

Brooklyn Law School  
**BrooklynWorks**

---

Faculty Scholarship

---

Summer 2022

## The Role of the "Victim" in the Criminal Legal System

Kate Mogulescu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the **Criminal Law Commons**

---

# FOREWORD

## THE ROLE OF THE “VICTIM” IN THE CRIMINAL LEGAL SYSTEM

*Kate Mogulescu*<sup>†</sup>

### INTRODUCTION

One of the most entrenched and deeply held constructs of the criminal legal system is that of victim and perpetrator—the notion that a victim and perpetrator are separate and distinct, clearly identifiable, and defined. This binary creates presumptions, determines practice, and dictates process. The end result is a punishment paradigm that fails to offer opportunities for healing and fails to reckon with the acts of both causing and experiencing harm.<sup>1</sup>

As it exists, the criminal legal process does not meaningfully address people’s lived experience, either the harm of being subject to a criminal offense that is the subject of prosecution or the harm that may have contributed to one’s participation in or commission of an offense. Prosecutors routinely move forward in ways that do not align with the desire or perspective of an identified victim, stripping the identified victim of agency or influence. Courts are quick to point to the long-lasting impact of victimization when imposing longer terms of imprisonment, orders of protection, extended surveillance and, more generally, increased punishment, but refuse to acknowledge the experience of victimization of the person charged.

On September 24, 2021, the *Brooklyn Law Review* brought together scholars looking at the role of the “victim” in the criminal legal system.<sup>2</sup> Of consideration were the following

---

<sup>†</sup> Kate Mogulescu is Associate Professor of Clinical Law, Brooklyn Law School.

<sup>1</sup> See generally Kathy Boudin et al., *Movement-Based Participatory Inquiry: The Multi-Voiced Story of the Survivors Justice Project*, SOC. SCIS. (Mar. 15, 2022), <https://www.mdpi.com/2076-0760/11/3/129/htm> [<https://perma.cc/FFU4-2GJK>] (describing the work of the Survivors Justice Project at Brooklyn Law School that formed in recognition of this phenomenon).

<sup>2</sup> Thanks to the editors of the *Brooklyn Law Review* for convening this symposium and the resulting issue and to the Events Team at Brooklyn Law School for successfully hosting one of the first in-person events after the onset of the COVID-19

questions: Who is labeled a victim and how does that impact outcomes and process? Where does the issue of victimization emerge, how is it received and what should the system's response be? Who gets a voice? And when? Does the existing victim-offender binary further exacerbate a criminal legal system build on misogyny, xenophobia, and white supremacy?

The series of articles and essays that make up this issue reflect the symposium's multidimensional discussion and interrogate the way the legal system recognizes, or fails to recognize, those who have experienced harm.

The pieces in this issue go beyond what Susan Bandes identifies as "[l]egal critiques [that] tend to appear both heartless and hyper technical," not daunted by the "forcefield" that more typically insulates the criminal legal system's treatment of victimization from scrutiny.<sup>3</sup> The symposium, and this resulting issue, meaningfully engage with the humanity and lived experience of both people who have caused and experienced harm—often overlapping categories. The scholarship contained herein contemplates the role of prosecutors, defense attorneys, judges, people charged with offenses seeking to represent themselves, parole arbiters, and those who the system formally identifies as "victims."

## I. WHO DECIDES? ARRESTS, CHARGING, AND PLEA BARGAINING

Deciding who is to be accorded victim status, and what role victims have in deciding who to prosecute for what has great significance in our criminal legal system. Margaret Garvin reminds us of the need to respect the agency of people who have been subject to a criminal offense, which includes choosing whether and how to participate in, or disengage from, the criminal process and urging counsel for those decisions.<sup>4</sup> Bruce Green and Brandon Ruben explore how this could, and should, impact prosecutors' actions through the perspective and experience of a public defender in Maryland.<sup>5</sup>

Broadening the lens to consider what we mean by victimhood, Tamara Lave analyzes how the system responds to police violence and offers a new understanding of "victimization"

---

pandemic. Special gratitude to the symposium participants for being lively discussants, thoughtful commenters and creative visionaries.

<sup>3</sup> Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1259, 1265 (2022).

<sup>4</sup> Margaret Garvin, *Giving Meaning to the Apostrophe in Victim[']s Rights*, 87 BROOK. L. REV. 1109, 1113 (2022).

<sup>5</sup> Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions?*, 87 BROOK. L. REV. 1127 (2022).

that takes into account the “exploit[ation of] structural social, economic, and health mistreatment” and how this mistreatment is weaponized against victims of police violence.<sup>6</sup>

## II. TRIAL PRACTICE, EVIDENCE, AND OUTCOMES

In looking at evidence and trial practice, Katharine Manning examines issues that arise when a person representing themselves without the assistance of a lawyer cross examines a victim witness and proposes a rule that would require standby counsel in such instances.<sup>7</sup> Anna Roberts uplifts the contradictions in allowing impeachment of prosecution witnesses with their own prior conviction records by defense counsel.<sup>8</sup> She highlights the way in which criminal record impeachment has tenuous connections to both veracity and guilt, risks unfair prejudice, and provides a fertile ground for racial bias to operate and further marginalize.<sup>9</sup>

Turning to the influence that identified victims have on outcomes, Susan Bandes and Alexis Karteron warn of the problematic nature of victim impact statements in their respective pieces, Bandes at sentencing decisions<sup>10</sup> and Karteron in critical questions of release on parole after incarceration.<sup>11</sup> Bandes questions the value of victim impact statements at sentencing, and suggests that as currently utilized, such statements may impair the integrity of the criminal process by not actually serving the identified victims of offenses and unfairly prejudicing those charged and convicted.<sup>12</sup> Karteron offers an in depth look at how victim impact statements in parole determinations may exacerbate racial disparities.<sup>13</sup>

## III. BEYOND THE VICTIM-OFFENDER CATEGORIES

Finally, Steven Zeidman and Cynthia Godsoe urge consideration of victimization from a different perspective—the life experience and circumstances of those prosecuted for criminal

---

<sup>6</sup> Tamara Rice Lave, *Blame the Victim: How Mistreatment by the State Is Used to Legitimize Police Violence*, 87 BROOK. L. REV. 1161, 1164 (2022).

<sup>7</sup> Katharine L. Manning, *Protecting the Constitution While Protecting Victims: Challenges to Pro Se Cross-Examination*, 87 BROOK. L. REV. 1197 (2022).

<sup>8</sup> Anna Roberts, *Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses*, 87 BROOK. L. REV. 1225, 1236–48 (2022).

<sup>9</sup> *Id.* at 1230–34.

<sup>10</sup> Bandes, *supra* note 3.

<sup>11</sup> Alexis Karteron, *Parole, Victim Impact Evidence, and Race*, 87 BROOK. L. REV. 1283 (2022).

<sup>12</sup> Bandes, *supra* note 3, at 1259–77.

<sup>13</sup> Karteron, *supra* note 11, at 1290, 1293–95.

offenses. Zeidman highlights how the criminal legal process silences those charged—a glaring omission when considering how often their own experiences of victimization may have impacted their participation in the offense and should be weighed in determining culpability and punishment.<sup>14</sup> Godsoe offers an important reminder of the overlap between experiencing trauma and offending, making clear that “the overly reductionist, and arguably false, victim/offender binary masks the complexity of violence, as well as its often cyclical nature.”<sup>15</sup>

## CONCLUSION

Although concepts like accountability, healing, and responsibility too often remain aspirational and elusive, the articles and essays in this issue move the conversation forward. This issue identifies harmful practices and offers solutions within the current frameworks of arrest, prosecution, and punishment. In doing so, it may serve to loosen the stronghold of the victim-offender binary ever so slightly, providing an opening for a richer, and more grounded, understanding of how the criminal legal system engages with people’s experiences with harm.

---

<sup>14</sup> Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who Is a Victim?*, 87 BROOK. L. REV. 1299 (2022).

<sup>15</sup> Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319, 1321–22 (2022).