3d 503 (N.D. Tex. 2022) (ordering evidentiary hearing on status of crash victims as "crime victims"); U.S. v. Boeing, 2022 WL 13829875 (N.D. Tex. 2022) (concluding that crash victims were crime victims and that government violated their CVRA rights in failing to confer with their families); U.S. v. Boeing, 655 F.Supp.3d 519 (N.D. Tex. 2023) (concluding that no remedy could be provided for the violation of the families' CVRA rights); *In re* Ryan, 88 F.4th 614 (5th Cir. 2023) (denying mandamus because no pending victims' rights issue was before the district court)—all discussed in Cassell, *Enforcement of Rights, supra* note 608. Examples in state court also exist. *See, e.g.,* State v. Leingang, 763 N.W.2d 769, 770 (N.D. 2009) (concluding the victim had no standing to challenge the trial court's decision granting defendant's request to withdraw a guilty plea and dismiss the criminal charges pursuant to a deferred sentencing order even where defendant had agreed to pay all restitution ordered).

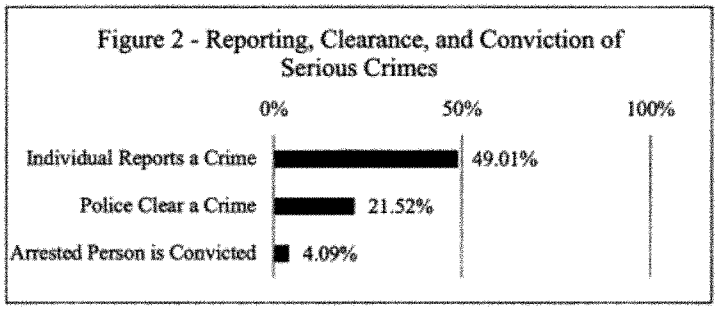
[931] *See* Twist & Kubota, *supra* note 515, at 1 (citing, e.g., Ariz. Const. art. II, § 2.1).

[932] *See, e.g.,* Ariz. Const. art. II, § 2.1; Fla. Const. art. I, § 16(b)(1) & (2); Wisc. Const. art. I, 9m(2)(b); *see also* 18 U.S.C. § 3771(a) (extending to victims the right "to be treated with fairness and with respect for the victim's dignity and privacy").

[933] *See* Cassell & Garvin, *Marsy's Law*, *supra* note 375, at 127; *see also* Wendy Murphy, *Unpacking the Rights of Third Parties in Criminal Cases*, 5 FAMILY & INTIMATE PARTNER VIOLENCE QUART. 73 (2012).

[934] *See, e.g.,* Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREX. L. REV. 43, 44–46 (2016) (arguing for expansive interpretation of right to dignity); Nat'l Crime Victim Law Institute, Ten Common Victims' Rights (2023) (discussing caselaw on victims' right to privacy and fairness), available at https://ncvli.org/wp-content/uploads/2024/02/Common-Victims-Rights_final.pdf. *Cf.* State v. Zarella, 2025 N.H. 20 (interpreting general state constitutional right to privacy as protecting against disclosure of sexual assault counseling records).

[935] Shima Baradaran Baughman, *Crime and the Mythology of Police*, 99 WASH. U.L. REV. 65, 115–16 (2021).



Baughman calculates that for reported crimes in 2019, "the number of victims whose cases were never cleared was 5,709,766 victims (around 78.5 percent). Yet the victims' rights scholarship has never focused on the lack of crime solving, and most of the legal policing literature focuses on the issues arising from the relatively small percentage of cases in which a crime victim is brought through the justice system."[936] It is important to emphasize the efforts surrounding improving police clearance rates are independent of issues concerning the punitiveness of punishment. Surely all thoughtful observers can agree that it is a serious problem—for victims and society—that almost four out of every five serious crimes are never solved. These issues surrounding clearance rates remain important ones for the crime victims' rights movement to address.

As Baughman points out, most victims' rights provisions directly address victims' rights in already-filed criminal cases, such as the right to speak at bail hearings or sentencings. To be sure, it now appears to be standard practice for prosecutors to consider the views of victims in deciding whether to file criminal charges.[937] But the victims' rights movement also seems likely to address issues arising from prosecutor's decisions not to file charges.[938]

Illustrating this issue is the under-enforcement of sexual assault laws, which is a particularly pernicious and prominent problem. A commonly reported figure is that "most of the [rape] cases—in fact, over 80 percent of the cases—still

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[936] *Id.* at 116.

[937] Fourth Edition of *Criminal Justice Standards for the Prosecution Function*, Am. Bar Ass'n (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [https://perma.cc/VV27-CQ9M] (last visited May 18, 2022) (Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges). PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 418, at 63, http://www.ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf [https://perma.cc/576Y-UQZT] (recommending that prosecutors "bring to the attention of the court the views of victims of violent crime on bail decisions, continuances, plea bargains, dismissals, sentencing, and restitution").

[938] *See generally* Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed,* 104 J. CRIM. L. & CRIMINOLOGY 59 (2014) (addressing this question). The victims' rights movement also seems likely to be involved in efforts to create new crimes arising from new technologies. *See generally* Rachel A. Van Cleave, *Book Review,* __ U. PAC. L. REV. __ (2025 (reviewing CRIMINALIZING INTIMATE IMAGE ABUSE: A COMPARATIVE PERSPECTIVE (Gian Marco Caletti & Kolis Summerer eds. 2024).

go unreported."[939] Racial disparities also exist in this area, as the rate of reporting for sexual violence is even lower for victims who are women of color.[940]

If reporting alone was the problem, interventions to increase accessibility of reporting and responsiveness of law enforcement might be the answer. Even when victims report sexual assault crimes, however, most are never successfully prosecuted.[941] A variety of factors contribute to the low prosecution rate. Recent research reports deep "skepticism of rape accusations" within America's criminal justice system.[942] Part of the skepticism stems from systemic gender bias.[943] Other research shows an acceptance of "rape myths" by prosecutors.[944] The likelihood of a prosecution of a reported rape is particularly low when the accused perpetrator is a person known to the victim.[945]

Recently, there has been renewed interest in reforms to allow victims to challenge prosecutors' decisions not to file charges,[946] particularly in the area of sexual assault. For example, building from Professor Capers' skepticism of prosecutors, Professor Jenia Turner has suggested that America should consider giving victims the right to challenge prosecutorial declination decisions.[947] Outside the United States, numerous common law countries already provide victims participation rights in criminal cases, sometimes even including the authority to

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[939] *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases,* Hearing Before the Subcomm. on Crime and Drugs, Sen. Jud. Comm., 111th Cong. 27 (2010) (statement of Dean G. Kilpatrick).

[940] *See, e.g.,* Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It,* CHRON. HIGHER EDUC. (June 18, 2015), *available at* https://www.chronicle.com/article/Another-Challenge-on-Campus/230977 [https://perma.cc/DK77-DZM8].

[941] *See* RAINN, *The Vast Majority of Perpetrators Will Not Go to Jail or Prison*, https://rainn.org/statistics/criminal-justice-system [https://perma.cc/W3CQ-M28Y]; Majority Staff of the Senate Committee on the Judiciary, 102d Cong., *The Response to Rape: Detours on the Road to Equal Justice*, 2, 57 (1993); Campbell, R., D. Patterson & L. Lichty, *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA, VIOLENCE, AND ABUSE 1, 2 (2005) ("[d]espite the alarming prevalence of this crime, most sexual assault victims do not report to law enforcement, and of those incidents that are reported, the vast majority will not be prosecuted"); *see also* Julie Valentine, *Justice Denied: Low Submission Rates of Sexual Assault Kits and the Predicting Variable* (doctoral dissertation Duquesne Univ. 2016), https://dsc.duq.edu/etd/1526 [https://perma.cc/A3XH-76KX].

[942] *See* Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 32 & n.181 (2017).

[943] *See* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1312–34 (2016) (discussing the Justice Department's findings of systematic gender-based bias that contributed to the under-investigation and under-enforcement of sexual assault crimes against women).

[944] *See generally* Rape Victims' Access to Justice: Understanding and Combatting Pervasive Rape Myths, NCVLI Victim Law Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), Apr. 2014, available at https://law.lclark.edu/live/files/16725-ncvlivawrape-victims-access-to [https://perma.cc/Y2YH-BDZ7].

[945] David P. Bryden, *Redefining Rape,* 3 BUFF. CRIM. L. REV. 317, 317–18 (2000) (citations omitted). *See also* Cassia Spohn & Katharine Tellis, Nat'l Criminal Justice Reference Serv., *Policing & Prosecuting Sexual Assault in Los Angeles City & County: VI-VII* (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf [https://perma.cc/UL7D-CEN6] (discussing problems of underprosecution of non-stranger sexual assault compared to stranger sexual assault); *Lisa R. Avalos, Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. GENDER RACE & JUST. 459, 476–77 (2017) (similar).

[946] The issue has been considered for some time. *See, e.g.,* Stuart P. Green, Comment, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488 (1988) ("at least nine states have, or recently had, statutory schemes that potentially enable private persons to challenge prosecutorial inaction").

[947] *See* Jenia I. Turner, *Victims as a Check on Prosecutors: A Comparative Assessment*, 13 CAL. L. REV. ONLINE 72 (2022); *see also* Corey Rayburn Yung, *Private Prosecution of Rape*, 13 CAL. L. REV. ONLINE 86 (2022); Shima Baughman & Jensen Lillquist, *Fixing Disparate Prosecution*, 108 MINN. L. REV. 1955, 2006–07 (2024) (discussing ways in which victims might object to prosecutor's declination decisions).

prosecute cases.[948] Inside the United States, some states currently allow victims to present a case directly to the grand jury.[949] Other states permit victims to approach the grand jury with the court's permission.[950] And in still other jurisdictions, citizens may collect signatures and present a petition to convene a grand jury on the criminal case.[951]

Other jurisdictions inside the United States directly provide for review of prosecutors' decisions not to file charges.[952] For example, some states have specific statutory provisions for obtaining judicial review of a declination decision.[953] Some victims' advocates have filed innovative lawsuits, arguing that declinations violate equal protection principles,[954] although the legal theories in this area remain under development.

Perhaps these approaches could be developed more broadly to allow victims of rape and other crimes to force the filing of meritorious criminal charges when government actors fail to do so. While a full return to an exclusive system of private prosecution seems unlikely in the future, victims seem likely to continue to push for—and in some cases obtain—a greater role in encouraging prosecutors to file charges.

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[948] *See* Verónica Michel & Kathryn Sikkink, *Human Rights Prosecutions and the Participation Rights of Victims in Latin America*, 47 LAW & SOC'Y REV. 873, 881–82 (2013) (identifying 21 common law countries providing prosecutorial participation or civil actor rights in criminal cases).

[949] *See, e.g.*, State *ex rel.* Miller v. Smith, 285 S.E.2d 500 (West Va. 1981) (upholding a citizen's state constitutional right to directly report crime to grand jury without public prosecutor interference); Brack v. Wells, 40 A.2d 319 (Md. 1944) (upholding citizen access to the grand jury); King v. Second Nat'l Bank & Trust Co., 173 So. 498, 499–500 (Ala. 1937) (observing that "[p]ublic policy demands that the citizen, without hazard to himself, may freely bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as he has in aid of the investigation"); State v. Sullivan, 105 So. 631, 633 (La. 1925) ("[a]ny person has a right to go before the grand jury and prefer a charge against another"); Tex. Crim. Proc. Code Ann. art. 20.09 ("The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."); Tenn. Code Ann. § 40-12-104 (a)-(c) ("Any person having knowledge or proof of the commission of a public offense triable or indictable in the county may testify before the grand jury."); Watts v. Civil Serv. Bd. for Columbia, 606 S.W.2d 274, 282–83 (Tenn. 1980) ("no one may prevent a person from appearing before a grand jury. Indeed, it is his duty to do so if he has evidence of a crime."). *Cf.* Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEVELAND ST. L. REV. 535 (2017) (urging that a grand jury victim advocate represent the interests of the complainant in grand jury investigations into police use of excessive force).

[950] *See, e.g., In re* New Haven Grand Jury, 604 F. Supp. 453 (D. Conn. 1985); *In re* Petition of Thomas, 434 A.2d 503 (Me. 1981); Colo. Rev. Stat. Ann. § 16-5-204(4)(l) (allowing "any person" to approach "the grand jury); Neb. Rev. Stat. § 29-1410.01 (similar statute to Colorado's); State *ex rel.* Wild v. Otis, 257 N.W.2d 361, 364-65 (Minn. 1977) (observing that while a private citizen "does not have a right to appear before the grand jury, he is free to attempt to get the grand jury to take action").

[951] *See, e.g.*, Neb. Rev. Stat. § 29-1401.

[952] *See* BELOOF, CASSELL ET AL., *supra* note 23, at 282–92.

[953] *See, e.g.*, Commonwealth v. Benz, 565 A.2d 764, 767 (Pa. 1989) (court-ordered charges filed in homicide case on motion of victim's mother); State v. Unnamed Defendant, 441 N.W. 2d 696 (Wis. 1989) (permitting court to conduct investigation and review and order charges filed pursuant to "John Doe" procedure).

[954] *See, e.g.*, In Re: Petition for Appointment of a Prosecutor Pro Tempore by Jane Doe 1, Jane Doe 2, Jane Doe 3, and Jane Doe, Original Action No. 20180839-SC (filed Utah Sup. Ct. Oct. 16, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271926 [https://perma.cc/H7DV-VLZ9].

4. Developing Alternatives to Adversarial Criminal Justice.

The victims' rights movement also seems likely to continue its efforts to develop victim-inclusive alternatives to adversarial criminal justice, such as restorative justice procedures.[955] Once again, it is important to underline that the crime victims' rights movement does not automatically correspond with longer criminal sentences (although, of course, an individual victim might make such an argument in a particular criminal case).[956] To the contrary, "[e]mpirical evidence suggests that victims are far less vengeful than one might think."[957] For example, a recent national survey of crime victims' views on criminal justice found that, by a two-to-one margin, victims prefer that the criminal justice system generally focus more on rehabilitating people who commit crimes than on punishing them.[958] To be sure, these views are about the system in general. In particular cases (especially violent crime cases), victims may have strong views about the need for tough punishment. But here again, even in individual cases, victims do not always seek longer sentences than the system is currently imposing.[959]

Victims clearly want greater help from the criminal justice system in recovering from crimes.[960] One way to address this need is through "restorative justice" processes. Recent surveys suggest that such processes, "[w]hile once primarily conceived as a social service associated with the criminal and juvenile justice systems, . . . have now migrated across multiple public systems."[961] If properly employed in appropriate cases,[962] such processes could potentially

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[955] *See* Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 334 (2020) ("What victims want may well be what restorative justice has to offer. It is time to give it more serious consideration.").

[956] *See* Erez et al., *supra* note 361, at 330 ("surveys of public attitudes toward punishment confirm that victims' wishes for commensurate punishment generally reflect those of the general public; the two do not differ in their preferred type or degree of harshness in sentencing"). *Cf.* Benjamin Levin, *Victims' Rights Revisited*, 13 CAL. L. REV. ONLINE 30 (2022) ("Many people of many different politics agree that the system doesn't help victims. But rather than framing that observation as support for more punitive policies, progressive and left commentators increasingly suggest that advancing victims' interests isn't tantamount to embracing the law-and-order politics of yesterday.").

[957] *See, e.g.*, Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 336 (2007); *see also* Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 293 (2020) ("[V]ictims are a diverse group with differing needs . . . ."). *See generally* Capers, *supra* note 33, at 1602–03 (collecting studies suggesting that the public and victims are less punitive than the law commonly allows); Edna Erez et al., *supra* note 361, at 329 (attacking the "myth" that victims are vengeful and punitive).

[958] Alliance for Safety and Justice, *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*, ALL. FOR SAFETY & JUST. 5 (2016), available at http://www.allianceforsafetyandjustice.org/crimesurvivorsspeak/report [https://perma.cc/J647-DS4Q].

[959] *Cf.* Cassell & Erez, *Victim Impact Statements*, *supra* note 8, at 949–51 (survey data on victim impact statements and finding that VISs do not generally correlate with longer sentences); Cassell, *Merciful Victims*, *supra* note 835, at 1402–07 (collecting evidence that crime victims often want merciful outcomes).

[960] *See* Alliance for Safety and Justice, *supra* note 958, at 11 (reporting most victims did not receive help in recovering from crimes).

[961] Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1028.

[962] Whether "restorative justice" processes can work in cases of extreme violence, such as homicide and rape, remains a debatable proposition outside the scope of this article.

provide significant benefits to victims by helping them regain control over their lives and heal from the effects of crimes.[963]

Some restorative justice advocates seem to believe that victims should be heard only when they advocate a particular outcome: shorter sentences.[964] But this one-sided approach fails to fully respect victims as independent participants in criminal proceedings.[965] Victims' rights advocates should continue to consider how to expand and improve restorative justice processes, but the underlying goal should be respecting victims' participatory interests rather than pursuing other, unrelated agendas.

5. Expanding the Victims' Role in Adversarial Processes.

Even working within existing adversarial processes, some very far-reaching proposals for reforming the system and expanding victims' rights have been advanced. Some of the most interesting proposals come from the book by renowned legal scholar George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials*.[966] After reviewing such miscarriages of justice as the manslaughter verdict in the Harvey Milk slaying, the first Rodney King not-guilty verdict, and the surprise acquittals in the trials for the murders of Meier Kahan and Yankel Rosenbaum, Fletcher argues that victims need to have more power in adversarial criminal justice processes. He intriguingly proposes that victims should be given a veto over any proposed plea bargain that would short-circuit the trial process, which would give victims greater power over the outcome in most criminal cases.[967] He also suggests that victims should have a formal role at trial, making an unsworn opening statement.[968]

Perhaps unsurprisingly, these expansive proposals have attracted criticism. For example, Stephanos Bibas (and a colleague) defend the victim's right to be heard in plea bargaining but conclude that a right to veto simply goes "too far."[969] And Professor Stephen Schulhofer criticizes Fletcher's proposal to give victims a role in trials as undermining the search for truth. Schulhofer concludes that "[a]ny thoroughgoing effort to reshape the criminal trial to serve the victim, at the expense of truth seeking, would have dramatic and totally unacceptable costs . . . ."[970]

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[963] *See generally* Béatrice Coscas-Williams et al., *Victims Participation in an Era of Multi-Door Criminal Justice*, 56 CONN. L. REV. 511, 533–35 (2024); Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 DENV. L. REV. FORUM 1 (2021); Dena M. Gromet et al., *A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments*, 36 L. & HUM. BEHAV. 375 (2012); *see also* Avlana Eisenberg, *A Trauma-Centered Approach to Addressing Hate Crimes*, 112 J. CRIM. L. & CRIMINOLOGY 729 (2023) (arguing for restorative justice approaches for addressing hate crimes).

[964] *See, e.g.*, Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions?*, 87 BROOK. L. REV. 1127 (2022).

[965] *See* Cassell, *Merciful Victims, supra* note 835, at 1398–1400.

[966] GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995).

[967] *Id.* at 247–48.

[968] *Id.* at 248–50. For similar arguments for an expanded role for victims in trial processes, see Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J. LAW & SOC'Y 294 (2005).

[969] Stephanos Bibas & Richard Bierschbach, *Integrating Remorse and Apology into Criminal Procedure,* 114 YALE L.J. 85, 139 (2004).

[970] Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 841 (1995).

The point here is not to sort out the exact costs and benefits of proposals such as Fletcher's, but instead to highlight that robust discussion of the role of victims in criminal justice processes is now a given. The current debate about victims' rights is no longer whether victims deserve rights, but how far should those rights extend—a debate will clearly continue in this country and elsewhere.

6. Enacting a Federal Victims' Rights Amendment.

Finally, the victims' rights movement seems likely to seek—and should seek—one overarching goal: a federal victims' rights amendment. Since first proposed by the President's Task Force in 1982, a federal amendment has remained the movement's greatest goal. Even though considerable progress has been made in the last several decades toward improving victims' rights, that progress has been uneven and incomplete. As a recent analysis concluded, crime victims' rights laws are too often underenforced, largely due to the lack of effective implementation. Issues such as "the lack of professional knowledge, the lack of enforcement mechanisms, strict eligibility criteria for compensation, existence of varying definitions of victim across jurisdictions, and the limited scope of most crime victim legislations" have all combined to "undermine the effort to protect victims successfully and achieve a global recognition of the status of victims in the criminal justice system."[971]

In one fell swoop, a federal constitutional amendment would not only achieve "global recognition" of victims but also respond to many of the problems that currently hamper victims' rights efforts. As I have argued elsewhere, the values undergirding a federal amendment are "widely shared in our country, reflecting a strong consensus that victims' rights should receive protection. Contrary to the claims that a constitutional amendment is somehow unnecessary, practical experience demonstrates that only federal constitutional protection will overcome the institutional resistance to recognizing victims' interests." Moreover, while some have claimed that victims' rights do not belong in the Constitution, "in fact the Victims' Rights Amendment addresses subjects that have long been considered entirely appropriate for constitutional treatment.[972]

Using state constitutional amendments as models for language, it is possible to carefully draft a federal amendment in ways that protect victims' interests in the system without harming defendants' or other interests.[973] Congress last held hearings on the amendment in 2013 and 2015.[974] With the increasing

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[971] Francis D. Boateng & Gassan Abess, *Victims' Role in the Criminal Justice System: A Statutory Analysis of Victims' Rights in the U.S.*, 19 INT'L J. POLICE SCI. & MANAGEMENT 221, 227 (2017); *see also* Edna Erez et al., *supra* note 361, at 322 ("Despite expanded victim rights and greater victim involvement in the criminal justice system, such reforms have failed to fully realize the desired outcome of victim inclusion").

[972] Cassell, *Barbarians at the Gates?*, *supra* note 5, at 533; *see also* Steven J. Twist & Daniel Seiden, *The Proposed Victims' Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 343, 378 (2012).

[973] *See* Cassell, *Clause-by-Clause*, *supra* note 530.

[974] Victims' Rights Amendment: Hearings before Subcomm. on the Constitution of the House Judiciary Comm. (2015), https://www.congress.gov/114/chrg/CHRG-114hhrg94411/CHRG-114hhrg94411.pdf [https://perma.cc/GL6T-F9RW]; *see also* Victims' Rights Amendment: Hearings before the Subcomm. on the Constitution of the House Judiciary Comm. (2013), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/legacy_files/wp-content/uploads/2016/02/113-18_80543.pdf [https://perma.cc/R7D9-FFZ5].

success of the victims' rights movement in advancing state constitutional amendments, it is time for the movement to make a new push for a comprehensive federal amendment.

VI. CONCLUSION

Springing from ancient roots in private prosecution, over the last half century the crime victims' rights movement has succeeded in transforming the role of crime victims in the criminal justice process. It is no longer accurate to think of crime victims as the "forgotten persons" in American criminal justice. Rather, as a result of the crime victims' rights movement, victims now have protected and expanding rights across the country.

As this article has developed, an important role for victims is justified on historical, legal, and theoretical grounds. First, as a matter of history, the established tradition of private prosecution in criminal cases supports victim involvement. Additionally, as a matter of current law, the crime victims' rights movement has enshrined victims' rights to participate in criminal processes throughout the country. Finally, as a matter of criminal law theory, victims' rights comport with widely shared intuitions about how criminal law processes ought to be structured—as reflected most recently in victims' rights provisions in the Model Penal Code.

These three arguments—stemming from history, current law, and criminal law theory—combine to make a compelling normative case for victims having participatory rights in criminal justice processes. This case does not hinge on any substantive outcome in criminal cases—and certainly not on the claim that victims will make the system more punitive. Rather, the case develops from the procedural claim that the American criminal justice system functions more fairly when victims' voices are included. Over the last half century, the victims' rights movement has restored the victims' voice, making a procedural claim for victim involvement successfully and powerfully. Victims are now heard . . . and it is generally agreed they deserve to be heard. The question remaining is no longer whether victims should have a voice in the process but how to best amplify that voice in the pursuit of justice.

Appendix A. California Marsy's Law Card Prepared by the California Attorney General's Office (2011)

Kamala D. Harris, Attorney General
State of California

Marsy's Card and Resources

The California Constitution, Article 1, Section 28(b), confers certain rights to victims of crime. Those rights include:

1. **Fairness and Respect** - To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse throughout the criminal or juvenile justice process.
2. **Protection from the Defendant** - To be reasonably protected from the defendant and persons acting on behalf of the defendant.
3. **Victim Safety Considerations in Setting Bail and Release Conditions** - To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the defendant.
4. **The Prevention of the Disclosure of Confidential Information** - To prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law.
5. **Refusal to be Interviewed by the Defense** - To refuse an interview, deposition, or discovery request by the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interview to which the victim consents.
6. **Conference with the Prosecution and Notice of Pretrial Disposition** - To reasonable notice of and to reasonably confer with the prosecuting agency, upon request, regarding, the arrest of the defendant if known by the prosecutor, the charges filed, the determination whether to extradite the defendant, and, upon request, to be notified of and informed before any pretrial disposition of the case.
7. **Notice of and Presence at Public Proceedings** - To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.
8. **Appearance at Court Proceedings and Expression of Views** - To be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.
9. **Speedy Trial and Prompt Conclusion of the Case** - To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.
10. **Provision of Information to the Probation Department** - To provide information to a probation department official conducting a pre-sentence investigation concerning the impact of the offense on the victim and the victim's family and any sentencing recommendations before the sentencing of the defendant.
11. **Receipt of Pre-Sentence Report** - To receive, upon request, the pre-sentence report when available to the defendant, except for those portions made confidential by law.
12. **Information About Conviction, Sentence, Incarceration, Release, and Escape** - To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant, and the release of or the escape by the defendant from custody.
13. **Restitution**
    A. It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.
    B. Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.
    C. All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.
14. **The Prompt Return of Property** - To the prompt return of property when no longer needed as evidence.
15. **Notice of Parole Procedures and Release on Parole** - To be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender.
16. **Safety of Victim and Public are Factors in Parole Release** - To have the safety of the victim, the victim's family, and the general public considered before any parole or other post-judgment release decision is made.
17. **Information About These 16 Rights** - To be informed of the rights enumerated in paragraphs (1) through (16).

Attorney General's Victims' Services Unit – Provides local victim/witness information, geographic resource information and appeal status to victims of crime. To obtain information resources on your local Victim Witness Assistance Center or to request appeal status notification, contact: **1-877-433-9069**.

For more information on Marsy's Law, visit the Attorney General's website at: *www.ag.ca.gov/victimservices*

Additional Resources

The Attorney General does not endorse, have any responsibility for, or exercise control over these organizations' and agencies' views, services, and information.

Victim Compensation Program - Help for victims of: Assault, Drunk Driving, Sexual Assault, Child Abuse, Homicide, Stalking, Domestic Violence, Robbery, and Human Trafficking. Victim Compensation can help pay for: mental health counseling, funeral costs, loss of income, crime scene cleanup, relocation, medical and dental bills. For more information contact your local Victim Witness or Victim Compensation and Government Claims Board: **1-800-777-9229.** *www.vcgcb.ca.gov/victims*

CA Dept. of Corrections and Rehabilitation, Office of Victim & Survivor Rights & Services - Provides information on offender release, restitution, parole conditions and parole hearings when the offender is incarcerated in prison. **1-877-256-6877.** *www.cdcr.ca.gov/victim_services*

McGeorge School of Law - Victims of Crime Resource Center - Provides resources for victims by their geographic area along with information on restitution, civil suits, domestic violence, elder abuse, child abuse, abuse against the disabled, victims' rights and compensation. **1-800-Victims.** *www.1800victims.org*

National Domestic Violence Hotline – 24-hour hotline for domestic violence resources. **1-800-799-SAFE TTY: 1-800-787-3224.** *www.ndvh.org*

Adult Protective Services County Contact Information (Elder abuse) – Website lists 24 hour hotline numbers for each county in California. *www.cdss.ca.gov/agedblinddisabled/PG230.htm*

National Child Abuse Hotline – Treatment and prevention of child abuse. **1-800-4-A-CHILD.** *www.childhelp.org/pages/hotline-services*

Rape, Abuse & Incest National Network Hotline – Provides free, confidential services to victims of sexual assault. **1-800-656-HOPE.** *www.rainn.org*

National Human Trafficking Resource Center Hotline-24-hour hotline for reporting tips, contacting local anti-trafficking services and requesting information. **1-888-373-7888.** *www.traffickingresourcecenter.org*

The California Relay Service: For speech impaired, deaf or hard-of-hearing callers: **Dial 711. TTY/HCO/VCO to Voice for English:** 1-800-735-2929 **and for Spanish:** 1-800-855-3000. **Voice to TTY/VCO/HCO for English:** 1-800-735-2922 **and for Spanish:** 1-800-855-3000. **From or to Speech to Speech – English and Spanish:** 1-800-854-7784.

A 'victim' is defined under the California Constitution as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term 'victim' does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim." (Cal. Const., art. I, § 28(e).) A victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon request of the victim, may enforce the above rights in any trial or appellate court with jurisdiction over the case as a matter of right. The court shall act promptly on such a request. (Cal. Const., art. I, § 28(c)(1).)

Victims' Services Unit, September 2011

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Appendix B. Model Marsy's Law Language for State Constitutional Amendments

A. To preserve and protect for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights which shall be protected in a manner no less vigorous than the rights afforded to the accused: to be treated with fairness and respect for the victim's safety, dignity, and privacy; upon request, to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct; to be heard in any public proceeding involving release, plea, sentencing, disposition, parole, and any public proceeding during which a right of the victim is implicated; to reasonable protection from the accused or any person acting on behalf of the accused; upon request, to reasonable notice of any release, or escape of an accused; to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused; to full and timely restitution; to proceedings free from unreasonable delay and a prompt conclusion of the case; upon request, to confer with the attorney for the government; and to be informed of all rights enumerated in this section.

B. The victim, the victim's attorney or other lawful representative, or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with jurisdiction over the investigation or case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law. The court or other authority with jurisdiction shall act promptly on such a request. This section does not create any cause of action for compensation or damages against the State, any political subdivision of the State, any officer, employee, or agent of the State or of any of its political subdivisions, or any officer or employee of the court.

C. As used in this section, a "victim" includes any person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

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