

2005

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### Recommended Citation

Erin A. O'Hara, *Victim Participation in the Criminal Process*, 13 J. L. & Pol'y (2005).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol13/iss1/12>

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## VICTIM PARTICIPATION IN THE CRIMINAL PROCESS

*Erin Ann O'Hara\**

### INTRODUCTION

Criminal law scholarship has recently turned its eye toward the victim—an individual obviously profoundly affected by the crime and its consequent legal proceedings. Nevertheless, this focus is unusual for modern lawyers because victims are typically ignored in the legal academy, where criminal law is cast essentially as a battle between prosecutors and defendants. In fact, a recent survey of eighteen criminal procedure textbooks indicated that the vast majority of the texts do not mention victims at all in their indexes, several include only a single paragraph or note on victim involvement in criminal trials, and only one treats victims with any degree of sophistication.<sup>1</sup> These omissions reflect the realities of the American criminal justice system, in which victims have gradually been sidelined during the past century.

Given that virtually all law professors were trained in criminal law classes that ignored victim involvement in the criminal justice

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\* Professor of Law, Vanderbilt University. Special thanks to Nancy King, Donald Hall, and the participants at the Brooklyn Law School panel discussion on Three Perspectives on Criminal Justice for helpful comments, questions, and insights. Thanks also to Julie Reed who has provided valuable research assistance. This project was generously supported by the Vanderbilt University Law School.

<sup>1</sup> *Hearing on H.J. Res. 64 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, House of Rep., 106th Cong. 2d Sess. at 227 (Feb. 10, 2000) (statement of Douglas Beloof, Professor, Northwestern School of Law at Lewis & Clark College) [hereinafter *Hearing on H.J. Res. 64*], available at <http://judiciary.house.gov/legacy/belo0210.htm>.

process, it is perhaps not surprising that it is considered heretical to suggest that direct participation by victims might be warranted.<sup>2</sup> Indirect participation<sup>3</sup> by victims and even the attendance of victims at criminal proceedings<sup>4</sup> are likewise viewed by many as problematic. In the legal academy, any other state of affairs threatens the very foundations of justice.

This prevailing attitude is encapsulated in a letter signed by 450 law professors opposing the proposed federal Victims' Rights Amendment.<sup>5</sup> The amendment has been considered in Congress each year since 1996 and, although the specific provisions vary from term to term, the amendment basically would guarantee victims: (1) the right to attend the trials of their accused perpetrators; (2) the right to notice of important proceedings involving defendants; (3) the right to be heard at proceedings involving plea agreements, sentencing, and parole; (4) the right to confer with the prosecuting attorney prior to the disposition of their

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<sup>2</sup> *Id.* (“[T]here is immense resistance within the legal academy to the idea of victims becoming part of the criminal process. This is because . . . we have a legal culture in which all of us were taught that there are only two sides to a proceeding”). For examples of critiques of victim participation, see Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749, 756-57 (2002) (arguing against allowing victims the ability to state the punishment that they feel the offenders deserve); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 514 (1994) (opposing any participation at trial by attorneys hired by victims).

<sup>3</sup> See, e.g., Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 235 (1991) (opposing the use of victim impact statements at sentencing).

<sup>4</sup> *Hearing on H.J. Res. 64*, *supra* note 1, at 104 (statement of Judge Emmett G. Sullivan, U.S. District Court for the District of Columbia) (expressing disapproval of attendance at trial of victims who wish to testify at the guilt phase).

<sup>5</sup> *Id.* at 56. Several articles opposing the proposed amendment have appeared in law reviews. See, e.g., Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371, 372-74 (2000); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L. J. 1691, 1692 (1997) [hereinafter *Victims' Rights*]; see also *infra* notes 15, 24.

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cases; (5) consideration of their concerns regarding the timely resolution of cases; and (6) consideration of their safety prior to the conditioned release of offenders.<sup>6</sup> The law professors' letter in opposition to the amendment was submitted to the Senate Judiciary Committee in 1997.<sup>7</sup>

Several recent law review articles also are highly critical of the victims' rights movement. The authors of these articles view revenge as distasteful, lower-class behavior, and victims' preferences for involvement as unnecessary, unfair, and dangerous.<sup>8</sup> For example, Elayne Rapping laments:

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<sup>6</sup> See, e.g., Letter from Law Professors Regarding the Proposed Victims' Rights Constitutional Amendment (Apr. 28, 2003) (on file with author); 2002 *Victims' Rights Amendment: Hearing on H.J. Res. 91 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, House of Rep., 107th Cong. 2d Sess. (May 9, 2002) [hereinafter *Hearing on H.J. Res. 91*], available at [http://commdocshouse.gov/committees/judiciary/hju79525.000/hju79525\\_0.htm](http://commdocshouse.gov/committees/judiciary/hju79525.000/hju79525_0.htm) (last visited Feb. 11, 2005); 2000 *Rights of Crime Victims' Constitutional Amendment: Hearing on H.J. Res. 64 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, House of Rep., 106th Cong. 2d Sess. (Feb. 10, 2000).

<sup>7</sup> A handful of law professors and authors of law review articles have come out in support of the amendment. See, e.g., *Hearing on H.J. Res. 91*, *supra* note 6, at 95 (May 9, 2002) (prepared statement of Roberta Roper) (quoting Professor Lawrence Tribe as supporting the proposed amendment); *Id.* at 150-56 (prepared statement of Professor Douglas Beloof in favor of proposed Amendment); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 481-82; Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369, 372-73.

<sup>8</sup> See William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in *LAW AND THE DOMAIN OF CULTURE* 161, 161-62 (Austin Sarat & Thomas R. Kearns eds., 1998) (arguing that "church, state and reason all line up against" the legitimacy of revenge, leaving revenge with the status of "the ineffable vulgarity of young lower-class males"). As Miller indicates, this distaste for victims' desire for revenge reflects broader social concerns with the concept. Susan Jacoby eloquently states the point:

Justice is a legitimate concept in the modern code of civilized behavior. Vengeance is not. We prefer to avert our eyes from those who persist in reminding us of the wrongs they have suffered—the mother whose child disappeared three years ago on a New York street and who, instead of mourning in silence, continues to appear on television and

a slow but insidious trend in national consciousness and criminal justice policy away from the liberal policies of the Warren Court, with its concern for the rights of defendants . . . toward a far more reactionary (in the truest sense of the word), often even bloodthirsty, concern for the 'rights' of 'victims' to revenge and punishment of the most extreme kind.<sup>9</sup>

She warns that the "rhetoric" and "displays of grief" by victims in fact mask "a great deal of cold brutality."<sup>10</sup> "Beneath the compelling emotion that informs the demands of victims, there is all too often an ugly and irrational cry for blood that smacks of mob violence and vigilante justice."<sup>11</sup> Rachel King has written similar, but more measured, remarks: "giving victims 'constitutional rights' is a step down a slippery slope to returning our criminal justice system to a time of private prosecutions when personal vengeance ruled the outcome of cases."<sup>12</sup> Paul Robinson, who at least thinks that victims' rights groups should be paid some attention,<sup>13</sup> nevertheless argues that "victims ought to have no influence [over adjudication] because an offender's liability and punishment ought to depend on his blameworthiness (including,

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appeal for information about her missing son; the young Sicilian woman who, instead of marrying her rapist as ancient legal custom dictates, scandalizes the town by bringing criminal charges; the concentration camp survivors who, instead of putting the past behind them, persist in pointing their fingers at ex-Nazis living comfortable lives on quiet streets. Such people are disturbers of the peace; we wish they would take their memories away to a church, a cemetery, a psychotherapist's office and allow us to return justice and vengeance to the separate compartments they supposedly occupy in twentieth-century life.

SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 1-2 (1983).

<sup>9</sup> Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 665 (1999-2000).

<sup>10</sup> *Id.* at 679.

<sup>11</sup> *Id.*

<sup>12</sup> Rachel King, *Why a Victims' Rights Constitutional Amendment is a Bad Idea*, 68 U. CIN. L. REV. 357, 359 (2000).

<sup>13</sup> Robinson, *supra* note 2, at 749 (advocating victims' rights organizations' influence over criminal law adjudication).

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primarily, the seriousness of his offense) not on his good luck as to the forgiving or vindictive nature of his victim.”<sup>14</sup>

Although opponents of victims' rights use the term “revenge” rather than “retribution” to describe the victims' goals, the distinction is purely rhetorical:

[T]he relationship between ‘retribution’ and ‘revenge’ is analogous to the only recently obsolete substitution of ‘protection’ for ‘birth control’: it has less to do with good and evil than with ambivalence about violations of social piety and propriety grown so widespread that they have become the rule rather than the exception.<sup>15</sup>

Whether labeled as revenge or retribution, these opponents believe that the criminal justice process should be insulated from victims' sentiments.

This essay does not promote the Victims' Rights Amendment<sup>16</sup> or advocate any other specific victims' rights proposal.<sup>17</sup> Rather, it suggests that, as a positive matter, victim involvement in the criminal process is becoming and will continue to be a reality of our criminal justice process. Too often law professors feel content to dogmatically insist that crimes are wrongs committed against

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<sup>14</sup> *Id.*

<sup>15</sup> JACOBY, *supra* note 8, at 4.

<sup>16</sup> The strengths and weaknesses of the proposed amendment are explored in a *Hearing on H.J. Res. 91*, *supra* note 6, and in a *Hearing on H.J. Res. 64*, *supra* note 1.

<sup>17</sup> Victims' rights groups have proffered a number of proposals either to afford victims rights or to modify the criminal justice process to aid conviction and sentencing. Some of the proposals have been enacted into state and federal statutes and into state constitutional amendments. The proposals include victims' rights to restitution, attendance, participation, and allocution. They also include the rights to consult with prosecutors, to veto plea agreements, to refuse defendants' discovery requests, and to have their safety considered prior to any release of the offender. Other reform efforts include the elimination of the exclusionary rule, speedier trials, reduced bond releases, evidence rule modification, bans on defendant profiting from crime, and enhanced sentences and use of the death penalty. For a discussion of these reform efforts, see Lynn N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 966–1020 (1985); see generally DOUGLAS E. BELOOF, *VICTIMS IN CRIMINAL PROCEDURE* (1999).

the public rather than an individual and that, therefore, victim involvement in criminal cases beyond the potential witness capacity is inappropriate.<sup>18</sup> Contrary to their assertions, however, victims have been involved in the disposition of criminal cases for much longer than they have been marginalized, and they are unlikely to remain impotent forces in the disposition of cases. As a consequence, advocates must think creatively about how to provide victims with participation at a minimal cost to existing procedural protections for defendants. Part I of this essay briefly traces the evolution of state control over criminal prosecution. Part II argues that, as a matter of political economy, an unstable equilibrium is created by closing victims out of the criminal justice system. This article leaves for future discussion the identification of desirable victims' rights reforms.

#### I. THE MARGINALIZATION OF CRIME VICTIMS

Victims of crime may bring tort actions against their perpetrators, but because many, if not most, criminals are essentially judgment-proof, the civil route is often considered to be an ineffective or insufficient means by which to provide relief to victims.<sup>19</sup> Even when perpetrators are able to pay judgments, the civil trial can be a hollow, antiseptic, and therefore inappropriate forum for serving the emotional needs of the victim.<sup>20</sup> Victims seek both revenge and strong social condemnation of criminals, and they hope to receive vindication and validation from society.<sup>21</sup> These needs are far more effectively served in the criminal law

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<sup>18</sup> See Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Antigang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 751 (2000) (discussing this viewpoint); see also *EACRET V. HOLMES*, 333 P.2d 741, 742 (Or. 1958) (stating that criminal punishment is a matter of public policy, not private vengeance).

<sup>19</sup> John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victims' Rights Movement: Enforcing Crime Victims' Rights in the Courts*, 33 MCGEORGE L. REV. 689 (2002).

<sup>20</sup> Note, *Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1532-33 (1993) (stating that tort suits "lack the social condemnation that accompanies criminal sanctions").

<sup>21</sup> See *infra* Part II.

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setting.

Historically, victims have had significant influence on the criminal process. After the collapse of the Roman Empire, victims throughout Europe were left without a governmental structure to address their suffering.<sup>22</sup> Victims were left to rely on self help, the assistance of kin, and the practice of “outlawry,” whereby the community was considered entitled to attack and banish an offender from its midst.<sup>23</sup> The victims’ desire for revenge, condemnation, vindication, and validation could all be satisfied “privately.” Eventually, however, a system of fines payable to both the victim and the king began to replace self-help violence, with victims prosecuting their own claims to restitution.<sup>24</sup> As the legal system developed in England,

[t]he lords’ consolidation of power, the greed of kings, and the need for a coherent system of laws transformed criminal law from a mixture of public and private law, to law of an exclusively public nature. A similar shift from a mixed system to an exclusively public system took place on the continent. As English criminal law became more public, victims lost some discretion once they initiated a prosecution, but still retained an important role in the process through the unique English system of “private” prosecution.<sup>25</sup>

Although private prosecutions have been significantly restrained, victims in England still retain a right to initiate criminal proceedings against their accused offenders.<sup>26</sup>

In the American colonial period, private prosecutions were common. Scholars, however, debate their precise prevalence in our early history. Steven Twist, for example, asserts that “[p]rivate prosecutions, whereby the victim or the victim’s relatives or friends brought and prosecuted criminal charges against the accused wrongdoer, were the norm in the American justice system

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<sup>22</sup> Henderson, *supra* note 17, at 938-39.

<sup>23</sup> *See id.* at 938-39 (citing several sources).

<sup>24</sup> *Id.* at 939.

<sup>25</sup> *Id.* at 940-41.

<sup>26</sup> Twist, *supra* note 7, at 371.



at the time of the colonial revolution and the drafting of the Constitution.”<sup>27</sup> In contrast, Rachel King asserts that “prosecuting criminals was in some sense always seen as a public duty, due to the greater egalitarianism of American society and to the fact that God, not just the people, demanded that the State handle this duty.”<sup>28</sup> According to Lawrence Friedman, “[t]he public prosecutor—a government officer in charge of prosecution—appeared quite early on this side of the Atlantic.”<sup>29</sup> Although it is not clear whether public or private prosecutions predominated during the colonial period, it is evident that “criminal law was a combination of both public and private prosecution.”<sup>30</sup> Private prosecutions continued in many states without significant scrutiny throughout the nineteenth century and still continue to this day in three states.<sup>31</sup> In several other states, victims can hire their own attorneys to assist the prosecutor so long as control over the prosecution remains with the State.<sup>32</sup> For the most part, however, the victim has been marginalized in criminal cases.

Shifts from private to public administration of criminal justice became common as countries developed their bureaucratic capabilities.<sup>33</sup> This trend is typically justified on several grounds. First, scholars note the prevalence of inaccurate accusations and excessive victim vengeance in private prosecutions.<sup>34</sup> A victim

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<sup>27</sup> *Id.* at 370-71.

<sup>28</sup> King, *supra* note 12, at 366-67.

<sup>29</sup> Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 29-30 (1993).

<sup>30</sup> King, *supra* note 12, at 367.

<sup>31</sup> Bessler, *supra* note 2, at 518-21 (noting that Alabama, Montana, and Ohio retain private prosecutions).

<sup>32</sup> *Id.* at 529.

<sup>33</sup> See generally David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475 (1995) (discussing the English trend toward public prosecution); Vik Kanwar, *Capital Punishment as ‘Closure’: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 224 (2001-2002).

<sup>34</sup> See Aya Grueber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behaviors in An Era of Victims’ Rights*, 76 TEMP. L. REV. 645, 654 (2003) (discussing this viewpoint); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L.

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who seeks “an eye for an eye” from an innocent accused can spark a feud that ravages a community.<sup>35</sup> Even when the accused is, in fact, the perpetrator, some victims will demand two eyes for an eye, creating the same possibility of extensive feuding.<sup>36</sup> Presumably, community stability, general peacekeeping, and proportional punishment for defendants are all enhanced when the State exercises monopoly power over vengeance.

The problems with privately-sponsored criminal law enforcement tend to grow with the size of the criminal code. For one thing, when legislatures begin to criminalize conduct that is considered “victimless,” private enforcement of “victimless” crimes is likely to lead either to underenforcement or standing problems.<sup>37</sup> As a consequence, much of this conduct is more efficiently deterred by placing prosecution in the hands of the State. Moreover, as criminal law has expanded to cover behaviors such as theft, fraud, and negligent homicide, the line between criminal conduct and socially useful behavior has become hazier.<sup>38</sup> Simple breach of contract is now hard to distinguish from theft, and modest mistakes in daily life look like manslaughter.<sup>39</sup> Public prosecutors are not always ideally situated to perfectly judge which harms should be prosecuted as crimes, but they are very often more neutral and emotionally detached in exercising their discretion than

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REV. 511 (1994).

<sup>35</sup> For a discussion of blood feuds and attempts by Germanic law to discourage them, see James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U.L. REV. 29, 53-55 (1996).

<sup>36</sup> *Id.*

<sup>37</sup> Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1739 n. 244 (discussing standing problems associated with the private prosecution of victimless crimes).

<sup>38</sup> See Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993) (discussing the role of mens rea in sorting socially useful activities from criminal activities).

<sup>39</sup> This issue might have contributed to the Supreme Court of Wisconsin's determination that private prosecution is invalid. In *Biemel v. State*, 37 N.W. 244 (Wis. 1888), two members of a sailor's union boarded a ship and attempted to eject the defendant, who was viewed to be working against the union's interest. The defendant ended up shooting and killing one of the union members, so the union hired an attorney to prosecute the case. *Id.*

are victims.<sup>40</sup>

The second difficulty with private enforcement of criminal law is that some victims are too forgiving. When a perpetrator preys on a member of the community and is not punished for the wrong, others in the community are at greater risk of being victimized by the perpetrator.<sup>41</sup> Punishing the wrongdoer takes both time and effort, however, and not all victims can be counted on to make the requisite investment. Historically, when criminal law enforcement was nothing more than vigilante justice, the community, for its own protection, reserved for itself the authority to punish offenders.<sup>42</sup> Public prosecutions, the legal counterpart of this social development, serve a similar function.

In addition to time and effort, effective private prosecution also requires resources. Under a system of purely private prosecution, therefore, a perpetrator was much more likely to be punished when he harmed a rich person than when he victimized the poor.<sup>43</sup> Without public prosecution, the poor were disproportionately victimized relative to the rich.<sup>44</sup> This disparity unfortunately persists under a system of public prosecution, but it is likely less magnified than it would be in a system based on private prosecution. Public prosecution thus enables a society to strive toward the provision of equal justice for all.

To summarize, public enforcement of the criminal law can (1) contribute to the provision of equal access to justice; (2) increase the accuracy of verdicts; (3) help to more effectively separate criminal from noncriminal conduct; and (4) help to ensure that the guilty are punished while tempering the potential excesses of

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<sup>40</sup> Prosecutors presumably also are better able to objectively determine whether the excuse and justification defenses appropriately apply.

<sup>41</sup> In some cases, public prosecution is intended to protect the forgiving victim rather than the public at large. Domestic violence cases can fall into this category. See Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 49 CHI.-KENT L. REV. 1055 (2004).

<sup>42</sup> Henderson, *supra* note 17, at 939 & n.7.

<sup>43</sup> Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPP. L. REV. 117, 130 (1984).

<sup>44</sup> Cf. Friedman, *supra* note 33 at 490.

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victim desires for revenge. To serve these goals, victim involvement in criminal trials has diminished over time, as the State has become the predominant enforcement agent.

## II. THE POLITICAL INEVITABILITY OF VICTIM PARTICIPATION AT CRIMINAL TRIALS

Although the shift from private to public prosecution serves important public policy goals, the pendulum has swung too far away from the victim. As a matter of rhetoric, first-year law students are often told that crimes are wrongs committed against the State rather than against the individual. As a matter of practice, victims are often completely sidelined in the criminal process. Many victims never have an opportunity to meet with the prosecutors in their cases and those who do very often report that they do not feel as though their concerns were taken into account.<sup>45</sup> The vast majority of criminal cases end with plea agreements,<sup>46</sup> and yet victims often are not informed that their cases have been resolved.<sup>47</sup> Victim notice is similarly lacking with regard to bond releases and parole grants.<sup>48</sup> Until recent advocacy efforts enabled the submission of victim impact statements, many victims were denied the opportunity to speak to the court about either the extent of their suffering or their views about the appropriate punishment

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<sup>45</sup> David M. Lerman, *Forgiveness in the Criminal Justice System: If It Belongs, Then Why Is It So Hard To Find?*, 27 *FORDHAM URB. L. J.* 1663, 1670 (2000). This problem may depend on the location of the crime, and many law enforcement personnel believe that they do, in fact, take victim concerns into account. See generally Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 *VAND. L. REV.* 931 (1975) (reporting that interviewed Nashville, Tennessee law enforcement personnel stated that they believed they took victims' concerns and desires into account).

<sup>46</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L. J.* 1909, 1909 n.1 (1992).

<sup>47</sup> PEGGY M. TOBOLOWSKY, *CRIME VICTIMS' RIGHTS AND REMEDIES* 39 (2001).

<sup>48</sup> *Hearing on H.J. Res. 64, supra* note 1, at 20 (statement of Rep. Steve Chabot) (stating that "a study by the National Institute of Justice found that only 60 percent of victims are notified when defendants are sentenced and only 40 percent are notified of a defendant's pretrial release").

of the offenders.<sup>49</sup> To date, some victims and their family members are subpoenaed by defense counsel as potential witnesses and, therefore, are barred from even attending the trials in their cases.<sup>50</sup> Further, trials are often delayed repeatedly, causing victims increasing anxiety.<sup>51</sup>

Many prosecutors, defense attorneys, and law professors would challenge the assertion that the pendulum has swung too far. Prosecutors would likely claim that they are already sadly overburdened with preparing cases for court.<sup>52</sup> After all, they are not trained to be counselors and are less able to do their jobs effectively if they have to spend time holding victims' hands. Defense attorneys no doubt worry that victim attendance and participation at criminal trials would force each of their clients to defend himself against not one but two adversaries. Notably, the recent political clamor for victims' rights is often driven by various law enforcement personnel, who have formed formidable interest groups in Congress and the state legislatures.<sup>53</sup> Thus, to the extent that the State hides in the clothing of the victim, its claims of unfairness are suspicious and unavailing. Finally, law professors might make the mistake of concluding that victim absence from criminal procedure textbooks indicates that victims do not deserve a place in the criminal process. As a consequence, most law

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<sup>49</sup> See Rachele K. Houpp, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through The Victims' Rights Amendment*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 207, 237 n.48 (2002).

<sup>50</sup> See, e.g., *Hearing on H.J. Res. 91*, *supra* note 6, at 50 (prepared statement of Steven J. Twist) (discussing proposed right to presence and providing an example of a victim's family's strategic exclusion from the courtroom).

<sup>51</sup> *Id.* at 59-61 (discussing the proposed amendment's recognition of victims' interest in avoiding unreasonable delay and providing examples of occasions in which victims' interests have been ignored).

<sup>52</sup> See M. Elaine Nugent & Mark L. Miller, *Basic Factors in Determining Prosecutor Workload*, 36 THE PROSECUTOR 32, 33 (Jul.-Aug. 2002) (noting that prosecutors' workloads have increased due to victims' rights legislation).

<sup>53</sup> Examples of law enforcement advocacy groups in the United States include the Law Enforcement Alliance of America, the National Troopers Coalition, the International Association of Chiefs of Police, the National District Attorneys Association, and the Prosecutor Bar Association, among many others.

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professors are heavily biased toward the maintenance of the status quo. Myriad arguments have been advanced to discredit victim involvement in the criminal context.<sup>54</sup> Notice to victims is expensive. Victim involvement at trial is unfair to defendants and can undermine prosecutorial efforts. Victim witness attendance can lead to false convictions. Impact statements are simply prosecutorial ploys to enhance sentences. Restricted trial continuances hurt both the prosecutor's and the defense's case. Some "victims" are actually in collusion with defendants to try to prevent conviction.

Many of these arguments have considerable merit. Others make sense in the abstract, but do not seem to be supported by negative effects in actual trials. For example, studies of victim impact statements indicate that the statements have little or no effect on sentencing, although they seem to contribute significantly to victim satisfaction in the resolution of the cases.<sup>55</sup> On the other hand, many proposals would likely prove quite harmful. Tinkering with the criminal process can threaten the due process rights of the defendant, and broadly-worded state and proposed federal constitutional amendments can significantly alter the balance of forces at criminal trials in unintended and potentially deleterious ways.<sup>56</sup> Very careful consideration should be given to any victims' rights proposal.

Despite our concerns and preferences for the current balance, however, victims will, as a matter of political reality, find a way to swing the pendulum back in the direction of their participation at trial. Thirty-two states have already passed constitutional amendments guaranteeing victims' rights,<sup>57</sup> and others have provided similar rights with statutes.<sup>58</sup> Moreover, Congress has been quick to consider similar changes to the United States Code

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<sup>54</sup> See authorities cited in *supra* footnotes 2-5.

<sup>55</sup> *Hearing on H.J. Res. 91, supra* note 6, at 55 (prepared statement of Steven J. Twist) (citing studies).

<sup>56</sup> See *Victims' Rights, supra* note 5, at 1691.

<sup>57</sup> The texts of the state constitutional amendments have been reproduced at *Hearing on H.J. Res. 64, supra* note 1, at 154-202.

<sup>58</sup> Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft*, 78 N.C. L. REV. 371, 374-75 (2000).

and the federal Constitution.<sup>59</sup> This trend in the direction of victim involvement will no doubt continue.

The recent and ongoing success of the victims' rights movement can be attributed to the "Baptists and Bootleggers" form of the interest groups that are collaborating to advocate the reforms. The classic "Baptists and Bootleggers" coalition is one "in which do-gooders and special interests combine forces to endorse legislation (such as Prohibition) that the 'Baptists' believe to be morally worthy and the 'Bootleggers' believe will benefit them economically."<sup>60</sup> The two groups together can achieve legislative reforms that often neither can achieve alone.<sup>61</sup> The "Bootleggers" need a public interest face to make their reforms seem more popular, and the "Baptists" need a group with a significant personal stake in the outcome to relentlessly finance or otherwise help to push through the legislation.<sup>62</sup>

The proposals to include victim participation in the criminal process are sponsored and supported by two different groups. The "Bootleggers" of the victims' rights movement are organizations representing the police and prosecutors, whose jobs are hindered by defendants' procedural guarantees.<sup>63</sup> They can be viewed as "Bootleggers" not because the individual members of the organizations stand to gain financially from the passage of criminal procedure reforms, but rather because these groups are viewed with suspicion when they stand alone to push reforms. After all,

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<sup>59</sup> *Id.*

<sup>60</sup> David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1986 n.133 (2003) (review essay); see also Todd J. Zywicki, *Baptists? The Political Economy of Environmental Interest Groups*, 53 CASE W. L. REV. 315 (2002).

<sup>61</sup> Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, REGULATION MAY/JUNE 1983, at 13-14 (describing the Baptist, Bootlegger Theory of Regulation).

<sup>62</sup> Bruce Yandle & Stuart Buck, *Bootleggers, Baptists and the Global Warming Battle*, 26 HARV. ENVTL. L. REV. 177, 188 (2002).

<sup>63</sup> Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 582 (1998) ("[M]any of the proposals and victims' rights amendments to state constitutions had less to do with the real concerns and needs of victims of violent crime than with law enforcement and crime control concerns.").

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defendants' procedural protections exist because of the potential for state powers to become oppressive. Thus, state employees are hardly effective symbols of the need for procedural reform.

The victims, on the other hand, serve as the "Baptists" of the victims' rights movement. Victims of violent crimes perpetrated by strangers are the most effective spokespeople for the movement because they remind us of our own vulnerability to predation. They have suffered tremendous hardship and have turned their grief into an effort to help prevent others from suffering their fates. Their tales of neglect and abuse in the criminal justice process serve to powerfully illustrate the weaknesses of a system that has marginalized them and, as a consequence, magnified their suffering.

Why should marginalization cause extra harm to victims? Deeply embedded in our human psyche is an instinct to act retributively when others harm us in a way that threatens our status in our social communities.<sup>64</sup> The desire for retribution is an effective tool for discouraging others from taking advantage of us. There may be a role for forgiving others, but forgiveness, if conferred routinely and automatically, invites future predation.<sup>65</sup> From an evolutionary perspective, victimization might also have been a signal that the person did not enjoy the respect and support of community members.<sup>66</sup> Humans have never thrived in isolation.<sup>67</sup> Instead, they live in groups for several reasons, including the fact that loyal group members enhance personal

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<sup>64</sup> See JACOBY, *supra* 8, at 152 ("It was taken for granted that humans had a deep need—a need as sharp as hunger or sexual desire—to avenge their injuries, to restore a sense of equity when they felt their integrity had been violated.").

<sup>65</sup> See Erin O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1178 (2002) (stating that victims who forgive too easily may be seen as "chumps" or "pushovers").

<sup>66</sup> Relatedly, income and risk of victimization are negatively correlated, suggesting that, even today, those who enjoy higher social status are less likely to be victimized. John H. Laub, *Patterns of Criminal Victimization in the United States*, in VICTIMS OF CRIME 9, 15-16 (Sage Publications 1997) (interpreting National Crime Victimization Survey data as demonstrating that income is negatively and proportionally related to risk of personal victimization).

<sup>67</sup> PAUL H. RUBIN, DARWINIAN POLITICS: THE EVOLUTIONARY ORIGIN OF FREEDOM 4, 7 (2002).



security.<sup>68</sup> An individual who received little respect in her community during an era without an effective public criminal justice system was presumably less likely to garner private support in her efforts to retaliate and, therefore, more vulnerable to being victimized.

When the State monopolizes retributive efforts, victims feel anxious for two distinct reasons. First, an unsuccessful trial or poor treatment by the State's representatives can cause the victim to believe that she lacks the support of her community.<sup>69</sup> Second, her feelings of disempowerment are exacerbated by the fact that she is disenabled from taking retribution into her own hands.

Victims, therefore, often seek three types of reforms in an effort to satisfy their status and vulnerability concerns: (1) reforms designed to make conviction easier; (2) reforms designed to ensure victims better treatment in the criminal justice process; and (3) reforms designed to ensure victims active participation in the criminal proceedings.<sup>70</sup> Experts on the psychological effects of crime have emphasized the importance to victims of this last set of reforms by noting that "failure to offer victims a chance to participate in criminal proceedings can 'result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm.'" At the same time, "there is mounting evidence that 'having a voice may improve victims' mental condition and welfare.' For some victims, making a statement helps restore balance between themselves and the offenders."<sup>71</sup>

With respect to some of these reforms, the interests of the "Baptists" and "Bootleggers" begin to diverge. Law enforcement personnel obviously are interested in increased convictions, but it seems plausible that they may be decidedly ambivalent about

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<sup>68</sup> *Id.* at 38 ("One of the major benefits of group living is the ability to minimize predation.").

<sup>69</sup> Indeed, one of the primary reasons that victims often fail to report crimes is their fear about how they will be treated and whether they will be believed. Deborah P. Kelly & Edna Erez, *Victim Participation in the Criminal Justice System*, in VICTIMS OF CRIME 231, 232-33 (Sage Publications 1997).

<sup>70</sup> See generally *Hearing on H.J. Res. 91*, *supra* note 6, at 28-69.

<sup>71</sup> *Id.* at 57 (prepared statement of Steven J. Twist) (citing experts).

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victim participation rights. Active participation by victims can threaten the discretion and authority of the State, and victim presence at proceedings can expose prosecutor strategies and behaviors that law enforcement might prefer to keep hidden.<sup>72</sup>

For those who are sympathetic to the needs of victims yet suspicious of state agents' efforts to retain and increase their powers at the expense of defendants, it seems worthwhile to give some thought to whether the "Baptists" really need the "Bootleggers" to obtain reforms.

Twenty-five years ago, victim advocacy groups were weak and unfunded, victims were just beginning to organize, and law enforcement groups already were well-organized, effective lobbying groups. In those days, the "Baptists" relied heavily on the "Bootleggers" to help them try to reform the system. In fact, some claim that the victims' rights movement was co-opted by law enforcement.<sup>73</sup>

Today, however, victims' rights groups are better organized and better funded—thanks in part to their success in obtaining government funding through legislative reforms and grant offerings.<sup>74</sup> Several national organizations have achieved prominence, including The National Center for Victims of Crime<sup>75</sup>

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<sup>72</sup> See, e.g., Ronald Goldstock et al., *Justice That Makes Sense*, 32 THE PROSECUTOR 28, 31 (Feb. 1998) (President of the National District Attorneys Association stating opposition to victims' rights proposals that would interfere with prosecutorial discretion); Kelly & Erez, *supra* note 69, at 233 ("Prosecutors are particularly likely to resist consideration of the victims' point of view because it is prosecutors' control that would be most eroded.").

<sup>73</sup> See, e.g., Robert Elias, *Which Victim Movement? The Politics of Victim Policy in VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 229-47 (Arthur J. Lurigio, et al. eds., 1990); Mosteller, *Victims' Rights*, *supra* note 5; Henderson, *supra* note 17, at 951.

<sup>74</sup> See, e.g., National Center for Victims of Crimes, at [http://www.ncvc.org/ncvc/main.aspx?dbID=DB\\_About](http://www.ncvc.org/ncvc/main.aspx?dbID=DB_About) 189 (noting support from government grants); Parents of Murdered Children, Inc., at <http://www.pomc.com/history.cfm> (same); Office for Victims of Crime, at <http://www.ojp.usdoj.gov/ovc/fund/2005NCVRWfund/welcome.html> (grant opportunity offered by the Office for Victims of Crime).

<sup>75</sup> The National Center website states that the organization has worked with more than 10,000 grassroots organizations and has assisted millions of crime victims. See <http://www.ncvc.org/> (last visited Feb. 21, 2005).

and several co-supporters of the Victims' Rights Amendment, including Parents of Murdered Children, The National Organization for Victim Assistance (NOVA),<sup>76</sup> Mothers Against Drunk Driving (MADD), the Stephanie Roper Foundation, Arizona Voice for Crime Victims, Crime Victims United, and Memory of Victims Everywhere. These organizations, along with state and regional organizations, train volunteers and professionals, and achieve legislative and constitutional reforms. Especially given the popularity of recent victims' rights reform efforts,<sup>77</sup> victims' groups may be capable of obtaining (at least statutory) reforms on their own, whether or not these reforms coincide with the interests of law enforcement.

Whether victims' rights organizations can obtain reforms independently is significant because there may be reforms that will address victims' concerns without increasing the problems associated with state authority in the criminal process. Of the three types of reforms mentioned above—victim participation, victim treatment, and enhanced convictions—only the third inevitably leads to increased state authority. These reforms are probably the easiest to achieve statutorily because the “Baptists” and “Bootleggers” can work together; however, presumably they are also the most likely to be struck down by the U.S. Supreme Court. The recent unsuccessful effort to undo the exclusionary rule provides an instructive example of such an attempt.<sup>78</sup>

Victim treatment and participation rights, on the other hand, could address legitimate victim concerns without upsetting the balance between the defendant and the State. Moreover, these rights might enable victims to more effectively monitor

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<sup>76</sup> NOVA's listed mission, purposes, and accomplishments make clear its broad influence in the areas of victim assistance and victims' right reforms. See National Organization for Victim Assistance, at <http://www.trynova.org/about/> (last visited Feb. 11, 2005).

<sup>77</sup> See *Hearing on H.J. Res. 64*, *supra* note 1, at 45 (statement of Hon. Robert C. Scott, A Representative in Congress from the State of Virginia) (“[T]he polls demonstrate the power that victims have in 60, 70, 80, 90 percent passage of constitutional amendments. Whether they diminish the rights of defendants or not, they are very popular. The victims have the political power.”).

<sup>78</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

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prosecutorial conduct. Of course, proposed reforms in these categories could also undermine criminal justice. Examples of such questionable reforms include proposals to enable victims to veto plea agreements or to oppose continuances, which might force parties to proceed to trial before they are ready.<sup>79</sup> Others, however, are more benign, such as the right of victims to notice and attendance, and the right to speak at release and sentencing proceedings.<sup>80</sup>

## CONCLUSION

This essay leaves for another day a more detailed exploration of possible reforms. It argues, however, that law professors may make matters worse when they wholesale reject victims' rights efforts as destructive of established principles of justice. Victims' rights advocates are not likely to disappear in the near future; indeed, their influence is growing and their message powerful. Consequently, commentators in the field of criminal justice must work carefully to craft reforms that serve victims without aiding the State in amassing boundless power or in eroding protections for defendants. Oddly enough, as victims' rights groups gain strength, they become better able to obtain reforms that contribute to their emotional wellbeing without affecting the balance between the official adversaries in the criminal process. Rather than resisting victims by accusing them of "irrationality" or "brutality," scholars and advocates should focus on finding ways to separate the "Baptists" from the "Bootleggers."

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<sup>79</sup> Kelly & Erez, *supra* note 69, at 234 ("No state gives victims a veto over plea bargains."); Henderson, *supra* note 17, at 974-76 (opposing a proposal that would allow victims to oppose continuances).

<sup>80</sup> Kelly & Erez, *supra* note 69, at 233-34 (summarizing the adoption of such participatory reforms).