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## The Importance of Being Earned: How Abatement After Death Collaterally Harms Insurers, Families, and Society at Large

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# The Importance of Being Earned

## HOW ABATEMENT AFTER DEATH COLLATERALLY HARMS INSURERS, FAMILIES, AND SOCIETY AT LARGE

### INTRODUCTION

Imagine a nine-year-old girl murdered, her father forced to amputate his leg, and the family faced with nearly one-and-a-half million dollars in medical expenses. Now imagine that the person who caused this harm was convicted and ordered to pay restitution to the family, but—without any legal review—the court vacated the conviction and the restitution order. These are the facts of *People v. Schaefer*.<sup>1</sup>

With unreviewed vacations (or abatements) of convictions come many immediate and ancillary consequences that affect victims and third parties alike. Courts often issue restitution orders with criminal convictions to compensate victims for their losses. In many jurisdictions, when a court abates a conviction it also abates the corresponding restitution order, which denies the victim his interest in compensation. These immediately noticeable effects, however, are not the only problems caused by abatement. Essentially, when a conviction abates, all proof of the conviction and its consequences legally disappear,<sup>2</sup> which affects the victim in subsequent civil suits and ripples the harm to collateral third parties. The absence of a criminal conviction creates unnecessary obstacles to meeting the burden of proof in a civil case. This can also create unpredictable results for insurance settlements related to the criminal conviction. Even though a defendant has been convicted beyond a reasonable doubt, and even though in most jurisdictions insurance does not pay for the wrong-doing of criminals and allows the insurer to seek indemnification from the wrongdoer through subrogation, abatement creates the possibility that insurers will have to pay

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<sup>1</sup> *People v. Schaefer*, 146 Cal. Rptr. 3d 497 (2012).

<sup>2</sup> *See infra* Part I.C.

for the consequences of an insured criminal or that the insurance company's ability to seek indemnification through subrogation will be diminished, which takes money out of the pockets of others insured by the company.

Because there is limited legal guidance on what courts should do when a criminal dies before exhausting his right to appeal, the possibility of vacating punishment without review lurks behind every criminal conviction.<sup>3</sup> This includes—but is not limited to—murder,<sup>4</sup> fraud,<sup>5</sup> and arson convictions.<sup>6</sup> Currently, only one jurisdiction in the United States has enacted legislation to address this problem.<sup>7</sup>

There are three basic options of what to do when a criminal dies before exhausting his right to appeal: (1) abate the conviction; (2) stay the proceedings (essentially, refuse to abate or review the conviction outright); and (3) allow for substitutive appeal. Historically, a large majority of courts abate the conviction *ab initio* when a defendant dies before exhausting his right to appeal.<sup>8</sup> Abatement *ab initio*<sup>9</sup> acts to erase all

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<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> See, e.g., *Schaefer*, 146 Cal. Rptr. 3d at 501 (where the defendant was convicted of second degree murder and ordered to pay the victim restitution but died before appealing his conviction).

<sup>5</sup> See, e.g., *United States v. Lay*, 456 F. Supp. 2d 869, 870, 875 (2006) (where the court abated former Enron Chief Executive Officer Kenneth Lay's conviction of "conspiracy to commit securities and wire fraud" among others crimes, when defendant Lay died before exhausting his right to appeal).

<sup>6</sup> See, e.g., *United States v. Estate of Parsons*, 367 F.3d 409, 411, 418 (5th Cir. 2004) (where defendant was convicted of arson (among other crimes) and ordered to pay restitution, and the court abated his conviction because he died before exhausting his right to appeal).

<sup>7</sup> That jurisdiction is the State of Virginia. See *Bevel v. Commonwealth*, 717 S.E.2d 789, 794 (Va. 2011) (where the court notes in its analysis that "[i]t does not appear that abatement of a criminal case is addressed by statute in any jurisdiction in the United States" (citation omitted)); see also Tim A. Thomas, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4th 189 (1990). Further, while the right to appeal is not granted in the Constitution, all jurisdictions have made post-trial review "an integral part of the adjudicatory mechanism" and most states grant defendants at least one appeal of right. See Marc M. Arkin, *Rethinking the Constitutional Right to A Criminal Appeal*, 39 UCLA L. REV. 503, 576 (1992); see also *infra* Part IV.B (detailing the current status of abatement). Since the most recent update of the A.L.R., in February 2012, Virginia enacted a statute that adopted a procedure to follow when defendants die while their appeals are pending. See *infra* text accompanying notes 159-61.

<sup>8</sup> See *State v. Carlin*, 249 P.3d 752, 760 & n.45 (Alaska 2011); see also Timothy A. Razel, Note, *Dying to Get Away with It: How the Abatement Doctrine Thwarts Justice—And What Should Be Done Instead*, 75 FORDHAM L. REV. 2193, 2196 (2007).

<sup>9</sup> *Ab initio* means "[f]rom the beginning." BLACK'S LAW DICTIONARY 5 (9th ed. 2009).

evidence the conviction ever existed.<sup>10</sup> When a conviction is abated ab initio, the appellate court “dismiss[es] the appeal as moot . . . and remand[s] the case to the [trial court] to vacate the judgment and dismiss the indictment.”<sup>11</sup> For the purpose of this note, the phrase strict abatement ab initio means that all aspects of the conviction—including restitution orders and any proceedings leading up to the conviction—are erased when the defendant dies. Some jurisdictions apply looser forms of abatement ab initio where only the conviction and the proceedings leading up to the conviction are abated but the restitution order is not abated (or other slight variations of the abatement ab initio doctrine). This is detailed *infra* in the Appendix, Table 2. Jurisdictions that apply the abatement doctrine do so because they view the presumption of innocence to endure until a final review of the case, and they believe that anything short of abatement would unjustly harm the defendant’s family by forcing them to pay for the wrongs of the deceased defendant.<sup>12</sup> While abatement accounts for the interests of the defendant’s family, it ignores the interests of the victims, their families, and collateral third parties.<sup>13</sup>

Simply staying the proceedings and refusing to abate a conviction is not an adequate solution to the unfairness the abatement doctrine creates. In a minority of jurisdictions in the United States, the presumption of innocence is erased at the moment of conviction. This is detailed *infra* in the Appendix, Table 3. The presumption then becomes that the conviction was proper and the defendant is guilty unless proven otherwise through appeals.<sup>14</sup> Jurisdictions that view the presumption of innocence this way stay the proceedings (refuse to abate)<sup>15</sup> when a defendant dies and do not allow the filing or the continuance of any appeals; any prosecutorial proceedings that were initiated before the defendant’s death abate.<sup>16</sup> This practice is as unfair as abating convictions because instead of

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<sup>10</sup> See *Durham v. United States*, 401 U.S. 481, 483 (1971), *overruled in part* by *Dove v. United States*, 423 U.S. 325 (1976); *State v. Devin*, 142 P.3d 599 (Wash. 2006); see also Razel, *supra* note 8, at 2196.

<sup>11</sup> *United States v. Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007).

<sup>12</sup> See *United States v. Estate of Parsons*, 367 F.3d 409, 413 (5th Cir. 2004).

<sup>13</sup> See *infra* Parts II & III.

<sup>14</sup> *Gollott v. State*, 646 So. 2d 1297, 1300 (Miss. 1994); see also *State v. Carlin*, 249 P.3d 752, 762 (Alaska 2011) (noting that to rely on the presumption of guilt violates defendants’ rights); *infra* Part I.B.

<sup>15</sup> To stay means “the postponement or halting of a proceeding, judgment, or the like.” BLACK’S LAW DICTIONARY 1548 (9th ed. 2009).

<sup>16</sup> See, e.g., *Estate of Parsons*, 367 F.3d at 413.

harming victims, this practice denies defendants their right to legal review, forces their families to pay untested restitution orders, and—like abatement—ignores possible harmful effects to third parties.<sup>17</sup>

For the most part, a third doctrine—substitution—can solve all these problems by allowing interested third parties to substitute for the defendant in the appeal after his death. This doctrine, currently recognized in ten states, affords defendants their right to post-trial review, gives defendants' families the opportunity to appeal the conviction and thus the restitution orders without unjustly forcing them to pay compensation to anyone, and mitigates the problems caused to third parties in subsequent civil proceedings.<sup>18</sup> This is detailed *infra* in the Appendix, Table 4. Substitution also ensures that victims maintain the possibility of receiving restitution, allows the record to legally reflect the conviction's existence for subsequent civil proceedings (like insurance payments), and mimics what might have happened if the defendant lived to see his appeal through.<sup>19</sup>

This note argues for the application and codification of the substitution doctrine because of the important and resounding primary and collateral effects felt by victims, insurers, families, and society at large when they are forced to pay for (or denied payment from) an unreviewed conviction. Part I of this note describes the practices courts most commonly follow in the case of a defendant's death before exhausting his right to appeal, and comments on the different positions courts take regarding abatement of restitution orders. Part II discusses problems that arise when a defendant dies while his appeal is pending and the trial process is stopped prematurely, including the harms it causes defendants, primary victims, and governments. For the purpose of this note, the term *primary victims* refers to the people who were directly victimized by the criminal act; primary victims include the person who was murdered, the person who was raped, the person who was robbed, etc. Part III of this note discusses the harm premature adjudication may impose on collateral victims, and specifically analyzes the effect of abatement on insurance companies and society at large. For the purpose of this note, the term *collateral victims* refers to all parties who are secondarily harmed by the

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<sup>17</sup> See *infra* Parts II & III.

<sup>18</sup> See *infra* Part V.

<sup>19</sup> See *infra* Part V.

judicial proceedings. Collateral victims are the defendant's estate, the victim's family, insurance companies, etc. Part IV discusses the current state of legislation regarding victims' rights, the lack of abatement legislation (and its effect on victims' rights statutes) and provides a state-by-state, circuit-by-circuit overview of each jurisdiction's current abatement practices. Part V offers a model substitution statute and illustrates that allowing an interested third party to substitute in the appellate proceedings is the only practice that adequately balances the interests of all parties involved. Ultimately, this note advocates for legislatures to codify, and courts to adopt, the practice of substitution when a defendant dies while his appeal is pending.

## I. ABATEMENT IN AMERICA

In order to understand the fundamental differences between abatement *ab initio*, substitution, and refusing to abate it is simplest to compare the effects with an example. The following hypothetical was created for the purpose of this note.<sup>20</sup>

### A. *Hypothetical Case and Potential Results*

Fred and Wilma, a married couple, have life and homeowner's insurance. One day their house catches fire and Wilma dies in the fire. The police investigate and determine this was both arson and murder.

A neighbor, Barney, is arrested and convicted of both crimes. He is sentenced to thirty years in prison and to pay restitution to Fred for Wilma's life and the house. Barney appeals his conviction but dies shortly after the appeal is filed.

#### 1. Hypothetical Results of Abatement

If Barney and Fred live in a jurisdiction that practices abatement *ab initio*, Barney (or, rather, his estate) is in luck.<sup>21</sup> If the court were presented with his appeal, it would simply dismiss the appeal and abate the conviction. In most jurisdictions, even if Barney did not initiate the appeal the court would abate his conviction. Barney would be presumed innocent

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<sup>20</sup> The facts herein are loosely based on multiple cases and their results in different jurisdictions all discussed elsewhere in this note.

<sup>21</sup> Because Barney is dead, it is actually his estate that will benefit.

because he did not exhaust his right to appeal and a person is innocent until proven guilty—not just at trial, but by also failing on all appellate attempts. The record would reflect that no conviction ever occurred and no subsequent criminal action could be brought against Barney for these crimes because Barney is dead. Barney's estate would not be required to pay the restitution order for Wilma's life or Fred's home. Because it is possible that his conviction was in error, this result would be fair to Barney and his estate.

Because Fred and Wilma had house and life insurance, Fred will be able to file a claim with his insurance company to recover for his monetary losses. But this means that the cost of repairs shifts to Fred's insurer, who will be forced to compensate Fred for the harm allegedly caused by Barney. Theoretically, the insurance company could step into Fred's shoes as subrogee and pursue Barney's estate for indemnification of their expenses, but it could not use proof of Barney's conviction to shift liability (because no conviction exists). Without a conviction, if the insurance company wants to be indemnified it will have a more difficult time proving that Barney was responsible for the crime and it will cost more for the insurance company to meet its burden of proof (where a conviction would essentially speak for itself). If the indemnification suit is unsuccessful then the insurance company (and the clients who pay premiums to that insurance company) lose even more money than just the compensation to the victim.

## 2. Hypothetical Results of Staying the Proceedings

If Barney and Fred live in a jurisdiction that refuses to abate convictions, it is Fred who is in luck (legally, that is). Following Barney's conviction, Barney would be presumed guilty and his death would simply result in the dismissal of his appeal as moot without any change to his conviction. Fred would receive payment from Barney's estate to compensate for the loss of his wife and home. This is fair to Fred because Barney was, in fact, convicted for the crimes against Fred and his family.

Unfortunately for Barney (or his estate), this means that his conviction receives no review. If his conviction were in error, this can never be proven. Barney's estate would be forced to pay the restitution orders to Fred even if Barney was innocent.

### 3. Hypothetical Results of Substitution

If Barney and Fred live in a jurisdiction that allows substitution for posthumous appeals, everyone is in luck (at least as far as judicial fairness is concerned). Barney's estate (or any other eligible third party)<sup>22</sup> would be permitted to step into Barney's shoes for the purposes of the appeal if they choose. Even if Barney did not file the appeal before he died, an eligible third party could choose to bring the appeal. The court would review the appeal as if Barney were still alive. If the court were to determine that there was no miscarriage of justice in Barney's conviction, then Barney's conviction and restitution order would stand and Barney's estate would pay restitution to Fred. On the other hand, if the court determines there was a miscarriage of justice in Barney's conviction, then the court would abate Barney's conviction. Barney's estate would not be burdened with paying a restitution order that was issued in error.

#### B. *The Development of the Abatement Doctrine*

The abatement doctrine is born from state and federal common law, and the lack of statutory codification leaves modern courts questioning their jurisdictional practices and continually changing their positions on abatement.<sup>23</sup> The dilemma forces courts to consider whether justice is better served if courts stay proceedings or abate convictions.<sup>24</sup> The varying interests of parties involved in litigations have called courts to question the

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<sup>22</sup> Note that the term *eligible* could vary from state to state. See the proposed substitution statute set forth in Part V.B. of this note for suggested eligibility guidelines.

<sup>23</sup> See, e.g., *State v. Carlin*, 249 P.3d 752, 754 (Alaska 2011) (overruling *Hartwell v. State*, 423 P.2d 282 (Alaska 1967) and holding that substitution must be permitted after the defendant's death "[b]ecause of changed conditions, including increased recognition of the rights of crime victims and rejection of abatement by some state courts"); *State v. Makaila*, 897 P.2d 967 (Haw.), *opinion after reinstatement of appeal*, 927 P.2d 419 (Haw. 1995) (overruling *State v. Gomes*, 554 P.2d 235 (Haw. 1976), and holding that substitution must be permitted because "it seem[ed] unreasonable automatically to follow the abatement *ab initio* rule and pretend that the defendant was never indicted, tried, and found guilty"); *State v. Korsen*, 111 P.3d 130, 135 (Idaho 2005) (overruling *State v. Stotter*, 175 P.2d (Idaho 1946), and staying the proceedings because abatement *ab initio* failed to recognize victims' rights); *State v. Benn*, 274 P.3d 47, 49-50 (Mont. 2012) (overruling *State v. Holland*, 955 P.2d 164 (Mont. 1998), and staying the proceedings because abatement *ab initio* failed to recognize victims' rights); *State v. Devin*, 142 P.3d 599 (Wash. 2006) (overruling *State v. Furth*, 144 P. 907 (Wash. 1914), because abatement *ab initio* "conflict[ed] with modern laws that compensate crime victims for their suffering").

<sup>24</sup> See *infra* note 162; see also Joseph Sauder, Note, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement Ab Initio Doctrine*, 71 TEMP. L. REV. 347, 360 (1998).



purpose of criminal law, and the different answers to this question have shaped the current legal landscape of abatement.<sup>25</sup>

In recent years, when faced with the issue, courts have been vocal about their reluctance to adhere to past precedent but have nonetheless adhered because of a lack of statutory guidance to do otherwise.<sup>26</sup> An increased awareness of victims' rights has started to show an impact on the approach courts use when faced with this problem. In the past decades, five state courts abolished the dated practice of abatement ab initio by overruling long-standing precedent that requires courts to apply the doctrine.<sup>27</sup> Most courts, however, still choose to uphold the doctrine of abatement ab initio absent legislation ordering otherwise.<sup>28</sup>

### C. *Abatement Ab Initio*

Abatement ab initio was the first procedure to develop in the event a defendant died before exhausting his right to appeal and is the most widely used procedure today.<sup>29</sup> Abatement ab initio acts to completely erase “not only the appeal but also all proceedings had in the prosecution from its inception.”<sup>30</sup> When courts strictly follow abatement ab initio, they vacate all penal, compensatory, and restitutionary aspects of punishments.<sup>31</sup>

Abatement ab initio emerged in the early 1900s, from *United States v. Pomeroy*.<sup>32</sup> In *Pomeroy*, the defendant was convicted of violating the Interstate Commerce Act and sentenced to pay a fine as part of his criminal punishment.<sup>33</sup> The defendant died before satisfying the restitution order and his executrix moved to abate the conviction.<sup>34</sup> The court abated both the conviction and the fine, reasoning that “the object of

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<sup>25</sup> See *infra* note 162.

<sup>26</sup> See *supra* note 23.

<sup>27</sup> See *infra* note 153 and accompanying text.

<sup>28</sup> See, e.g., *Bevel v. Commonwealth*, 717 S.E.2d 789, 795 (Va. 2011).

<sup>29</sup> See *id.* at 793. Though courts recently have begun to stray from abatement, it is still the most widely used practice today. For a comprehensive list of states that strictly apply abatement ab initio see *infra* Appendix, Table 1. For a detailed list of states that apply other forms of abatement, see *infra* Appendix, Table 2.

<sup>30</sup> *Durham v. United States*, 401 U.S. 481, 483 (1971), *overruled in part by* *Dove v. United States*, 423 U.S. 325 (1976).

<sup>31</sup> *United States v. Morton*, 635 F.2d 723, 726 (8th Cir. 1980).

<sup>32</sup> *United States v. Pomeroy*, 152 F. 279 (C.C.S.D.N.Y. 1907), *rev'd sub nom.* *United States v. N.Y. Cent. & H.R.R. Co.*, 164 F. 324 (2d Cir. 1908).

<sup>33</sup> *Id.* at 280.

<sup>34</sup> *Id.*

criminal punishment is to punish the criminal, and not to punish his family.”<sup>35</sup> In the years following the *Pomeroy* decision, nearly all state and federal courts confronted with this issue adopted the practice of strict abatement ab initio,<sup>36</sup> as did the Supreme Court half a century later in *Durham v. United States*.<sup>37</sup>

To the extent that abatement applied to writs of certiorari, however, the Court overruled *Durham* five years later in *Dove v. United States*.<sup>38</sup> In *Dove*, the defendant petitioned the Court for writ of certiorari and the Court dismissed his petition because the defendant died before the petition went before the Court. In the years following the *Dove* decision, “the federal circuit courts have concluded that *Dove* did not abrogate the abatement doctrine entirely for criminal cases, but only for those cases that had concluded their initial appeals.”<sup>39</sup>

Courts that continue to practice abatement ab initio do so because it protects defendants’ rights<sup>40</sup> and protects defendants’ families from punishment.<sup>41</sup> Today, twelve states, the District of Columbia, and seven circuit courts apply strict abatement ab initio.<sup>42</sup> Six other states and three other circuit courts currently apply some other form of the abatement doctrine when a defendant dies while his appeal is pending.<sup>43</sup>

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<sup>35</sup> *Id.* at 282. *But see infra* note 162.

<sup>36</sup> *See Razel, supra* note 8 at 2199-2203.

<sup>37</sup> 401 U.S. 481, 483 (1971) (where the Court convicted the defendant for possession of a counterfeit bill and the defendant died while his appeal was pending), *overruled by Dove v. United States*, 423 U.S. 325 (1976). The Supreme Court’s decision to adopt abatement ab initio turned on the lower federal courts’ overwhelming unity in following *Pomeroy. Id.*

<sup>38</sup> 423 U.S. 325.

<sup>39</sup> *Bevel v. Commonwealth*, 717 S.E.2d 789, 793 (Va. 2011). Note that the right to appeal criminal convictions is not a right that is embedded in our Constitution, but a right that has developed in each jurisdiction over the years. *See Arkin, supra* note 7, at 576.

<sup>40</sup> *See United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004).

<sup>41</sup> *See Crooker v. United States*, 325 F.2d 318, 321 (8th Cir. 1963). Some jurisdictions, though, take a strictly procedural approach and claim convictions must abate because the court no longer has jurisdiction over a deceased party. *See, e.g., State v. Griffin*, 592 P.2d 372, 373 (Ariz. 1979). This rationale is flawed, and ignores the rights of primary and collateral victims and forces their claims to fall silent. A court “obtains personal jurisdiction over a criminal defendant by the service of a summons and complaint or by arrest. Once personal jurisdiction is obtained over a party, it will generally not be lost as a result of subsequent events.” *State v. Carlin*, 249 P.3d 752, 763 (Alaska 2011); *accord* FED. R. APP. P. 43; FED. R. APP. P. 12.1 (dictating that the “[c]ourt of appeals . . . retains jurisdiction unless it expressly dismisses the appeal”).

<sup>42</sup> *See infra* Appendix, Table 1.

<sup>43</sup> *See infra* Appendix, Table 2.

D. *Indefinitely Staying the Proceedings (Refusing to Abate)*

Another approach courts take when a defendant dies before exhausting his right to appeal is indefinitely staying the proceedings (refusing to abate). When a conviction is upheld without review, subject to jurisdictional rules, the estate is required to satisfy any monetary, restitutionary, and compensatory judgments ordered with the conviction.<sup>44</sup> If the defendant initiated an appeal before his death, the court abates the appeal itself.<sup>45</sup>

Currently, twelve states and one circuit court practice indefinitely staying the proceedings when a defendant dies before exhausting his right to appeal.<sup>46</sup> Courts embrace this rationale because they view the presumption of innocence to stop at the moment of conviction.<sup>47</sup> The presumption of innocence is replaced with a presumption that the conviction was proper.<sup>48</sup> Courts that stay proceedings and uphold convictions without review do so because it serves the victims' rights by allowing the conviction to stand.<sup>49</sup>

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<sup>44</sup> See, e.g., *Carlin*, 249 P.3d at 762.

<sup>45</sup> See, e.g., *id.*

<sup>46</sup> See *infra* Appendix, Table 3; see also *Carlin*, 249 P.3d at 760-62 (detailing that eight states currently dismiss appeals without review and two states, Alabama and Oregon, practice variations of the refusal to abate method). For examples of states that stay proceedings without review see *State v. Bostwick*, 740 A.2d 381 (Conn. 1999) (where the court held that the defendant's death rendered his appeal moot); *Perry v. State*, 575 A.2d 1154, 1156 (Del. 1990) (where defendant died while the appeal of his murder conviction was pending and the court held that it was unable to hear the appeal because the court was "divested of its jurisdiction to proceed" upon defendant's death); *State v. Korsen*, 111 P.3d 130, 135 (Idaho 2005) (where the court held that the defendant's conviction and restitution order must remain after his death because the state's substitution provision only applied in the civil context); *Peters v. Michigan*, 516 U.S. 1048 (1996) (where the defendant died while the appeal of his first degree murder conviction was pending and the court dismissed his appeal because "[t]he presumption of innocence falls with a guilty verdict" because wiping out this kind of judgment for a reason other than a finding of error benefits no parties of the litigation and would be likely to "produce undesirable results in the area of survivor's rights in more instances" than not); *Royce v. Commonwealth*, 577 S.W.2d 615, 616 (Ky. 1979) (where the defendant died while the appeal of his manslaughter and robbery convictions was pending and the court held that an appeal would be improper because his death terminated the attorney client relationship, and therefore no one, including the Public Defender, had authority or standing to speak on behalf of the deceased); *State v. Anderson*, 314 S.E.2d 597, 597 (S.C. 1984) (where the court held that the defendant's death when his appeal was pending was grounds for dismissal, and that the State Supreme Court substitution rule applied only in civil, not criminal contexts).

<sup>47</sup> See, e.g., *Whitehouse*, 364 N.E.2d at 1016.

<sup>48</sup> See *id.*; see also *Nicholson v. State* 254 So. 2d 881, 884 (Miss. 1971).

<sup>49</sup> Cf. *Carlin*, 249 P.3d at 758-59 (noting that jurisdictions reject abatement because of victims' rights).

### E. Substitution

The final common approach for handling the fate of convictions when a defendant dies before exhausting his right to appeal is to substitute an eligible third party for the defendant in the appellate proceedings posthumously.<sup>50</sup> If a defendant's eligible personal representative so chooses, he may bring (or proceed with) the appeal; otherwise, the conviction stands.<sup>51</sup>

Today, only ten states permit a third party representative to substitute in appellate proceedings for a deceased defendant.<sup>52</sup> Courts that embrace substitution do so because the death of a criminal defendant does not necessarily render a claim moot.<sup>53</sup> Even after the defendant's death, there are victims' rights and the possibility of collateral consequences to consider.<sup>54</sup>

### F. Restitutionary Differences

Courts differ in their positions on abating monetary punishments.<sup>55</sup> Strict followers of abatement *ab initio* abate the

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<sup>50</sup> See *e.g.*, *Surland v. State*, 895 A.2d 1034, 1045 (Md. 2006).

<sup>51</sup> See *id.*

<sup>52</sup> See *infra* Appendix, Table 4; see *e.g.*, *Carlin*, 249 P.3d at 762 (holding that upon defendant's death the defendant's estate may substitute in the appellate process, but that to allow substitution without the consent of the estate could frustrate the interests of the estate and should not be permitted); *Gollott v. State*, 646 So. 2d 1297, 1303 (Miss. 1994) (holding that while the State Supreme Court rule to allow substitution after a defendant's death only specifically proscribes substitution in civil proceedings it does not prohibit substitution in criminal proceedings, and that so long as the substitution is made in a timely manner, any party may substitute in the appellate proceedings after defendant's death as the appeal is an appeal of right); *State v. Salazar*, 945 P.2d 996, 1004 (N.M. 1997) (holding that New Mexico's Appellate Procedure rules allow substitution of parties upon a defendant's death but "where no substitution is sought by either the court or the parties, the court [should] then abate the entire proceeding *ab initio*"); *State v. McGettrick*, 509 N.E.2d 378, 381 (Ohio 1987) (holding that because the State's rules of Appellate Procedure clearly allowed substitution of parties, that the substitution of parties in criminal appeals after defendants die is permissible so long as the substitution is made in a timely manner); *State v. Webb*, 219 P.3d 695, 699 (Wash. 2009) (holding that substitution of parties is permissible in criminal appeals if filed in a timely manner, and if no application for substitution is filed then conviction and punishments remained intact).

<sup>53</sup> See, *e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 9 (1998).

<sup>54</sup> See *id.* (holding that "[t]he possibility of consequences collateral to the imposition of sentence [was] sufficiently substantial to justify . . . dealing with the merits [of the case]" (quoting *Pollard v. United States*, 352 U.S. 354, 484 (1957) (internal quotation marks omitted)); see also *Sibron v. New York*, 392 U.S. 40, 55 (1968). For a more comprehensive discussion on the collateral consequences of criminal convictions see Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145 (2008).

<sup>55</sup> See *United States v. DiBruno*, 438 F. App'x. 198, 200 (4th Cir. 2011) (citing and comparing *United States v. Christopher*, 273 F.3d 294, 298-99 (3d Cir. 2001) (where restitution did not abate), *United States v. Johnson*, 1991 U.S. App. LEXIS

conviction and the entire monetary judgment.<sup>56</sup> Courts that distinguish between penal and compensatory restitution—that is, restitution ordered solely to punish the criminal versus restitution ordered solely to compensate the victim—generally abate penal restitution (regardless of the conviction’s abatement), but uphold orders for compensatory restitution.<sup>57</sup> Other jurisdictions uphold the conviction because it acted as a punishment to the defendant, but abate all restitution ordered because enforcing the monetary judgment would punish the defendant’s family.<sup>58</sup> Different still, some jurisdictions abate the conviction, but uphold the restitution.<sup>59</sup> There are five states that do not fall into any of the three typical procedural categories of what to do when a defendant dies while his appeal is pending.<sup>60</sup>

## II. PROBLEMS CAUSED FOR PRIMARY PARTIES WHEN THE JUDICIAL PROCESS IS STOPPED PREMATURELY

Abating convictions without review and staying proceedings without review both stop the judicial process and deny parties rights that have been afforded to them.<sup>61</sup> To abate a conviction without review is to say an appeal would have necessarily been successful, and all proceedings must adhere to the procedure of a successful appeal.<sup>62</sup> To stay proceedings without review is to say the appeal would have necessarily been

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17204 (6th Cir. July 18, 1991) (where restitution did not abate)), and *United States v. Dudley*, 739 F.2d 175, 178 (4th Cir. Md. 1984) (where restitution did not abate), *with* *United States v. Rich*, 603 F.3d 722, 728-31 (9th Cir. 2010) (where restitution did abate), *United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004) (en banc) (where restitution did abate), and *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997) (where restitution did abate)).

<sup>56</sup> See e.g., *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006); *People v. Schaefer*, 146 Cal. Rptr. 3d 497 (2012); *Bevel v. Commonwealth*, 717 S.E.2d 789 (Va. 2011).

<sup>57</sup> See, e.g., *United States v. Mmahat*, 106 F.3d 89, 93 (5th Cir. 1997), *abrogated by* *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004); *see also* *United States v. Asset*, 990 F.2d 208, 210 (5th Cir. 1993), *abrogated by* *Estate of Parsons*, 367 F.3d 409. Today, however, courts typically will not refund any amount of restitution paid before the defendant’s death. *See Estate of Parsons*, 367 F.3d at 410-11, 413.

<sup>58</sup> See *United States v. DeMichael*, 461 F.3d 414, 416 (3d Cir. 2006) (“[A]n uncollected fine in a criminal case is comparable to the balance of the defendant’s prison sentence; the . . . fine, like the remaining sentence, abate[s] with death.” (quoting *United States v. Morton*, 635 F.2d 723, 725 (8th Cir. 1980))).

<sup>59</sup> See, e.g., *DiBruno*, 438 F. App’x. at 199 & 203.

<sup>60</sup> Alabama, Connecticut, Kentucky, Minnesota, and Wisconsin. *See infra* Appendix, Table 5. Six other states, Arkansas, Delaware, Nevada, North Dakota, Vermont, and West Virginia have not addressed this issue. *Id.*, at n.lii.

<sup>61</sup> See generally *State v. Carlin*, 249 P.3d 752, 762 (Alaska 2011).

<sup>62</sup> *Wheat v. State*, 907 So. 2d 461, 462 (Ala. 2005).

unsuccessful, and all proceedings must adhere to the procedure of an unsuccessful appeal.<sup>63</sup> But—without an actual appeal—neither conclusion can be known for certain; and prematurely stopping the judicial process obstructs justice. This obstruction manifests in harm to primary and collateral victims of the defendant’s alleged wrongdoing.<sup>64</sup>

A. *Problems Caused for Defendants*

The United States’ criminal justice system developed to be protective of criminal defendants because the thought of wrongly convicting innocent people is reprehensible.<sup>65</sup> Persons accused of crimes are afforded many rights and opportunities to prove their innocence,<sup>66</sup> including the Constitutional right to a fair trial.<sup>67</sup> Though neither the Constitution nor the Federal Rules of Criminal Procedure grant defendants the right to appeal their criminal convictions,<sup>68</sup> the right to post-trial review “has become an integral part of the adjudicatory mechanism of every American jurisdiction.”<sup>69</sup> The right to appeal a criminal conviction is now an essential part of the criminal justice system and serves as one of a defendant’s most important tools to protect his due process rights.<sup>70</sup>

Refusing to abate a conviction, and dismissing a defendant’s pending appeal without review, only recognizes the rights of primary victims and strips the defendant of his due process rights.<sup>71</sup> This practice disregards the rights of the accused and potentially, of collateral victims.<sup>72</sup> Courts refuse abatement to afford victims protection of certain rights and interests that society feels all people have earned by virtue of being citizens, like the right to dignity, the right to be heard, etc.,<sup>73</sup> but every

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<sup>63</sup> See *Wheat*, 907 So. 2d at 462.

<sup>64</sup> See generally *Carlin*, 249 P.3d 752, 758-59.

<sup>65</sup> See generally H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32-Sep. COLO. LAW., 11 (2003).

<sup>66</sup> See *id.*

<sup>67</sup> U.S. CONST. amend. XIV, § 1; see also *Thomas v. Wyrick*, 520 F. Supp. 139, 142 (E.D. Mo. 1981), *aff’d*, 687 F.2d 235 (8th Cir. 1982).

<sup>68</sup> *People v. Peters*, 537 N.W.2d 160, 162 (Mich. 1995).

<sup>69</sup> *Arkin*, *supra* note 7, at 576.

<sup>70</sup> *Razel*, *supra* note 8, at 2202.

<sup>71</sup> See *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980); *cf.* *Razel*, *supra* note 8, at 2213-14 (noting that many of the disadvantages of refusing abatement are the advantages of abating).

<sup>72</sup> *Id.* at 2214.

<sup>73</sup> See, e.g., *State v. Devin* 142 P.3d 599 (Wash. 2006).

person is granted the rights of due process and a fair trial,<sup>74</sup> and these rights should not be ignored regardless of whether the defendant is dead or alive.

### B. *Problems Caused for Primary Victims*

Criminal law has come to recognize that victims' rights are an important aspect of the criminal justice system.<sup>75</sup> This appreciation for victims' rights began with the Civil Rights movement.<sup>76</sup> Due to a rise in reported crime during the 1970s and 1980s, public opinion of victims' rights changed drastically, and a community outcry for victims' justice developed.<sup>77</sup> When society realized that the criminal justice system ignored victims, several groups formed to advocate for victims and provide them with essential services.<sup>78</sup> Today, many states have officially recognized the protection of certain victim interests; the conviction of criminals is an important tool to afford victims their rights.<sup>79</sup> When courts abate criminal convictions, they

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<sup>74</sup> U.S. CONST. amend. XIV, § 1.

<sup>75</sup> See *State v. Carlin*, 249 P.3d 752, 754 (Alaska 2011) (abolishing abatement ab initio and permitting third party substitution after a defendant's death "[b]ecause of changed conditions, including increased recognition of the rights of crime victims and rejection of abatement by some state courts."); *State v. Makaila*, 897 P.2d 967, 972 (Haw.) *opinion after reinstatement of appeal* 927 P.2d 419 (Haw. 1995) (ordering substitution of third parties in legal proceedings instead of abatement ab initio because "it seem[ed] unreasonable automatically to follow the abatement *ab initio* rule and pretend that the defendant was never indicted, tried, and found guilty"); *State v. Korsen*, 111 P.3d 130, 135 (Idaho 2005) (holding because abatement ab initio failed to recognize victims' rights the conviction must stand); *State v. Benn*, 274 P.3d 47, 50 (Mont. 2012) (abolishing abatement ab initio and staying the conviction because abatement ab initio failed to recognize victims); *State v. Devin*, 142 P.3d 599, 599 (Wash. 2006) (holding that abatement ab initio "conflict[ed] with modern laws that compensate crime victims for their suffering"); see also David Cole, *Who Pays for the Right to Bear Arms?*, N.Y. TIMES, Jan. 2, 2013, at A19, available at <http://www.nytimes.com/2013/01/02/opinion/who-pays-for-the-right-to-bear-arms.html>; Ted Poe & Carolyn Maloney, *SAFER Act Will Help Rape Victims Get Justice They Deserve*, HILL'S CONGRESS BLOG (Jan. 2, 2013, 3:00 PM), <http://thehill.com/blogs/congress-blog/judicial/275211-safer-act-will-help-rape-victims-get-justice-they-deserve>.

<sup>76</sup> Razel, *supra* note 8, at 2204.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citing Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, 1 EMERGING ISSUES ST. CONST. L. 163, 165 (1988)); cf. BUREAU OF JUST. STAT., HOMICIDE TRENDS IN THE U.S.: LONG TERM TRENDS AND PATTERNS, available at <http://bjs.gov/content/pub/pdf/htius.pdf> (last visited Mar. 31, 2013); see also KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 3 (1997) (discussing the changing views on crime and criminals); David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim"*, 17 PEPP. L. REV. 35, 36 (1989).

<sup>79</sup> Cf. *Devin*, 142 P.3d at 605 (where the state argued that it was harmful to abate because the potential collateral consequences felt by victims).

reimpose a burden on victims that legislatures intended to alleviate through these victims' rights statutes.

### C. *Problems Caused for Government*

The government has an interest in affording all citizens the rights granted to them and an interest in promoting fairness and consistency in the criminal justice system.<sup>80</sup> When courts abate convictions without review, courts deny victims rights those victims have come to expect, and deny consistent application of the law.<sup>81</sup> When courts stay convictions without review, courts deny defendants of rights those defendants and their families have come to expect. This may lead citizens to lose faith in criminal procedure and the government.<sup>82</sup> Further, this may be a vehicle for setting irreversible and undesirable precedents.

## III. PROBLEMS CAUSED FOR COLLATERAL PARTIES WHEN THE JUDICIAL PROCESS IS STOPPED PREMATURELY

Many parties are affected by criminal convictions, and because each case is different, each case produces a unique group of collateral victims. It is unjust to stop the trial process the moment a defendant dies.

### A. *Problems Caused for Defendants' Families*

When courts stay proceedings without review, defendants' heirs may become collateral victims.<sup>83</sup> And because a dead person cannot be punished—at least not terrestrially—opponents of staying proceedings without review argue that anything other than abating the conviction does no more than punish the heirs of the alleged criminal and forces the heirs to “argue about a conviction that no longer exists.”<sup>84</sup> This argument is flawed because without abatement, the conviction does exist and the consequences of it are real. In many

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<sup>80</sup> See Letter from George Washington to Edmund Randolph, *quoted in* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 214 (1993) (“[T]he due administration of justice is the firmest pillar of good government.”).

<sup>81</sup> See Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1154 (2007).

<sup>82</sup> See Furman, *supra* note 65, at 25.

<sup>83</sup> See, e.g., *Crooker v. United States*, 325 F.2d 318, 321 (8th Cir. 1963); *State v. Jones*, 551 P.2d 801, 804 (Kan. 1976).

<sup>84</sup> *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006) (quoting *United States v. Estate of Parsons*, 367 F.3d 409, 416 n.17 (5th Cir. 2004)).



jurisdictions, the estate is forced to pay all restitutionary judgments issued with the original conviction.<sup>85</sup> If the appeal would have been successful, though, this restitution order would be vacated. Staying proceedings without review also ignores the interest of the defendant's family to "preserv[e], unstained, the memory of the deceased defendant or his reputation"—and if the defendant really was innocent the family should have the opportunity to do just that.<sup>86</sup>

Further, when courts stay convictions without review, the defendant's estate becomes more vulnerable to civil suits connected to the defendant's alleged wrongdoing. The burden of proof is lower in civil suits than in criminal cases and when a criminal has been proven guilty beyond a reasonable doubt in criminal court, the preponderance of the evidence standard required in civil court is already met.<sup>87</sup> Neither a defendant, nor his estate, may deny the proven elements of his conviction in a related civil suit if the conviction exists.<sup>88</sup>

#### B. *Problems Caused for Victims' Families*

When courts abate convictions ab initio, the victims' families can be collaterally harmed.<sup>89</sup> This can happen if the court abates a restitution order that was intended to make the victim, or the victim's family, whole again. When courts order restitution, a property right is created.<sup>90</sup> Like most property, restitution is inheritable.<sup>91</sup> Even if the victim is dead, the right to restitution still exists.<sup>92</sup>

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<sup>85</sup> See Alexander F. Mindlin, "Abatement Means What It Says": *The Quiet Recasting of Abatement*, 67 N.Y.U. ANN. SURV. AM. L. 195, 232 (2011).

<sup>86</sup> *State v. Morris*, 328 So. 2d 65, 67 (La. 1976) (upholding strict abatement ab initio). Note that it is beyond the scope of this note to consider whether the party bringing the substitutive appeal should have the right to counsel, though cogent arguments could be made for both sides of that debate.

<sup>87</sup> See *Lay*, 456 F. Supp. 2d at 875 (internal citation omitted).

<sup>88</sup> See *id.* at 874.

<sup>89</sup> See *Estate of Parsons*, 367 F.3d at 421 (5th Cir. 2004) (citing 18 U.S.C. § 3663A(a), (c) (2012)).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

### C. Problems Caused for Insurance Providers

#### 1. Effect of Abatement on Insurance, Generally

Insurers can become collateral victims of abated criminal convictions because the absence of a conviction decreases the insurer's ability to be indemnified through subrogation. With many criminal convictions, courts order restitution to victims to compensate for their losses,<sup>93</sup> the losses are often monetary injuries resulting from the criminal activity.<sup>94</sup> If the victim was insured at the time of injury, the insurer is the party that compensates the victim for that loss.<sup>95</sup> At that time, the insurer, as subrogee, steps into the shoes of the victim and the insurer assumes the insured's rights against the third party.<sup>96</sup> As subrogee, an insurer can seek indemnification from the third party responsible for the harm.<sup>97</sup> But if the conviction is abated without review, the insurer may experience the loss indefinitely because even if the insurer pursues indemnification as subrogee, there is no conviction to use as proof that the defendant was responsible for the harm.<sup>98</sup>

When courts abate convictions, by nature of the insurance industry, the harm extends to other people insured by that insurance company and thus to society as a whole.<sup>99</sup> People enter into insurance contracts expecting the premiums they pay will help them (or others insured) in times of need, not

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<sup>93</sup> See, e.g., *id.* at 411; *People v. Schaefer*, 146 Cal. Rptr. 3d 497, 1284-85 (2012).

<sup>94</sup> See, e.g., *Estate of Parsons*, 367 F.3d at 411; *Schaefer*, 146 Cal. Rptr. 3d at 1284-85.

<sup>95</sup> See, e.g., *Estate of Parsons*, 367 F.3d at 411.

<sup>96</sup> See *Fed. Ins. Co. v. Travelers Cas & Sur. Co.*, 743 So. 2d 140 (Ala. 2002). For a detailed discussion on an insurer's right to subrogation, see Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 MO. L. REV. 723 (2005).

<sup>97</sup> See *North Star Reinsurance Corp. v. Continental Ins. Co.* 82 N.Y.2d 281, 294 ("Subrogation, an equitable doctrine, entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss which the insurer is bound to reimburse; it allocates responsibility for the loss to the person who, in equity and good conscience, ought to pay it, in the interest of avoiding absolution of a wrongdoer from liability simply because the insured had the foresight to procure insurance coverage." (citations omitted)); see also *Schaefer*, 146 Cal. Rptr. 3d at 1285 (before abatement).

<sup>98</sup> Cf. *Estate of Parsons*, 367 F.3d 409, 422 (Dennis, J. dissenting) (because the conviction and the restitution order were abated, the insurance company never regained this loss).

<sup>99</sup> Paying premiums distributes the risk of harm; it is a process where "individuals and organizations share the risk of misfortune. We each pay a little (sometimes not so little) so that there will be money to pay for the losses of the unfortunate few." Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1401 (1994).

in times of criminal activity.<sup>100</sup> Presumably, others insured by the insurance company do not have a moral (or legal) issue with the company compensating the victim, but a problem develops when an insurer is not able to be indemnified for the proven criminal misdoings of an individual.<sup>101</sup>

The insurance industry's communal nature imposes a duty on insurers to limit the claims for which they allow recovery, or alternatively, to take on the costs of pursuing indemnification from a responsible third party.<sup>102</sup>

Similarly, if the criminal is the insured party, the insurer should not be forced to pay for the damage the insured caused. Typically, insurers do not provide relief for intentional damage, and this makes it crucial for the insurer to determine if the damage *was*, in fact, caused intentionally.<sup>103</sup> Public policy urges the refusal of recovery for the direct results of one's own criminal acts.<sup>104</sup> The reason that insurance contracts cannot compensate criminals for their intentional wrongdoing is because there is an "imposition of externalities on third parties [which] is a chief source of negative social costs from illegal contracts."<sup>105</sup>

When insurers are forced to compensate for the illegal acts of a client, there is a ripple of negative consequences, and others unnecessarily become collateral victims of the illegal acts.<sup>106</sup> While direct and collateral victims of crime will always exist, abatement extends this harm further than necessary—

<sup>100</sup> Insurance is "[a] contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency . . . . An insured party [usually] pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk." BLACK'S LAW DICTIONARY 870 (9th ed. 2009); *see also* Baker, *supra* note 99, at 1401.

<sup>101</sup> While it is true that insurers often are unable to achieve indemnification from the responsible third party—either because of the third party's insolvency or another complication—that point is irrelevant to whether the insurer should be able to seek indemnification as subrogee in the first place.

<sup>102</sup> *See* Deborah A. Stone, *Promises and Public Trust: Rethinking Insurance Law Through Stories*, 72 TEX. L. REV. 1435, 1443 (1994).

<sup>103</sup> *Cf.* *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d 771, 798 (E.D. Mich. 1998) (citing *Arco Indus. Corp. v. Am. Motorists Ins. Co.* 448 Mich. 395, 419 (1995) (Boyle, J., concurring)).

<sup>104</sup> 43 AM. JUR. 2d *Insurance* § 582 (2013). *But see* *Interstate Life Assur. Co. v. Dalton*, 165 F. 176, 178 (6th Cir. 1908) (holding if there is not an express condition prohibiting recovery for such acts then recovery should be permitted).

<sup>105</sup> Adam B. Badawi, *Harm, Ambiguity, and the Regulation of Illegal Contracts*, 17 GEO. MASON L. REV 483, 493 (2009–10).

<sup>106</sup> As discussed in the text accompanying *supra* note 105, insurance does not, as a matter of legal and moral principal, compensate an individual for his illegal misdoings. When a conviction is abated, however, the proof of illegality disappears and makes it less likely that the insurance company will be able to be indemnified by the defendant (or his heirs, rather) for his illegal misdoings.

that is, abatement imposes costs on insurers and other collateral victims—and presents courts with the task of determining the most just solution. Compensating for illegal acts relieves a barrier to committing crimes, facilitates criminal activity, and protects criminals from certain consequences like restitution payments and attorneys' fees.<sup>107</sup> When crimes become easier to commit, members of society are at a higher risk of being victimized by crime.<sup>108</sup> Additionally, the premiums other (assumably innocent) clients pay are used to benefit the wrongdoer (or, in the case of abatement, the wrongdoer's estate).<sup>109</sup> All these effects could potentially influence the decisions of people seeking insurance and cause them to seek alternatives, or to forego insurance entirely.<sup>110</sup> Though it is true that people enter insurance contracts knowing that their premiums will go to pay for the harm caused to others, if insurance companies are unable to be indemnified for the harms for which they pay compensation, premiums will increase and other insured's will bear this cost; "the business of insurance directly and indirectly affects all sectors of the public, business[,] and government."<sup>111</sup> These collateral consequences are only one of the many reasons that a claim is not moot simply because the defendant is dead.<sup>112</sup>

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<sup>107</sup> See 43 AM. JUR. 2d *Insurance* § 582. Note that the insurability punitive damages varies from state to state. Compare GA. CODE ANN. § 51-12-5.1(2010) and N.Y. INS. LAW § 3420 (McKinney 2013) (Georgia permits the insurability of punitive damages where New York does not). But see *Gollot v. State*, 646 So. 2d 1297 (Miss. 1994) (holding that abatement ab initio does not harm society because, "society needs no protection from the deceased, nor can the deceased be rehabilitated . . . [and] potential criminals will be no less deterred from committing crimes").

<sup>108</sup> Cf. Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 588 (1982) (arguing the value of deterrence is how it "affects the future conduct of the general public").

<sup>109</sup> See Stone, *supra* note 102, at 1443 ("[P]remiums will compensate the losses of other policyholders.").

<sup>110</sup> Cf. *id.* (highlighting that insurers purposely try to disguise "the multilateral nature of insurance contracts" because people like to think they are paying for their own risk; not the risk of others). But see *Mutual Life Ins. Co. v. Dreeben*, 20 F.2d 394, 394-95 (N.D. Tex. 1927) (holding that if insurance is too strictly regulated people may not want to obtain it).

<sup>111</sup> N.Y. INS. LAW § 401(a).

<sup>112</sup> See *id.*; see also *United States v. Mmahat*, 106 F.3d 89, 92 (5th Cir. 1997), *abrogated by United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004); accord *Lance Duroni, Insurer, Ex-Enron Chairman's Widow Settle Annuity Dispute*, LAW360 (Aug. 13, 2012 8:51 PM), <http://www.law360.com/articles/369357/insurer-ex-enron-chairman-s-widow-settle-annuity-dispute>.

## 2. Effect of Abatement on Life Insurance

The effects of abatement on life insurance exemplify the need for an alternative judicial process—one that does not prematurely stop the legal proceedings immediately when defendants die—when the wrongdoer is the beneficiary of the life insurance contract.<sup>113</sup> Life insurance is “[a]n agreement between an insurance company and the policy holder to pay a specified amount to a designated beneficiary on the insured’s death.”<sup>114</sup> Essentially anyone with an insurable interest may take out an insurance policy on the life of any other individual.<sup>115</sup>

Allowing recovery for a contract taken out fraudulently, however, is prohibited.<sup>116</sup> If a person with an insurable interest takes out a policy on another’s life with the intent to kill that other person and reap the benefits, recovery is impermissible; this is known as the “Slayer Rule.”<sup>117</sup>

A slayer’s acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim’s death constitutes unjust enrichment that the slayer will not be allowed to retain. In particular . . . , [a] slayer may not receive the proceeds of insurance on the life of the victim.<sup>118</sup>

Courts and legislatures rationalize the Slayer Rule because it is reprehensible to allow criminals to reap benefits from their own wrongs.<sup>119</sup> Courts have sidestepped the issue of slayers’ recovery in the abatement context, however. For example, in *State v. Krysheski*, the court convicted the defendant of murder in the first degree, but the defendant died while his appeal was still pending.<sup>120</sup> The State argued that abating his conviction would cause a significant problem in this case, and also in other cases where the murderer is the beneficiary of the victim’s life insurance policy because it would it would relieve a barrier to the estate of the wrongdoer

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<sup>113</sup> See, e.g., *State v. Krysheski*, 349 N.W.2d 729, 732 n.6 (Wis. Ct. App. 1984) (the State’s argument), *overruled by* *State v. McDonald*, 424 N.W.2d 411 (Wis. 1988). While *Krysheski* was overruled, this case exemplifies the insurance problem that can arise with abatement, and most jurisdictions still practice abatement.

<sup>114</sup> BLACK’S LAW DICTIONARY 1010 (9th ed. 2009).

<sup>115</sup> See Badawi, *supra* note 105, at 523.

<sup>116</sup> See generally Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010).

<sup>117</sup> RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 (2011).

<sup>118</sup> *Id.* The term *slayer* refers to the person who killed the insured.

<sup>119</sup> Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 797 (2012).

<sup>120</sup> *Id.*

collecting on the insurance policy.<sup>121</sup> The State raised this argument as a reason to stray from the doctrine of abatement *ab initio*, but the court quickly dismissed the concern in a footnote.<sup>122</sup> The court instead held that “this consideration should [not] outweigh the policies of favoring abatement,” and reasoned that “[p]robate court proceedings would adequately protect a victim’s estate in this . . . situation.”<sup>123</sup> While it is true that probate proceedings might allow the victim’s estate to recover the value of the insurance payments from the defendant, this act would simply shift who the recipient of this illegal payment was. The court here wrongly puts the focus on recovery to the victim’s family. It is not the victim’s family who had the foresight to take out insurance on the life of the victim, it is the slayer who had this foresight. The slayer should not be compensated by the insurance policy because the slayer took out this insurance policy fraudulently, but the victim’s estate is no more entitled to the insurance payments than the defendant’s estate. Even though the victim’s estate and the defendant’s estate may very well be the same people (for example, if a husband fraudulently took out an insurance policy on his wife’s life and then killed her), recovery should not be permitted. It is the insurance company that has to bear this cost. When insurance companies have to make payments in situations like these, it increases the premiums that other insured’s must pay and it undermines the integrity of insurance.

But, in the absence of a conviction (resulting from an abatement), there is no legal reason to deny the defendant’s estate from collecting insurance proceeds from the policy taken out on the victim’s life.<sup>124</sup> Once the conviction is abated, the conviction itself may not be used to prove the elements of the crime to assess liability in civil court so the insurance company will have a difficult time avoiding or being indemnified for such payments.<sup>125</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *State v. Krysheski*, 349 N.W.2d 729, 732 n.6 (Wis. Ct. App. 1984), *overruled by State v. McDonald*, 424 N.W.2d 411 (Wis. 1988).

<sup>123</sup> *Id.*

<sup>124</sup> *See United States v. Estate of Parsons*, 367 F.3d 409, 425 (5th Cir. 2004).

<sup>125</sup> *See United States v. Lay*, 456 F. Supp. 2d 869, 874 (S.D. Tex. 2006). *But see* 18 U.S.C. § 1964 (2012) (“A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.”).

### 3. Effect of Abatement on Financially Insured Institutions

Fraud committed against a financially insured institution may negatively affect the insurer. In *United States v. Mmahat*, two brothers held the positions of president and chairman of a federally insured institution, Gulf Federal Savings Bank.<sup>126</sup> To maintain the revenue they personally received from the bank's business, the brothers had the bank make "sham loans to shell corporations and loan swaps with other banks so as to conceal its weak financial position."<sup>127</sup> The result was "temporarily to decrease Gulf's delinquent loan balance and inflate its income on its 1984 financial statements. Ultimately, their scheme failed, and Gulf went into receivership in November 1986."<sup>128</sup> The Fifth Circuit convicted the brothers for misappropriation of bank funds and ordered them to pay restitution to the insurer.<sup>129</sup> One brother died while his appeal was pending, and his estate moved to abate his conviction and the punishment. The court held that to the extent the punishment was compensatory to the insurance company, the punishment would not abate; but to the extent the punishment was strictly penal in nature, the punishment did abate.<sup>130</sup>

In *Mmahat*, the insurance company did not become a collateral (or primary) victim of the deceased defendant's fraud because the court did not apply strict abatement ab initio, and recognized the insurer's interest in receiving restitution. The court later abrogated the *Mmahat* decision, however, and adopted strict abatement ab initio as the Fifth Circuit's practice, which subsequently forced contrary results.<sup>131</sup>

### 4. Effect of Abatement on Fraudulently Received Insurance Settlements

When a defendant dies after he has already received insurance proceeds and the court abates the conviction and restitution order ab initio, the primary and collateral victims include the insurance company, other insureds, and through

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<sup>126</sup> 106 F.3d 89, 91 (5th Cir. 1997), *abrogated by* *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004).

<sup>127</sup> *Id.* at 92.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 98.

<sup>130</sup> *Id.* at 93.

<sup>131</sup> See generally *Estate of Parsons*, 367 F.3d 409.

them other members of society because this creates the need for higher insurance premiums to account for losses like these.<sup>132</sup> Nearly two decades after its decision in *Mmahat*, the court abrogated its holding with *United States v. Estate of Parsons*, and adopted abatement ab initio as the practice in the Fifth Circuit.<sup>133</sup> In *Estate of Parsons*, the defendant was convicted for arson. Before his conviction, he illegally collected insurance proceeds to cover his property loss. When the court convicted him, it ordered restitution of over \$1.3 million dollars to the insurance company as compensation for the defendant's fraud.<sup>134</sup> The defendant died with his appeal pending, and the court abated his conviction ab initio.<sup>135</sup> The court held that abatement ab initio vacated not only the conviction, but also the restitution order to the insurer.<sup>136</sup>

#### IV. CURRENT STATE OF AFFAIRS

##### A. *Victims' Rights Legislation*

In recent decades, Congress has made an attempt to formally recognize crime victims' rights through acts like the Victim Witness Protection Act,<sup>137</sup> the Mandatory Victim's Restitution Act,<sup>138</sup> the Crime Victims' Rights Act,<sup>139</sup> and the Justice for All Act.<sup>140</sup> Such statutes protect the essential rights society feels each individual has earned just by virtue of being citizens. These rights deserve recognition because "too often victims of crime experience a secondary victimization at the hands of the criminal justice system."<sup>141</sup> These acts formally grant victims necessary rights: the right to restitution in the "full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant";<sup>142</sup>

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<sup>132</sup> See *infra* notes 133-36.

<sup>133</sup> *Estate of Parsons*, 367 F.3d at 418.

<sup>134</sup> *Id.* at 411.

<sup>135</sup> *Id.* at 416.

<sup>136</sup> *Id.* The court did not require the insurer to refund any payments the defendant made before his death. *Id.* at 411.

<sup>137</sup> 18 U.S.C. § 3663(a)(1)(A) (2012).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* § 3771.

<sup>140</sup> Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat 2260.

<sup>141</sup> 150 CONG. REC. §10910 (daily ed. Oct. 9, 2004) (daily ed. Oct. 9, 2004) (statement of Sen. Kyl).

<sup>142</sup> *United States v. Estate of Parsons*, 367 F.3d 409, 421 (5th Cir. 2004) (citing 18 U.S.C. § 3663A(a), (c), 3364(f)(2)-(4)) (where the act mandates that the right to restitution is inheritable so "if the victim is deceased," the victim's family has the right to restitution).



the right to “be reasonably protected from the accused”;<sup>143</sup> “[t]he right to be treated with fairness and with respect for the victim’s dignity and privacy”;<sup>144</sup> and the right to participate in criminal proceedings,<sup>145</sup> among others.

Victims’ rights statutes do not limit protection to the primary victims of harm because there is an interest in “minimizing secondary harm from the criminal process.”<sup>146</sup> The individual—whether it is an insurance company or another person—who compensates a victim for the loss addressed by a restitution order “may to the extent of the payment be subrogated to the victim’s right against the restitution debtor.”<sup>147</sup>

### B. *Current Legal Landscape*

Virginia is currently the only jurisdiction in the United States that has a statutory procedure to follow when a defendant dies before exhausting his right to appeal.<sup>148</sup> The highest courts in three other states—Hawaii, New Mexico, and Ohio—have each held that the states’ rules of appellate procedure that allow substitution in civil cases extend to allow substitution in appeals of criminal cases after a defendant dies while his appeal is pending.<sup>149</sup> The highest court in Oregon has held that the state’s appellate procedure rules demand abatement of a criminal conviction when a defendant dies while his appeal is pending.<sup>150</sup> Other than these exceptions, there is no statutory guidance for what to do when this problem arises. Because of the lack of statutory guidance, when a defendant dies before exhausting his right to appeal, the rights afforded to victims—even rights that are said to be mandatory<sup>151</sup>—are jeopardized.<sup>152</sup> Some jurisdictions continue to

<sup>143</sup> Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat 2260.

<sup>144</sup> *Id.*

<sup>145</sup> 18 U.S.C. § 3771.

<sup>146</sup> Beloof, *supra* note 81, at 1150.

<sup>147</sup> *Estate of Parsons*, 367 F.3d at 422 (internal citations omitted).

<sup>148</sup> See Thomas, *supra* note 7. Since the most recent update of this A.L.R. article, Virginia has codified the method of staying the proceedings (refusing to abate). See Abatement of Criminal Conviction; Effect of Death of Convicted Person While Case on Appeal, Va. Code §19.2-8.2 (2012).

<sup>149</sup> *State v. Makaila*, 897 P.2d 967, 972 (Haw.) *opinion after reinstatement of appeal* 927 P.2d 419 (Haw. 1995); *State v. Salazar*, 945 P.2d 996, 1003-04 (N.M. 1997); *State v. McGettrick*, 509 N.E.2d 378, 381 (Ohio 1987).

<sup>150</sup> *State v. Kaiser*, 683 P.2d 1004, 1006 (Or. 1984).

<sup>151</sup> See, e.g., 18 U.S.C. § 3663A (2012) (Mandatory Restitution to Victims of Certain Crimes).

<sup>152</sup> See, e.g., *People v. Robinson*, 719 N.E.2d 662, 663 (Ill. 1999) *vacated*, 719 N.E.2d 662 (Ill. 1999); cf. *Poe v. Ullman*, 367 U.S. 497, 530 (1961) (Harlan, J.,

utilize the outdated method of abatement ab initio because stare decisis demands it, and a decision to stray from precedent is a decision best left to the legislature.<sup>153</sup> Courts therefore refuse to acknowledge victims' rights in the abatement context absent legislation specifically providing otherwise.<sup>154</sup> This produces archaic results.<sup>155</sup>

In 2011, the Virginia Supreme Court in *Bevel v. Commonwealth*, refused to dictate even a mandatory common law procedure when a criminal defendant dies before completing his appeal.<sup>156</sup> The court held that it is the legislature's place, not the court's, to govern proper practices and procedures in criminal law.<sup>157</sup> In *Bevel*, the court convicted the defendant of incest, and he died while his appeal was pending. The court noted that, in this particular instance, it was not contrary to justice to apply abatement ab initio because no collateral harms were immediately recognizable. But it held that because "[i]t [was] conceivable that . . . a criminal conviction could have a significant negative impact on a deceased defendant's estate or the rights of his heirs or another party," abatement ab initio was not appropriate in all circumstances.<sup>158</sup> Because it is always conceivable that a conviction could have significant negative impact on other parties involved, it would be improper to have a rule that mandates abatement ab initio in all circumstances.

Subsequently, in February 2012, Virginia enacted legislation that officially adopted the method that stays the

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dissenting); see also *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006). The *Lay* Court recognized the rights of the deceased, the primary victims, and the collateral victims may be better served with permissible substitution but upheld abatement ab initio anyway because of stare decisis: "[A]llowing the estate to substitute for the dead defendant ensures the fair representation of the decedent's interests, but such a substitution does not align logically with the abatement of all prior criminal proceedings." *Lay*, 456 F. Supp. 2d at 875.

<sup>153</sup> See, e.g., *People v. Schaefer*, 146 Cal. Rptr. 3d 497, 501 (2012) (upholding strict abatement ab initio because "neither the state constitutional provision establishing the right to victim restitution nor the statutory scheme governing victim restitution specifically address[ed] whether a defendant's death pending appeal abates a victim restitution order" (internal citations omitted)); *Bevel v. Commonwealth*, 717 S.E.2d 789, 795 (Va. 2011); see also *United States v. Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007) (where the court recognized the monetary windfall abatement provides defendants but upheld abatement ab initio because "binding precedent . . . require[d]" it to do so).

<sup>154</sup> See, e.g., *Koblan*, 478 F.3d 1324.

<sup>155</sup> *Accord In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 78 (Minn. Ct. App. 2012); cf. *Wheat v. State*, 907 So. 2d 461, 463 (Ala. 2005); *State v. Carlin*, 249 P.3d 752, 758 (Alaska 2011).

<sup>156</sup> *Bevel*, 717 S.E.2d at 795.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 795-96.

judicial proceedings after a defendant dies before exhausting his right to appeal (refusing to abate).<sup>159</sup> While it is important to codify the procedure to follow when a criminal defendant dies before completing his appeal, it is equally important to enact legislation that produces the most just results.<sup>160</sup> Substitution is the only method that adequately addresses the interests of all parties concerned.<sup>161</sup>

Tables 1-5 in the Appendix illustrate the different stances that each state and circuit takes on the issue of abatement.

## V. PERMISSIBLE SUBSTITUTION AS THE SOLUTION

### A. *The Need for a Solution*

A defendant's death while his appeal is pending poses the question: "What is the purpose of criminal law?"<sup>162</sup> If the

<sup>159</sup> Abatement of Criminal Conviction; Effect of Death of Convicted Person While Case on Appeal, Va. Code §19.2-8.2 (2012).

<sup>160</sup> See *Gollott v. State*, 646 So. 2d 1297, 1300 (Miss. 1994) ("If the abatement *ab initio* rule is perceived to be unjust, it is equally unjust to allow a conviction to stand and be used against the deceased's estate for various collateral matters as if the appeal had been heard and the conviction affirmed.").

<sup>161</sup> See *id.*

<sup>162</sup> Courts have tried to answer this question in the context of abatement. Compare *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977) (upholding abatement *ab initio* because "the interests of justice ordinarily require that [the defendant] not stand convicted without resolution of the merits of his appeal, which is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.'") (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)), and *Surland v. State*, A.2d 1034, 1038-39 (Md. 2006) (upholding abatement *ab initio* because "the criminal justice system exists primarily to punish and cannot effectively punish one who has died" (quoting *United States v. Estate of Parsons*, 357 F.3d 409, 411 (5th Cir. 2004)), with *State v. Carlin*, 249 P.3d 752, 764 (Alaska 2011) (enforcing permissible substitution in criminal appeals because "[c]riminal administration [is] based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation"), *Bevel v. Commonwealth*, 717 S.E.2d 789, 794 (Va. 2011) (abolishing abatement *ab initio* (but declining to decide the issue of permissible substitution), the court held that "the criminal justice system does not only serve to punish, but it also serves to protect and compensate crime victims"), *State v. Devin*, P.3d 599, 604-05 (Wash. 2006) (abolishing abatement *ab initio* and staying the conviction because punishment of the offender is not the sole purpose of criminal law, holding that "[the] State's goal is to ward off potential harm to innocent people"), *Calderon v. Thompson*, 523 U.S. 538, 539 (1998) (acknowledging that there is an interest in punishing offenders but distinguishing that the interest is shared by the "State and crime victims alike"), and *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (refusing to abate restitution because "[i]t is separate and distinct from any punishment visited upon the wrongdoer and operates to ensure that a wrongdoer does not procure any benefit through his conduct at others' expense"). Accord *Lynn Johnston Splitok, State v. McDonald: Death of A Criminal Defendant Pending Appeal in Wisconsin—The Appeal Survives*, 1989 WIS. L. REV. 811, 813 (1989) (stating that "[t]he purposes for enforcement of criminal laws are the punishment and reform of the guilty and the

purpose of criminal law is solely to punish the defendant, then abatement *ab initio* serves this purpose well because a person cannot be punished once he is dead. But the decades-long struggle to shift the focus of criminal law from a penal nature to a protective nature illustrates that this is too narrow a view because abatement ignores the collateral consequences that may arise.<sup>163</sup> When punishment comes at too high a cost—and is punishment for punishment’s sake—then the fundamental underpinnings of any justice system have the potential to be destroyed. Criminal law is a tool to punish criminals *and* to make parties whole again;<sup>164</sup> it is a tool to protect members of society and to make members of society *feel* protected.<sup>165</sup>

When courts abate convictions, justice owed to primary victims is obstructed, collateral victims are created, and harm is extended. It is unreasonable, unnecessary, and unjust to ignore the rights of affected parties.<sup>166</sup>

On the other hand, when courts stay proceedings without review, defendants’ rights are ignored and defendants’ heirs become collateral victims of the judicial process.<sup>167</sup> Balancing defendants’ rights and expectations, victims’ rights and expectations, and members of society’s rights and expectations against each other is essential. Victims expect a restitution order at the moment of conviction, defendants expect the chance to appeal, and members of society expect justice in all

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protection of the public” (emphasis added) (quoting *State v. Morris*, 328 So. 2d 65 (La. 1976) (internal quotation marks omitted)).

<sup>163</sup> See *United States v. Estate of Parsons*, 367 F.3d 409, 422 (5th Cir. 2004) (Dennis, J., dissenting); *supra* Parts II & III.

<sup>164</sup> See *supra* note 162.

<sup>165</sup> See *People v. Robinson*, 699 N.E.2d 1086, 1090 (Ill. 1998), *vacated*, 719 N.E.2d 662 (Ill. 1999). The court abated the deceased defendant’s conviction because enforcing the conviction of “a defendant who is no longer able to appreciate the benefits of such a ruling, would have a senselessly harsh impact upon the psychological well being of [the defendant’s] surviving family.” *Id.* On review, however, the court refused to abate the conviction because abatement would have a “senselessly harsh impact on the psychological well-being of crime victims and their families by implying that defendants have somehow been exonerated.” *Id.*; see also *State v. Gartland*, 694 A.2d 564, 567 (N.J. 1997) (where the court gave the “jury sufficient latitude to consider the decedent’s prior mistreatment and physical and psychological abuse of [his wife]”); *supra* note 162.

<sup>166</sup> See *Morris v. Slappy*, 461 U.S. 1, 14 (1983). *But see* *United States v. Estate of Parsons*, 367 F.3d 409, 416 (5th Cir. 2004) (expressing fear that the term “victim” would be misused and that a defendant would be wrongly convicted by trying to protect other parties from errors in the proceeding).

<sup>167</sup> See *Wetzel v. Ohio*, 371 U.S. 62, 65 (1962) (Douglas, J., concurring) Justice Douglas noted the significant interest the deceased defendant’s heirs have to protect the estate: “If the conviction stands, those collateral consequences or penalties will be the likely reduction of appellant’s estate through the collection of costs from it.”

proceedings.<sup>168</sup> These expectations, developed through state and federal common law, are consistent with the current justice system.<sup>169</sup> A defendant's death should not vitiate the rights or interests of any party affected.<sup>170</sup>

Without written abatement procedures, too many people are left asking large, overarching legal questions.<sup>171</sup> Neither crime victims, alleged criminals, parties with collateral interests in the outcome of a case, nor members of society want courts re-questioning the criminal justice system's purpose during trial. Citizens deserve to know that there are practices and protocols in place, that those practices and protocols lead to the fairest results possible, and that our government officials are devoted to ensuring justice.<sup>172</sup> Prematurely stopping the judicial process can offend the rights of parties on either side of the litigation, but there is no reason to offend the rights of any party after a defendant's death because substitution recognizes the rights of all parties involved.<sup>173</sup> A substitution statute resembling the model statute proposed in this note would protect the rights and interests of primary and collateral parties.

## B. *Sample Substitution Statute*

### Substitution of Parties in Criminal Appeals After Death

#### (a) Procedure

After a criminal conviction, if the defendant dies before exhausting his right to appeal, the case does not automatically become moot. Any eligible, interested party may elect to substitute in the criminal appeal. Should the appellate court elect to reverse the conviction on the substitutive appeal, the defendant's conviction and all punishment ordered (compensatory,

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<sup>168</sup> Beloof, *supra* note 81 at 1135-36, 1153, 1158-59.

<sup>169</sup> *See id.* at 1153, 1158-59.

<sup>170</sup> *Id.* at 1159.

<sup>171</sup> *See* Bevel v. Commonwealth, 717 S.E.2d 789, 795 (Va. 2011); *see also supra* note 162.

<sup>172</sup> *Cf.* Payne v. Tennessee, 501 U.S. 808, 833-34 (1991) (Scalia, J., concurring) (citing Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 618 (1983), and Flood v. Kuhn, 407 U.S. 258, 293 n.4 (1972)) (noting that stare decisis is "not an imprisonment of reason" and that "however admirable [the justice system]'s resolute adherence to the law as it . . . a decision contrary to the public sense of justice . . . operates . . . to diminish respect for the courts and for law itself").

<sup>173</sup> *See* State v. McGettrick, 509 N.E.2d 378, 380-81 (Ohio 1987).

penal, and restitutionary) shall vacate, and the record shall reflect a successful appeal in the same manner as if the defendant himself successfully appealed while living. If, however, the appellate court does not elect to reverse the conviction, the defendant's conviction and punishment orders (compensatory, penal, and restitutionary) shall be upheld and enforced. Substituting parties may, however, elect to continue to pursue the appeal through the appropriate channels. The appellate court may not elect to remand the case. If a conviction is vacated the State may not retry the case.

(b) Appeals Permitted

A party may substitute in appeals of right and appeals of discretion.

(c) Timing

Substitution shall be valid so long as the substitutive appeal is made within 180 days from the last day the defendant himself or herself would have been permitted to bring the appeal were he or she still living.

(d) Parties Permitted to Substitute

Defendant's successor, estate, representative, or any other interested party including, but not limited to, a public or private defense attorney may elect to substitute in the appellate process.

C. *Why Courts Do Not Adopt Substitution*

Many courts refuse to adopt substitution because, in their view, the defendant's death renders the controversy moot.<sup>174</sup> A moot case is "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights."<sup>175</sup> Courts

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<sup>174</sup> See, e.g., *State v. Krysheski*, 349 N.W.2d 729, 732 (Wis. Ct. App. 1984), *overruled by State v. McDonald*, 424 N.W.2d 411 (Wis. 1988) (upholding abatement ab initio and noting abatement is not a comment on the defendant's guilt or innocence, but "a return to the status quo before commencement of the case based on a determination to hold the case moot due to the futility of resolving the defendant's appeal").

<sup>175</sup> BLACK'S LAW DICTIONARY 1099 (9th ed. 2009). Mootness heavily relies on ripeness, defined as the circumstance existing when a case "has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." *Id.* at 1442.

typically do not entertain moot cases. Nevertheless, there are many instances where courts are at liberty to hear “moot” claims.<sup>176</sup> For example, courts may hear technically “moot” appeals when “collateral consequences arise from the challenged ruling”<sup>177</sup>—so that the claims do not “evade review.”<sup>178</sup> One court went as far to as hear a “moot” claim because it could not be proven that *no* collateral consequences attached to the appellant’s order.<sup>179</sup> Because it is impossible to see or foresee all collateral consequences, it may never be possible to prove that no collateral consequences exist.

Critics argue that if a court did hear an appeal after a defendant died, it would be strictly academic or, alternatively, it could only punish the defendant’s family.<sup>180</sup> First, while it is true some results cannot effectuate with substitution,<sup>181</sup> (*e.g.*, if the court orders a new trial or confirms the defendant’s prison sentence),<sup>182</sup> this is outweighed by the benefit of the results that *can* be effectuated.<sup>183</sup> The effect of abatement on collateral parties is not only relevant to consider, but also nearly impossible to ignore. Second, substitution does not punish the defendant’s family; it simply prevents them from receiving the

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<sup>176</sup> See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV 562, 563 (2009). The right to raise a mootness concern, however, is not waivable because it arises from Article III of the United States Constitution. *See id.*

<sup>177</sup> *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 84 (Minn. Ct. App. 2012) (civil case).

<sup>178</sup> Hall, *supra* note 176, at 583. Further, in *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), the court held the Article III “live controversy” requirement of the Constitution “may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.” Essentially, recovery does not need to be to a primary victim of the wrongdoing but could be afforded to collateral victims. *See id.* Additionally, in New Jersey, the state constitution itself does not require that the controversy is “live” and the court entertains “moot” appeals if there is a strong public policy reason to do so. *See Minnesota v. Dickerson*, 508 U.S. 366, 371-72 & n.2 (1993) (holding that “reinstatement of the record of the charges against respondent would carry collateral legal consequences and that, therefore, a live controversy remains”).

<sup>179</sup> *In re Welfare of Child of J.K.T.*, 814 N.W.2d at 84 (where a mother appealed the termination of her parental rights of her severely disabled child but her child died while the appeal was pending).

<sup>180</sup> Razel, *supra* note 8, at 2211, 2219.

<sup>181</sup> *See, e.g.*, *State v. Morris*, 328 So. 2d 65, 67 (La. 1976) (noting if the appeal was permitted and a new trial was ordered the new trial could not proceed because the defendant would be unavailable).

<sup>182</sup> A trial cannot be held against a person who is not alive and likewise a person who is not alive cannot serve a prison sentence. *See U.S. CONST. amend. VI; see also Mindlin, supra* note 85 at 232.

<sup>183</sup> *See infra* Part V.D.

windfalls of abatement.<sup>184</sup> When a defendant's estate is required to pay the defendant's restitution order after his death, the estate is satisfying the order with the very same funds the defendant himself would have used to satisfy the order (if he were still alive). Because of this, the estate is not losing funds that would have rightly benefitted it; the order would satisfy the proper allocation of the funds (because the defendant would have allocated the funds to satisfy his restitution order). Abating such an order could create a windfall to the estate. Alternatively, if the defendant successfully appealed his conviction, the funds would not be allocated to satisfy the restitution order. Thus to stay the order could create a windfall to the victim or the victim's estate. But if the goal of criminal punishment is to protect innocent people from undue harm then it seems inconsistent with this goal to protect the heirs of criminals but to ignore their victims.<sup>185</sup>

Other courts refuse substitution expressly because there are no statutory rules providing otherwise.<sup>186</sup> By codifying the substitution method, however, the possibility of these windfalls can be avoided.

#### *D. Why Courts and Legislatures Should Adopt Substitution*

Courts and legislatures should adopt the substitution method because a substitution method similar to the model statute posed in this note closely parallels what would happen if the defendant had not died. The interests that primary and collateral parties have in the conviction's final ruling prevent the controversy from becoming moot.<sup>187</sup> With substitution, parties can be afforded almost the same rights they would be afforded if the defendant were alive.

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<sup>184</sup> See, e.g., *United States v. Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007) (where the court recognized the monetary windfall abatement provides defendants but upheld abatement ab initio because "binding precedent . . . require[d]" it to do so).

<sup>185</sup> See *State v. Devin*, 142 P.3d 599, 605-06 (Wash. 2006). *But see* *Whitehouse v. State*, 266 364 N.E.2d 1015, 1016 (Ind. 1977) ("Although a criminal conviction carries a definite 'fall-out' that extends beyond the person of the defendant, we are aware of no right to be free of such, even if such conviction be erroneous.").

<sup>186</sup> See e.g., *Bevel v. Commonwealth*, 717 S.E.2d 789, 795 (Va. 2011).

<sup>187</sup> See *State v. Carlin*, 249 P.3d 752, 764 (Alaska 2011) ("The interests of the victim and the community's interest in condemning the offender persist even after the defendant's death.").



### 1. Substitution Recognizes Defendants' Interests

Courts should not deny defendants their rights, even in the event of a defendant's death. Refusing to abate ignores defendants' right to a fair trial. Substitution, however, affords defendants the right to fair trials by allowing post-trial review of their conviction, and by maintaining their presumption of innocence.<sup>188</sup> Though abatement affords defendants the right to a fair trial, abatement denies other parties essential rights; the model substitution statute would afford defendants the right to a fair trial without ignoring the rights and interests of others.

One commentator has argued, however, that posthumous appeal ignores defendants' right to a fair trial because it ignores defendants' right to dictate how far to take the appeal process.<sup>189</sup> If the defendant is not alive he cannot exercise this right, but the role a defendant plays in criminal appeals is very limited.<sup>190</sup> There are likely few instances where a defendant would feel his rights were violated by a court reviewing his conviction. Further, because the model statute allows for parties to elect to substitute in the appellate process, it is likely that the parties would elect to do so, at least in part, to defend the defendant's rights rather than to offend his rights. While it is true that defendants may have an interest in halting the appeal, most rational people would prefer the opportunity to have their appeal heard.

### 2. Substitution Recognizes Primary Victims' Interests

Criminal defendants' deaths should not impinge on victims' rights. Substitution is necessary to afford victims their rights.<sup>191</sup> States recognize the importance of victims feeling

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<sup>188</sup> Some jurisdictions view the enduring presumption of innocence to be a part of a defendant's right to a fair trial. *See, e.g.*, *United States v. Estate of Parsons*, 367 F.3d 409, 415 (5th Cir. 2004) (holding that it is consistent with the right to post-trial review that the presumption of innocence endures until the defendant has exhausted his right to appeal).

<sup>189</sup> Razel, *supra* note 8, at 2218-19 (citing *Surland v. State*, 895 A.2d 1034, 1041 (Md. 2006)).

<sup>190</sup> For an example of why this is true, see FED. R. APP. P. 27 (ordering that "[a] motion will be decided without oral argument unless the court orders otherwise"). If oral argument is ordered and the appellant is not present at the proceeding the court may still hear the appellee's argument; if neither party is present, the case is decided on the briefs prepared by the parties' attorneys. *See* FED R. APP. P. 27 (cmts.).

<sup>191</sup> *Cf. State v. Carlin*, 249 P.3d 752, 762-63 (Alaska 2011) (adopting the substitution method because both abatement and refusal to abate offend a party's rights).

protected and redeemed by the criminal justice system.<sup>192</sup> Convicting criminals is an important tool to achieve this goal, but when courts abate convictions, victims are denied this right.

First, while it may be possible for most parties to seek monetary compensation in civil court (where the burden of proof is lower),<sup>193</sup> it is impractical to assume civil court proceedings will properly afford victims their rights because without a conviction the results of the civil proceedings are unpredictable. If substitution is permitted, victims have the same opportunity to use proof of the final conviction in civil proceedings as they would if the defendant were still alive;<sup>194</sup> if the conviction were abated, the lower burden of proof does not ensure the victim a favorable result in civil proceedings.

Second, this wrongly assumes the victims' only interests are monetary; victims also have interests in being heard and having wrongdoers convicted, among other interests.<sup>195</sup> Most importantly, substitution affords victims a form of due process without denying defendants that same right.<sup>196</sup> Further, because interests in restitution are inheritable, substitution recognizes the victims' families' interests.<sup>197</sup> Even if the victim is dead, the victims' family still has an interest in a final ruling on the conviction—a right which substitution affords.<sup>198</sup>

### 3. Substitution Recognizes Governments' Interests

Substitution also protects courts and government agencies. First, substitution protects courts from further unnecessary litigation.<sup>199</sup> If the court allows the appeal to

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<sup>192</sup> For a more comprehensive look at how states balance victim's interests in the criminal justice system see Beloof, *supra* note 81. The right to feel heard and be protected has also been granted federally. See FED. R. CRIM. P. 60.

<sup>193</sup> *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006). This is because the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure allow victims to bring claims against the deceased's estate, and also permit interested parties to act as substitutes for the defendant if they file within a certain time. FED. R. APP. P. 43; FED. R. CIV. P. 25; FED. R. CIV. P. 25 (Comm. Notes); see also 1 AM. JUR. 2d *Abatement, Survival, and Revival* § 50 (2013).

<sup>194</sup> This is not possible, however, when the conviction abates because abatement ab initio treats the conviction as if it never happened. See *United States v. Estate of Parsons*, 367 F.3d 409, 414 n.14 (5th Cir. 2004).

<sup>195</sup> See *supra* Part IV.A.

<sup>196</sup> See *supra* Part V.D.1.

<sup>197</sup> See *United States v. Estate of Parsons*, 367 F.3d 409, 421 (5th Cir. 2004) (citing 18 U.S.C. § 3663A(a), (c) (2012)).

<sup>198</sup> See *id.*

<sup>199</sup> See *Gollott v. State*, 646 So. 2d 1297, 1303 (Miss. 1994). *But see* Razel, *supra* note 8, at 2210 (noting that it may waste the court's time to hear such an appeal).

continue and the conviction is affirmed then it will not be necessary to initiate separate civil actions.<sup>200</sup> If, on the other hand, the court finds a reversible error on appeal, a civil proceeding can be conducted to resolve any collateral issues.<sup>201</sup> Substitution cuts costs and promotes judicial economy.<sup>202</sup> Because the results of substitution closely mirror what would happen if the defendant never died, it promotes fairness and consistency in the criminal justice system and it provides a layer of protection that avoids setting irreversible and undesirable precedents from cases that are never able to be reviewed.

#### 4. Substitution Recognizes Defendants' Families' Interests

Substitution also protects defendants' families. First, because it does not uphold the conviction without review, it allows families the chance to preserve the family name.<sup>203</sup> Second, it prevents defendants' families from becoming unnecessarily vulnerable in subsequent civil proceedings.<sup>204</sup> If the substitutive appeal is successful, the defendant's conviction vacates, making it more difficult—though not impossible—for third parties to prevail against the estate in civil proceedings.<sup>205</sup>

Substitution also ensures that defendants' families are not forced to unjustly enrich victims or the State with the estate's assets, which would be allocated to the heirs of the estate.<sup>206</sup> Consider what could have resulted in *Mmahat* if substitution had been permitted.<sup>207</sup> If a party had substituted in the appellate proceedings to seek a final ruling on *Mmahat*'s guilt or innocence, it is possible the appeal would have been successful and the estate would not have been forced to pay restitution. When such appeals are successful, the court should abate the conviction and the restitution order (as in the model

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<sup>200</sup> State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988).

<sup>201</sup> *Id.*

<sup>202</sup> Cf. Razel, *supra* note 8, at 2210 (noting courts' interest in efficiency).

<sup>203</sup> See State v. Morris, 328 So. 2d 65, 67 (La. 1976) (“[T]he surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation.”).

<sup>204</sup> See United States v. Lay, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006).

<sup>205</sup> This is because there is no longer any proof of a conviction.

<sup>206</sup> Surland v. State, 895 A.2d 1034, 1049 (Md. 2006). See *supra* Part I.C.

<sup>207</sup> United States v. Mmahat, 106 F.3d 89, 91-93 (5th Cir. 1997) (where brothers misappropriated funds of a financially insured institution).

statute) to ensure that no party “enjoy[s] the fruits of an untested conviction.”<sup>208</sup>

##### 5. Substitution Recognizes Insurance Providers’ Interests

Substitution could also benefit insurers by protecting them from erroneous payments and unnecessary litigation they might otherwise be subjected to if abatement or refusal to abate were applied.<sup>209</sup> Common civil proceedings with liability insurers highlight this benefit. Liability insurance is “[a]n agreement to cover a loss resulting from the insured’s liability to a third party, such as a loss incurred by a driver who injures a pedestrian.”<sup>210</sup> Courts allow substitution in the civil context; courts recognize the need for the litigation to continue on a party’s death and recognize that a party’s death does not render the claim moot.<sup>211</sup>

Consider *People v. Schaefer*, mentioned at the beginning of this note.<sup>212</sup> In 2010, a jury convicted Schaefer for murdering a nine-year-old girl, in the second-degree, as a result of his drunk driving. Schaefer also injured the girl’s father, necessitating the amputation his leg; Schaefer’s actions cost the victims’ family more than \$1.3 million dollars in medical (among other) expenses. Along with Schaefer’s conviction, the court ordered restitution to the family to cover their expenses. Schaefer appealed his conviction, but died while the appeal was pending.<sup>213</sup> California followed the rule of strict abatement ab initio (where absolutely everything from the inception of the case is abated, including restitution), and so the court abated Schaefer’s conviction and the restitution order.<sup>214</sup> Because “[a] victim restitution order requires a conviction for a crime that caused the victim’s loss,”<sup>215</sup> without any “specific statute

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<sup>208</sup> *United States v. Estate of Parsons*, 367 F.3d 409, 414 (5th Cir. 2004).

<sup>209</sup> *C.f. State v. Makaila*, 897 P.2d 967, 969 (Haw. 1995) (“[T]he abated conviction cannot be used in any related civil litigation.”), *opinion after reinstatement of appeal*, 927 P.2d 419 (Haw. 1996).

<sup>210</sup> BLACK’S LAW DICTIONARY 873 (9th ed. 2009).

<sup>211</sup> For example, in *Broyle v. Eagle Picher Industries*, 123 F.R.D. 230 (M.D. La 1988) (where the court held that it was proper for a deceased man’s wife to substitute in the products liability action initiated by that man after his death).

<sup>212</sup> 146 Cal. Rptr. 3d 497 (2012). *See* Introduction, *supra*.

<sup>213</sup> *Id.* at 498.

<sup>214</sup> *Id.* at 499-501. More recently, the court has left open the possibility of posthumous appeals. *See People v. Her*, 216 Cal. Rptr. 3d 977, 978 n.1 (App. Ct. 2013).

<sup>215</sup> *Id.* at 501.

expressing the contrary,” the court was compelled to abate both the conviction and the restitution order.<sup>216</sup>

The court did not acknowledge the effect this abatement would have on primary or collateral parties involved. Without the restitution order to the family, it is plausible that the victim’s insurance company (or worse, the victim’s family) will have to satisfy this debt without the possibility of indemnification.<sup>217</sup>

Also consider the consequences that might arise if the driver’s insurance company has to compensate the defendant’s estate for the defendant’s wrongdoing. Insurance companies hire underwriters to determine the potential risk of each client, which determines the premiums clients must pay to the insurer to assume the risk of harm.<sup>218</sup> Insurance does not account for “moral hazard” or any other intentional wrongdoing by the insured.<sup>219</sup> Moral hazard becomes a problem when individuals who “are or have been affected by a contract of insurance [fail] to uphold the accepted moral qualities.”<sup>220</sup> When a conviction abates there is no longer legal proof that the action was a “moral hazard” because all proceedings, including the indictment, vacate.<sup>221</sup> This may force the insurance company to allocate funds to conduct its own investigation to prove that recovery should not be afforded because without a conviction the insurer, as subrogee, cannot automatically recover these funds—to the extent that the defendant’s estate has these funds—from the defendant’s estate.

Substitution, however, would allow the insurance company the opportunity to seek indemnification from the defendant’s estate with the same likelihood of recovery as if the defendant were still alive.

*E. Who Should be Allowed to Substitute in Appellate Proceedings?*

As indicated in the model statute, substitution should be permitted to any interested third party as long as the

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<sup>216</sup> *Id.*

<sup>217</sup> Currently, there have been no civil motions filed by any parties.

<sup>218</sup> Joni Woloniecki, *The Duty of Utmost Good Faith in Insurance Law: Where Is It in the 21st Century?*, 69 DEF. COUNS. J. 63, 63-64 (2002).

<sup>219</sup> “Moral hazard [is] any personal habit or activity of the insured that would cause him to be something less than a standard risk for insurance.” Baker, *supra* note 99, at 1403.

<sup>220</sup> EDWIN J. FAULKNER, HEALTH INSURANCE 327 (1960).

<sup>221</sup> See *United States v. Koblan*, 478 F.3d 1324, 1325 (11th Cir. 2007).

substitution is filed in a timely manner.<sup>222</sup> The model statute allows for an additional 180 days to file the substitutive appeal because of the complications and delays that the defendant's death may cause. Defendants' estates, families, and insurers can all have interests in a final review of the deceased's conviction. The list of parties that could have an interest in final review of this kind of case is not finite because there could be a greater public interest at stake. Because of this greater public interest, the deceased's private attorney or public defender or any other legitimately interested party should be allowed to substitute in the appellate proceedings; this would not violate the rights or interests of any other party.<sup>223</sup>

For example, in *Gartland v. State*, after the court charged the defendant with reckless manslaughter of her husband, she died while her appeal was pending.<sup>224</sup> At trial, the defendant had claimed self-defense against her husband's brutal abuse.<sup>225</sup> The court allowed a substitute to pursue the appeal because the state had a "strong commitment to the eradication of domestic violence[,] . . . murder[,] and other offenses committed with guns."<sup>226</sup> Effectively, the court recognized that setting a precedent like this without allowing any opportunity for review could lead to a slippery slope that would hinder the effort to eradicate domestic violence and to change how it is handled in the courts. This potential effect necessitated the case's review and negated the possibility of the appeal immediately becoming moot when the defendant died. The court held there was an important balance to strike and "interests of the defendant or society at large may be at stake if an erroneous conviction is left standing."<sup>227</sup>

By making substitution permissible rather than mandatory, no party is unwillingly burdened.<sup>228</sup> Permissible

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<sup>222</sup> In Hawaii, for example, if interested parties make a timely motion for the defendant's appeal of right the reviewing court has the discretion to "(1) dismiss the appeal as moot, vacate the original judgment of conviction, and dismiss all related criminal proceedings, or, in the alternative, (2) enter such other order as the appellate court deems appropriate pursuant to [Hawaii Rules of Appellate Procedure]." *State v. Makaila*, 897 P.2d 967, 972 (Haw.), *opinion after reinstatement of appeal*, 927 P.2d 419 (Haw. 1995). *Cf. Bevel v. Commonwealth*, 717 S.E.2d 789, 794 (Va. 2011); *State v. Devin*, 142 P.3d 599, 599-603, 605-06 (Wash. 2006).

<sup>223</sup> *See State v. Carlin*, 249 P.3d 752, 765-66 (Alaska 2011), *State v. Gartland*, 694 A.2d 564, 568 (N.J. 1997).

<sup>224</sup> *Gartland*, 694 A.2d at 568.

<sup>225</sup> *Id.* at 569.

<sup>226</sup> *Id.* at 568.

<sup>227</sup> *Id.* at 569.

<sup>228</sup> *But see Razel, supra* note 8, at 2222.

substitution does not require defendants' estates to bear the cost of the appeal, rather it permits them the opportunity to embrace the costs and the appeal *if they so choose*. If a party decides to bring an appeal, that party recognizes that the interests of appellate review outweigh the costs of the appeal.<sup>229</sup>

#### F. *The Procedure and Results of Substitution*

When courts have allowed substitution, the results have been consistent with what would occur if the defendant lived to see the appeal through.<sup>230</sup> If a third party chooses to bring an appeal on behalf of the deceased defendant, the party should file notice of appeal and pay the district clerk "all required fees."<sup>231</sup> If the substitutive appeal is successful, the conviction should vacate, any restitution ordered should vacate, and costs should be charged against the appellee subject to local rules (as enumerated in the model statute). This result allows defendants' families to benefit from the estate's full value, and it avoids the unjust enrichment of third parties.<sup>232</sup>

Alternatively, if the substitutive appeal is unsuccessful, the court should affirm the conviction, enforce the restitution, and "tax" costs "to the appellant" (subject to local rules).<sup>233</sup> This result does not harm defendants' families because the deceased's estate is a product of the deceased.<sup>234</sup> The estate should pay all fines and restitution rightly owed by the defendant. To order otherwise would unjustly enrich the estate and its beneficiaries.<sup>235</sup> It is fair to satisfy a restitution order using funds from the defendant's estate because the beneficiaries of the estate would not benefit from those funds had the defendant lived to see the appeal through.<sup>236</sup> Substitution produces the

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<sup>229</sup> See FED. R. APP. P. 3. The Federal Rules mandate that "[u]pon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals." *Id.* If the appellant believes the costs outweigh the benefits of bringing the appeal, the appellant may simply choose to abstain from filing the appeal. *Id.*

<sup>230</sup> Cf. FED. R. APP. P. 39.

<sup>231</sup> *Id.*

<sup>232</sup> Cf. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 (2011).

<sup>233</sup> Cf. FED. R. APP. P. 39.

<sup>234</sup> An estate is "[t]he amount, degree, nature, and quality of a person's interest in land or other property." BLACK'S LAW DICTIONARY 626 (9th ed. 2009).

<sup>235</sup> See *United States v. Estate of Parsons*, 367 F.3d 409, 423 n.16 (5th Cir. 2004); *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006) (noting the possibility that abatement would unjustly enrich the defendant's estate but ultimately upholding abatement because civil proceedings *may* provide relief for victims).

<sup>236</sup> The defendant would have satisfied the restitution from his own assets thereby decreasing the value of his estate. See *Estate of Parsons*, 367 F.3d at 422-24;

fairest results of any current posthumous appellate procedure because it does not prematurely stop the trial process and dictate a ruling regardless of what an actual review would produce.

### G. *Substitution Today*

Currently, ten states allow substitution in appellate proceedings after a defendant dies before exhausting his right to appeal.<sup>237</sup> Jurisdictions that practice substitution acknowledge the defendants' interests, the victims' interests, and the collateral parties' interests.<sup>238</sup> Because convictions carry with them the possibility of collateral effects, it benefits society to review the merits of the criminal proceedings.<sup>239</sup> The death of a defendant should not extinguish his rights or the rights of anyone else affected by the alleged wrongdoing.<sup>240</sup>

## CONCLUSION

In the wake of the victims' rights movement—and with the purview of collateral consequences for families, insurers, and members of society—it is archaic and unjust to ignore the effect posthumous abatement has on the interests of all parties. Staying proceedings without review, however, ignores the due process rights the Constitution affords every American—including defendants. In the absence of legislation ordering otherwise, courts are bound to dated principles or, alternatively, are constantly forced to re-question the purpose of criminal law.

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People v. Ekinici, 743 N.Y.S.2d 651, 655-56 (N.Y. Sup. Ct. 2002); *see also Lay*, 456 F. Supp. 2d at 871 (United States' opposition).

<sup>237</sup> In recent years a growing minority of courts have adopted this rationale and abandoned the archaic practice of abatement ab initio. *See, e.g.*, State v. Clements, 668 So. 2d 980 (Fla. 1996); State v. Makaila, 897 P.2d 967 (Haw.), *opinion after reinstatement of appeal*, 927 P.2d 419 (Haw. 1995); State v. Korsen, 111 P.3d 130, 133 (Idaho 2005) (citing *Ekinici*, 743 N.Y.S.2d 651); People v. Peters, 537 N.W.2d 160 (Mich. 1995); State v. Salazar, 945 P.2d 996, 1000-05 (N.M. 1997); State v. Hoxsie, 570 N.W.2d 379, 379-82 (S.D. 1997); State v. Christensen, 886 P.2d 533, 536-37 (Utah 1993); Perry v. State, 575 A.2d 1154 (Del. 1990).

<sup>238</sup> *See, e.g.*, State v. McGettrick, 509 N.E.2d 378, 380 (Ohio 1987); *see also supra* note 52.

<sup>239</sup> State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988).

<sup>240</sup> *See Bevel v. Commonwealth*, 717 S.E.2d 789, 793 (Va. 2011); *see also Wheat v. State*, 907 So. 2d 461, 463-64 (Ala. 2005) Here, the court noted the current trend for courts to abolish abatement ab initio and embrace substitution. The court stated, "We expect this trend will continue as the courts and public begin to appreciate the callous impact such a procedure necessarily has on the surviving victims of violent crime." *Id.* Despite this, the court declined to adopt substitution and upheld abatement ab initio, but ordered that the record reflect that the conviction was abated because of the defendant's death. *Id.*



A statute permitting substitution—like the model statute set forth in this note—is the only remedy that adequately addresses the rights of all interested parties. Substitution affords defendants appellate review without forcing untested re-victimization, or initial collateral-victimization, on any party.

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## APPENDIX

<b>Table 1</b>	
<b>Jurisdictions that Apply Strict Abatement Ab Initio</b>	
<b>Jurisdiction</b>	
	Fifth Circuit <sup>i</sup>
	Sixth Circuit <sup>ii</sup>
	Seventh Circuit <sup>iii</sup>
	Eighth Circuit <sup>iv</sup>
	Ninth Circuit <sup>v</sup>
	Tenth Circuit <sup>vi</sup>
	Eleventh Circuit <sup>vii</sup>
	Arizona <sup>viii</sup>
	Colorado <sup>ix</sup>
	District of Columbia <sup>x</sup>
	Illinois <sup>xi</sup>
	Louisiana <sup>xii</sup>
	Maine <sup>xiii</sup>
	Missouri <sup>xiv</sup>
	Nebraska <sup>xv</sup>
	New York <sup>xvi</sup>
	Rhode Island <sup>xvii</sup>
	Tennessee <sup>xviii</sup>
	Wyoming <sup>xix</sup>

<b>Table 2</b>	
<b>Other Jurisdictions that Currently Abate</b>	
<b>Jurisdiction</b>	<b>Special Rules</b>
Second Circuit	Abatement ab initio with the possibility that restitution orders would be upheld if the facts of the case demand it <sup>xx</sup>
Third Circuit	Abatement ab initio when a defendant dies after “filing an appropriate appeal”; restitution orders may not be appealed <sup>xxi</sup>
D.C. Circuit	Abatement ab initio even when the defendant is guilty by reason of plea as long as defendant has made a timely appeal of his conviction prior to his death <sup>xxii</sup>
California	Defendant’s death abates further proceedings of the case but the appellate court may exercise its discretion and hear the appeal <sup>xxiii</sup>
Indiana	Abatement ab initio; arguably the court has left the possibility of a different disposition if there is a greater public interest at stake <sup>xxiv</sup>
Iowa	Abatement ab initio with the possibility of a different disposition if there is a greater public interest at stake <sup>xxv</sup>
Massachusetts	Abatement ab initio for direct appeals; refusal to abate for subsequent appeals <sup>xxvi</sup>
Pennsylvania	Each time the court has addressed this issue it has abated, but it has determined the merits of appeals that were filed before the defendant’s death <sup>xxvii</sup>
South Dakota	Abatement ab initio, but if the defendant was guilty as a result of a plea and did not claim a “trial court error or abuse of discretion in his judgment of conviction” the conviction stands and the appeal abates <sup>xxviii</sup>

<b>Table 3</b>	
<b>Jurisdictions that Currently Refuse to Abate</b>	
<b>Jurisdiction</b>	<b>Special Rules</b>
Fourth Circuit	There is no “litigable interest” to seek reversal of the conviction; all penal judgments abate; restitution orders do not automatically abate <sup>xxxix</sup>
Georgia	When the appellant dies the appeal is dismissed <sup>xxx</sup>
Idaho	Conviction, and orders for payment of court costs, fees, and restitution are upheld; orders for incarceration are abated <sup>xxxix</sup>
Michigan	Conviction is upheld; compensatory restitution may be enforced <sup>xxxix</sup>
Montana	Appeal is dismissed as moot <sup>xxxix</sup>
New Hampshire	Appeal abates <sup>xxxix</sup>
North Carolina	Appeal abates <sup>xxxix</sup>
Oklahoma	Appeal abates <sup>xxxix</sup>
Oregon	Appeal abates as per the State’s rules of appellate procedure <sup>xxxix</sup>
South Carolina	Appeal abates and substitution is explicitly not permitted <sup>xxxix</sup>
Texas	Appeal abates for lack of jurisdiction <sup>xxxix</sup>
Utah	Conviction does not abate; penal orders abate; appeals regarding compensatory restitution orders do not abate <sup>xl</sup>
Virginia	Appeal rendered moot <sup>xli</sup>

<b>Table 4</b>	
<b>Jurisdictions that Currently Allow Substitutive Appeals</b>	
<b>Jurisdiction</b>	<b>Special Rules</b>
Alaska	The deceased's estate may, within reasonable time, move to proceed with the appeal; if no movement for substitution is made, the conviction is upheld <sup>xlii</sup>
Florida	If the State or a representative of the defendant shows "good cause" the appellate court may determine that the appeal should be heard <sup>xliii</sup>
Hawaii	The appellate court has the discretion to hear a substitutive appeal if a "proper party-defendant" files a motion for substitution "within a reasonable time after death" <sup>xliv</sup>
Kansas	The right to appeal is integral to the judicial process so it must be permitted even after a defendant's death, especially if there is a greater public interest at stake <sup>xlv</sup>
Maryland	If the defendant elected to appeal but died before the final disposition of the appeal, the defendant's estate (and only his estate) may elect to pursue the appeal so long as the substitution is made in a timely manner <sup>xlvi</sup>
Mississippi	State may file a motion to name a substitute as party appellant; any party may make a timely filing for substitutive appeal in the case <sup>xlvii</sup>
New Jersey	A defendant's legal representative or other collateral victim may pursue the appeal <sup>xlviii</sup>
New Mexico	The appellate court has the discretion to appoint a substitute in the appellate process where "(1) the remaining parties have not tendered a motion for substitution, (2) where the court determines that continuing the appeal will not prejudice the rights or interests of the deceased, and (3) where concluding the appeal would be in the best interests of the decedent's estate, the remaining parties, or society" <sup>xlix</sup>
Ohio	Either an appointed representative of the decedent's estate or the State may make a timely motion for a substitutive appeal pursuant to the State's appellate rules of procedure <sup>l</sup>
Washington	Court is permitted to hear the merits of a criminal appeal if "doing so is warranted"; court may abate financial penalties that are owed to the government if such penalties would risk "unfairly burdening the defendant's heirs"; restitution orders to victims do not abate <sup>li</sup>

<b>Table 5</b> <b>Other Jurisdictions<sup>lii</sup></b>	
<b>Jurisdiction</b>	<b>Special Rules</b>
Supreme Court of the United States	Petitions for certiorari are dismissed <sup>liii</sup>
First Circuit	The circuit court has not addressed the issue but one district court within the circuit has adopted abatement ab initio and held that fines paid before the defendant's death must be returned to the defendant's estate <sup>liv</sup>
Alabama	The appeal is abated and the appellate court must "instruct the trial court to place in the record a notation stating that the fact of the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed" <sup>lv</sup>
Connecticut	The court has never explicitly adopted a practice to follow when a defendant dies while his appeal is pending <sup>lvi</sup>
Kentucky	The court recognizes that the death of a defendant renders a case moot as to that defendant but that there could be other consequences to third parties; in the most recent case presented to the court the possibility of collateral consequences was strictly academic and the court has refused to decide a disposition regarding the hypothetical collateral consequences <sup>lvii</sup>
Minnesota	The state has not adopted the abatement doctrine <sup>lviii</sup>
Wisconsin	If defendant dies while pursuing an appeal the appeal may be heard <sup>lix</sup>

<sup>i</sup> See *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006).

<sup>ii</sup> *United States v. Toney*, 527 F.2d 716, 720 (6th Cir. 1975).

<sup>iii</sup> See *United States v. Bowler*, 537 F. Supp. 933, 936 (N.D. Ill 1982); *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977).

<sup>iv</sup> *United States v. Morton*, 635 F.2d 723, 726 (8th Cir. 1980).

<sup>v</sup> *United States v. Rich*, 603 F.3d 722, 731 (9th Cir. 2010).

<sup>vi</sup> *United States v. Rice*, 303 Fed. Appx. 581, 582 (10th Cir. 2008).

<sup>vii</sup> *United States v. Koblan*, 478 F.3d 1324, 1326 (11th Cir. 2007).

<sup>viii</sup> *State v. Griffin*, 592 P.2d 372, 373 (Ariz. 1979).

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- ix People v. Lipira, 621 P.2d 1389, 1390 (Colo. 1980).
- x Howell v. U.S., 455 A.2d 1371, 1373 (D.C. 1983).
- xi People v. Robinson, 719 N.E.2d 662, 664 (Ill. 1999).
- xii State v. Thom, 438 So. 2d 208, 208 (La. 1983).
- xiii State v. Carter, 299 A.2d 891, 895 (Me. 1973).
- xiv State v. West, 630 S.W.2d 271, 271 (Mo. Ct. App. 1982).
- xv State v. Campbell, 193 N.W.2d 571, 572 (Neb. 1972).
- xvi People v. Craig, 585 N.E.2d 783, 788 (N.Y. 1991).
- xvii State v. Marzilli, 303 A.2d 367, 368 (R.I. 1973).
- xviii Carver v. State, 398 S.W.2d 719, 720-21 (Tenn. 1966).
- xix State v. Free, 260 P. 173, 173 (Wyo. 1927).
- xx United States v. Wright, 160 F.3d 905, 911 (2d Cir. 1998).
- xxi U.S. v. Christopher, 273 F.3d 294, 295 (3d Cir. 2001).
- xxii United States v. Pogue, F.3d 663 (D.C. Cir. 1994).
- xxiii People v. Her, 216 Cal. Rptr. 3d 977, 978 n.1 (App. Ct. 2013). Here, the defendant appealed his conviction but died before the disposition of the appeal. The court held that a “[d]efendant’s death during the pendency of the appeal abates all further proceedings of the case” but that the court was able to “exercise [its] inherent authority to retain the appeal for issuance of [the] opinion since it raises important issues of public interest that are likely to recur in other cases.” *Id.* The court remanded the case to the trial court so that the record could reflect that all proceedings in the case were permanently abated. Generally, California has practiced abatement ab initio. *See, e.g.,* People v. Schaefer, 146 Cal. Rptr. 3d 497, 501 (2012). The fact that the *Her* court entertained the appeal made it appear that the court was allowing the substitution method, but the court’s decision to abate the case was solely based on the defendant’s death, which is contrary to substitution.
- xxiv Kenner v. State, 470 N.E.2d 1361, 1362 (Ind. 1984).
- xxv Maghee v. State, 773 N.W.2d 228, 242 (Iowa 2009).
- xxvi Commonwealth v. De La Zerda, 619 N.E.2d 617, 619 (Mass. 1993).
- xxvii *See generally* Commonwealth v. Bizzaro, 535 A.2d 1130 (Pa. 1987).
- xxviii State v. Hoxsie, 570 N.W.2d 379, 382 (1997).
- xxix United States v. Dudley, 739 F.2d 175, 176 n.1, 178 (4th Cir. 1984).
- xxx Harris v. State, 194 S.E.2d 76, 77 (Ga. 1972).
- xxxi State v. Korsen, 111 P.3d 130, 135 (Idaho 2005).
- xxxii People v. Peters, 537 N.W.2d 160, 161, 165 (Mich. 1995).
- xxxiii State v. Clark-Kotarski, 486 P.2d 876, 876 (Mont. 1971).
- xxxiv State v. Poulos, 88 A.2d 860, 861 (N.H. 1952).
- xxxv State v. Dixon, 144 S.E.2d 622, 622 (N.C. 1965).
- xxxvi *See* Johnson v. State, 392 P.2d 767, 767 (Okla. Crim. App. 1964).
- xxxvii *See* State v. Kaiser, 683 P.2d 1004, 1006 (Or. 1984).
- xxxviii State v. Anderson, 314 S.E.2d 597, 597 (S.C. 1984).
- xxxix State v. McCaffrey, 76 S.W.3d 392, 392 (Tex. Crim. App. 2002).
- xl State v. Christensen, 866 P.2d 533, 536-37 (Utah 1993).
- xli Abatement of Criminal Conviction; Effect of Death of Convicted Person While Case on Appeal, Va. Code §19.2-8.2 (2012).
- xlii State v. Carlin, 249 P.3d 752, 766 (Alaska 2011).
- xliiii State v. Clements, 668 So.2d 980, 982 (Fla. 1996).
- xliiv State v. Makaila, 897 P.2d 967, 972 (Haw.), *opinion after reinstatement of appeal*, 927 P.2d 419 (Haw. 1995).
- xliv State v. Karson, 304 P.3d 317, 321 (Kan. 2013).
- xlvi Surland v. State, 895 A.2d 1034, 1044-45 (Md. 2006).
- xlvii Gollot v. State, 646 So.2d 1297, 1304-05 (Miss. 1994).
- xlviii City of Newark v. Pulverman, 95 A.2d 889, 894 (N.J. 1953).
- xlix State v. Salazar, 945 P.2d 996, 1003-04 (N.M. 1997).
- l State v. McGettrick, 509 N.E.2d 378, 381 (Ohio 1987).
- li State v. Devin, 142 P.3d 599, 606 (Wash. 2006).

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<sup>lii</sup> Arkansas, Delaware, Nevada, North Dakota, Vermont, and West Virginia have not addressed this issue. See Tim A. Thomas, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R.4th 189.

<sup>liii</sup> *Dove v. United States*, 423 U.S. 325, 325 (1971). If an appeal of first impression were to come before the Supreme Court, abatement ab initio may still apply. See *Durhan v. United States*, 401 U.S. 481, 483 (1971), *overruled in part by Dove*, 423 U.S. 325 (1971).

<sup>liv</sup> *United States v. Sheehan*, 874 F. Supp. 31, 32 (Dist. Mass. 1994).

<sup>lv</sup> *Wheat v. State*, 907 So.2d 461, 464 (Ala. 2005).

<sup>lvi</sup> See, e.g., *State v. Trantolo*, 549 A.2d 1074, 1074 (Conn. 1988).

<sup>lvii</sup> *Royce v. Commonwealth*, 577 S.W.2d 615, 616 (Ky. 1979).

<sup>lviii</sup> See *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 80 (Minn. Ct. App. 2012).

<sup>lix</sup> *State v. McDonald*, 424 N.W.2d 411, 415 (Wis. 1988).