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Crime Victims' Rights

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Over the last 40 years, advocates for crime victims have succeeded in enshrining victims' rights in state constitutions and other enactments. These provisions show that a consensus has developed around the country on certain core victims' rights. Included in the core are, among other things, the right to notice of court hearings, to attend court hearings, to be heard at appropriate court hearings, to proceedings free from unreasonable delay, to consideration of the victims' safety during the process, and to restitution. The current challenge for the country is ensuring that these core rights are fully and effectively implemented and that victims have a means for enforcing these rights. Strengthened enforcement language in state constitutions and, ultimately, perhaps placing victims' rights in the United States Constitution offer the best prospects for fully protecting crime victims' interests in the criminal justice system.

INTRODUCTION

The other chapters in this volume on criminal justice reform have largely focused on prosecutors' interests in bringing criminals to justice or defendants' (or potential defendants') interests in protecting their personal privacy or receiving due process. But no discussion of criminal justice would be complete without considering the interests of an important group: crime victims. Crime victims have compelling concerns in the criminal justice system. No system of criminal justice can gain broad community acceptance if it fails to attend appropriately to victims' interests.

Over the last 40 years, acting on a bipartisan basis, the vast majority of states have adopted significant statutory and even constitutional protections for crime victims. These enactments rest on the widely shared premise that “[w]hile defendants have strong interests in fair trials, victims likewise have strong personal interests in being listened to and taken seriously.”¹ This chapter looks carefully at the federal and state crime victims' rights protections that have become an important—but often underappreciated—part of the current architecture in American criminal justice. While these protections differ in detail from jurisdiction to jurisdiction, when examined as a group, many common features emerge.

The goal of this chapter is to attempt to distill from these enactments a core set of shared values for victims' rights in these American provisions.² This chapter begins by briefly discussing the history of the crime victims' rights movement over the last several decades. It then reviews crime victims' enactments to identify the core set of values that have emerged. It finally

¹ STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 91 (2012).

² Similar shared values about the importance of victims' rights exist in foreign and international law as well, but are beyond the scope of this short chapter. *See, e.g.*, HUMAN RIGHTS WATCH, *MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME* (2008), <https://www.hrw.org/report/2008/09/23/mixed-results/us-policy-and-international-standards-rights-and-interests-victims> (discussing the many “international human rights instruments [that] address or touch on [crime] victims' rights”); *cf.* Marie Manikis, *Imagining the Future of Victims' Rights in Canada: A Comparative Perspective*, 13 OHIO ST. J. CRIM. L. 163 (2015); Michael K. Browne, *International Victims' Rights Law: What Can Be Gleaned from the Victims' Empowerment Procedures in Germany as the United States Prepares to Consider the Adoption of a “Victim's Rights Amendment” to its Constitution*, 27 HAMLIN L. REV. 15 (2004) (discussing German victims' law).

offers some thoughts about what appears to be the most pressing current challenge for crime victims' rights: the need for effective enforcement. This chapter concludes that strengthened state constitutional amendments—and perhaps even a federal constitutional amendment protecting crime victims' rights—offer the best path for ensuring that crime victims' interests are properly protected in our criminal justice process.³

I. THE CRIME VICTIMS' RIGHTS MOVEMENT

While a comprehensive history of the treatment of crime victims in the system remains to be written, the broad outlines can be quickly sketched. At our country's founding, crime victims played an important role in criminal prosecutions, often bringing their own "private" prosecutions.⁴ Over time through the 19th century, however, a system of public prosecution steadily displaced victims.⁵ Ultimately, well into the 20th century, the system had moved to the point where it seemed fair to describe the victim as "the forgotten man" of the system.⁶

The Crime Victims' Rights Movement developed in the 1970s because of this perceived imbalance. The victim's absence from criminal processes conflicted with "a public sense of justice keen enough that it . . . found voice in a nationwide 'victims' rights' movement."⁷ Victims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.⁸ These advocates urged reforms to give more attention to victims' concerns, including protecting victims' rights to be notified of court hearings, to attend those hearings, and to be heard at appropriate points in the process.⁹ The victims' rights movement brought together a broad and diverse coalition, including women's rights advocates concerned about the treatment of rape victims in court proceedings, advocates for racial minorities concerned about inadequate protection against racially motivated violence, and "law and order" advocates concerned that victims' interests were given inadequate attention by judges focused on defendants' rights.

³ This chapter draws on some of my earlier articles discussing victims' rights. See, e.g., Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301 (2012); 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. U.L. REV. 599 (2010); Paul G. Cassell & Steven Joffe, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2010); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861.

⁴ William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976).

⁵ BIBAS, *supra* note 1, at 88; Abraham Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 1 (1982); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U.L. REV. 1135, 1138-42 (2007).

⁶ McDonald, *supra* note 4, at 650.

⁷ *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (internal quotations omitted). See generally DOUGLAS EVAN BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 3-35 (3d ed. 2010); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 [hereinafter Cassell, *Balancing the Scales*]; Goldstein, *supra* note 5; William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37 (1996); Collene Campbell et al., *Appendix: The Victims' Voice*, 5 PHOENIX L. REV. 379 (2012).

⁸ See generally BELOOF, CASSELL & TWIST, *supra* note 7, at 29-38; Douglas E. Beloof, *The Third Wave of Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255; Cassell, *Balancing the Scales of Justice*, *supra* note 7, at 1380-82.

⁹ See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517.

The victims' rights movement received considerable impetus in 1982 when the President's Task Force on Victims of Crime reviewed the treatment of victims.¹⁰ In a report issued that year, the task force concluded that the criminal justice system "has lost an essential balance. ... [T]he system has deprived the innocent, the honest, and the helpless of its protection. ... The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed."¹¹ The task force advocated multiple reforms, such as prosecutors assuming the responsibility for keeping victims notified of all court proceedings and bringing to the court's attention the victim's view on such subjects as bail, plea bargains, sentences, and restitution.¹² The task force also urged that courts should receive victim-impact evidence at sentencing, order restitution in most cases, and allow victims and their families to attend trials even if they would be called as witnesses.¹³ In its most sweeping recommendation, the task force proposed a federal constitutional amendment to protect crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."¹⁴

In the wake of the recommendation for a federal constitutional amendment, crime victims' advocates considered how best to pursue that goal. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to try to initially enact state victims' amendments. They have had considerable success with this "states first" strategy.¹⁵ To date, about 35 states have adopted victims' rights amendments to their own state constitutions protecting a wide range of victims' rights.

The state constitutional amendments were passed in two waves. Beginning with Rhode Island's enactment of a statement amendment in 1986¹⁶ and Michigan's in 1988,¹⁷ more than 30 states passed the state constitutional amendments in what might be regarded as the first wave of protection of crime victims' rights. The amendments provided a broad range of crime victims' rights in the criminal justice process. And even in states without constitutional protection, statutory protections for victims' rights were enacted. In many states, however, the amendments and statutes lacked effective enforcement mechanisms to ensure that their rights were fully implemented. As Attorney General Janet Reno explained in 1997 after a Justice Department review of the landscape, these state efforts "failed to fully safeguard victims' rights."¹⁸

One way of improving enforcement of state crime victims' rights enactments is through strengthened state constitutional protections. In 2008, a second wave of state constitutional efforts began. In California, Dr. Henry T. Nicholas (the co-founder of Broadcom Corp.) backed the enactment of "Marsy's Law," named after his sister Marsalee (Marsy) Nicholas. She was stalked and killed by her ex-boyfriend in 1983. Only a week after her murder, Dr. Nicholas and Marsy's mother walked into a grocery store after visiting Marsy's grave and were confronted by

¹⁰ PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982), *available at* <https://www.ovc.gov/publications/presdntstskforcprpt/welcome.html>.

¹¹ *Id.* at 114.

¹² *Id.* at 63.

¹³ *Id.* at 72-73.

¹⁴ *Id.* at 114 (emphasis omitted).

¹⁵ *See* S. REP. NO. 108-191 (2003).

¹⁶ RHODE ISLAND CONST. art. I, § 23.

¹⁷ MICH. CONST. art. I, § 24

¹⁸ *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

the accused murderer. The family had not been told that he had been released on bail.¹⁹ The family also suffered further indignities during the criminal justice process.

Determined to prevent mistreatment of other victims in the process, Dr. Nicholas supported a comprehensive rewrite of California's state constitutional amendment protecting crime victims. In November 2008, California voters overwhelmingly approved Proposition 9,²⁰ making California's amendment arguably the strongest and most comprehensive in the country. Since then, similar Marsy's Law amendments have been added to the state constitutions of Illinois in 2014,²¹ and Montana, North Dakota, and South Dakota in 2016.²² Efforts are currently underway to add enhanced state constitutional protections for victims in Georgia, Idaho, Kentucky, Maine, Nevada, North Carolina, Ohio, Oklahoma, and Wisconsin, among other states.²³

II. CORE CRIME VICTIMS' RIGHTS

The enactment of state crime victims' rights amendments across the country suggests, when viewed together, an emerging consensus that certain core victims' rights should be protected. This section briefly reviews a number of these core rights,²⁴ making the case for each of them and then explaining how protection has been operationalized in the current state constitutional (and, in some cases, statutory) enactments.

A. THE RIGHT TO NOTICE OF COURT HEARINGS

A crime victim's right to notice about criminal proceedings is an important right that is now broadly recognized. Because victims and their families are directly and often irreparably harmed by crime, they have a vital interest in knowing about any subsequent prosecution and any associated hearings. Notice of court hearings is traditionally recognized as a core part of due process.²⁵ While victims may not suffer a loss of liberty as the result of a criminal proceeding, they certainly have strong claim to be kept fully informed about the progress of a criminal case. Knowing what is happening can, for example, greatly reduce a victim's anxiety about the process.²⁶ For reasons such as these, the President's Task Force on Victims of Crime urged that "[p]rosecutors should keep victims informed about the status of the case from the initial decision to charge or to decline prosecution."²⁷

To guarantee that victims will be kept informed about the progress of court cases, many state constitutional and statutory provisions promise crime victims that they will be notified about court hearings. The California Constitution, for example, guarantees crime victims "reasonable notice" of all public proceedings.²⁸ The Idaho Constitution guarantees the right "to prior

¹⁹ See *About Marsy's Law*, MARSY'S LAW FOR ALL, <https://marsyslaw.us/about-marsys-law/>.

²⁰ CAL. CONST. art. I, § 28.

²¹ ILL. CONST. art. I, § 8.1.

²² Respectively, MONT. CONST. art. II, § 36; N.D. CONST. art. I, § 25; and S.D. CONST. art. VI, § 29.

²³ See *About Marsy's Law*, *supra* note 19.

²⁴ In this brief chapter, I don't discuss every right that might be considered "core" or important to victims.

²⁵ See, e.g., *Dusenberg v. United States*, 534 U.S. 161, 167 (2002).

²⁶ PRESIDENT'S TASK FORCE, *supra* note 10, at 64 (quoting victim to this effect).

²⁷ *Id. Cf.* Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Report (suggestion declaration of standards for prosecutors, standards which could include crime victims' rights protections).

²⁸ CAL. CONST., art. I, § 28(b)(7).

notification of trial court, appellate and parole proceeding.”²⁹ And the Texas Constitution promises “the right to notification of court proceedings . . . on the request of a crime victim.”³⁰

Some state provisions spell out notifications in more detail. For example, my own state of Utah has enacted the Utah Rights of Crime Victims Act, which provides that “[w]ithin seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges.”³¹ The initial notice must contain information about “electing to receive notice of subsequent important criminal justice hearings.”³² In practice, Utah prosecuting agencies have provided these notices with a detachable postcard or, more recently, a computer-generated letter that victims simply return to the prosecutor’s office to receive subsequent notices about proceedings. The return letter serves as the victims’ request for further notices. In the absence of such a request, a prosecutor need not send any further notices.³³

Fortunately, with developing new electronic technologies, keeping victims informed about court hearings is becoming easier than ever.³⁴ Automated victim-notification systems abound, most prominently the so-called VINE (Victim Information Notification Everyday) system.³⁵ Under such a system, a victim registers for notification through e-mail or phone call. Then, when court hearings are scheduled, a computerized notification is made.

In some cases (e.g., terrorist bombings or massive financial frauds), the large number of victims may render individual notifications impractical. In such circumstances, notice by means of a press release to daily newspapers in the area has been regarded as a reasonable alternative to actual notice sent to each victim at his or her residential address.³⁶ New technologies may also provide a way of affording reasonable notice. For example, some federal courts have approved notice by publication, where the publication directs crime victims to a website maintained by the government with hyperlinks to updates on the case.³⁷

B. THE RIGHT TO ATTEND COURT HEARINGS

Victims also deserve the right to attend all public proceedings related to a crime, as is recognized across the country. The President’s Task Force on Victims of Crime articulated the basis for this right: “The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.”³⁸

²⁹ IDAHO CONST., art. I, § 22(3). See Note, *Victim’s Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 184-86 (1997) (discussing enforcement of notification provisions).

³⁰ TEX. CONST. art. I, § 30 (order rearranged).

³¹ UTAH CODE ANN. § 77-38-3(1). See generally Cassell, *Balancing the Scales*, *supra* note 7.

³² *Id.* § 77-38-3(2). The notice will also contain information about other rights under the victims’ statute. *Id.*

³³ *Id.* § 77-38-3(8); see also Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims’ Rights in Arizona*, 47 ARIZ. ST. L.J. 421, 434 (2015) (discussing victim notification in Arizona).

³⁴ See BIBAS, *supra* note 1, at 150 (“With the advent of email, notifying victims . . . is even easier”).

³⁵ See, e.g., VINE, APPRISS SAFETY, <https://apprissafety.com/solutions/vine/>.

³⁶ United States v. Peralta, No. 3:08cr233, 2009 WL 2998050, at *1-2 (W.D.N.C. Sept. 15, 2009).

³⁷ See, e.g., United States v. Skilling, No. H-04-025-SS, 2009 WL 806757, at *1-2 (S.D. Tex. Mar. 26, 2009); United States v. Saltsman, No. 07-CR-641 (NGG), 2007 WL 4232985, at *1-2 (E.D.N.Y. Nov. 27, 2007); United States v. Croteau, No. 05-CR-30104-DRH, 2006 U.S. Dist. LEXIS 23684, at *2-3 (S.D. Ill. 2006).

³⁸ PRESIDENT’S TASK FORCE, *supra* note 10, at 80.

Several strong reasons support such a right. As Professor Doug Beloof and I have argued at length elsewhere,³⁹ the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. And it is widely recognized that the “victim’s presence during the trial may also facilitate healing of the debilitating psychological wounds suffered by a crime victim.”⁴⁰

Concern about psychological trauma becomes even more pronounced when coupled with findings that defense attorneys have, in some cases, improperly used broad witness-exclusion rules to harm victims.⁴¹ Moreover, without a right to attend the trial, “the criminal justice system merely intensifies the loss of control that victims feel after the crime.”⁴² It should come as no surprise that “[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum.”⁴³ One crime victim put it more directly: “All we ask is that we be treated just like a criminal.”⁴⁴ Defendants take full advantage of their right to be in the courtroom.⁴⁵

To ensure that victims can attend court proceedings, many state amendments extend to a crime victim an unqualified right to attend trial,⁴⁶ while others extend a qualified right to attend unless the victim’s testimony would be materially affected by attendance.⁴⁷ Typically such provisions give victims a right not to be excluded from public proceedings. The right is phrased in the negative—a right *not* to be excluded—thus avoiding the possible suggestion that a right “to attend” carried with it a victim’s right to demand payment from the government for travel to court.⁴⁸ Such an unqualified right does not interfere with a defendant’s right for the simple reason that defendants have no constitutional right to exclude victims from the courtroom.⁴⁹

The victim’s right not to be excluded is limited to public proceedings. While the great bulk of court proceedings are public, occasionally they must be closed for various compelling reasons.

³⁹ See 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 (2005).

⁴⁰ Ken Eikenberry, *Victims of Crimes/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

⁴¹ See generally OFFICE FOR VICTIMS OF CRIME, U.S. DEP’T OF JUSTICE, *THE CRIME VICTIM’S RIGHT TO BE PRESENT* 2 (2001) (showing how defense counsel can successfully argue to have victims excluded as witnesses).

⁴² Deborah P. Kelly, *Victims*, 34 WAYNE L. REV. 69, 72 (1987).

⁴³ Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims’ Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

⁴⁴ *Id.* at 59 (quoting Edmund Newton, *Criminals Have All the Rights*, LADIES’ HOME J., Sept. 1986).

⁴⁵ See LINDA E. LEDRAY, *RECOVERING FROM RAPE* 199 (2d ed. 1994) (“Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.”).

⁴⁶ See, e.g., ALASKA CONST. art. I, § 24 (right “to be present at all criminal ... proceedings where the accused has the right to be present”); MICH. CONST., art. I, § 24(1) (right “to attend the trial and all other court proceedings the accused has the right to attend”); OR. R. EVID. 615 (witness exclusion rule does not apply to “victim in a criminal case”); see also Beloof & Cassell, *supra* note 39, at 504-19 (providing a comprehensive discussion of state law on this subject).

⁴⁷ See, e.g., FLA. CONST. art. I, § 16(b) (“Victims of crime or their lawful representatives ... are entitled to the right ... to be present ... at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused”).

⁴⁸ Cf. ALA. CODE § 15-14-54 (right “not [to] be excluded from court ... during the trial or hearing or any portion thereof ... which in any way pertains to such offense”). This negative formulation may be excessive caution, because no right-to-be-present provision has been interpreted to require the State to pay for victims to travel.

⁴⁹ See Beloof & Cassell, *supra* note 39, at 520-34; see, e.g., *United States v. Edwards*, 526 F.3d 747, 757-58 (11th Cir. 2008).

Generally the way that state amendments work is not to interfere with court closure policies, but simply to indicate that when a proceeding is closed, the victim may be excluded as well.⁵⁰

C. THE RIGHT TO BE HEARD AT RELEVANT PROCEEDINGS

Many states have also properly recognized that crime victims deserve the right to be heard at appropriate points in the criminal justice process, thus allowing victims to participate directly in criminal proceedings. Allowing such victim participation can provide important information to judges. Having the actual victim speak is useful because “gauging the harm to a unique human being, not a faceless abstraction, requires evidence of how that particular victim suffered.”⁵¹ And victim participation can lead to important therapeutic benefits. As Professor Bibas has explained at length in his important book *The Machinery of Criminal Justice*, “it is simple participation that helps to empower and heal victims. Participants see the law as more fair and legitimate when they have some control over the process and they have been heard, whether or not they control ultimate outcomes.”⁵² Hearing victim voices can be important regardless of any formal effect on criminal penalties, as recent experience with “reconciliation commissions” in other countries attests.⁵³

Recognizing such benefits, states have extended a right to participate in various ways. For example, the recently enacted constitutional provision in South Dakota promises crime victims the “the right to be heard in any proceeding involving release, plea, sentencing, adjudication, disposition or parole, and any proceeding during which a right of the victim is implicated.”⁵⁴ A number of states have added similar provisions to their state constitutions guaranteeing victim participation.⁵⁵

The existing state amendments frequently recognize several points in the process as appropriate times for crime victims to be heard. First, the amendments commonly extend the right to be heard regarding any *release* proceeding—i.e., bail hearings. This right allows, for example, a victim of domestic violence to warn the court about possible violence should the defendant be granted bail. At the same time, however, nothing in these rights gives victims the ability to veto the release of any defendant. The ultimate decision to hold or release a defendant remains with the judge. The victim’s right to be heard regarding bail simply provides the judge with more information on which to base that decision. Release proceedings typically include not

⁵⁰ See generally WAYNE R. LAFAYE ET. AL., CRIMINAL PROCEDURE § 23.1(b) (3d ed. 2007) (discussing court closure cases).

⁵¹ BIBAS, *supra* note 1, at 91; see also Laurence H. Tribe, *McVeigh’s Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25.

⁵² BIBAS, *supra* note 1, at 151.

⁵³ See, e.g., Mary Burton, *Custodians of Memory: South Africa’s Truth and Reconciliation Commission* 32 INT’L J. LEGAL INFO. 417 (2004).

⁵⁴ S.D. CONST. art VI, § 29.

⁵⁵ See, e.g., ARIZ. CONST. art II, § 2.1(A)(4) (right to be heard at proceedings involving post-arrest release, negotiated pleas, and sentencing); COLO. CONST. art. II, § 16a (right to be heard at critical stages); FLA. CONST. art. I, § 16(b) (right to be heard when relevant at all stages); ILL. CONST. art. I, § 8.1(4) (right to make statement at sentencing); KAN. CONST. art. 15, § 15(a) (right to be heard at sentencing or any other appropriate time); MICH. CONST. art. I, § 24(1) (right to make statement at sentencing); MO. CONST. art. I, § 32(1)(2) (right to be heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless interests of justice require otherwise); N.M. CONST. art. II, § 24(A)(7) (right to make statement at sentencing and post-sentencing hearings); R.I. CONST. art. I, § 23 (right to address court at sentencing); WASH. CONST. art. I, § 35 (right to make statement at sentencing or release proceeding); WIS. CONST. art. I, § 9m (opportunity to make statement to court at disposition); UTAH CONST. art. I, § 28(1)(b) (right to be heard at important proceedings).

only bail hearings but other hearings involving the release of accused or convicted offenders, such as parole hearings. Victim statements to parole boards are particularly important because they “can enable the board to fully appreciate the nature of the offense and the degree to which the particular inmate may present risks to the victim or community upon release.”⁵⁶

The right to be heard also typically extends to any proceeding involving a plea bargain. Under the present rules of procedure in most states, a plea bargain between the prosecution and a defendant must be submitted to the trial judge for approval.⁵⁷ If the judge believes that the bargain is not in the interests of justice, she may reject it.⁵⁸ Unfortunately in some states, a victim does not always have the opportunity to discuss a plea with the prosecution while it is being negotiated⁵⁹ or to present to the judge information about whether to approve the plea. Indeed, it may be that in some cases, “keeping the victim away from the judge ... is one of the prime motivations for plea bargaining.”⁶⁰ Yet victims have compelling reasons for some role in the plea bargaining process:

The victim’s interests in participating in the plea bargaining process are many. The fact that they are consulted and listened to provide them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine. ... [B]ecause judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.⁶¹

As with the right to be heard regarding bail, victims have a voice in the plea bargaining process, not a veto. The judge is not required to follow the victim’s suggested course of action on the plea, but simply has more information on which to base such a determination.

State amendments typically extend to victims the right to be heard at proceedings for determining a sentence. Defendants, of course, have the right to directly address the sentencing

⁵⁶ Frances P. Bernat et al., *Victim Impact Laws and the Parole Process in the United States: Balancing Victim and Inmate Rights and Interests*, 3 INT’L REV. VICTIMOLOGY 121, 134 (1994); see also Laura L. Richardson, *The Impact of Marsy’s Law on Parole in California*, 49 CRIM. L. BULL. 1091 (2013) (discussing changes in parole hearings after Marsy’s law enactment); Kathryne M. Young, *Parole Hearings and Victims’ Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431 (2016).

⁵⁷ See generally BELOOF, CASSELL & TWIST, *supra* note 7, at 422 (discussing this issue); John Pfaff, “Prosecutorial Guidelines,” in the present Report (discussing broad discretion for prosecutors in plea bargaining); Jenia I. Turner, “Plea Bargaining,” in the present Report (arguing for greater transparency in plea bargaining practices).

⁵⁸ See, e.g., UTAH R. CRIM. P. 11(e) (“The court may refuse to accept a plea of guilty ...”); *State v. Mane*, 783 P.2d 61, 66 (Utah Ct. App. 1989) (following Rule 11(e) and holding “[n]othing in the statute requires a court to accept a guilty plea”).

⁵⁹ See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 377 (2016) (discussing diversity in practice about victim involvement in plea negotiations).

⁶⁰ HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES 70 (1978).

⁶¹ BELOOF, CASSELL & TWIST, *supra* note 2, at 423. See generally Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97 (2014) (discussing victims’ rights during plea); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (advancing reasons for victim participation in plea discussions); Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 330-32 (2007) (victim involvement in plea bargains improves perception of fair treatment and increases public confidence in the process).

authority before sentence is imposed.⁶² Victims' enactments typically extend the same basic right to victims.⁶³

Elsewhere, I have argued at length in favor of such victim-impact statements.⁶⁴ The essential rationales are that victim-impact statements provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness of sentencing.⁶⁵ The arguments in favor of victim-impact statements have been generally persuasive in this country, as the federal system and all 50 states provide victims the opportunity to deliver a victim-impact statement.⁶⁶ It is important to emphasize that victims "are not reflexively punitive" and a number of "[e]mpirical studies find that participation by victims does not lead to harsher sentences."⁶⁷ Nor does the claim that victims' impact statements might be somehow "emotional" carry much weight, given that many other parts of the law recognize that it is proper to have such arguments.⁶⁸

Victims can exercise their right to be heard in any appropriate fashion, including making an oral statement at court proceedings or submitting written information for the court's consideration. Defendants can respond to the information that victims provide in appropriate ways, such as providing counter-information.⁶⁹

⁶² See, e.g., FED. R. EVID. 32(i)(4)(A); UTAH R. CRIM. P. 22(a).

⁶³ See generally NORMA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 349-58 (3d ed. 2013) (discussing victim impact statements).

⁶⁴ Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

⁶⁵ *Id.* at 619-25.

⁶⁶ *Id.* at 615; see also Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299-305 (2003).

⁶⁷ BIBAS, *supra* note 1, at 91; see also Cassell, *supra* note 64, at 634-37 ("good evidence that victim impact statements generally lead to harsher sentences is lacking"); Edna Erez, *Who's Afraid of the Big Bad Victims? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 548 ("sentence severity has not increased following the passage of [victim impact] legislation"); Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 308 (2003) ("We find [no] significant relation between the introduction of [victim impact evidence] and sentencing outcomes."); EDWIN VILLMOARE & VIRGINIA N. NETO, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY, VICTIM APPEARANCES AT SENTENCING HEARINGS UNDER THE CALIFORNIA VICTIMS' BILL OF RIGHTS 61 (1987) ("[t]he right to allocution at sentencing has had little net effect ... on sentences in general"); Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 466 (1994) (finding "no support for those who argue against [victim impact] statements on the grounds that their use places defendants in jeopardy"); ROBERT C. DAVIS ET AL., VICTIM IMPACT STATEMENTS: THEIR EFFECTS ON COURT OUTCOMES AND VICTIM SATISFACTION 68 (1990) (concluding that the result of the study "lend[s] support to advocates of victim impact statements" since no evidence indicates that these statements "put[] defendants in jeopardy [or] result in harsher sentences"); cf. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 137 (2004) ("Victims do not want vengeance so much as additional rights to participate."); but cf. Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1050 (2014) (discussing limitations of the current studies and making suggestions for future research); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 166-67 (2012) (arguing that mock jury research shows victim impact evidence leads to punitiveness).

⁶⁸ Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U.L. REV. COLLOQUY 355, 356 (2008) ("Rather than bemoaning emotional reactions, reformers should acknowledge emotion as the legitimate battlefield of criminal justice."); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims Rights Amendment*, 1999 UTAH L. REV. 479, 486-96 (victim impact statements convey information, not emotion).

⁶⁹ See generally Paul G. Cassell & Edna Erez, *Victim Impact Statements and Ancillary Harm: The American Perspective*, 15 CAN. CRIM. L. REV. 149, 175-96 (2011) (providing a fifty state survey on procedures concerning victim impact statements).

Finally, many state amendments extend to a victim a general right to be heard at any proceeding involving any right established by the amendment. This allows victims to present information in support of a claim of right under the amendments, consistent with normal due-process principles.⁷⁰

D. THE RIGHT TO PROCEEDINGS FREE FROM UNREASONABLE DELAY

Many state provisions also extend to crime victims the right to “a speedy trial and a prompt and final conclusion of the case”⁷¹ or to proceedings “free from unreasonable delay.”⁷² Such provisions are designed to be the victim’s analogue to a defendant’s Sixth Amendment right to a speedy trial.⁷³ The defendant’s right is designed, among other things, “to minimize anxiety and concern accompanying public accusation” and “to limit the possibilities that long delay will impair the ability of an accused to defend himself.”⁷⁴ The interests underlying a speedy trial, however, are not confined to defendants. The Supreme Court has acknowledged that “there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.”⁷⁵

Victims often suffer significantly from delays in the criminal justice system.⁷⁶ For example, victims of violent crime frequently suffer from post-traumatic stress disorder (PTSD).⁷⁷ A connection between initial victimization and later depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and even suicide has also been reported in the academic literature.⁷⁸ Delays in the criminal process then exacerbate these initial injuries. Indeed, a “common problem in the prosecution of crimes against victims is that the trial is typically delayed through scheduling conflicts, continuances, and other unexpected delays throughout the course of the trial.”⁷⁹ It thus is not surprising that multiple studies suggest “the negative effect on a victim’s healing process when there is a prolonged trial of the alleged attacker because the actual judicial process is a burden on the victim.”⁸⁰ And “[t]he long delay between reporting a crime to the police and the beginning of the trial represents [a] source of psychological stress for crime victims.”⁸¹

⁷⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (“For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard.” (internal quotation omitted)).

⁷¹ See, e.g., CAL. CONST., art. I, § 28(b)(9).

⁷² See ARIZ. CONST. art. II, § 2.1(A)(10); CAL. CONST. art. I, § 29; ILL. CONST. art. I, § 8.1(a)(6); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(1)(5); WIS. CONST. art. I, § 9m.

⁷³ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ...”).

⁷⁴ *Smith v. Hoey*, 393 U.S. 374, 378 (1969) (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

⁷⁵ *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

⁷⁶ See Brief of Amicus Curiae Arizona Voice for Crime Victims (AVCV) at 6-9, *Ryan v. Washington*, 137 S. Ct. 1581 (Feb. 2017) (No. 16-840) (collecting research). This section draws heavily on the research collected in the AVCV brief.

⁷⁷ See Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUM. STRESS 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUM. STRESS 119, 119 (2003).

⁷⁸ Parsons & Bergin, *supra* note 77, at 182.

⁷⁹ Mary Beth Ricke, *Victims’ Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 WASH. U. J. L. & POL’Y 181, 183 (2013).

⁸⁰ *Id.* at 193.

⁸¹ Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Victims?*, 19 J. INTERPERSONAL VIOLENCE 212, 215 (2004).

Academic literature confirms the ways in which delays in the criminal justice system compound the crime's initial effects on a victim.⁸² A victim's experience with the justice system often "means the difference between a healing experience and one that exacerbates the initial trauma."⁸³ For example, one study examining the effect of offender punishment on crime-victim recovery found that most victims experienced improved recovery when there was an increased perceived punishment of the offender.⁸⁴

Delays in proceedings can also be particularly hard on child victims, who have difficulty healing until the anxiety of legal proceedings can be brought to an end.⁸⁵ More broadly, all victims have difficulty healing from the trauma of the crime until the trial is over and they can turn the page to the next chapter in their lives.⁸⁶ The harm caused by drawn-out judicial proceedings is especially acute in cases involving capital punishment, where the delay between the initial sentencing and an execution can stretch for decades.⁸⁷ Delay in death-penalty cases means that "[c]hildren who were infants when their loved ones were murdered are now, as adults, still dealing with the complexities of the criminal justice system."⁸⁸

To reduce such suffering, state constitutional provisions now often extend to crime victims the right to proceedings free from unreasonable delay. These provisions do not require courts to follow victims' demands for scheduling trial or for ending all delay, but rather to insure against "unreasonable" delay.⁸⁹ In interpreting these provisions, courts can look to the body of case law that already exists for resolving defendants' speedy-trial claims. For example, in *Barker v. Wingo*, the United States Supreme Court set forth various factors that could be used to evaluate a defendant's speedy-trial challenge in the wake of a delay.⁹⁰ As generally understood today, those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy-trial right; and (4) whether the defendant was prejudiced by the delay.⁹¹ The same sorts of considerations apply to victims and could be evaluated in assessing victims' claim to the need for a speedy resolution.

E. THE RIGHT TO NOTICE OF RELEASE OR ESCAPE OF THE ACCUSED

Another commonly recognized right concerns protections for victims. Defendants and convicted offenders who are released pose a special danger to their victims. An unconvicted defendant may threaten or carry out violence to permanently silence the victim and prevent subsequent testimony. Or a convicted offender may later attack the victim in a quest for revenge. These dangers are particularly pronounced for victims of domestic violence and rape. For instance, Colleen McHugh obtained a restraining order against her former boyfriend Eric

⁸² Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUM. STRESS 159, 159 (2003).

⁸³ Parsons & Bergin, *supra* note 77, at 182.

⁸⁴ Joel H. Hammer, *The Effect of Offender Punishment on Crime Victims' Recovery and Perceived Fairness (Equity) and Process Control* (1989) (unpublished dissertation, The New School).

⁸⁵ Cassell, *Balancing the Scales of Justice*, *supra* note 7, at 1402-07.

⁸⁶ See PRESIDENT'S TASK FORCE, *supra* note 10, at 75.

⁸⁷ See *Hill v. McDonough*, 547 U.S. 573, 585 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."); see also Douglas A. Berman, *Finding Bickel Gold in a Hill of Beans*, 2006 CATO SUP. CT. REV. 311, 322.

⁸⁸ Dan S. Levy, *Balancing the Scales of Justice*, 89 JUDICATURE 289, 290 (2006).

⁸⁹ See, e.g., *United States v. Wilson*, 350 F. Supp. 2d 910, 931 (D. Utah 2005) (interpreting CVRA's right to proceedings free from unreasonable delay to preclude delay in sentencing).

⁹⁰ *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972).

⁹¹ See *id.* See generally LAFAVE ET AL., *supra* note 50, § 18.2.

Boettcher on January 12, 1994.⁹² Authorities soon placed him in jail for violating that order.⁹³ He later posted bail and tracked McHugh to a relative's apartment, where on January 20, 1994, he fatally shot both Colleen McHugh and himself.⁹⁴ No one had notified McHugh of Boettcher's release from custody.⁹⁵

To prevent such travesties, a number of states have enacted constitutional provisions requiring notice to crime victims whenever an offender is no longer in custody. California's amendment, for example, gives victims, upon request, the right to be informed of "the scheduled release date of the defendant, and the release of or the escape by the defendant from custody."⁹⁶ Other states have comparable requirements.⁹⁷ These provisions ensure that victims are not suddenly surprised to discover that an offender is back on the streets—one of the animating concerns for the recent Marsy's Law efforts.⁹⁸ Generally, notice is provided in either of two circumstances: either a *release*, which could include a post-arrest release or the post-conviction paroling of a defendant or a pardon,⁹⁹ or an *escape*. The administrative burdens associated with such notification requirements have recently been minimized by technological advances. Many states have developed computer-operated programs that can place a telephone call to a programmed number when a prisoner is moved from one prison to another or released.¹⁰⁰

F. THE RIGHT TO CONSIDERATION OF THE VICTIM'S SAFETY

Given the safety concerns of a crime victim in a criminal case, a number of states have also recognized a right for crime victims to have their safety considered during court proceedings. For example, about 15 states extend to victims the constitutional right to be reasonably protected from the accused—such as the California constitutional provision extending a right to victims to "be reasonably protected from the defendant and persons acting on behalf of the defendant" and 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."¹⁰¹ Virginia extends to victims "[t]he right to protection from further harm or reprisal through the imposition of appropriate bail and conditions of release."¹⁰² Sometimes such enactments are supplemented by giving victims the right to be free from harassment.¹⁰³ Federal law, too, gives victims "[t]he right to be reasonably protected from the accused."¹⁰⁴

⁹² Jeffrey A. Cross, *The Repeated Sufferings of Domestic Violence Victims Not Notified of Their Assailant's Pre-Trial Release from Custody: A Call for Mandatory Domestic Violence Victim Notification Legislation*, 34 U. LOUISVILLE J. FAM. L. 915, 915-16 (1996).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.* (providing this and other examples).

⁹⁶ CAL. CONST. art. I, section 28(b)(12).

⁹⁷ *See, e.g.*, ARIZ. CONST. art. II, § 2.1 (victim's right to "be informed, upon request, when the accused or convicted person is released from custody or has escaped"); S.C. CONST. art. I, § 24 ("victims of a crime have a right to ... be reasonably informed when the accused or convicted is arrested, released from custody, or has escaped"); MICH. CONST. art. I, § 24 (crime victims have the right to information about the conviction, sentence, imprisonment, and release of the accused").

⁹⁸ *See supra* note 19 and accompanying text.

⁹⁹ Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89 (2015).

¹⁰⁰ *See, e.g.*, VINELINK, <https://www.vinelink.com>.

¹⁰¹ CAL. CONST. art. I, § 28(b)(2)-(3).

¹⁰² VA. CONST. art. I, § 8-A.

¹⁰³ *See, e.g.*, CAL. CONST. art. I, § 28(b)(1) (victims have a right 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

These provisions are designed to require that a crime victim's safety be considered by courts, parole boards, and other government actors in making discretionary decisions that could harm a crime victim.¹⁰⁵ For example, in considering whether to release a suspect on bail,¹⁰⁶ a court following such a provision is required to consider the victim's safety. This dovetails with the earlier-discussed provisions giving victims a right to speak at proceedings involving bail.¹⁰⁷ Once again, it is important to emphasize that nothing in these provisions gives the victim any sort of veto over the release of a defendant. To the contrary, the provisions merely establish a requirement that due consideration be given to such concerns in the process of determining release.

Part of that consideration will undoubtedly be whether the defendant should be released subject to certain conditions. One often-used condition of release is a criminal protective order.¹⁰⁸ For instance, in many domestic-violence cases, courts may release a suspected offender on the condition that he¹⁰⁹ refrain from contacting the victim. In many cases, consideration of the safety of the victim will lead to courts crafting appropriate no-contact orders and then enforcing them through the ordinary judicial processes currently in place.

G. THE RIGHT TO PROTECTION OF PRIVACY AND DIGNITY

Victims also have considerable privacy and dignity interests at stake in criminal proceedings.¹¹⁰ Sexual-assault victims, for example, suffer the ultimate invasion of privacy from the crime, and run the risk of continued loss of privacy during the criminal justice process.¹¹¹ A criminal justice system should be structured so that it avoids unnecessary invasions of privacy and insults to dignity.¹¹²

Recognizing the legitimacy of protecting such victims' interests, about 20 states extend to crime victims protection for their privacy and dignity interests. For example, California promises a victim a right "[t]o be treated with fairness and respect for his or her privacy and dignity."¹¹³ Arizona promises crime victims the right "[t]o be treated with fairness, respect, and dignity ... throughout the criminal justice process."¹¹⁴ And Indiana extends to victims "the right to be treated with fairness, dignity and respect throughout the criminal justice process."¹¹⁵ Federal law,

justice process"); TENN. CONST. art. I, § 35 (victims shall be entitled to the "right to be free from intimidation, harassment and abuse throughout the criminal justice system"); ILL. CONST. art. 1, § 8.1 (crime victims have the right to "right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process").

¹⁰⁴ 18 U.S.C. § 3771(a)(1) (2006). See generally Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85-96 (2010).

¹⁰⁵ In the case of a mandatory release of an offender (e.g., releasing a defendant who has served the statutory maximum term of imprisonment), there is no such discretionary consideration to be made of a victim's safety.

¹⁰⁶ See generally Megan Stevenson & Sandra Mayson, "Pretrial Detention and Bail," in the present Report.

¹⁰⁷ See *supra* note 56 and accompanying text.

¹⁰⁸ See generally BELOOF, CASSELL & TWIST, *supra* note 7, at 310-23.

¹⁰⁹ Serious domestic violence defendants are predominantly, although not exclusively, male.

¹¹⁰ See generally Mary Graw Leary, *The Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139 (2015).

¹¹¹ See Paul Marcus & Tora McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019 (1991).

¹¹² Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43 (2016).

¹¹³ CAL. CONST. art. I, § 28(b)(1).

¹¹⁴ ARIZ. CONST. art. II, § 2.1.

¹¹⁵ IND. CONST. art. I, § 13(b).

too, guarantees crime victims “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy.”¹¹⁶

The precise scope of these general rights remains to be fully defined. At a minimum, such provisions provide constitutional dignity to various other enactments that help protect victim privacy. For example, some states have enacted so-called victim-counselor privilege laws, which enable victim counselors to maintain the confidentiality of information revealed to them by crime victims, subject of course to constitutional disclosure obligations.¹¹⁷ Constitutional protection for victims’ privacy may help to ensure that such statutes operate as intended.¹¹⁸

H. THE RIGHT TO RESTITUTION

Finally, all states have recognized, to some degree, a crime victim’s right to restitution,¹¹⁹ and about 20 states have added a state constitutional right to restitution. For example, Illinois promises to a crime victim simply “[t]he right to restitution.”¹²⁰ North Carolina extends to a crime victim “[t]he right as prescribed by law to receive restitution.”¹²¹ The California Constitution contains perhaps the most elaborate provision:

(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.¹²²

Congress has also enacted broad restitution provisions in the federal system. In the Mandatory Victims Restitution Act,¹²³ Congress required federal courts to enter a restitution order in favor of victims for crimes of violence. The law provides that “[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a crime of violence as defined elsewhere,] the court *shall* order ... that the defendant make restitution to the victim of the offense.”¹²⁴ In justifying this approach, the Judiciary Committee explained that “the principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture

¹¹⁶ 18 U.S.C. § 3771(a)(8).

¹¹⁷ See, e.g., 735 ILL. COMPILED STAT. ANN. 5/8-802.1 (protecting confidentiality of statements made to rape crisis personnel). See generally Bonnie J. Campbell, *Preface* to U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS: THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN SEXUAL ASSAULT OR DOMESTIC VIOLENCE VICTIMS AND THEIR COUNSELORS: FINDINGS AND MODEL LEGISLATION (1995).

¹¹⁸ See *People v. Turner*, 109 P.3d 639, 643 (Colo. 2005) (noting justifications for victim-counselor privilege); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 907 (discussing victims’ privacy interests).

¹¹⁹ PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 171 (3d ed. 2016).

¹²⁰ MICH. CONST. art. I, §(a)(12). For discussion of Illinois’ provision, see Jeffrey A. Parness, *The New Illinois Constitutional Crime Victim Restitution Right: A Revolutionary Amendment?*, 27 DCBA BR. 26 (2015).

¹²¹ N.C. CONST. art. I, § 37(1)(c).

¹²² CAL. CONST. art. I, § 28(b)(13).

¹²³ 18 U.S.C. §§ 3663A, 3664.

¹²⁴ 18 U.S.C. § 3663A(a)(1) (emphasis added).

and every time.”¹²⁵ While restitution is critically important, the committee also found that restitution orders were only sometimes entered and, in general, “much progress remains to be made in the area of victim restitution.”¹²⁶ Accordingly, restitution was made mandatory for crimes of violence in federal cases.

Questions continue to swirl around the breadth of these restitution provisions. While some decisions interpret restitution provisions broadly to ensure that victims have been made whole,¹²⁷ other courts appear to be unwilling to give any real content to constitutional protections for a victim’s right to restitution.¹²⁸ And new crimes have posed particularly vexing challenges, such as the issues surrounding how to provide full restitution for victims of child-pornography crimes when many widely distributed offenders are responsible for the victims’ losses.¹²⁹ Perhaps the best response to these concerns will be legislative enactments clarifying that victims truly do deserve full restitution.¹³⁰ Legislatures have broad discretion to act in this area, because only “utterly disproportionate” restitution awards against defendants raise any constitutional concerns.¹³¹

Under restitution provisions, courts are often required to enter an order of restitution against the convicted offender. However, frequently offenders lack the means to make full restitution payments. Accordingly, the courts can establish an appropriate repayment schedule and enforce it during the period of time in which the offender is under the court’s jurisdiction.¹³²

In determining the contours of the victims’ restitution right, well-established bodies of law can be examined.¹³³ Moreover, details are often explicated in implementing legislation accompanying state amendments. For instance, in determining the compensable losses, an implementing statute might rely on the current federal statute, which includes among the compensable losses medical and psychiatric services, physical and occupational therapy and rehabilitation, lost income, the costs of attending the trial, and in the case of homicide, funeral expenses.¹³⁴ It is important to understand that victims’ interests and defendants’ interests can sometimes align on restitution. A defendant who pays restitution may be able to raise a well-deserved claim for mitigation of other penalties, perhaps gaining a shorter term of imprisonment

¹²⁵ S. REP. NO. 104-179, at 12-13 (1995) (quoting S. REP. NO. 97-532, at 30 (1982)). This report was later adopted as the legislative history of the MVRA. See H.R. CONF. REP. NO. 104-518, at 111-12 (1996).

¹²⁶ S. REP. NO. 104-179, at 13.

¹²⁷ See, e.g., *United States v. Kaplan*, 839 F.3d 795, 800-03 (9th Cir. 2016) (allowing restitution to capture “sentimental value” of destroyed property).

¹²⁸ See, e.g., *A.B. v. Lynch*, No. CV-16-0192-PR (Ariz. 2017) (petition for review granted, and then later dismissed, regarding review of trial court decision upholding an artificial \$10,000 cap on restitution in certain traffic-related criminal cases despite Arizona constitutional provision guaranteeing right to “receive prompt restitution” from a convicted defendant).

¹²⁹ See, e.g., *Paroline v. United States*, 134 S. Ct. 1710 (2014) (reversing order for full restitution to child pornography victim and ordering only proportional restitution).

¹³⁰ 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). See generally Warren Binford, *A Global Survey of Country Efforts to Ensure Compensation for Child Pornography Victims*, 13 OHIO ST. J. CRIM. L. 37 (2015).

¹³¹ See Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 44-45 (2016).

¹³² Cf. 18 U.S.C. § 3664 (establishing restitution procedures).

¹³³ See generally Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts*, 30 UCLA L. REV. 52 (1982). Cf. RESTATEMENT (FIRST) OF RESTITUTION (2011) (setting forth established restitution principles in civil cases).

¹³⁴ See 18 U.S.C. § 3663A.

or perhaps even no imprisonment at all so that he can continue to work and make restitution payments to victims.¹³⁵

III. THE FUTURE OF CRIME VICTIMS' RIGHTS

Given the emerging consensus concerning core victims' rights as reflected in many state constitutions as well as in federal law, credible criminal justice reform efforts cannot ignore crime victims' interests. In moving forward, several recommendations for the future suggest themselves.¹³⁶ Perhaps the most basic—but also most important—goals for the future should be expanding the coverage of these core rights across the country. As a result of the history surrounding the adoption of these amendments, current coverage is incomplete, both with regard to the number of states with amendments in place and the breadth and enforceability of these amendments.

Currently, 15 states lack any constitutional protection for crime victims' rights. The absence of a victims' rights amendment does not appear to be due to lack of support for such rights by citizens in those states, but simply the happenstance that the political processes in these states have blocked a straight up-or-down vote on these issues. Crime victims' rights measures are generally in place throughout the West, where the initiative process permits direct access to the ballot. Most of the states lacking such rights are in the Northeast and Upper Midwest (including the populous states of New York, Pennsylvania, and Wisconsin), where such direct ballot access is not generally possible. Working within existing political structures, efforts should be made to bring the number of states with victims' rights amendments much closer to 50, so that the core rights are available to all victims in all states.

Even within the roughly 35 states where victims' rights amendments currently exist, much work remains to be done. Some of the first states to pass such amendments included only a small number of rights in their amendments. Illustrative of such a bare-bones amendment is Florida's, which provides only that 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."¹³⁷ The failure of Florida's amendment to more fulsomely cover the other core rights discussed in this article appears to be due not to some policy decision to exclude those other rights, but simply the fact that the amendment was passed nearly 30 years ago when other, more-expansive models were unavailable.

Related to these coverage limitations are implementation problems. Victims' rights advocates have long been concerned that current enactments "frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, [or] sheer inertia."¹³⁸ As the Justice Department reported in 1997:

[E]fforts to secure victims' rights through means other than a constitutional amendment have proved less than fully adequate. Victims['] rights advocates have

¹³⁵ Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161, 194 (2016) (reporting survey finding "strong agreement among judges that victim compensation could be mitigating"); see also Benji McMurray, *The Mitigating Power of a Victim Focused Sentencing*, 19 FED. SENT'G REP. 125 (2006); but cf. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 673 (2003) (arguing that "the victim's rights movement further imperils the traditional goals of sentencing in that it tends, by its nature, to serve only the goal of retribution").

¹³⁶ See generally Paul G. Cassell, *The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1 (2015).

¹³⁷ FLA. CONST. art. I, § 16(b).

¹³⁸ Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5.

sought reforms at the State level for the past 20 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.¹³⁹

While more recent and comprehensive statistics are lacking, the general consensus appears to be that victims' rights "enforcement is wildly uneven."¹⁴⁰ The limited statistics that are available present cause for concern. Consider, for example, one of the seemingly simplest rights to extend: the right to notice of court hearings. In the federal system, despite the CVRA extending a right to notice to crime victims (and the availability of federal resources), many victims continue to be unaware of that right. A GAO report, for example, found that approximately 25% of the responding federal crime victims were unaware of their right to notice of court hearings.¹⁴¹ Even larger percentages of failure to provide required notices were found in a survey of (presumably less well-funded) state criminal justice systems.¹⁴² Distressingly, the same survey found that racial minorities were less likely to be notified than their white counterparts.¹⁴³

Against this backdrop, it would make sense to push for strengthening of prominence and enforcement of crime victims' provisions throughout the country. The recent efforts to pass Marsy's laws—strong constitutional amendments—in states that are currently lacking fully effective victims' protections should be encouraged. The Marsy's Law formulations contain clear enforcement mechanisms for crime victims, by directly provided standing to pursue judicial enforcement¹⁴⁴ as well as the right to a prompt trial-court decision and, if necessary, appellate review. Such clear provisions—lodged in state constitutions—offer the best short-term mechanism for fully vindicating crime victims' important interests.

Also important are efforts to provide legal counsel for crime victims. Enforcement of victims' rights often requires legal assistance.¹⁴⁵ And yet all too often, crime victims lack the guiding hand of counsel as they confront the daunting and often novel legal questions of how to protect their interests in criminal proceedings. While Congress' enactment of the CVRA in 2004 was accompanied by funding for legal clinics for victims, in recent years that funding has dissipated. Efforts should be made to restore that funding. Perhaps Justice Reinvestment Initiatives, which attempt to re-channel certain criminal justice expenditures,¹⁴⁶ can be tapped as

¹³⁹ *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S.J. Res. 6 Before the S. Comm. on the Judiciary*, 105th Cong. 64 (1997) (statement of Janet Reno, U.S. Att'y Gen.).

¹⁴⁰ BIBAS, *supra* note 1, at 90.

¹⁴¹ U.S. GOV'T ACCOUNTABILITY OFFICE, CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 82 (Dec. 2008).

¹⁴² National Victim Center, *Comparison of White and Non-White Crime Victim Responses Regarding Victims' Rights*, in BELOOF, CASSELL & TWIST, *supra* note 7, at 631-34.

¹⁴³ *Id.* See generally Paul Butler, "Race and Adjudication," in the present Report (discussing other responses to addressing racial discrimination in criminal cases).

¹⁴⁴ See Lawrence Schlam, *Enforcing Victims' Rights in Illinois: The Rationale for Victim "Standing" in Criminal Prosecutions*, 49 VAL. U.L. REV. 597 (2015).

¹⁴⁵ John W. Gillis & Douglas Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 692 (2002).

¹⁴⁶ LINDSEY CRAMER ET AL., URBAN INSTITUTE, THE JUSTICE REINVESTMENT INITIATIVE—EXPERIENCES FROM THE LOCAL SITES (2014), available at <https://www.bja.gov/Publications/UI-JRI-Local-Sites.pdf>. Cf. John Schwartz & Emma Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, N.Y. TIMES (Mar. 9, 2011),

a source of funds. Recent steps by the American military to provide legal counsel for sexual-assault victims illustrate how such programs to provide legal assistance to victims can be effective.¹⁴⁷

It would also be useful to explore ways of expanding participation of victims through innovative “restorative justice” models of criminal justice.¹⁴⁸ These models can enhance victim participation by affirmatively seeking the active participation of crime victims in criminal processes.¹⁴⁹ Restorative justice approaches bring outside-the-box thinking to ensure that victims’ voices are heard.

Taking the longer view, it is well worth considering whether crime victims’ rights should be placed in the United States Constitution. While this brief essay is not the place to explore all of the issues surrounding such a step,¹⁵⁰ it is worth noting that the idea has attracted bipartisan support, including (for example) both Presidents Bill Clinton and George W. Bush.¹⁵¹ Of course, the Constitution should never be amended merely to achieve short-term, partisan, or purely policy objectives. But a federal Victims’ Rights Amendment would protect the basic rights of crime victims not to be victimized again through the process by which government officials prosecute, punish, and release accused or convicted offenders. These are the very kind of rights with which our Constitution is typically and properly concerned—the right of individuals to participate in all those government processes that strongly affect their lives.¹⁵² Perhaps in years to come, the experience of the states in amending their constitutions to protect crime victims will serve as the basis for crafting a federal amendment that will ensure, once and for all, that these important rights are enshrined in and protected by our nation’s fundamental charter.

RECOMMENDATIONS

To ensure appropriate protection for crime victims in the criminal justice process, the following measures are recommended:

<http://www.nytimes.com/2011/03/10/us/10illinois.html> (noting funds saved through abolition of death penalty to be reinvested in things such as services for victims’ families).

¹⁴⁷ Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67 (2015).

¹⁴⁸ See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 223; MARK S. UMBREIT, VICTIM MEETS OFFENDER 2-5 (1994); Jessica M. Marshall, *(I Can’t Get No) Satisfaction: Using Restorative Justice to Satisfy Victims’ Rights*, 15 CARDOZO J. CONFLICT RES. 569 (2014); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1990); see also Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349 (Randy E. Barnett & John Hagel III eds., 1977). See generally *The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1 *et seq.*

¹⁴⁹ Luna, *supra* note 148, at 228-29.

¹⁵⁰ See generally *Victims’ Rights Amendment: Hearing Before the House Judiciary Subcomm. on the Constitution*, 114th Cong., 1st Sess. (2015); *Special Symposium Issue: A Proposed Victims’ Rights Amendment to the Constitution*, 5 PHOENIX L. REV. 301 (2012). Compare, e.g., Cassell, *Barbarians at the Gates*, *supra* note 68 (arguing for the amendment); Steven J. Twist, *The Crime Victims’ Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999) (same); with, e.g., Robert Mosteller, *Victims’ Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) (arguing against the amendment).

¹⁵¹ See 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) (providing a comprehensive history of victims’ efforts to pass a constitutional amendment).

¹⁵² Tribe & Cassell, *supra* note 138, at B5.

- 1. Each state should adopt its own state constitutional amendment protecting core crime victims' rights**—such as the Marsy's Law amendments currently contained in the state constitutions of California, Illinois, Montana, North Dakota, and South Dakota.
- 2. Each state should ensure that its constitutional and other crime-victim enactments are fully enforceable**, by giving crime victims standing to enforce their rights and appellate review of trial court denials of their rights.
- 3. The states and the federal government should find ways to expand legal services for crime victims**, by increasing funding for crime victims' legal clinics.
- 4. Congress should approve a federal crime victims' rights amendment** and send it to the states for ratification.