THE VICTIMS' RIGHTS MISMATCH

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INTRODUCTION

A conceptual puzzle lingers at the core of victims' rights law. On the one hand, the participation of *living* victims provides the best moral justification for modern victims' rights practices. On the other hand, the victims' rights movement has triumphed largely as a response to crime-caused *death*.[1] This Article is about the mismatch between practice and justification in dead-victim cases, the moral questions that follow, and what to do about them.

Some causes of mismatch are intuitive. There's an interest in dignifying the direct bearers of interpersonal harm with a right to participate in punishment. In dead-victim cases, however, the primary bearer of interpersonal harm is gone. Even if decedents have some enforceable post-mortem rights,[2] one can't reasonably count the decedent's rights to expression and confrontation among them. Secondary harm bearers—think grieving family members—should instead be conceptualized as asserting *their own* rights, and moral justifications for victims' rights practices must change accordingly.

There's also mismatch because dead-victim cases almost always involve long sentences. They're usually homicides,[3] and homicides trigger executions or lengthy prison terms.[4] Even if

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[1] See MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 179 (2002).

[2] See *infra* note 149 and accompanying text.

[3] I use the term "dead-victim cases" rather than "homicides" because my analysis applies whenever a victim of crime-caused harm is dead, whether the crime is a homicide or not.

[4] For noncapital sentences in state court, *see* DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TIME SERVED IN STATE PRISON, 2018, at 2, 3 (2021), https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf (reporting that the average time served for a murder conviction in state prison is 17.8 years and that 42% of people with state murder convictions spend more than twenty years in prison); *id.* at 4 n.b. (reporting that, if the statistics exclude people convicted of murder who receive life sentences, death sentences, and who die in prison, the average sentence length rises to 20.2 years). For federal murder convictions, *see* UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT 9 tbl. 6 (Through September 30, 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY19.pdf (reporting that the average sentence length of a person with a federal murder conviction is just under 22 years). For capital murder convictions, s*ee generally* Tracy L. Snell, U.S. Dept' of Justice, NCJ 305534, CAPITAL PUNISHMENT, 2021 – STATISTICAL TABLES (2023), https://bjs.ojp.gov/document/cp21st.pdf (providing of statistical snapshot of the death penalty as of 2021).

one assumes that victim involvement generally increases punishment,[5] the problem in dead-victim cases is that neither deterrence nor incapacitation can justify the potential increments of severity.[6] There might be utilitarian justifications for incremental severity at lesser sentencing magnitude, but not for murderers who will spend decades in prison whether victims are involved or not.[7]

Finally, dead-victim scenarios amplify an equality problem that dogs victim involvement generally: it sensitizes punishment to a decedent's social worth.[8] The criminal legal system becomes even more responsive to victims with certain cultural profiles, who are represented by structurally advantaged groups, who had privileged forms of social connectivity, and so forth.[9] This problem is grave enough even in living-victim cases,[10] but it is devastating when the victims are dead.[11]

I proceed in five parts. In Part I, I provide readers with a (very) brief history of victims' rights practices. In Part II, and building on my 50-state survey of victims' rights law,[12] I develop the concept of mismatch. In so doing, I unpack the

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[5] That victim involvement tends to inflate punishment is the conventional wisdom, which helps explain why the victims' rights movement has doubled as a tough-on-crime movement. See Dubber, *supra* note 1, at 3; see also Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL'Y 333, 355 (2005) (finding strong relationship between victim involvement and parole outcomes). For a more comprehensive discussion of the empirical literature, which discloses mixed findings on the specific relationship between victim impact statements and the harshness of sentencing, see note 267, *infra*.

[6] See *infra* Sections IV.A (deterrence) and IV.B (incapacitation).

[7] For discussion of the empirical picture as to deterrence, see RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 42-43 (2019) (collecting studies showing minimal deterrent effect over extreme range); J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1660 (2020) ("Research suggests that lengthening already long prison sentences has little to no deterrent effect on violent crime."). For discussion as to incapacitation, see, Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 459 (2017) ("The short residual career lengths of most offenders mean that there is little incapacitative gain to be realized from imprisoning people for lengthy periods[.]").

[8] See *infra* Section III.C.

[9] *See id.*

[10] See *infra* note 220 and accompanying text.

[11] See *infra* notes 221 to 226 and accompanying text.

[12] The results of this survey appear in the Appendix.

concept of victimhood along three dimensions: (1) the definition of a victim; (2) the substantive rights that attach to victim status; and (3) who gets to demand institutional responses (remedies). For each dimension, I explain why dead-victim scenarios require different moral justifications than what the victims' rights movement typically offers.

Parts III and IV represent the moral critique of mismatch, with Part III presenting the deontological arguments and Part IV the consequentialist ones. Justifications for victim involvement are weakest for the dead-victim scenarios that give the victims' rights movement its emotional charge. Expressive and confrontative justifications for victim involvement deteriorate when there is no living victim to do the expressing and confronting.[13] Consequentialist justifications for victim involvement collapse when the involvement affects margins on the right tail of sentencing outcomes—when it influences sentence intensity at levels that are already severe.[14] Finally, in dead-victim cases, the risk that sentencing will reflect victims' social worth swamps interests that might push in the other direction.[15]

In Part V, I consider the institutional implications of the moral mismatch. First, there ought not be a global category of "victims' rights" that apply in all cases; the mix of rights and enforcement should vary meaningfully between living-victim and dead-victim cases. Second, the scope of victim involvement in dead-victim cases shouldn't just be *different*, it should be *low*. There remain good reasons to keep secondary victims apprised of legal process—and ensure their ability to observe it—but the reasons for allowing them to participate in decision-making are weaker. Third, and in view of a pared-down victims' rights menu in dead-victim cases, the state should be more accountable for the rights that remain.

To say that we should think about rights differently when victims are dead neither disparages victimhood nor suggests that victims are unworthy of profound social reparation. Every life lost to crime is a tragedy that radiates a unique signature of pain and loss, and the state should take care of those bearing collateral damage. But the state response should be more appropriately tailored to the problem, and not funneled into a criminal trial where rights of victims compete with those of defendants.[16]

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[13] See *infra* Section III.A.

[14] See *infra* note 273 (collecting citations relating to deterrence); *infra* note 279 (incapacitation).

[15] See *infra* Section III.C.

[16] See, e.g., Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 774–75 (2008) (discussing

I. A BRIEF HISTORY OF VICTIMS' RIGHTS

The cultural phenomenon most responsible for the presence of victims' remedies on the American legal landscape is the twentieth-century victims' rights movement.[17] The concept of victims' rights itself doesn't have a lengthy pedigree. What it meant to be a "victim" in a criminal proceeding wasn't even fixed until the middle of the nineteenth century.[18] In fact, before about the fourteenth century, there wasn't any public confrontation recognizable as "criminal law." Redress for interpersonal harm—at least in the Anglo-American legal tradition—instead took the form of vendetta-driven blood feuds.[19]

Over time, the state eventually assumed civic responsibility for the response to certain social transgressions.[20] In view of that responsibility, that transgression was reconceptualized as a breach of social contract or as an affront to the state—what we now call a criminal offense.[21] The criminal proceeding was a forum for a *public* confrontation between the state and the defendant, rather than a *private* site of loss allocation. Because the state-centric paradigm of criminal punishment was premised on crime-caused interpersonal harm, however, victims still figured prominently in the process.[22] They could initiate private prosecutions[23] and bear witness.[24] There

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unsuitability of criminal trial).

[17] For material documenting the victims' rights movement, *see* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 102 (2020)*;* Dubber, *supra* note 1, at 151-209; Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 938-53 (1985); CARRIE RENTSCHLER, SECOND WOUNDS: VICTIMS' RIGHTS AND THE MEDIA IN THE U.S. 55-80 (2011).

[18] *See* Andrew Nash, *Victims by Definition*, 85 WASH. U.L. REV. 1419, 1422 (2008).

[19] *See* Harold J. Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 553, 554-55 (1978).

[20] *See* Henderson, *supra* note 17, at 940-42.

[21] *See* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 36-39 (2001) (discussing cluster of liberal punishment theory).

[22] Notwithstanding infra notes 23 to 26 and accompanying text, and with specific respect to the English system of privately initiated prosecution, victim involvement still lessened over time. *See* Henderson, *supra* note 17, at 940-42.

[23] *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 652 (1976).

[24] *See* Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS &

remained a sense that primary victims of interpersonal harm were entitled, in view of dignity or some other value, to demand a system of criminal accountability that worked on their behalf, at least in the aggregate.

Over time, however, victims found themselves with less influence over the state's approach to criminal punishment in specific cases. The state (acting through its agents) and the victims might prefer different responses to a given crime. As the United States moved through its various punishment paradigms—first rehabilitation and now retribution[25]—victims might insist on punitive hardship as vengeance, but the state might prioritize some other objective and punish at some lower level.[26]

The bureaucracy of criminal punishment also marginalized victims. Broad, thick criminal codes meant more arresting, more prosecuting, and more punishing.[27] For example, the system came to rely heavily on plea bargaining to manage criminal dockets.[28] These deals might produce less than victim-preferred punishment, and they eliminate trials that would dignify victimhood with further participation. (It's no surprise that modern plea adjudication is a primary target of the modern victims' rights movement.[29])

The nascent victims' rights movement was a natural fit for the tough-on-crime politics of the 1970s, and modern movement grammar reflects that linkage.[30] The movement wanted victims

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CLARK L. REV. 481, 484-93 (2005).

[25] See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 (2003).

[26] See David Alm, *Crime Victims and the Right to Punishment*, 13 CRIM. L. & PHIL. 63, 68 (2019).

[27] For leading discussions about the effects of broad criminal codes, *see* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 4 (2008); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 725 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

[28] See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6, 34 (1979); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865, 867 (2000).

[29] See Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions?*, 87 BROOK. L. REV. 1127, 1133 (2022); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 752 (1996).

[30] *See* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865 (2007) (hereinafter "Cassell, *Treating Crime Victims Fairly*"); RENTSCHLER, *supra* note 17, at 97.

to have a louder voice in criminal proceedings,[31] starting from the decision over whether to prosecute and continuing through parole. Although the early movement was a meaningful point of emphasis for feminists, anti-poverty advocates, and civil-rights organizations,[32] it shed progressive elements over time.[33] The vast literature on the formation and growth of the victims' rights movement reflects an overwhelming-but-not-unanimous conclusion that it was selectively oriented towards increasing punishment.[34]

In 1982, President Ronald Reagan jolted the movement by appointing the Task Force on Victims of Crime.[35] The Task Force presented the movement as an effort to "balance" the rights of victims against those belonging to defendants,[36] and it recommended a constitutional amendment to implement that

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[31] See DUBBER, *supra* note 1, at 123.

[32] See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612-13 (2009) (hereinafter Cassell, "*Defense*"); Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. REV. 835, 841 (2005) (hereinafter Cassell, "*Recognizing Victims*"); RENTSCHLER, *supra* note 17, at 55-56. But see Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 763 (2007) (arguing that the victims' rights movement was always socially conservative).

[33] See DUBBER, *supra* note 1, at 305; Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 Osgoode Hall L.J. 151, 157-59 (1998). Cf. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 638 (2009) (noting that the victims' rights movement was always difficult to square with attempts to purge the influence of stereotypes from the criminal legal system).

[34] See, e.g., DUBBER, *supra* note 1, at 1 ("Two phenomena have shaped American criminal law for the last thirty years: the war on crime and the victims' rights movement. These two political programs are related. The war on crime has been waged on behalf of victims against offenders; to pursue criminals has meant to pursue victims' rights. To be pro-victim was to e anticrime, and vice versa."); Martin, *supra* note 33, at 158 ("It was not inevitable that a punitive, retribution-driven agenda came to dominate criminal law reform and the most publicly accessible face of the women's movement, but it would have been very difficult to resist or prevent.").

[35] See Executive Order 12360—President's Task Force on Victims of Crime (1982), at https://www.reaganlibrary.gov/archives/speech/executive-order-12360-presidents-task-force-victims-crime.

[36] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982) (hereinafter "TASK FORCE REPORT"); see also RENTSCHLER, *supra* note 17, at 34 (emphasizing importance of Task Force). For more extensive discussion of the report, and its relationship to both the movement and follow-on legislation, *see* Cassell, *Treating Crime Victims Fairly*, *supra* note 30, at 865-66.

balance.[37] As victims' rights advocates fought for constitutional change, they also racked up legislative victories.[38] Federal breakthroughs included: the Victim and Witness Protection Act (1982),[39] the Victims of Crime Act (1984),[40] the Victims' Rights and Restitution Act (1990),[41] the Violent Crime Control and Law Enforcement Act (1994),[42] the Antiterrorism and Effective Death Penalty Act (1996),[43] the Mandatory Victims Restitution Act (1996) ("MVRA"),[44] and the Victim Rights Clarification Act (1997).[45]

The victims' rights movement crested in the mid 2000s, at least federally.[46] Senators Feinstein (D-California) and Kyle (R-Arizona) pushed for the constitutional amendment,[47] although they ultimately withdrew it on the Senate floor.[48] In exchange for dialing back their push for an amendment, victims' rights advocates received almost universal support for statutory reform.[49] The 2004 CVRA probably represents the movement's point of maximum political success, and it was significant both because it enumerated a specific victims' rights menu and because it extensively specified enforcement.[50]

The victims' rights movement achieved remarkable success at the state level, too. Between 1982 and 2009, thirty-two states passed constitutional amendments that dealt with victims' rights in some form or another.[51] (There was another

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[37] TASK FORCE REPORT at 114.

[38] These are discussed in Cassell, *Treating Crime Victims Fairly*, *supra* note 30, at 866-67.

[39] Pub. L. No. 97-291, 96 Stat. 1248 (1982).

[40] Pub. L. No. 98-473, 98 Stat. 2170 (1984).

[41] Pub. L. No. 101-647, 104 Stat. 4820 (1990).

[42] Pub. L. No. 103-322, 108 Stat. 1796 (1994).

[43] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[44] Pub. L. No. 104-132, 110 Stat. 1227 (1996).

[45] Pub. L. No. 105-6, 111 Stat. 12 (1997).

[46] For a detailed history of movement work towards constitutional amendment, *see* Cassell, *Treating Crime Victims Fairly*, *supra* note 30, at 867-69.

[47] *See* Cassell, *Treating Crime Victims Fairly*, *supra* note 30, at 868.

[48] *See id.*

[49] *See* Cassell, *Defense*, *supra* note 32, at 616.

[50] *See* 18 U.S.C. § 3771(a) (specification of rights); § 3771(d) (enforcement).

[51] *See* Ala. Const. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. 2, § 2.1; Cal. Const. art. 1, § 28; Colo. Const. art. II, § 16a ; Conn. Const. art. 1, § 8(b); Fla. Const. art. 1, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. 1, § 8.1; Ind. Const. art. 1, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. 1, § 25; Md. Decl. of Rights art. 47; Mich. Const. art. 1, § 24; Miss. Const. art. 3, § 26A; Mo. Const. art. 1, § 32; Neb. Const. art. I, § 28; Nev. Const. art. 1, § 8; N.J. Const. art. 1, § 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, §

burst of activity after 2008, after states began enacting so-called "Marsy's Laws."[52]) Every single state now has a victims' rights statute.[53] The general structure of the laws broadly parallel the federal CVRA.[54] The states define who victims are;[55] award them rights to things like notice, dignity, and input;[56] and specify enforcement.[57]

The justifications for victim involvement are reasonably consistent across reform efforts. Advocates say that victim participation calibrates harm for the purposes of retribution,[58] facilitates more accurate restitution,[59] affirms the humanity of the victims themselves,[60] promotes offender rehabilitation,[61] and improves sentencing fairness.[62] These justifications rely largely on an essentialized model of victimhood in which there is a *person* whose interpersonal victimization must be dignified with some role in a criminal proceeding. This essentialized victimhood dominates the construction of victims' rights law,

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10a; Okla. Const. art. 2, § 34; Or. Const. art. I, § 42; R.I. Const. art. 1, § 23; S.C. Const. art. I, § 24; Tenn. Const. art. I, § 35; Tex. Const. art. 1, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. 1, § 35; Wis. Const. art. 1, § 9m. These amendments were originally collected in Cassell, *Defense*, *supra* note 32, at 614 n.13.

[52] See Cassell & Garvin, *supra* note 17, at 106-08.

[53] See note 67, *supra*.

[54] See appendix A (collecting state statutes).

[55] See Section II.A, *infra*.

[56] See Section II.B, *infra*.

[57] See Section II.C, *infra*.

[58] See, e.g., Cassell, *Defense*, *supra* note 32, at 620 ("Victim impact statements provide information about the full harm of the defendant's crime."); Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89, 118 (2015) ("Nonetheless, appropriately measured information from the victim regarding the extent of harm caused by the defendant helps ensure a retributively sound response to the crime.");

[59] See, e.g., Cassell, *Defense*, *supra* note 32, at 620 ("A related, secondary point is that a victim impact statement can contain important information about restitution.").

[60] See, e.g., Payne v. Tennessee, 501 U.S. 808, 809, 111 S. Ct. 2597, 2600, 115 L. Ed. 2d 720 (1991) ("Such evidence is not generally offered to encourage comparative judgments of this kind, but is designed to show instead each victim's uniqueness as an individual human being.").

[61] See, e.g., DUBBER, *supra* note 1, at 338 (explaining rehabilitation rationale); Cassell, *Defense*, *supra* note 32, at 623 (referencing Dubber, *supra*, favorably).

[62] See, e.g., Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 318 (1999) ("Denying the significance of the victim's stake by exclusion from trial is offensive to the victim and to principles of fairness.").

and it is the framework I use to build out the arguments that follow.[63]

II. SPECIFYING MISMATCH

In Part II, I identify the dimensions along which victims' rights and their justifications are mismatched in dead-victim cases. There are three: (1) which harm-bearers qualify as victims;[64] (2) the rights menu that attaches to victimhood;[65] and (3) who gets remedies.[66] Understanding the normative mismatch detailed in Parts III and IV requires understanding who gets to assert what rights on behalf of which people harmed by crime,[67] and the difficulties that dead-victim cases present. These difficulties persist because of the extreme political salience of victimhood in homicide cases.[68]

A. Defining Victims

Victimhood isn't an empirical fact about the physical world,[69] so normative questions aren't limited to the "rights" that victims should have. Victimhood is *itself* a concept freighted with normative judgment.[70] If Adam kills Bob, then Bob is certainly a victim. What about Bob's spouse Carter, his mother Denise, his best friend Ezra, and his neighbor Felicia? Carter, Denise, Ezra, and Felicia all experience harm and loss—for some, bottomless—but are they all victims in a sense that would entitle them to claim rights against the state?

To phrase the point analytically, conceptualize murder-caused harm as a circle surrounding the core interpersonal violence experienced by the deceased victim. The harm radiates outwards from the core, spreading economic, emotional, and psychic loss across an affected community. The crucial legal

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[63] See DUBBER, *supra* note 1, at 175.
[64] *See* Section II.A, *infra*.
[65] *See* Section II.B, *infra*.
[66] *See* Section II.C, *infra*.
[67] The National Crime Victim Law Institute maintains a library of victims' rights provisions across American jurisdictions. *See* National Crime Victim Law Institute, *Victim Law Library*: *Rights by Jurisdiction*, at https://ncvli.org/victim-law-library-rights-by-state/ (last visited Mar. 25, 2024).
[68] See Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1493 (2017).
[69] See RENTSCHLER, *supra* note 17, at 57 (discussing "models for conceiving of … victims")
[70] See James Holstein & Gale Miller, *Rethinking Victimization: An Interactional Approach to Victimology*, 13 SYMBOLIC INTERACTION 103, 104-05 (1990). *Cf.* Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1451 (2021) (exploring normative choice to use "victim" before conviction).

question is where to fix the perimeter beyond which harm does not entail a victimhood that triggers rights against the state. The legal category can't possibly include every person who experienced any harm or loss. People who didn't even know our primary victim (Bob) might experience elevated fear, and a life insurance company might experience financial loss. But they aren't usually entitled to claim rights as "victims" of interpersonal harm to Bob. When specifying victim's rights, the law must necessarily recognize as victims only a subset of all people subject to crime-caused harm.

If crime-caused harm is necessary but not sufficient for victimhood,[71] then there must be some normative position about what kinds of harm qualify. One might think the easy way out is to define "victimhood" to include only the bearers of direct and proximately caused harm. This approach works well in living-victim cases, where the primary bearer of interpersonal harm is also the one asserting rights in court. But it creates mismatch in dead-victim cases where those two roles separate.

1. Victims generally

Most of criminal law is organized around a stylized-but-largely-modal transgression—a bilateral encounter in which one person commits a crime that causes interpersonal harm to someone else.[72] One football fan socks another after too many beers, a burglar steals a Van Gough from an art collector's home, a bank robber shoots a teller, and so forth. The point is that there is a clear vector of interpersonal harm running from a victimizer to a victim.[73] The terminology that normal people use to talk about crime, and the ways that political communities construct criminal legal systems, reflect this modal scenario.

I primarily focus on the third of three moments during criminal punishment where the law constructs the victim category, but I ought to at least mention the first two. The first and most obvious site of victim specification is through a definition of the crime itself: Human beings can form parts of criminal conduct elements. For example, a criminal assault might be defined as causing *physical injury to another person*

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[71] See Luis E. Chiesa, *Why Is It A Crime to Stomp on A Goldfish? - Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 13 (2008); I am not here suggesting that harm is necessary for there to be *crime*. I'm just saying that there needs to be harm for there to be a *victim*.

[72] See Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1493 (2017).

[73] See Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 421 (1988).

with sufficient intent.[74] Or larceny (theft) might be defined as the unlawful taking of personal property with the intent to permanently deprive *the lawful owner* of possession.[75] In each case, victimhood lives in the DNA of the crime itself. Assault victims include the person physically harmed, and larceny victims include the person deprived of stuff they own.[76]

Second, the law identifies victims in sentencing guidelines that prevail across the federal and state judiciaries. For example, after a federal district court calculates a base offense level, § 1B1.1 of the Federal Sentencing Guidelines directs it to "apply adjustments as appropriate related to *victim*, role, and obstruction of justice."[77] Moreover, § 3A is entitled "Victim-Related Adjustments" and, as its title suggests, its contents detail sentencing adjustments based on attributes and treatment of victims.[78] There are separate adjustments for hate crimes,[79] crimes that involve vulnerable and official victims,[80] and crimes in which the offender restrains the victim.[81] The Guidelines contain no native definition of "victim," and instead

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[74] See, e.g., Cal. Penal Code § 240 (West) ("An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."); N.Y. Penal Law § 120.00 (McKinney) (defining third-degree assault in New York); see also Jeff Bellin, Mass Incarceration Nation 97 (2023) (setting forth prototypical aggravated assault statute).

[75] See, e.g., N.Y. Penal Law § 155.05 (McKinney) ("A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof."); Tex. Penal Code Ann. § 31.03 (West) ("A person commits an offense [of theft] if he unlawfully appropriates property with intent to deprive the owner of property.").

[76] See also, e.g., N.C. Gen. Stat. Ann. § 15A-830(a)(7) (defining a victim as a "person against whom there is probable cause to believe an offense against the person or a felony property crime has been committed").

[77] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. Sentencing Comm'n 2023).

[78] See *id.*

[79] See *id.* at § 3A1.1(a) (providing upward adjustment where a defendant is convicted of a crime in which they "intentionally select[] any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation").

[80] See *id.* at § 3A1.1(b) (providing upward adjustment in scenarios where there is a "vulnerable victim"); *id.* at § 3A1.2 (providing upward adjustment when crime was motivated by the victim's status as a current or former government employee, or proximity thereto).

[81] See *id.* at § 3A1.3 ("If a victim was physically restrained in the course of the offense, increase by 2 levels.").

incorporate the definition from the CVRA, which I discuss below.[82]

The third moment at which the criminal punishment sequence assigns victim status—and the one that most interests me—is when it specifies rights and remedies belonging to the victim category. For example, crime victims are usually entitled to some compensatory restitution.[83] The federal Mandatory Victims Restitution Act ("MVRA") requires restitution for certain crimes, with funds flowing either to the victims themselves or to their estates.[84] For the purposes of the MVRA, a victim is a person "directly and proximately harmed as a result of a" covered offense.[85] The Crime Victim Rights Act ("CVRA") creates victim rights to notice and participation at various phases of the criminal punishment pipeline.[86] And, like the MVRA, the CVRA defines a victim as "a person directly and proximately harmed as a result of the commission of" a federal crime.[87]

The concept of "direct" and "proximate" harm, present in both the MVRA and the CVRA, is central to the process of constructing victim identity. These concepts appear across victims' rights law in the United States, even if they are expressed in slightly different terminology.[88] They also form the definitional basis for victimhood in the adjacent academic literature.[89] The point is simple: if a crime is direct and causes interpersonal harm to someone else, then the person harmed is a victim.

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[82] See UNITED STATES SENTENCING COMMISSION, ANNOTATED 2023 CHAPTER 6: CRIME VICTIMS' RIGHTS § 6A.5 (2023), at https://www.ussc.gov/guidelines/2023-guidelines-manual/annotated-2023-chapter-6.

[83] See 18 U.S.C. § 3663A(a)(2). See also Appendix column G (50-state survey on restitution for survivors).

[84] See *id.* at § 3663A(a)(1).

[85] *Id.* at § 3663A(a)(2).

[86] See 18 U.S.C. § 3771(a).

[87] See *id.* at § 3771(e)(2)(A).

[88] See, e.g., Colo. Rev. Stat. Ann. § 24-4.1-401 (West) (defining victim to include people who have "suffered direct and proximate harm as a result of the commission of qualifying criminal activity"); Fla. Stat. Ann. § 960.03 (West) (including several subjections defining victimhood by reference to directly caused injury); Ohio Rev. Code Ann. § 2929.18 (West) ("The amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. Some states restrict victim status to people who are harmed by particular crimes."); Restitution Revisions, 2024 Utah Laws Ch. 330 (H.B. 218) ("'Deceased victim' means an individual whose death is proximately caused by the criminal conduct of the defendant.").

[89] See Dubber, *supra* note 1, at 266.

Directness and proximateness are meaningful limiting principles, made necessary because (as explained above) not all bearers of crime-caused harm are victims. Refresh the point with a new example: When a house is burgled, neighbors might become more fearful for their own security. The neighbors' harm (fear) is quite real, and the burglary is but-for cause of that harm. Nevertheless, the law might say that the fear is harm that is insufficiently direct or insufficiently crime-caused. No matter how the law gets to it, the result will be the same; the neighbors aren't the types of harm bearers who can assert victimhood as a basis for claims against the state.[90]

Directness and proximate-ness limit the universe of victims in two distinct ways. The first is *experiential*. Many people experience real harm from crime, and some of that might rise to the level of profound suffering. Nevertheless, in many scenarios other than attempt crimes, the criminal law does not recognize victimhood unless the harm bearer is injured either physically or economically.[91] If the only harm a person sustains is increased fear, then they are not victims with remedies that they can assert against the state.[92] (Think of the frightened neighbor from the previous paragraph.) After all, virtually every witness to a violent crime experiences terror, at least for a time—yet the criminal law does not denominate them as victims entitled to make claims against the state.

The other way that "direct" and "proximate" harm limits victimhood is *causal*. Even in situations where the experiential features of harm might be physical or pecuniary, the law often refuses to recognize harm bearers as victims.[93] If our burglar hits several homes in a single neighborhood, then insurance premiums may rise—or the community might be forced to finance some sort of supplemental security presence. Either way, the economic loss (harm) is undeniable, but the law does

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[90] See Appendix column D (50-state survey on definition of "victim").

[91] See, e.g., Ariz. Rev. Stat. Ann. § 13-4401 (in cases where the victim isn't deceased or otherwise incapacitated, defining "victim" to mean "a person against whom the criminal offense has been committed"); Colo. Rev. Stat. Ann. § 24-4.1-302 (West) ("'Victim' means any natural person *against whom any crime has been perpetrated or attempted* ….") (emphasis added); Tex. Code Crim. Proc. Ann. art. 56A.001(7) (West) (defining victims narrowly to include only people defined as victims in a short list of reference offenses or "has suffered personal injury or death as a result of the criminal conduct of another").

[92] See Appendix column D (50-state survey on definition of "victim").

[93] See, e.g., United States v. Sharp, 463 F. Supp. 2d 556, 566 (E.D. Va. 2006) (refusing victim status for a person claiming to have been injured because the defendant sold drugs to a boyfriend who abused her); People v. Birkett, 21 Cal. 4th 226, 231, 232-33 (1999) (refusing restitution to insurer of those who experienced direct harm).

not treat the loss-bearers as victims because the crime-caused harm is too attenuated.

In sum, and across jurisdictions, even the narrowest definitions of "victim" tend to include people who sustain direct and proximately caused harm from crime. I refer generally to these people as either "primary victims" or "primary harm bearers." Victimhood as primary harm bearing is amenable to straightforward application in living-victim cases, but—as the next Subsection explains—is less so when the direct-and-proximate harm-bearer is dead.

2. Dead victims

Professor Markus Dubber has caustically observed that "the victims' rights movement looked more like the relatives of victims' rights movement."[94] The dead-victim cases strain the victim category—at least conceptually—because they give rise to questions about whether the law will recognize victims *other than the decedent*. The definitional problem in dead-victim cases was a direct point of dissent to the senate judiciary report endorsing the federal victims' rights amendment: "Ordinarily, we would think of the victim of [murder] as the dead person, but that answer … will not do here."[95] American jurisdictions take different approaches to the problem.

Some resolve the problem by simply including decedent families in the primary victim category.[96] The California restitution statute, for example, defines "victim" (somewhat confusingly) to include the "immediate surviving family of the *actual victim*."[97] (Who is the "actual victim" and what kind of victim is a victim who is not an "actual victim"?) California's restitutive category also includes people who suffered pecuniary losses and have some attenuated relationship to the victim.[98] And Article 28 of the California Constitution limits victims to those who suffer "direct or threatened physical, psychological, or financial harm," but it expressly includes as victims a decedent's "spouse, parents, children, siblings, or guardian, and includes a lawful representative … ." California is a particularly illustrative jurisdiction, but many other states

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[94] See Dubber, *supra* note 1, at 185.
[95] *See* S. Rep. No. 108-191, at 95 (2003) (dissenting views).
[96] See Appendix column D (50-state survey on definition of "victim").
[97] Cal. Penal Code § 1202.4(k)(1).
[98] Cal. Penal Code § 1202.4(k)(3). This part of the statute does not use the term "actual victim," even though that is presumably what the drafters intended.

follow the same approach, whether by force of constitution[99] or statute.[100]

Other jurisdictions are more limited in their construction of the victim category. For example, North Carolina has an extremely limited definition of victim, under which victims are only those people "against whom there is probable cause to believe an offense against the person or a felony property crime has been committed."[101] And Texas limits the definition of victim—at least for the purposes of its victims' rights statute—to those who are: sexually assaulted; kidnapped; subject to aggravated robbery; trafficked; injured and children, elderly or disabled; and people who have "suffered personal injury or death as a result of the criminal conduct of another."[102] Just as California was but one example of a specific approach, so too are North Carolina and Texas but two of many jurisdictions that take a more limited approach to the victim category.[103]

In the many states like California—states that denominate people who survive the decedent as victims—it is the definition of victim that itself causes mismatch. All victims usually receive the same bundle of rights, so secondary victims and the primary bearers of interpersonal harm are treated the same way. They are treated the same way, however, notwithstanding the fact that the justification for assigning rights to secondary victims looks very different from the justification for assigning rights to primary ones.[104]

B. Specifying Rights

Once the law fixes the victim category, it specifies the menu of rights that people belonging to the category own. As Section

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[99] Examples can be found in Appendix column D. See, e.g., A.R.S. Const. Art. II, § 2.1(C); N.J. Const., Art. I, ¶. 22; N.D. Const. Art. I, § 25(4); S.C. Const. Ann. Art. I, § 24(C)(2).

[100] Examples can be found in Appendix column D. See, e.g., Ala. Code § 15-23-60(19); A.R.S. § 13-4401(19); C.R.S. § 24-4.1-302(5); Del. Code tit. 11 § 9401(7); KRS § 421.500(1)(a)(2); 17-A M.R.S. § 2101(2)(B)(2); N.J. Stat. § 52:4B-37; S.C. Code Ann. § 16-3-1510(1); Va. Code Ann. § 19.2-11.01(B)(v).

[101] N.C. Gen. Stat. Ann. § 15A-830(a)(7).

[102] Tex. Code Crim. Proc. Art 56A.001. Lest there be any confusion, the provision assigning rights to victims distinguishes between decedents and close family members when it declares: "A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights …." *Id.* at Art 56A.051(a).

[103] *See*, *e.g.*, Ohio Const. art. I, § 10a(D) (As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act.).

[104] See Parts III & IV, *supra*.

II.A explains, jurisdictions define the victim category differently—but there is almost no variation *within* the category. Assigning the same rights across living and dead-victim categories produces mismatch because the salient attributes of secondary harm bearers are very different from the salient attributes of decedents.

1. Victims generally

To convey the way that a typical jurisdiction specifies the menu of victims' rights, showing is probably better than telling. The Texas constitution bifurcates victims' rights into a subsection (a) that specifies the rights that must always be honored and a subsection (b) that specifies rights that must be honored upon request.[105] The mandatory rights are abstract injunctions to treat victims with "fairness" and to respect their "dignity and privacy."[106] The rights that are activated upon request include more tangible entitlements: to notification of legal events, to be present at public proceedings, to confer with prosecutors, to restitution, and to information about the sentence.[107] (I discuss both categories further in Part V.B.)

These features of Texas structure are typical of many victims' rights laws in the United States insofar as the rights assigned to the victim category are of two types. One type is aspirational or otherwise subject to conspicuous enforcement limitations.[108] In Texas, this is the type demanding that victims be treated with dignity, privacy, and fairness.[109] Another type

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[105] See TEX. CONST. art. I, § 30.

[106] State constitutions frequently award abstract rights like these. *See*, *e.g.*, Ill. Const. art. I, § 8.1(a) ("Crime victims … shall have … (1) [t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); Ohio Const. art. I, § 10a(A)(1) ("declaring that "a victim shall have" the right "to be treated with fairness and respect for the victim's safety, dignity and privacy"); Va. Const. art. I, § 8-A (assigning to victims the right to "be treated with respect, dignity and fairness at all stages of the criminal justice system"); see also Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255, 263-65 (2005) (discussing abstract victims' rights provisions in state constitutions).

[107] See TEX. CONST. art. I, § 30(b).

[108] See, e.g., Ill. CONST. art. I, § 8.1(a) ("Crime victims … shall have … (1) [t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process"); OH. CONST. art. I, § 10a(1) ("declaring that "a victim shall have" the right "to be treated with fairness and respect for the victim's safety, dignity and privacy"); VA. CONST. art. I, § 8-A(2) (assigning to victims the right to "be treated with respect, dignity and fairness at all stages of the criminal justice system").

[109] See TEX. CONST. art. I, § 30(a).

is more capable of enforcement, often because it consists of rights to procedural treatment rather than to any outcomes.[110] In Texas, this is the type providing, among other things, rights to be notified about and present at legal proceedings.[111] Federal law works his way. The CVRA sets forth ten rights, with the eighth containing the abstractions: (1) to reasonable protection from the accused; (2) to reasonable notice of any court and parole proceedings; (3) a limited right against exclusion from public court proceedings; (4) a right to be reasonably heard at public court proceedings involving release, a plea, sentencing, or parole; (5) to confer with prosecutors; (6) to timely restitution; (7) to have proceedings be free from unreasonable delay; (8) *to fair and respectful treatment of interests in dignity and privacy*; (9) to timely notification of plea agreements; and (10) to be informed about CVRA rights.[112]

The most controversial slice of the victims' rights bundle centers on victim *involvement*. Rights to victim involvement are distinct from rights to notice and dignified treatment insofar as they require various forms of victim input. That input might come at the front end (plea deals),[113] the middle (sentencing statements),[114] or the back (parole).[115] The primary examples from the CVRA would be the (a)(4) right to be heard at various points in the punishment sequence and the (a)(5) right to confer with prosecutors. Victim involvement is controversial because it most directly confounds the model of a criminal trial as an act of state justice rather than as a quasi-private response.[116]

The most conspicuous victim involvement consists of victim-impact statements ("VIS") given at criminal sentencing. Indeed, VIS have become the dominant way that victim voices find their way into the bloodstream of American criminal

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[110] See, e.g., Ill. Const. § 8.1(a)(2)-(a)(10) (assigning specific menu of enforceable rights after earlier subsection specified abstract principles); OH. CONST. art. I, § 10a(A)(2)-(A)(10) (same); VA. CONST. art. I, § 8-A(1), A(3)-A(7) (same except abstractly specified principles appear in subsection (A)(2)).

[111] See TEX. CONST. art. I, § 30(b)

[112] 18 U.S.C. § 3771(a) (emphasis added). In a subsequent habeas corpus proceeding, a victim gets the rights specified in (a)(3), (a)(4), (a)(7), and (a)(8).

[113] See, e.g., Cal. Const. art. I, § 28 (awarding right to" be heard, upon request, at any proceeding, including any … plea").

[114] See notes 115 to 122, *infra*.

[115] See, e.g., N.Y. Exec. Law § 259-i(2)(c)(A)(v) (requiring consideration of victim-provided content).

[116] See Austin Sarat, *Putting A Square Peg in A Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV. 1345, 1347, 1350-55 (2004); see also

justice practice.[117] Perhaps the most vivid example of VIS are statements of famous American gymnasts at the criminal sentencing of national-team trainer and serial sex abuser Larry Nassar.[118] Proponents of VIS argue that they provide crucial information to the sentencer,[119] that they are part of a restorative justice function,[120] and that they educate the public.[121] Opponents, by contrast, insist that VIS discriminate in favor of socially favored victims and that they improperly activate sentencers' punitive impulses.[122] For several reasons, the victim impact statement is an ideal vehicle for explaining mismatch, as explained in the following Subsection.

2. Dead victims

VIS are controversial even in cases where the victims giving the statements are the primary harm bearers,[123] but the controversy levels up in dead-victim scenarios. In those cases, VIS are necessarily given by aggrieved family members under circumstances ripe for emotional decision-making.[124] And within the category of dead-victim cases, VIS in capital proceedings are especially important because that is the context in which the Supreme Court has grappled with VIS most extensively.

The Supreme Court history is well known, and I tender only a brief summary here. In 1987, *Booth v. Maryland* held that the Eighth Amendment barred capital sentencing juries from hearing victim-impact statements.[125] *Booth* declared that "personal characteristics of the victims," the "emotional impact

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[117] *See* Tracey Booth, *Victim Impact Statements, Sentencing and Contemporary Standards of Fairness in the Courtroom*, *in* CRIME, VICTIMS AND POLICY (Dean Wilson & Stuart Ross eds. 2015).

[118] See Rosemary Ardman, *The Larry Nassar Hearings: Victim Impact Statements, Child Sexual Abuse, and the Role of Catharsis in Criminal Law*, 82 MD. L. REV. 782, 787-90 (2023)

[119] See Cassell, *Defense*, supra note 32, at 619.

[120] See Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1280 n.175 (2012).

[121] See Cassell, *Defense*, supra note 32, at 621-23.

[122] See, e.g., Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1014 (2014) (punitiveness); William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355, 367–68 (2004) (discrimination).

[123] See, e.g., *infra* notes 211 to 220 and accompanying text (discussing equality issues).

[124] For a discussion of the emotional content of such testimony, see *infra* note 194 and accompanying text.

[125] See 482 U.S. 496, 502 (1991).

of the crimes on the family," and "family members opinions and characterizations of the crimes and the defendant" were not relevant to the capital sentencing decision.[126] This information, in *Booth*'s view, was not information about a defendant's moral blameworthiness, which is the variable that dictates the permissibility of a death sentence.[127] *Booth* also reasoned that VIS ran the risk that capital sentencing decisions would impermissibly reflect assessments of victims' social value and place defendants in the impossible position of having to attack deceased victims and their families.[128]

For victims' rights advocates, the sting of *Booth* was short lived. Four years later, in *Payne v. Tennessee*, the Supreme Court reversed course and approved certain use of VIS.[129] In so doing, *Payne* endorsed the idea that certain metrics of individualized victim harm were relevant to the capital sentencing deliberation.[130] It also justified VIS admission as a measure of "fairness" as between the prosecution and the defense—to make sure that the prosecution can advocate for a death sentence by reference to the individual qualities of the *victim*, just as the defense can advocate for a life sentence by reference to the unique attributes of the *accused*.[131] *Payne* ultimately put it this way: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[132]

VIS place conceptual pressure on victims' rights arguments when they appear in decedent-victim scenarios because, by definition, the deceased victim does not author the statement. Instead, the witnesses are usually aggrieved family members asserting *their own rights* to speak about *effects on them*. There may be virtues in such testimony, but they differ from the virtues of statements from primary harm bearers. How do catharsis-based justifications work where the statement-giver is a secondary harm bearer, and what kinds of secondary harm bearing should entitle a person to victim-based involvement?

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[126] *Id.* at 503.

[127] *Booth* conceded that there were some situations in which VIS might contain information that was known to the defendant, and the known consequences of a decision to transgress criminally can be relevant to blameworthiness. *See id.* at 505. *Booth* nevertheless determined that the risk of arbitrary decision-making outweighed the potential value of such evidence. *See id.*

[128] *Id.* at 506-07

[129] See Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[130] See *id.* at 820-21.

[131] See *id.* at 822.

[132] *Id.* at 827.

C. Asserting Remedies

What remains logically after "victims" are assigned "victims' rights" is a question about who gets to assert them. The primary bearers of harm are victims who get to assert their own rights (of course), but thorny issues surface when those people are incapacitated. For that reason, victims' rights statutes provide standing to entities other than primary harm bearers.[133] As noted in Subsection II.A, some jurisdictions simply assign first-person rights to secondary victims.[134] Others create something like third-party standing under which a fiduciary asserts rights that belong to the first-party harm bearer. The third-party model creates mismatch because it requires some justificatory theory, for example, about how third parties can exercise others' rights to expression and participation.[135]

1. Victims generally

People who victims' rights statutes denominate as victims will have, well, rights. But American jurisdictions tend to be longer on rights and shorter on remedies. In fact, Professor Doug Beloof has referred to the push for remedial expansion as the "third wave" of the victims' rights movement.[136] Through some combination of constitutional law, statutory text, and judicial decision-making, American jurisdictions typically assign the powers to seek enforcement of the victims' rights menu, although the scope of that enforcement power might be limited.

Under the federal CVRA, for example, § 3771(a) specifies rights that attach to victimhood, and then § 3771(c) provides for "enforcement and limitations."[137] Section 3771(c)(1) states that "[t]he crime victim … may assert the rights described in subsection (a)." If a court denies victim-asserted relief, then the victim can seek some appellate remedies.[138] The remedies for victims'-rights violations do not include new trials, and the degree to which they may be used to reform sentences is severely restrained.[139] Under no circumstances may the breach of a victim's right form the basis for a cause of action or

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[133] See Appendix columns E and F (50-state survey on standing).
[134] See *supra* notes 97 to 103 and accompanying text.
[135] There is some variation in the people and entities that can exercise third-party victims' rights, although the families of decedents are always so vested. See Appendix columns E and F (50-state survey on standing).
[136] See Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255 (2005).
[137] 18 U.S.C. § 3771(a) & (c).
[138] *Id.* at § 3771(c)(1).
[139] See *id.* at § 3771(d)(3).

damages remedy against the United States.[140] In other words, the rights of victims' are pretty much limited to involvement in the criminal proceedings, which do include restitution from the defendant. There is no vehicle for more socialized compensation, however.

State laws tend to track the basic structure of the CVRA, at least insofar as there is rights specification followed by an enforcement provision. For example, Article I, § 10a of the Ohio Constitution awards ten enumerated rights to victims.[141] In the next subsection, Section 10a provides that "[t]he victim … may assert the rights enumerated in this section and any other right afforded to the victim by law."[142] As does the federal CVRA, the Ohio constitution allows victims to petition for prompt appellate relief.[143] And, as does the CVRA, the Ohio constitution underscores that its victims' rights provisions do not create economic liability for the state.[144] I highlight Ohio's constitution because its victims' rights provisions are short and to the point, but its makeup is typical of state approaches to the pertinent issues.

In fact, virtually every American jurisdiction includes a provision that empowers a third-party to seek remedies on behalf of a primary victim. The federal CVRA, for example, provides a trustee of sorts for the rights of minors, people who are incompetent or incapacitated, and those who are dead: "the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter … ."[145] State-law provisions of this type are legion, too. The Florida Constitution includes a third-party standing provision under which victims' rights can be asserted by "the retained attorney of the victim, a lawful representative of the victim, or the office of the state attorney upon request of the victim … ."[146]

The important point here is not what the victims' rights are. It's that, in cases where victims remain alive, they almost always assert their own first-party rights. The only exceptions are certain types of incapacity—for example, situations where victims are children or incompetent.

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[140] See *id.* at § 3771(d)(6).
[141] Ohio Const. art. I, § 10a(A).
[142] *Id.* at § 10a(B).
[143] *Id.*
[144] *Id.* at § 10a(C).
[145] 18 U.S.C. § 3771(e)(2)(B).
[146] Fla. Const. art. I, § 16(c).

2. Dead victims

To understand the complications that arise when victims are dead, distinguish between two different scenarios that appear across victims' rights law. One is a third-party scenario in which an entity, including a human being, asserts *the decedent's* rights. The second is a first-party scenario in which the person asserts *their own* rights. They look the same practically, and both present significant conceptual problems—problems that Parts III and IV explore in fuller detail. My objective at this juncture, however, is just to explain why they create mismatch.

Start with the third-party scenario—where the decedent is the formal holder of victims' rights and where a third party asserts those rights on the decedent's behalf. The federal CVRA is an example of such a statute, where representatives "assume" the rights of the dead victim.[147] So is the federal restitution statute, which sets forth categories of incapacity, followed by the CVRA-like rule stating that there should be a "suitable" court appointee who "assumes the victim's right's" specified in the subsection.[148] Dead-victim cases present basic normative questions about post-mortem rights bearing—including but not limited to whether dead people can even have enforceable rights.[149] But the justification for *victims' rights* is

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[147] 18 U.S.C. § 3771(e)(2)(B).

[148] 18 U.S.C. § 3663A(a)(2).

[149] The capacity of dead people to own interests and sustain harm has been a topic that's occupied philosophers for some time. See, e.g., Joel Feinberg, *Harm to Others*, *in* 1 THE MORAL LIMITS OF THE CRIMINAL LAW 79-95 (1984) (arguing that dead people can have interests and experience harm); Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 244 (1981) (contending that the dead "have no interests and are beyond both harm or benefit"). It has more recently entered a primary vein of legal scholarship. *See generally* Philippe Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195, 212 (1996) (exploring how the uses death to define the personhood necessary for rights-bearing); Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 932-49 (2016); Ray D. Madoff, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 1-20 (2010) (exploring increasing American tendency to allow the dead to control their legal interests); Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1475 (2020) (hereinafter "Smith, *Constitution After Death*") (attacking "legal rule that purports to categorically exclude the dead from America's constitutional tradition"); Fred O. Smith, Jr., *On Time, (in)equality, and Death*, 120 MICH. L. REV. 195, 200 (2021) (hereinafter "Smith, *Time, (In)equality, and Death*") (considering how to weigh post-humous legal interests); Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763 (2009) (exploring "why the law gives decedents certain legal rights but not others").

even more puzzling. If the primary justification for the exercise of rights is an expressive or participatory benefit that redounds to the victim, then how can a dead victim even realize those?[150]

An appealing solve might be a first-party approach in which statutes simply define the victim category to include secondary harm bearers. Arizona takes this approach; it simply defines the term "victim" to include, "if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative …."[151] This workaround is also common, and it is in fact canvased in Subsection II.A.2. But recall that this approach solves one conceptual problem by creating another. If the menu of rights is premised on a living victim model, how much does the justification suffer in dead-victim cases?

In still other jurisdictions, the specific nature of the rights asserted by victims' families is blended—or, less generously, unclear. For example, the Ohio Constitution looks a little like the CVRA in that it defines a suite of rights for crime victims, and then states that the victim's "lawful representative … may assert [those rights]."[152] Somewhat confusingly, however, the pertinent section defines a victim to be a "person against whom the criminal offense … is committed *or* who is directly and proximately harmed by the commission of the offense," and then specifies that the term "victim" does not encompass "a person whom the court finds will not act in the best interests of a deceased, incompetent, minor, or incapacitated victim."[153]

If one combs through legislative history of the failed constitutional amendment, one can find traces of this very problem. Lawmakers dissenting from the supportive Senate Report first noted the failure to define the term "victim."[154] It went on to observe that, in dead-victim cases, courts would have to struggle against the "plain language" of the word "victim" in order to give the term its meaning.[155] One outcome the dissenters envisioned was one in which "activist judges …

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[150] I explore this normative problem in Section III.A, *infra*. I make this point so that I may avoid more difficult questions about whether there are some other reparative rights, or rights against desecration of physical remains, and so forth.

[151] Ariz. Const. art. II, § 2.1(C).

[152] OHIO CONST. art. I, § 10a(10)(B). Somewhat confusingly, however, Section 10a(10)(D) defines a victim to be a "person against whom the criminal offense … is committed *or* who is directly and proximately harmed by the commission of the offense," and then specifying that the term "victim" does not encompass "a person whom the court finds will not act in the best interests of a deceased, incompetent, minor, or incapacitated victim."

[153] *Id.* at § 10a(10)(D).

[154] *See* S. Rep. 108-191, at 95 (dissenting opinion).

[155] *Id.*

add words to the amendment that are not there and extend the new rights to members of the murder victim's family."[156]

Whether one conceptualizes the families of dead victims to be exercising (1) their own rights or (2) the third-party rights of the decedents, there is a mismatch. Either way, the justifications typically offered for victim involvement land differently; they are simply not the primary bearers of interpersonal harm.

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American jurisdictions have secured victims' rights in varied ways, although the basic structure is similar enough. Legal texts define victims, assign them rights, and specify who can seek remedies. This process produces mismatch because the victim category retains the same rights—whether the victims are secondary or primary, dead or alive. Rights ordinarily justified by reference to living victims are instead being exercised by someone else.

III. DEONTOLOGICAL CONSIDERATIONS

The justification for certain victims' rights suffers when the primary bearers of interpersonal harm die. Part III considers the deontological aspects of that complication, by which I mean moral dimensions that are independent of utilitarian and (other) consequentialist considerations. Victims' rights in dead-victim cases can't be justified by reference to democratic participation or retribution, and they gravely jeopardize interests in victim equality.

A. Participatory Rights

The best justifications for victim involvement center on the rights of victims to *participate*[157] in criminal confrontation and punishment. "Participation" in the sense that I use it might mean a right to be consulted in a plea negotiation,[158] a right to give a VIS at sentencing,[159] or a right to input during a parole

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[156] *Id.* at 95-95.

[157] See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 327 (1999); Robert P. Moteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1054 (1998); Laurence H. Tribe, *In Support of A Victims' Rights Constitutional Amendment*, 9 LEWIS & CLARK L. REV. 659, 661 (2005).

[158] See Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 103 (2014).

[159] See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 390-410 (1996).

hearing.[160] What unifies the category is that it prioritizes the involvement of victims for involvement's sake, and not for the consequences thereof.

There is much to recommend abstracted versions of these participatory accounts. Many argue (reasonably) that criminal proceedings are important sites of democratic settlement.[161] That is, participation is justified because criminal proceedings are crucial moments of social reconciliation—where different parts of a community come together to resolve conflict. Whatever the strength of participatory accounts in the abstract, they fail as *deontic* theories of consequence-independent rights that belong to dead victims.[162]

1. Which victims?

In living-victim cases, these participatory accounts—which emphasize things like notice and voice—work well enough.[163] Primary victims own the rights and have all the predicates of personhood necessary to demand involvement; after all, they are the primary bearers of interpersonal harm. But the rationale breaks down in dead-victim cases. I am skeptical of post-mortem rights generally,[164] but there can be no plausible account of a dead person's right *to participate in a legal proceeding*.[165] Normative theory aligns with basic intuition: a person's right to express themselves cannot be reassigned after

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[160] See Kathryne M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 434 (2016).

[161] See, e.g., Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 287 (2019) (positive criminal trials as sites of "democratic contestation").

[162] I do not here deal with utilitarian/consequentialist accounts in favor of victim participation—specifically, with the argument that victim participation produces substantial utility either in the form of satisfaction or closure. I do, however, find those accounts similarly unpersuasive, for reasons elaborated in Section IV.C, *infra*.

[163] See Miriam Krinsky & Liz Komar, *"Victims' Rights" and Diversion: Furthering the Interests of Crime Survivors and the Community*, 74 SMU L. REV. 527, 538 (2021) (discussing in context of diversion program).

[164] See Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J.L. & JURIS. 29, 30 (2001); Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 244 (1981); see also *supra* note 149 (collecting references to broader discussion).

[165] See Daphna Hacker. *The Rights of the Dead through the Prism of Israeli Succession Disputes*, 11 INTERNATIONAL JOURNAL OF LAW IN CONTEXT 40, 44 (2015). But see Joel Feinberg, *Harm and Self-Interest*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 45, 59-68 (1980) (defending proposition that dead have some rights).

they die. If Adam survives Barry after the latter is violently murdered, any participatory interest that Adam owns is Adam's, not Barry's. With this observation in mind, I'll start with more abstract problems and work towards more specific ones.

Subjects of rights must possess certain features, which we might describe collectively as "personhood."[166] (My argument here doesn't implicate disputes over the rights-bearing status of animals.[167]) There is ambiguity around the category's periphery,[168] but personhood as a criterion for rights-ascription usually means that not-living things don't quality. Even though we might be morally obligated to treat decedents in certain ways, and even though we often shorthand that obligation as a decedent's "right"—think rules against necrophilia or disturbing burial grounds[169]—I operate on the assumption that it's not *really* because the dead are formal rights owners.[170]

But even if post-mortem rights bearing were a plausible account of some moral imperatives, it still couldn't justify the specific rights to participation that animate victims' rights practices. Unlike some other rights against mistreatment of dead bodies or spoilage of physical remains, rights to expressive ideation are intrinsically personal and non-transferable.

All of this is background for a basic point: when laws secure victim involvement, these are not the victim rights of decedents. These are the victim rights of other people—living people. A living person can't be exercising a decedent's right to participate, because dead people don't have those rights.[171] Laws might say that a relative "assumes" the participatory rights of a dead victim, but these rights are legible only as the relative's *first-party rights* to participate. There might be good reasons to recognize rights of participation that belong to secondary harm bearers, but the moral case for those victim's

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166 Cf. Dubber, *supra* note 1, at 153-56 (sketching concept in context of victims' rights).

167 See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997) (describing view).

168 See Richard L. Cupp, *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 FLA. L. REV. 465, 470 (2017).

169 The law of dead bodies gets comprehensive doctrinal and theoretical treatment in Ela A. Leshem, *Dead Bodies As Quasi-Persons*, 77 VAND. L. REV. 999, 1006 (2024).

170 See Anita L. Allen & Jennifer E. Rothman, *Postmortem Privacy*, 123 Mich. L. Rev. __, * 6 (forthcoming 2024), *at https://papers.ssrn.com/sol3/Delivery.cfm/4834871.pdf?abstractid=4834871.*

171 See *supra* note 166 to 170 and accompanying text.

rights is different, and weaker, than it is for the participation of those who bear the primary harm.

2. Participatory rights of secondary victims.

The point from the prior Subsection is that, if victims' rights in dead-victim cases are to be justified by reference to participatory interests, then those interests are necessarily those of the secondary (living) victims. Professor Dubber has observed that "victim impact evidence … isn't[] and can't be[] about the victim of the homicide. Instead, it's about everyone else."[172] And the justification for the involvement of "everyone else" is weaker.

One problem with the justification for secondary victim involvement is common to the justification for *all* victim involvement: it is at odds with the conceptualization of modern criminal punishment. We think of tort, contract, and property proceedings as sites of private confrontation;[173] but criminal law is a quintessentially public encounter between the state and the transgressor.[174] In criminal litigation, *The People* sits on the left side of the "v." The public framing of criminal prosecution isn't an accident; as recounted above, it results from a centuries-long evolution away from systems that privatized social responses to interpersonal harm.[175]

The split institutional response to certain transgression—private-law remedies and criminal punishment—tracks thinking about what criminal offending is. Crime-caused harm both damages a human being and offends the political community in whose name the state exercises power.[176] Cue Blackstone: "[E]very public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."[177] Retributivism, the dominant moral justification for criminal punishment, springs from this view of transgression.

On some retributive theories, the state's right (and obligation) to punish follows from a proposition embedded in the act of criminal offending: by refusing to comply with the community's rules, offenders have wrongly asserted their superiority.[178] On other theories, the state's right (and

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[172] Dubber, *supra* note 1, at 214 (emphasis added).
[173] See John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 946-47 (2010).
[174] See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?,* 102 MICH. L. REV. 689, 696 (2004).
[175] See Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 339 (1999).
[176] See Woolhandler & Nelson, *supra* note 174, at 696-97.
[177] 4 William Blackstone, Commentaries *5.
[178] See, e.g., George P. Fletcher, *Domination in Wrongdoing*, 76 B.U.

obligation) to punish follows from a presumption of individual autonomy; to give offenders their just deserts is to treat them as fully realized sovereigns over their own behavior.[179] When the offender offends, it would deny their humanity to refuse them the consequences of their decision.

The precise retributive theory isn't that important. The central point is that virtually all of them justify criminal punishment by reference to the harm experienced by a political community.[180] That conceptualization doesn't exclude victim involvement, which remains a crucial part of the community's response to crime. But if the responsive preferences of victims diverge from those of the state, then defending the modern conception of criminal law becomes nearly impossible.[181]

There are also problems unique to secondary victim involvement. Most importantly, what's the limiting principle? It can't be that *all* harm bearers are victims endowed with formal rights against the state. If all bearers of crime-caused harm can demand involvement, then the category is impossibly large. All harm bearers can't be consulted in a plea deal, invited to testify at sentencing, or entitled to input on parole. There must be limiting principle, and that limiting principle usually means that only the primary harm bearers have rights to participate in criminal punishment.

Perhaps one might argue that secondary victims own participatory rights only in dead-victim cases. But why? On non-consequentialist accounts, whether harm to B entitles B to participate in a criminal proceeding can't turn on whether person A is alive. There might be *administrative* reasons to say that person B can seek involvement only if person A can't, but that distinction is a very different principle. Nor can the administrative rationale be that some victim involvement is better than none, because the law throttles victim involvement all the time. If more victim involvement were better, then secondary harm bearers would have participatory rights when primary victims remain alive.

Perhaps secondary harm bearers get rights in dead-victim cases because, as a category, they experience more harm than do secondary harm bearers in living-victim cases. There's an

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L. REV. 347, 354 (1996).

[179] See, e.g., Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 14.

[180] See sources collected in footnotes 176 to 180, *supra*.

[181] Cf. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 76 (1999) ("Everyone else who has taken the victim's turn concludes that they don't believe in retributive justice anymore; they believe that criminal justice systems should serve corrective justice.").

intuitive appeal here: the grief and financial loss that ripples outward from death is quite substantial, even in relation to other serious crimes. Still, the magnitude of that loss varies tremendously across secondary victims. And if the argument is that there are administrative reasons for categorical treatment in dead-victim cases, then that argument differs from the idea that there's some essential moral linkage between harm and participatory rights.

In the end, a participation-centered justification for victims' rights just doesn't work in dead victim cases—at least as a consequence-independent moral justification. A decedent's right to participation is non-transferrable, and the involvement of secondary harm bearers requires extra layers of moral justification that are sorely lacking.

B. Harm (Retribution)

Another justification for victim involvement is that such participation helps courts understand the crime-caused harm at issue.[182] Judicial identification of such harm is, in turn, central to the retributive function of criminal punishment.[183] The problem with this argument is that it equates information about "harm" with information about the social worth of the victim,[184] and the latter is a terrible proxy for the former. In dead-victim cases, victim involvement adds only the smallest increments of information about retributively significant harm, if any at all.

1. Retributively significant harm generally

Victims' rights advocates often argue that victim involvement ensures a more accurate accounting of harm,[185]

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[182] See, e.g., Payne v. Tennessee, 501 U.S. 808, 821 (1991) (articulating such an argument for capital cases); see also Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 Geo. L.J. 721, 723 (2008) (describing phenomenon).

[183] I eschew a lengthy digression about "harm-based" retributivism versus what one might call "intent-based" retributivism. The former sets desert by reference to intended harm. See, e.g., See Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 5 J. CONTEMP. LEGAL ISSUES 31, 31-32 (1994). The latter sets it by reference to actual harm. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 60 (1974).

[184] For general discussions about how VIS create a problem involving the social worth of victims, see Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1264 (2022); Karen Miller, *Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUALITATIVE HEALTH RES. 1445, 1455 (2013).

[185] See *supra* note 58 and accompanying text.

and that harm is a central determinant of retribution.[186] One reason this justification fits the dead-victim scenario so poorly is a more general problem with how it fits all victim scenarios. Victims can be helpful in ascertaining retributively significant harm, but that's because they're good witnesses and not because of their victimhood *per se*. Philosopher Michael Moore frames the mainline thinking: "[V]ictims should and must be ignored if you are claiming to be doing retributive theory."[187]

I mentioned some constitutive elements of retributive thought already,[188] but some additional background is in order. In the main, retributivists are committed to the ideas that criminal punishment is justified because it is deserved and is constrained by the degree of that desert.[189] Notwithstanding considerable variation along many dimensions,[190] most retributivist theory proportions desert by reference to some combination of offender culpability and the harm of the offense.[191] More desert justifies and permits more punishment. The positive relationship between desert and punishment represents a foundational rule of proportionality in the criminal law.[192]

According to victims' rights advocates, more victim participation appropriately calibrates punishment to harm.[193]

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[186] See Moore, *supra* note 181, at 314 n.46.

[187] Moore, *supra* note 181, at 68; see also Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1090 (2013) (characterizing Moore's view as "typical of the field").

[188] See *supra* notes 179 to 183 and accompanying text.

[189] See Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 110, 110 (Andrew von Hirsch et al. eds., 3d ed. 2009). The origin of retributivist thought is generally attributed to Kant and Hegel. See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 101 at 129 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821); IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 195 (W. Hastie trans., 2002) (1797); VICTOR TADROS, THE ENDS OF HARM 283-91 (2011).

[190] For a useful summary of retributivist thought, including internal variation, see David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1659-72 (2010).

[191] See ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363-65 (1983) Michael Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING 188, 188 (Andrew von Hirsch & Andrew Ashworth eds., 1998).

[192] See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76-79 (2005) (capturing relationship of theory to dominant practice).

[193] See, Julian V. Roberts, *Crime Victims, Sentencing, and Release from Prison*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 106 (Joan Petersilia & Kevin R. Reitz eds., 2011).

The thinking is that, if victims have input on charging decisions, testify at trial, or offer sentencing assistance, then their participation ensures that state-imposed suffering tracks harm and, by extension, desert. Forget dead-victim scenarios momentarily; this argument struggles to justify practices even in cases where the primary harm bearers survive.

The retributive-input argument depends on what the victim is providing information *about*. Criminal law necessarily uses harm to calibrate retribution when it defines offenses, sets statutory penalties, and enacts sentencing guidelines. When we are talking about retributively significant harms, the victim's additive capacity is largely that of a witness. If the victim is moving the needle on charging and sentencing because they are providing information about retributively significant harms, then the argument is stronger. But if the information is retributively insignificant, then victim involvement isn't properly calibrating retribution. Testimony that goes to the unique social worth of a victim or that otherwise emphasizes something besides experiential harm creates precisely this problem.

And even if victims are providing retributively material information about harm, the value of that information may be swamped by other content. For example, even when a living victim provides retributively *material* information about harm to a sentencer, that information is likely to be commingled with content that is retributively *immaterial*—such as emotional pleas to coopt the state in pursuit of private vengeance. I join others who fear that the retributively immaterial elements of the victim-to-sentencing communication will only push in one direction.[194] It will tend to make sentences more severe, and not because the communication captures harm that should make a normative difference.

2. Retributively significant "harm" in dead-victim cases.

The harm-based justifications for certain victim practices break down when the primary victim is deceased. I want to focus on two such practices: (1) victim impact statements and (2) the role of victim families between death sentences and executions. Despite considerable literature on the first practice,[195] the fit between the traditional justifications for

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[194] See, e.g., Bandes, *supra* note 159, at 399-402 (explaining why more information is not always better because emotional processing works differently in different contexts); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuse of Victim Impact Evidence in Capital Trials*, 41 Ariz. L. Rev. 143, 156-65 (1999) (documenting problem across jurisdictions).

[195] See, e.g., Bandes, *supra* note 184, at 123-24 (introducing article

victim involvement and the practice itself remains under-theorized. And the second practice is, to my knowledge, almost totally unremarked-upon in the existing victims' rights literature.[196]

Start with the victim impact statements. A VIS in a decedent-victim case cannot, by definition, be communicative content from the victim. In decedent-victim scenarios, some states restrict VIS to surviving family members, but others permit VIS to be given by "family, friends, neighbors, and even co-workers."[197] In other words, many jurisdictions have abandoned attempts to enforce boundaries on the sources of victim impact evidence.[198] The sources of potentially relevant evidence become anyone in the "community,"[199] and the limits thereupon are largely administrative concepts like duplicativeness.

The information that secondary victims provide via VIS is less likely to be retributively significant—less likely to pertain to offense conduct or the primary victim's experienced harm. In many cases, VIS-friendly law is used to admit naked evidence of victim sentencing preference,[200] which has nothing at all to do with retributively significant harm.[201] Victim impact evidence in dead-victim cases also packs an explosive emotional punch.[202] It often takes the form of testimony about the social harm to a community, or retributively immaterial evidence

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length inquiry); Bandes, *supra* note 159, at 395 (discussing in context of capital case); Cassell, *Treating Crime Victims Fairly*, *supra* note 30, at 931-38 (discussing use of victim impact evidence in federal cases); Cassell, *Defense*, *supra* note 32, at 611 (defending practices against academic criticism); Logan, *supra* note 194, at 143-466 (conveying how VIS was used after landmark Supreme Court case).

196 There is some current and proposed legislation that would restrict contact between capital defendant representatives and victim families before a clemency decision, and this legislation certainly applies in capital cases. See, e.g, HLS 24RS-190 (Louisiana 2024), proposed bill at https://legis.la.gov/legis/ViewDocument.aspx?d=1346998.

197 Logan, *supra* note 194, at 154.

198 See Dubber, *supra* note 1, at 213-16; *supra* note 194, at 155; see also, e.g., Beck v. Commonwealth, 484 S.E.2d 898,906 (Va. 1997) (requiring only that the potential statement-offeror not be "so far removed from the victims as to have nothing of value to impart to the court about the impact of these crimes").

199 See, e.g., Logan, *supra* note 182, at 729-31 (describing tendency in federal cases).

200 See Wayne Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 518 (2000)

201 See *id.* at 538.

202 See Logan, *supra* note 182, at 742.

about the victim's social worth..[203] The idea that social worth could be a valid determinant of punitive suffering is a moral outrage; if social worth mattered, then the murder of lower-statused people would require less punishment than the murder of the higher-statused.

The role of victims after capital sentences is largely unexplored in the academic literature. I have written extensively on the process that follows death verdicts, both describing it and critiquing it normatively.[204] The topline numbers are staggering. Fewer people on death rows will die of executions than will exit because of summed suicides, vacated sentences, and natural-caused deaths.[205] Of those that die at the state's hand, the average time between death verdict and execution is about twenty years.[206]

With respect to executions, both the "who" and the "how long" are enormously sensitive to victim preferences. Higher-statused victims are more likely to leave behind family and extended communities that agitate for executions.[207] People are less likely to get clemency if the murdered victims come from communities that are media-fluent or otherwise capable of exerting cultural power.[208] By contrast, people who kill victims having few community connections will draw far fewer objections to a clemency push.[209] The social worth information that drives the clemency dynamic also drives differential

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[203] I don't mean to suggest that all victim attributes are morally irrelevant. There are, for example, good reasons to punish people who harm children more harshly. See Kleinfeld, *supra* note 187, at 1091.

[204] See, e.g., Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1321 (2020) (explaining unique circumstances that produce a flurry of pre-execution litigation); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1165 (2019) (exploring the "second American death penalty").

[205] See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 305534, CAPITAL PUNISHMENT, 2021—STATISTICAL TABLES 12 tbl.5 (2023).

[206] See *id.* at 19 tbl.12.

[207] See Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1210 (2019).

[208] Texas Governor Greg Abbott, for example, pardoned an ex Austin police officer who shot and killed an Air Force veteran who was protesting at a Black Lives Matter event. See William Melhado, *Gov. Greg Abbott pardons Daniel Perry, veteran who killed police brutality protester in 2020*, THE TEXAS TRIBUNE (May 16, 2024), https://www.texastribune.org/2024/05/16/daniel-perry-greg-abbott-pardon/.

[209] See Kovarsky, *supra* note 207, at 1210.

death-sentence implementation at various sites of institutional discretion.[210]

These problems illustrate the important point. The charging, trial, and sentencing proceedings largely exhaust retributively significant information about harm. What could the harm-based justification for making sentence implementation sensitive to victim preferences even be? Notice to aggrieved families is one thing, but input is another altogether.

C. Equality Objection

I allude to an equality concern throughout this Article because it relates to other observations I have about dead-victim cases. Here, I sketch that concern as a stand-alone objection. The improper influence of victim social worth is already a problem in living-victim cases;[211] in dead-victim cases, the problem is overwhelming.[212] Not only does the victim-worth effect degrade other justifications for victim involvement, but it also violates an independent moral principle of non-arbitrariness.

I begin with an explanation of what I mean by the "social worth" of victims, a concept best crystallized by Professor Susan Bandes.[213] When I refer to a victim's social worth, I am not trying to capture the value of their professional output, or any economic value for that matter. I am instead describing,

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[210] See *id.*

[211] See, e.g., Miller, *supra* note 184, at 1455 (study of victim involvement in sex assault cases); Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1146 (2018) (identifying acute pockets of the problem). See generally LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023) (developing broader theoretical framework for imperfect victimhood); Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529, 532-33, 536-42 (2021) (discussing relationship of ideal victims to victims' rights practices).

[212] See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 392–93 (1996) (making argument); Logan, *supra* note 182, at 741 (describing argument); see also, e.g.; Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 369 (2003) ("The California CJP data suggest that a juror's perception of the victim's character and role in the crime can have an important influence on a juror's inclination to vote for death or life in a capital case."); Heather Zaykowski et al, *Judicial Narratives of Ideal and Deviant Victims in Judges' Capital Sentencing Decisions*, 39 AM. J. CRIM. JUST. 716, 729 (2014) (finding worthiness effect in study of judicial behavior in Delaware capital cases).

[213] See Bandes, *supra* note 212, at 406.

more abstractly, the varied social value that a political community places on different identities.[214] The concept is straightforward and corresponds roughly to social status, although the controlling Supreme Court precedent doesn't acknowledge it. In *Payne*—the decision permitting the use of victim impact evidence—the Court rejected the idea that such evidence creates a problematic hierarchy of victims.[215] The evidence, *Payne* says, does not expressly call for a comparison across cases.[216]

Still, in the criminal legal system, it is difficult to dispute that the lives of some victims matter more than others.[217] The state funnels resources to the policing and prosecution of crime that affects higher-statused communities.[218] Cultural biases creep into other aspects of criminal punishing, too. Judges and juries, for example, still carry documented biases about what makes a rape "serious" and its victim "credible."[219] Simply put, social worth is a determinant of punishment across the legal landscape.

The victims' rights movement amplifies this problem. It's not that vindicating victims' rights necessarily aggravates existing inequalities; it's certainly possible, as a theoretical matter, that increased victim involvement might offset existing disadvantages. The problem is that the value of a right is contingent on the social value of its bearer. The return on involvement is higher when the involvement vindicates the interests of high-statused people. Awarding victims' rights *as a category* disproportionately benefits those people. So, for

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[214] See Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1037-40 (2014).

[215] See Payne v. Tennessee, 501 U.S. 808, 823 (1991) (As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind … . It is designed to show instead each victim's 'uniqueness as an individual human being' … .").

[216] See *id.*

[217] See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267 (1994) (discussing racial dimensions of phenomenon).

[218] See, e.g., Jeffrey A. Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 23 BERKELEY J. CRIM. L. 261, 266-67 (2018).

[219] Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 Brook. L. Rev. 1253, 1264 (2022) (citing MARY LAY SCHUSTER & AMY D. PROPEN, VICTIM ADVOCACY IN THE COURTROOM: PERSUASIVE PRACTICES IN DOMESTIC VIOLENCE AND CHILD PROTECTION CASES 551-81 (2011)).

example, a Canadian study showed that higher-statused victims were more likely to offer VIS at criminal trials.[220]

The problem is particularly severe in dead-victim cases. An enormous body of empirical work demonstrates that the death penalty is quite sensitive to victim race—work dating all the way back to the famous Baldus Study at the center of *McCleskey v. Kemp*.[221] Baldus and his co-authors estimated that killing a white victim was over four times as likely to result in a death verdict than was killing a Black one.[222] The race-of-victim effect in death penalty prosecutions is a well-documented phenomenon that persists across time, studies, and specifications.[223]

In dead-victim cases more generally—that is, dead-victim cases that are also noncapital—the rights to victim involvement generally redound to family members. English-speaking families and families with greater cultural capital are in a far superior position to influence prosecutors, juries, judges, correctional officials, and institutions that wield clemency power. One commentator memorably reinterpreted VIS law as a commandment that "Thou Shalt Not Kill Any Nice People."[224]

The problem of social worth is perhaps most acute in a subset of dead-victim cases: those in which a jury returns a death sentence for capital murder. In those cases, victim-family involvement can stretch over the course of twenty years or

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[220] *See* Karen Miller, *Purposing and Repurposing Harms: The Victim Impact Statement and Sexual Assault*, 23 QUALITATIVE HEALTH RES. 1445, 1455 (2013) (making the same point in the context of sexual assault cases in particular).

[221] McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (describing Baldus study); see also see also DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (study in book form).

[222] See *McCleskey*, 481 U.S. at 287 (discussing Baldus findings).

[223] See U.S. GEN. ACCOUNTING OFFICE, GAO-GGD-90-57, DEATH SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 26, 1990), http://www.gao.gov/assets/220/212180.pdf (determining that over 80% of empirical work on question disclosed race-of-victim effect); David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL LAW REV. 1638, 1661 (1998) (90%); Fagan & Geller, *supra* note 218, at 273-75 (surveying more recent empirical work on race-of-victim effect).

[224] Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997).

more.[225] After the capital sentence, structurally advantaged victims have a much greater chance of influencing decisions about: whether to seek execution at all; if so, on what timeline; whether prosecutors stipulate to findings that require a sentencing revision; and whether clemency is awarded.[226]

The literature does contain some responses to this objection—most notably, in the context of VIS, by law professor and former federal judge Paul Cassell.[227] Although I disagree with him in ways big and small, I often use Professor Cassell's arguments as stand-ins for those of the broader victims' rights movement because he has been its most persistent and thoughtful academic supporter.[228] In terms of the equality effects of VIS, and as far as I can tell, Professor Cassell's first response is that there's no evidence that victim impact statements have any effect on sentencing at all.[229] The second is that "maybe 'articulate' victims are simply those victims who have been harmed the most."[230] Both answers are unpersuasive.

Start with the idea that VIS have no real impact on sentencing. My argument is mechanistically broader than the one to which Professor Cassell responds insofar as the social worth problem arises from victim involvement generally—not just VIS. Those other mechanisms, accessible through unequally distributed cultural capital, also compromise the principle that victims be treated equally. Higher-statused victims leave behind loved ones more capable of advocating *for* prosecutions, trials, and harsher sentences, and more capable of advocating *against* plea deals, parole, and clemency. Unevenly distributed cultural capital does much of its work outside the jury's sight line.

Second, there are problems even with the inferences Professor Cassell draws from the pertinent VIS studies. For example, Professor Cassell writes off simulated juror studies showing that VIS do affect sentences, remarking that simulations, as a category, provide limited "insight."[231] But simulations produce still produce useful human knowledge; especially in the absence of well-designed experimental or quasi-experimental studies, they produce perfectly legitimate

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[225] See Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1176 (2019) (discussing data).
[226] See *supra* note 212.
[227] *See* Cassell, *Defense*, *supra* note 32, at 638-42.
[228] I discuss and cite Professor Cassell's work extensively, including sources cited at notes 36 (*supra*) and 267 (*infra*).
[229] *See* Cassell, *Defense*, *supra* note 32, at 639.
[230] *Id.* at 640.
[231] *Id.* at 634.

information about cause and effect.[232] In fact, some of the non-simulation studies on which Professor Cassell relies show that victim "admirability" indeed correlates substantially with increased involvement—even if they indicate that victim impact statements, in the aggregate, don't affect the volume of capital sentencing.[233]

Furthermore, the evidence on "real-world juries" isn't nearly as robust and conclusive as Professor Cassell suggests. Professor Cassell's major data point is a Cornell study in which researchers interviewed jurors who sat in South Carolina death penalty cases between 1985 and 2001.[234] As the study authors recognize, the Cornell data was collected long after the twenty-seven interview subjects rendered their capital case verdicts,[235] and it's potentially distorted by implicit bias and limited recall.[236] Setting aside that certain victim characteristics didn't affect ultimate case outcomes, the study actually confirmed the broader hypotheses circulating through the experiential and legal literature: that "more-admired victims are viewed as the victims of more-serious crimes."[237] The result, moreover, was not particularly robust across specifications, as the model revealed inversion between victim admirability and likelihood of a death vote when the study designers tweaked features of the dependent variable.[238] Finally, the study authors don't have a substantive rebuttal to the observation that the absence of effect could be attributable to significant bias in the defendant cohort actually put on capital trial—that is, killing of high-statused white victims has an enormous effect on who goes to trial in the first place.[239]

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[232] See, e.g., Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments, 5 Psychol.*, CRIME & L. 331, 345 (1999) ("[T]hese findings suggest that during the sentencing phase of a capital trial, … victims portrayed in a VIS as assets to their families and their communities may be perceived differently than victims portrayed in less glowing terms."); Greene et al., *supra* note 5, at 145-56 (finding effect).

[233] *See* Eisenberg et al., *supra* note 5, at 307-08.

[234] See Cassell, *supra* note 227, at 635 (discussing Eisenberg et al., *supra* note 8, at 308).

[235] The number 27 is the number of jurors asked about VIS. See Eisenberg et al., *supra* note 5, at 311.

[236] *See id.*

[237] *Id.* at 327.

[238] The inversion was statistically insignificant, however. See *id.* at 335.

[239] The only thing the authors were able to do was show that the ratio of death sentences to tried was unaffected by the increased use of victim impact evidence. See *id.* at 334-39. This statistical check doesn't address the fact that the methodology for the main model is masking upstream influence of perceived victim worthiness.

Professor Cassell also relies on a 1987 California survey of "presiding judges, probation departments, district attorneys, and victim/witness programs."[240] The survey was designed to understand California's 1982 Victims' Bill of Rights. Because the survey wasn't an experiment, the authors expressly disclaim any causal findings: "measuring actual effect was beyond the purpose and scope of the study."[241] Indeed, the central insight of the survey was that victim allocution didn't substantially affect statewide sentencing rates because victims didn't use it. As the study put it, "While the study shows that victims desire the right to participate in sentencing, few victims show any great predisposition to exercise the right.[242] The survey didn't suggest that allocution in individual cases had no effect.[243] Judges seemed to think that victim allocutions had little marginal effect simply because the effect was already captured by some form of written VIS.[244] (District attorneys and victims thought the effect of allocation was substantial.[245])

Finally, Professor Cassell relies on a 1994 quasi-experimental study that randomly assigned Bronx County, NY defendants to one of three treatments to determine whether victim impact statements had any impact on sentencing. Perhaps the most noteworthy finding from the study is the degree to which it undercuts *other arguments* made by victims' rights advocates: it suggested that VIS provided no meaningful information about retributively significant harm.[246] The study authors' conclusion is *not* that that victim involvement has no effect on sentencing; they conclude that VIS are a lousy vector for victim involvement, at least in less serious cases. And in more serious cases involving direct, interpersonal harm—"homicides, rapes, and aggravated assaults"—the authors concede that victim impact statements might have greater effects.[247]

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[240] Edwin Villmoare & Virginia V. Neto, *Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights*, NAT'L INST. JUST. ix (Mar. 1987), https://perma.cc/TFG2-MLSE (finding that victim statements to courts do not usually impact sentencing decisions) (cited in See Cassell, *supra* note 227, 635 n.123).

[241] See Villmoare & Neto, *supra* note 240, at 52.

[242] See *id.* 61.

[243] See *id.* at 52.

[244] See *id.* at 55, 59.

[245] See *id.* at 56.

[246] See Robert C. Davis & Barbara E. Smith, *The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting*, 11 JUST. Q. 453, 466 (1994) (cited by Cassell, *supra* note 227, at 635 n.124).

[247] See Davis & Smith, *supra* note 246, at 468.

In short, the study-based evidence doesn't substantially undermine the equality objection. The simulation data remains formidable in an empirical environment devoid of robust and controlled experimentation. The surveys that Professor Cassell discusses focus almost exclusively on the operation of victim involvement at trial, as opposed to upstream involvement in the decision to prosecute or downstream involvement in decisions about parole or clemency.[248] When the cited studies find that some form of victim involvement doesn't increase sentences, it's generally a finding that the mechanism *isn't being used*—not a finding that usage has no effect. These studies also tend to be about the effect of a VIS program in aggregate, and not about whether victim involvement has an effect in individual cases. Finally, none of these studies undermine the claim that, whatever the categorical effect of victim involvement on outcomes, the effect is stronger with respect to higher-statused victims.

The second responsive volley that Professor Cassell offers to the equality objection assumes that what he calls victim "articulateness" exerts some effect on outcomes. For example, he remarks that perhaps "'articulate' victims are simply those victims who have been harmed the most."[249] There's no data cited for the counterintuitive proposition that people whose harm is especially resonant are in fact harmed more. To the contrary, the idea that structurally advantaged groups obtain superior outcomes from criminal process is well documented,[250] and victim involvement is one specific instance of that broader phenomenon. Victims from a structurally advantaged groups are likelier to have appealing characteristics amenable to communal grieving, to leave behind English-speaking advocates for a criminal justice response, and to come from communities with the cultural and political influence necessary to combat any institutional pressure for lenience.

Professor Cassell then offers something of a "so what?"—assuming both that "articulateness" affects sentences *and* that articulate victim-impact witnesses get better results, then that

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[248] But see Morgan & Smith, *supra* note 5, at 355 ("The results of these studies suggest that a strong empirical relationship between victim participation and parole denials.").

[249] Davis & Smith, *supra* note 246, at 439.

[250] See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 98-99 (rev. ed. 2012) (racially disparate penalization of drug use); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2114 (2017) (arguing that poorer communities get lower quality policing services); Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 286 (2020) (linking differences in policing impact to tax structure of financing).

state of affairs doesn't differ meaningfully from the way legal institutions treat all witness testimony. As he puts it: "Even assuming a new study finds a unique 'articulateness' factor unrelated to the merits of the case, this sort of difference is hardly unique to victim impact evidence."[251] To be fair, Professor Cassell is more narrowly focused on VIS specifically rather than on victim involvement generally, so he may not object to my observation that differentiated social worth is a problem outside of the courtroom.

Having said that, I still disagree with even a narrower claim about victim-impact testimony. Something can be morally unproblematic even if it's tolerated in related contexts. But more importantly, victim impact testimony isn't like all other witness testimony. And the specific differences go directly to the boundaries we observe when witnesses testify. Witness testimony is *not* unbounded—it must be relevant,[252] and, even for relevant testimony, sometimes the difference between prejudice and probativeness can be impermissibly large.[253] That's the problem with victim testimony specifically and victim involvement generally. There is an unacceptably high risk that immaterial information dominates the rest.[254] And there's no slippery slope here; a rule constraining the scope of victim involvement wouldn't need to interfere with basic testimonial practice of non-victim witnesses.

Or perhaps, as Professor Cassell argues, these problems exist but are uniquely acceptable because—at least in capital cases—they "balance" a defendant's right to introduce mitigating evidence. Professor Cassell writes that "[e]quality demands fairness not only between cases, but also within cases."[255] This argument is puzzling. Mitigation evidence is relevant because substantive law makes a capital defendant's culpability strictly relevant to the sentence. To make the parity argument persuasively, it must be the case either (1) that substantive law makes victim social worth legally relevant or (2) that victim social worth should influence outcomes notwithstanding that it is irrelevant under substantive law. The first is descriptively false and the second doesn't make sense analytically.

The parity argument draws on a gauzier proposition about complete equality across a criminal prosecution. But the

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[251] Cassell, *supra* note 227, at 639.

[252] See, e.g., FED. R. EVID. 401 (federal evidence test for relevance).

[253] See, e.g., FED. R. EVID. 403 (federal evidence rule permitting evidence exclusion where probative value is substantially outweighed by unfair prejudice).

[254] See *supra* note 194 and accompanying text.

[255] Cassell, *supra* note 227, at 640.

prosecution and defense are always situated differently. They are endowed with different resources,[256] have different burdens of proof,[257] must prove different things,[258] and are subject to different constitutional constraints.[259] If differences in the admissibility of character evidence simply reflect a difference in the material elements of a sentence, then what's the within-case equality problem to weigh against the enormous risk of inequality across cases? Fairness and equal treatment are not the same thing.[260]

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Deontological arguments cut against victim involvement in dead-victim cases. Because it is the secondary harm bearers who are speaking and participating—rather than the decedent—the expressive and participatory interests that might otherwise underwrite the moral case disappear.[261] Nor does retributive logic work, as evidence unrelated to blameworthiness overwhelms information about retributively significant harm.[262] Finally, secondary victim involvement threatens a moral obligation to treat victims equally.[263]

IV. CONSEQUENTIALIST ARGUMENTS

Other arguments about victims' rights fall into a loosely related category that one might describe as utilitarian, or at least consequentialist. Most are familiar arguments about deterrence or incapacitation, but one is closer to the idea that victim involvement has a legitimacy dividend. All such arguments consist either of intuitively-dubious-but-unfalsifiable claims or falsifiable claims lacking empirical support.

A. Deterrence

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[256] See Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 175 (2012).

[257] See Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1403 (1991).

[258] See *id.*

[259] For example, the prosecution only must disclose evidence favorable to the opposing party. See Brady v. Maryland, 373 U.S. 83, 87 (1963). And only a defendant has a constitutional right to effective representation. See Strickland v. Washington, 466 U.S. 668, 671 (1984).

[260] See HERBERT J. GANS, MORE EQUALITY 73-74 (1973); Martha Minow, *Equality vs. Equity*, 1 AM. J. LAW & INEQ. 167, 179, 182 (2021).

[261] See Section III.A, *supra*.

[262] See Section III.B, *supra*.

[263] See Section III.C, *supra*.

Begin with a basic utilitarian argument articulated to support harsher criminal justice outcomes: that victim involvement reduces future offending by the defendant (specific deterrence) and other people (general deterrence).[264] Measuring deterrent effect is difficult enough,[265] and there is (to my knowledge) no empirical work suggesting that victim input provides information about harm that promotes the deterrent effect of the law. There is perhaps a *causal intuition* behind a deterrence argument, but—ironically—advocates for victims' involvement often want to deny the premise upon which it necessarily rests.[266]

Specifically, if one assumes that any increase in punishment has a nonzero effect on deterrence, and that victim involvement only increases punishment, then one could argue that victim involvement increases deterrence along some margin, however slight. I don't dwell on this argument too much—and it has plenty of problems—because victims' advocates don't generally want to claim this deterrence effect. They want to be able to say that victim involvement *isn't* unidirectional,[267] and that its effect on sentence intensity depends on the specific case.

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[264] Cf. IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 9-13 (1989) (explaining that utilitarianism and deterrence are the major justificatory theories of punishment). An example of an argument that victim involvement performs a deterrent function, see TYRONE KIRCHENGAST, VICTIMS AND THE CRIMINAL TRIAL 192 (2016). See also Phillip A. Talbert, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 216 (1988) (suggesting that effect "may" exist).

[265] Throughout this discussion, I rely on the exquisite treatment of research in Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 200 (2013).

[266] See, e.g., Paul G. Cassell, *On the Importance of Listening to Crime Victims ... Merciful and Otherwise*, 102 TEX. L. REV. 1381, 1403 (2024) ("And the claim that involving victims makes the system more punitive lacks significant empirical support.").

[267] The evidence on the relationship between victim impact statements and trial sentencing, however, is mixed. Data from juror simulations suggest a significant effect, especially in capital cases. See, e.g., Edith Greene et. al., *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145 (1998) (finding effect based on manipulation of victim impact evidence from famous case); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 13 (1995) (finding "strong" effect); Raymond Paternoster & Jerome Deise, *Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129, 153 (2011) (finding effect in capital-case simulation). Non-simulation data from South Carolina, however,

The baseline deterrence arguments are weak, even before considering how they might play out in dead-victim cases. There is at least some evidence that making legislatively specified punishment more sensitive to the harm caused by an offense does increase deterrence.[268] But the argument for victim involvement is three degrees removed from even that middling zone of statistical support.

First, the argument for victim involvement isn't one about increasing *average punishment legislated*, but about increasing sentencing *within a legislative range*. And sure, one might string together some studies to support the idea that, within a legislatively specified range, higher average sentencing might

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failed to disclose an effect. See Theodore Eisenberg et. al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 308 (2003). Some studies of noncapital cases, whether simulated juror studies or based on real-world data, are smaller or zero. See, e.g., Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing*, 107 MARQUETTE L. REV. __, *78-*83 (forthcoming 2024), draft at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4622666 (collecting empirical support regarding VIS); Edna Erez and Leigh Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*. JOURNAL OF CRIMINAL JUSTICE 363, 367-69 (1995) (finding no increase in custody rates or sentence lengths associated with the introduction of victim impact statements in Australian proceedings); Maarten Kunst et al., *The Impact of Victim Impact Statements on Legal Decisions in Criminal Proceedings: A Systematic Review of the Literature Across Jurisdictions and Decision Types*, 56 AGGRESSION & VIOLENT BEHAVIOR 1, 8 (2021) (finding a more ambiguous result in noncapital cases); Bryan Myers et al., *Victim Impact Statements and Mock Juror Sentencing: The Impact of Dehumanizing Language on a Death Qualified Sample*, 22 AM. J. FORENSIC PSYCHOL. 39 42, 50-51 (2004) (documenting a failure to replicate simulation studies showing effect). There has been some criticism leveled at the methodology of, as well as attempts to extrapolate from, the noncapital case studies. See Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 549 (1999).

[268] See JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 231 (2017); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [https://perma.cc/NX7M-ATCU]; Nagin, *supra* note 265, at 251-52; Joan Petersilia, *Beyond the Prison Bubble*, 268 NAT'L INST. JUST. J. 26, 27 (2011); DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 16 (2011), at https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%C20Deter%20A%20Review%20of%C20the%20Evidence.pdf.

produce more deterrence. Still, the effects of incremental harshness don't matter nearly as much as other determinants of expected punishment. The upstream likelihood of apprehension and conviction, for example, matter much more than the magnitude of downstream penalty.[269]

Second, arguments for victim involvement aren't about raising average punishment so much as they are about calibrating the punishment to harm. There is no empirical evidence substantiating a complex causal story in which such calibration reduces future offending. Nor is the story of causation intuitively appealing. Even assuming that, over some sentence ranges, there is a marginal effect to increased punishment, there is no reason to think that the incremental information that victims might provide about harm—specifically, increments of information that they would provide beyond that which they would provide as simple witnesses—would have any effect on behavior.

Third, even if the totality of this causal story was to be indulged, and if the punishment expectancy did affect behavior, it would be sensitive to what potential offenders *perceive* about the information provided.[270] And if potential offenders perceive victim involvement as providing information about victim status and social worth rather than about retributively material harm, then the whole story falls apart. If there is any causal story there, it's that offenders would seek out lesser-statused victims.

These problems are amplified in dead-victim cases. When the victim involved is alive, one might at least argue that information about status and social worth coexists with retributively material information about the effect of a crime. But that offset vanishes in dead-victim cases.[271] In those cases, the shape and intensity of victim involvement necessarily involve information weighted towards status and social worth.[272] There's no harm-deterrence calibration happening.

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[269] See Nagin, *supra* note 265, at 201-02.

[270] See *id.* at 204; see also John C. Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 347, 351 (1955) ("A law can have no deterrent influence upon a potential criminal if he is unaware of its existence."); *Raymond Paternoster, How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 780 (2010) ("[S]cholars began to understand deterrence as a social psychological theory of threat communication and to realize that if the objective properties of punishment are important, it is only because they affect crime through individual perceptions.").

[271] See Logan, *supra* note 200, at 541-43.

[272] See Section III.C, *supra*.

On matters of capital sentence *implementation*—questions about which death-sentenced prisoners get executed and how fast—the logic founders even more. There aren't reliable studies about how capital sentence implementation affects offending, even generally. And the more specific causal story borders on the absurd, at least if the story is that making capital sentence implementation sensitive to victim preferences reduces offending. If we're insisting on specifying small incentives, then the more intuitive effect is an incentive to kill marginalized, lower-statused victims.

But perhaps the biggest reason to doubt deterrent effects in dead-victim cases is that they're necessarily homicides cases with harsh penalties. Consider some easy examples: (1) at the front end, victim involvement prevents a prosecutor from offering a fifty-year sentence as a plea deal: (2) during trial, victims give impact statements that induce the sentencer to impose a life sentence instead of a fifty-year term; or (3) at the back end, surviving family members successfully oppose parole after fifty years in prison. In these scenarios—scenarios that bump sentence severity above fifty years of incarceration—what increment of deterrence does victim involvement serve? Existing empirical work strongly indicates that adding increments of punitiveness to already-harsh treatment has no marginal effect on deterrence.[273] As mentioned already, potential offenders are much more sensitive to enhanced probability of apprehension than they are to enhanced penalty,[274] and that's especially true at the highest ranges of punishment. There, the effect that sentencing practices have on deterrence virtually disappears.[275]

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[273] See Nagin, *supra* note 265, at 252; see also RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 42-43 (2019) (collecting studies); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, *in* DO PRISONS MAKE US SAFER? 269, 274, 301-02 (Steven Raphael & Michael A. Stoll eds., 2009) (showing inverse relationship between marginal incarceration and marginal deterrence); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 146 (2003) ("[S]tandard social scientific norms governing the acceptance of the null hypothesis justify the present (always rebuttable) conclusion that sentence severity does not affect levels of crime."); J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1660 (2020) ("Research suggests that lengthening already-long prison sentences has little to no deterrent effect on violent crime.").

[274] See *supra* note 269 and accompanying text.

[275] See *supra* note 273.

There is just no empirical support for the idea that victim involvement helps deter crime. Nor is there a plausible causal story—which would require that potential offenders calibrate their conduct based on whether they expect victims to be involved in subsequent criminal proceedings and the increased punishment expectancy that such involvement would entail.

B. Incapacitation

On utilitarian rationales for victim involvement other than deterrence, victims provide information about harm to further some other utilitarian end. Usually that end is incapacitation. More precisely, the argument is that victims provide vital information about future harm, and that information helps a community incapacitate its most significant threats.[276]

My concerns about this logic should sound familiar insofar as I doubt multiple pieces of the incapacitation rationale generally. For example, there may be good reasons to incapacitate offenders to protect the community, but if that's true then incapacitation isn't quite the same thing as punishment—and it should have a separate moral justification.[277] And because a criminal sentence is a fundamentally punitive form of state action, asking that it effectively double as a well-calibrated mechanism for incapacitation is a bridge too far.

Moreover, the system will constantly misfire in both comparative and absolute senses. Comparatively speaking, it will produce more incapacitation for highly culpable offenders and less incapacitation for those whose culpability is lower. But unless past culpability tracks future danger, the equation doesn't work.[278] And in absolute terms, the length of most

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[276] See Lynne Henderson, *Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 SAINT THOMAS L. REV. 579, 592 (1998) ("Victims' rights presently appear to focus almost entirely on an individual's right to have an offender swiftly punished, with the punishment based on revenge and incapacitation … ."); Cf. Talbert, *supra* note 264, at 219 ("[V]ictim participation serves the incapacitation goal only if the victim has a special basis of knowledge about the defendant's potential for future criminal activity.").

[277] See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 321 (2015); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1446 (2001); John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 683 (2012).

[278] See Adam J. Kolber, *Punishment and Moral Risk*, 2018 U. ILL. L. REV. 487, 523 (2018); see also Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 3 (2017) (disputing intuition).

criminal sentences *far* exceeds the state's incapacitating needs.[279]

Setting aside more general issues, there is no evidence that victim involvement properly calibrates incapacitation. True, information about *harm* might track the interest in incapacitation for individual defendants. But it's a leap to argue that the modal victim involvement captures that interest. Recall that victim involvement, at least within offense categories, tends to reflect social value and cultural influence more than harm.[280] And there's no reason to believe that social value and cultural influence parallel the incapacitating needs of the state.[281]

All these objections are magnified in dead-victim cases, where victim involvement takes the form of families and affected community members who can offer little other than information about the social worth of the decedent.[282] That increment of ancillary information does little to calibrate incapacitation, especially at the right tail of already-long sentences. And the data on the incapacitating effect of increments to already-harsh punishment is even clearer than the comparable deterrence work.[283] People quickly age out of periods marked by violent criminality, so incremental incapacitation of aged and enfeebled people doesn't reduce danger.[284]

I have one final point about incapacitation, and it might apply equally to deterrence. These arguments in favor of victim involvement are ultimately utilitarian. The social value of the practice must look at benefits but also costs.[285] I have tried to accurately characterize the deterrence and incapacitation effects of increments to already-long punishment—"near zero," and "close to zero," etc. A reasonable person might then

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[279] See Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 221 (2019); Binder & Notterman, *supra* note 278, at 53-54; Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 Wis. L. Rev. 669, 716-19 (2018).

[280] See *supra* Section III.C.

[281] The arguments I make apply equally to victim involvement at any phase in the criminal punishment process, including sentencing and parole.

[282] See *infra* notes 224 to 226 and accompanying text.

[283] See note 279, *supra*.

[284] See *id.*

[285] See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-15 (J.H. Burns & H.L.A. Hart eds. 1996) (1789) (setting forth classic formulation).

question whether there can be a utilitarian objection to such practices, given that these effects are potentially nonzero.

Yes, because those effects coexist with real costs, especially in dead-victim cases that already involve long sentences. If one assumes that victim involvement generally increases punishment, then more punishment produces negative utility alongside any deterrent and incapacitation gains. That's because increments of punishment produce additional suffering (disutility) in the person punished,[286] and that suffering might be even greater when the punished person is older and no longer able-bodied.[287] It will often leave those people in prison longer and when their age makes them vulnerable, and that vulnerability can further increase suffering and victimization.[288] It also entails the disutility that comes with incremental imprisonment generally, which disproportionately burdens vulnerable communities and exacts a great fiscal cost.[289]

C. Legitimacy

A final consequentialist justification often appears as part of the strongest victims' rights endorsements: that the involvement of victims adds some unquantifiable measure of legitimacy to the project of criminal punishment.[290] These

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[286] See Gray, *supra* note 190, at 1620.

[287] See Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. REV. 117, 124 (2022) (detailing link between age and carceral suffering in context of COVID litigation).

[288] See ASHLEY NELLIS, THE SENT'G PROJECT, NOTHING BUT TIME: ELDERLY AMERICANS SERVING LIFE WITHOUT PAROLE 9 (Kate Epstein ed., 2022).

[289] See Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q. J. ECON. 319, 347 (1996); Lois Presser, *The Restorative Prison*, *in* THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE 20-21 (Francis T. Cullen et al. eds., 2014); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1297 (2004).

[290] See, e.g., Cassell, *Defense*, supra note 32, at 625 (linking fairness of letting victims speak at sentencing to interest in "legitimacy" of punishment); Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89, 124 (2015) (framing victim participation in the pardon process as a legitimating function); Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 57 (2017) ("In line with the Procedural Justice Theory, victims' participation may enhance perception of the fairness of an official decision, an issue often raised in relation to defendants."); Zulkifl M. Zargar, *Secret Faits Accomplis: Declination Decisions, Nonprosecution Agreements, and the Crime Victim's Right*

arguments often latch casually onto Professor Tom Tyler's well-known work on procedural justice.[291] A pithy summary of Tyler's work goes something like as follows. Procedures that decide contested social questions should be perceived as respectful, fair, and neutral, because (1) losing contestants will more readily accept the loss and (2) the community generally will view the pertinent institutional practices as things to be respected.[292] These arguments—that victim involvement increases the legitimacy of the criminal legal system—are to be taken seriously, but they still falter in dead-victim cases.

First, victim disappointment is something that victims' rights statutes can't fix. The disappointment reflects, among other things, that victims cannot make binding decisions[293] and that the state is unaccountable for victims' rights breaches.[294] The criminal legal system rarely satisfies those who expect more than the thinnest rights to notice and respect because it is an "adversary system that too often cloaks punitive aims in the language of healing, making promises it cannot … keep."[295] Second, victim involvement aggravates the inequality examined in Section III.C,[296] and that aggravation is devasting

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to Confer, 89 FORDHAM L. REV. 343, 356 (2020) ("To the extent that victims' experiences do not comport with these procedural justice norms, victims may question the legitimacy of decision makers and consequently avoid cooperating with authorities in the future.").

[291] See, e.g., Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326-27 nn.16-20 (2007) (referencing Tyler to make argument); Pugach & Tamir, *supra* note 290, at 54 n.60 (same); Zargar, *supra* note 290, at 356 (same); Giannini, *supra* note 290, at 86-87 n.236 (same).

[292] Professor Tyler has made this argument broadly and across many publications. See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 239 (2008) (arguing that criminal legal institutions are perceived as more legitimate when they are perceived as promoting equality); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 122 (2000) (same); Tom Tyler, Comment, *Governing Pluralistic Societies*, LAW & CONTEMP. PROBS., Spring 2009, at 187, 187-88 (explaining that legitimacy is linked more closely to process than to outcomes; TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 53-56, 84 (2002) (reviewing empirical support).

[293] See Bandes, *supra* note 184, at 1269; Erin Ann O'Hara & Maria Mayo Robbins, *Using Criminal Punishment to Serve Both Victim and Social Needs*, LAW & CONTEMP. PROBS., Spring 2009, at 199, 209. Cf. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 778 (2007) (noting tendency to ignore victims who prefer mercy).

[294] See Appendix column H

[295] Bandes, *supra* note 184, at 1269.

[296] See Section III.C, *supra*.

for procedural justice arguments.[297] If victims' rights practices make the most estranged communities feel *worse*,[298] then the procedural justice rationale fails.

These two problems are worse in dead victim cases. First, secondary harm bearers often experience profound disappointment in the implementation of capital sentences. Death penalty jurisdictions may not be able to honor preferences for closure or mercy,[299] and ongoing involvement during the lengthy period between sentence and execution tests even the most resolute survivors.[300] Of course, all dead-victim cases don't involve the death penalty, but even longer sentences for other homicides—with endless parole hearings and post-conviction litigation—present similar problems.[301] Second, and as explained above, the equality objections are the most urgent in the dead-victim cases,[302] and it is therefore the victims' rights practices in those cases that represent the greatest threat to vulnerable communities' perception of equal treatment.

One might be tempted by a clever-seeming rejoinder: if the problem is that jurisdictions don't align with victim preferences well enough, then perhaps the answer is to give them even more influence. Maybe, but such influence aggravates all the *other problems* with existing practices in dead victim cases. It would push punishment even further towards a quasi-private

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[297] See *supra* note 292 and accompanying text.

[298] Cf. Bell, *supra* note 250, at 2114 (developing concept of estrangement).

[299] See Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447, 468 (2004) (families who favor mercy over severity); Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 687 (2010) (families waiting for execution).

[300] See Kovarsky, *infra* note 225 and accompanying text (noting length of post-conviction victim involvement); see also Susan L. Karamanian, *Victims' Rights and the Death-Sentenced Inmate: Some Observations and Thoughts*, 29 ST. MARY'S L.J. 1025, 1029 (1998) (discussing role of families during this period); Steiker & Steiker, *supra* note 299, at 687 (2010) (same).

[301] See Kathryne M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 460 (2016) (parole hearings); Cf. SUSAN HIRSCH, IN THE MOMENT OF GREATEST CALAMITY: TERRORISM, GRIEF, AND A VICTIM'S QUEST FOR JUSTICE 251 (2006) ("The penalty phase promises agency to victims but often delivers something quite different.").
Henderson, *supra* note 17, at 996-97 (explaining that the retaliatory preferences of victims diverge significantly over time).

[302] See Section III.C, *supra*.

process for redressing personal grievances, and away from a public process for punishing harm to political communities.[303] It would also amplify the inequality of victim worth.[304] Better to set clear limits on expectations, with victims having rights to dignified treatment and notice but not to control decision-making.

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In dead-victim cases, the consequentialist justifications in favor of existing victims' rights practices confront two insurmountable challenges. First, the fact that homicides involve long sentences means that victim involvement affects sentencing margins that have no deterrent or incapacitating effect. Second, the victim-worth problems defeat any legitimacy dividend that increased victim involvement might otherwise produce. Whatever the case for victims' rights, it's not a consequentialist one traditionally used to justify punishment practices.

V. INSTITUTIONAL IMPLICATIONS

American jurisdictions tend to award the families of dead victims the same rights that they afford to living ones,[305] even though the justifications for victim involvement across the two categories differ significantly. Part V lays out the best institutional responses to the mismatch. The first is the most obvious: victims' rights ought to be tiered, with survivors of dead victims having a pared-down menu of rights that correspond to their first-party interests. The rest reflect the view that criminal punishment is a poor site for addressing the manifold harm of secondary victimhood.

One global comment first. I urge sub-constitutional responses to mismatch. Even for the narrow slice of VIS activity that the Supreme Court addressed in the early 1990s,[306] *Payne* is unlikely to be revisited, let alone reversed. And even a *Payne* reversal wouldn't address victims' rights practices broadly; it would address only the admissibility of victim impact statements at capital trials. The response to mismatch must come in other forms: changes to state constitutions, statutes and regulations; changes to judicial

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[303] See Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance As A Justification for Punishment*, 50 WAYNE L. REV. 1115, 1165 (2005).

[304] See Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 225 (1995).

[305] See, e.g., Ala. Code § 15-23-60 (stating that certain family members may "assume" victims' rights of decedent).

[306] See *supra* notes 125 to 132 and accompanying text.

norms; and better articulated critiques of the victims' rights agenda itself.

A. Victims' Rights Should Be Tiered

In dead victim cases, normative support for victim involvement collapses—whether one is talking about deontic theories of victim participation[307] and retribution[308] or about consequentialist theories of deterrence,[309] incapacitation,[310] and legitimacy.[311] In light of this significant justificatory deficit, American jurisdictions should reconfigure victims' rights.

Recall from Part I that most American jurisdictions deal with victims' rights in three steps: (1) by specifying a set of people who have status as victims,[312] (2) by defining a menu of victims' rights,[313] and (3) by determining which people they empower to seek remedies.[314] Mismatch arises because there is a single bundle of "victims' rights" that attach to very different forms of crime-caused harm. People whose harm outlives the decedent either receive that bundle as first-party rights in virtue of their own victimhood,[315] or they "assume" the primary victim's rights as a kind of third party.[316]

The basic principle for reconfiguration is that primary and secondary harm bearers should have different bundles of

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[307] See Section III.A, *supra*.
[308] See Section III.B, *supra*.
[309] See Section IV.A, *supra*.
[310] See Section IV.B, *supra*.
[311] See Section IV.C, *supra*.
[312] See Section II.A, *supra*; see also Appendix column D (50-state survey of victim definitions).
[313] See Section II.B, *supra*.
[314] See Section II.C, *supra*.
[315] First, and at step (1), many jurisdictions simply define surviving harm-bearers as victims. For example, Michigan defines the "victim" category to include spouses, adult children, parents, guardians of minor children, siblings, grandparents, and guardians of the decedent. See Mich. Comp. Laws Ann. § 780.752(1)(m). Virginia defines the category to include "a spouse, parent, sibling, or legal guardian of … a person who … was the victim of a homicide." In these situations, there is an assignment of first-party rights to survivors of dead victims. See Va. Code Ann. § 19.2-11.01(B)(5).
[316] Second, and at step (3), other jurisdictions don't expressly award victim status to survivors of dead victims, but instead provide various mechanisms to assert or succeed to the rights that formally belong to the deceased victim. The easiest example is the CVRA, which states that "[i]n the case of a crime victim who is … deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter[.]" 18 U.S.C. § 3771(e).

rights. Surviving families (and estates) shouldn't have the exact same rights as living victims; those entities shouldn't belong to an undifferentiated first-person victim category or be assigned to exercise third-party rights on a dead victim's behalf. Survivors of dead victims should have *their own* (first-party) rights to notice and dignified treatment—for example, to notice that proceedings are pending, of significant developments, and that they own rights at all. In dead-victim cases, however, their rights should not extend to decision-making and influence.

Whether the mismatch results from a failure to differentiate first-party rights or wholesale assignment of third-party rights, both produce the problem I tackle here: a rights bundle selected for, and justified by, reference to materially different circumstances. The institutional fix should change that. Those owning rights in dead-victim cases should have *some of* the rights that belong to surviving victims, but not *all of* them.

B. Tiering the Rights

In what follows, I discuss *how* the rights should be tiered. Rights to dignity, respect, and protection are perfectly defensible as first-party rights of surviving harm bearers. Rights to involvement are not. The toughest issues surround victims' rights to restitution in criminal proceedings, although those are ultimately defensible on economic grounds.

1. Dignity, respect, and protection

There is no moral problem in retaining laws requiring that secondary victims be treated with dignity and respect. For example, the federal CVRA requires that crime victims "be treated with fairness and with respect for the victim's dignity and privacy."[317] California provides that "victims of crime should be treated with fairness and respect for their privacy and dignity, and should suffer the least amount of harm as a result of their interaction with the criminal justice system."[318] There is similar statutory language in the law of a great many states.[319] These hortatory provisions generally lack

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[317] 18 U.S.C. § 3771(a)(8).

[318] Cal. Const. art. I, § 28(a)(2).

[319] See, e.g. Ariz. Const. art. II, § 2.1(A) ("To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process."); Fla. Const. art. I, § 16(b)(1) ("The right to due process and to be treated with fairness and respect for the victim's dignity."); Ill. Const. art. I, § 8.1(a)(1) ("The right to be treated with fairness and respect for their dignity and privacy and to be free from harassment, intimidation, and abuse throughout the criminal justice process."); Ohio Const. art. I, § 10a(1)

enforcement beyond the more specific rules and remedies identified in the pertinent statutes,[320] but they may nonetheless ground worthy norms about how the criminal legal system accommodates the presence of privately harmed parties.[321]

Also worthy of protection are rights to reasonable protection from defendants. For instance, the very first right that the CVRA enumerates is the "right to be reasonably protected from the accused."[322] Many states have constitutional or statutory rules that protect victims from things like harassment, intimidation, and physical abuse.[323] Rights that exist to protect the safety and mental health of victim families—rights easily conceptualized as the first-party rights of the families themselves—do not implicate the equality-based problems specified in Section III.C.

2. Notice

Another group of first-party rights reasonably retained by surviving harm bearers involves notice. The first tranche of notice rights are rights to be notified about developments in cases—things like arrests, decisions to prosecute, trials, verdicts, post-conviction proceedings, parole decision-making, clemency, and executions. Rights to notice of this sort are core principles of the federal CVRA.[324] They're also an essential piece of state victims' rights laws, with notable examples including Arizona,[325] California,[326] Florida,[327] Illinois,[328] Michigan,[329] New York,[330] and Texas.[331]

("to be treated with fairness and respect for the victim's safety, dignity and privacy").

[320] Cf. Mary Margaret Giannini, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws*, 34 IND. L. REV. 1157, 1182 (2001) (advocating for change in Indiana on this ground).

[321] See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 63-72 (2002) (exploring how change in laws affect belief structures).

[322] 18 U.S.C. § 3771(a)(1).

[323] *See*, *e.g.*, Colo. Rev. Stat. § 24-4.1-302.5 (protecting "[t]he right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process"); Nev. Const. art. I, § 8A(1)(b) (entitling victims to the right "to be reasonably protected from the defendant and persons acting on behalf of the defendant").

[324] See 18 U.S.C. § 3771(a)(2) & (c)(1).

[325] *See* Arizona Constitution, Article II, Section 2.1.(A); Arizona Revised Statutes §§ 13-4405 & 4415.

[326] *See* California Constitution, Article I, § 28(b)(6); California Penal Code §§ 679.02(b)(14), 1191.15(a), & 1191.16.

[327] *See* Florida Constitution, Article I, § 16(b); Florida Statutes §

The other tranche of first-party notice rights reasonably retained by surviving harm bearers involves not notice of some case development, but rather notice of the victims' rights menu itself. In other words, it is analytically sound—even in dead-victim cases—for states to insist that the decedent's survivors be told that they have things called victims' rights, and what those rights are. The federal CVRA lavishes considerable statutory language on this principle, including a provision that entitles victims "to be informed of" victims' rights specified in various parts of the U.S. Code.[332] It also includes a best efforts provision, requiring that prosecutors and other federal employees do the best they can to see that "crime victims are notified" of the rights menu that the CVRA specifies.[333]

Again, what both notice-right tranches share, and what they have in common with the rights mentioned in Section V.B.1, is that they can be intelligibly justified as first-party rights. Even secondary harm bearers have real interests in information about the pace and content of legal proceedings, and the notice rights that reflect such interests don't create victim-worth problems.

3. Restitution

I sound a more ambivalent note about criminal restitution generally, although those concerns don't strongly implicate a distinction between living- and dead-victim cases. In the criminal sentencing context, restitutionary remedies order a victimizer to compensate a victim for financial loss.[334] Restitution has been a part of criminal punishment practice for a long time, and it became a meaningful part of federal sentencing after the victims' rights push in the early 1980s.[335] I do not mean to endorse punitive versions of restitution—nor expansive, compensatory restitution at all, really. Instead, I make only the more modest observation that there's less reason

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960.001(b).

[328] *See* Illinois Constitution, Article I, Section 8.1(a)(2); Rights of Crime Victims and Witnesses Act, 725 ILCS 120 § 4.

[329] *See* Michigan Constitution, Article I, § 24(d); Michigan Compiled Laws §§ 780.755, 780.756, 780.758, 780.763, 780.768.

[330] *See* New York Executive Law, Article 23, §§ 640(1) & 641(1), New York Criminal Procedure Law §§ 440.50(1) & 380.50(1).

[331] *See* Texas Code of Criminal Procedure, Articles 56A.051 & 56A.053.

[332] 18 U.S.C. § 3771(a)(10).

[333] 18 U.S.C. § 3771(c)(1).

[334] See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97 (2014) (taking issue with this development).

[335] See Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688 (2009).

to distinguish restitutionary remedies based on whether the primary victim is living or dead.

I strike this ambivalent tone because restitutionary remedies are, at least in the abstract, better conceptualized as tort remedies that are stapled to the criminal process. As Judge Richard Posner wrote twenty-five years ago, "Functionally, the [federal MVRA] is a tort statute[.]"[336] Restitution isn't a fine, and although I understand the efficiency-based justification for consolidating all facets of a dispute into a single proceeding,[337] I remain uneasy about blurring lines between the public elements of criminal punishment and the private elements of loss-allocation.[338]

Having copped to my ambivalence about these restitutionary remedies generally, there's no reason to distinguish between living-victim and dead-victim cases. The fundamental purpose of restitutionary remedies—at least in criminal cases—is to compensate victims for loss,[339] and estates or family members have easily justified first-party interests in compensation for the primary victim's death. These estates or families would presumably be entitled to compensatory remedies in separate tort action anyways.[340]

At first glance, the MVRA seems to offer a narrow vision of restitutionary compensation. In dead-victim cases, it provides expressly that victims be compensated only for funeral and related expenses.[341] But remember that the MVRA provides that families and estates can "assume" restitutionary rights,[342] and that assumption of such rights means that they unlock restitutionary entitlement to income that the dead victim lost on account of their death.[343] Many states take a more direct route to restitutive victim compensation, awarding broad first-person rights to secondary harm bearers. For example, the California constitution provides, "[A]ll persons who suffer

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[336] United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999).
[337] See *id.*
[338] See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 793 (1997).
[339] See Lollar, *supra* note 334, at 95, 101.
[340] See *Bach*, 172 F.3d at 523.
[341] 18 U.S.C. 3663A(b)(3).
[342] *Id.* at (a)(2).
[343] *Id.*at (b)(2)(C). The fact that the MVRA eschews a first-party rights approach in favor of an approach that assigns to survivors the rights that belonged to the dead victims produces an odd result: at least under the plain text of the statute, they can't recover costs associated with their participation in the legal proceedings. They could only recover the costs that the dead victim incurs, which are necessarily zero. *Id.* at (b)(4).

losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer."[344] In Florida, the next of kin is treated like the decedent and is therefore entitled to "restitution in every case and from each convicted offender for all losses suffered, both directly and indirectly, by the victim as a result of the criminal conduct."[345] Florida statutes, moreover, provide broad restitutionary rights for any "[d]amage or loss caused directly or indirectly by the defendant's offense."[346]

No matter how the statutes get there, they usually end up awarding surviving harm bearers with a way to recover a compensatory measure of economic loss. As long as the amount awarded is conceptualized as a first-party loss experienced by the secondary victim, there is no reason to distinguish between living and dead-victim cases.

4. Involvement

My final observation about the existing rights bundle should be obvious. Secondary victims should have limited rights to *active* involvement—maybe none at all—when the primary victim is dead. Secondary victim input should not be required for plea negotiations, nor during the trials and post-conviction proceedings that follow. Secondary victims should not have rights to offer, and usually shouldn't offer, victim impact testimony at sentencing. And they should not have a say in the scheduling of executions.

These institutional changes flow inexorably from the normative positions I take in Parts III and IV. There is little to justify victim involvement in dead-victim cases. More precisely, the expressive justifications for victim participation don't work the same way when the primary victim is dead,[347] the utilitarian justifications vanish at large sentencing magnitude,[348] and unequal victim treatment is a nearly insurmountable moral problem.[349]

None of this is to suggest that the moral interests favoring involvement are zero. Surviving family members, for example, certainly bear harm from the killing of a loved one. For that reason, they have first-party interests, both expressive and instrumental, in participation. But those moral interests are different and smaller than those attached to the experience of a

[344] Cal. Const. art. I, § 28(b)(13) (emphasis added).
[345] Fla. Const. art. I, § 16(b)(9).
[346] Fla. Stat. § 775.089(1)(a)(1).
[347] See Section III.A, *supra*.
[348] See Section IV.A, *supra*.
[349] See Section IV.B, *supra*.

primary harm bearer—a surviving victim.[350] In view of the considerable tension between victim involvement and a public approach to state punishment,[351] the differential moral accounting is material to institutional design.

Moreover, dead-victim scenarios present an incompatible-preference problem. In most living-victim cases, the primary victim's preferences dominate the preferences of other harm bearers. But in dead victim cases, the preferences of surviving family can diverge, sometimes substantially.[352] That divergence means that facilitating victim involvement can be a zero-sum game. These problems are particularly vexing in death penalty cases,[353] where prisoners will often have lengthy death row stays.[354] Moving those prisoners forward in an execution queue will often depend on family-member preferences, and different members often develop different preferences over time.[355]

I don't dwell on this recommendation too much, because I devoted the entirety of Parts II and III to normative support for it, and because the recommendation itself is mercifully simple. In dead-victim cases, states should simply eliminate most rights to influence and involvement that now redound to assignees and secondary harm bearers.

C. Recovery Against The State

One of the most surprising features of victims' rights law is, when rubber hits road, the degree to which American jurisdictions shirk meaningful state accountability for victim caretaking. One major obstacle to meaningful state accountability is that the fact that the state would be accountable for *too much*. Shrinking the rights available to secondary victims would, ironically, help close the accountability deficit. So, in conjunction with the recommendations in Subsections V.A and V.B, American jurisdictions should permit remedies against the state when they fail to honor the victims' rights that they enumerate.

To understand the issue, look no further than the CVRA, which bars recovery against the state for victims' rights violations:

> Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to

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[350] See Section III.A.2, *supra*.
[351] See *supra* notes 173 to 181 and accompanying text.
[352] See Rachel King, *Why A Victims' Rights Constitutional Amendment Is A Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357, 379 (2000).
[353] Logan, *supra* note 182, at 750.
[354] See *supra* notes 205 to 206 and accompanying text.
[355] See King, *supra* note 352, at 370.

> imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.[356]

Similar safeguards are present throughout state statutes.[357] (These provisions appear in Column H of the Appendix.) They might refute duties, bar causes of action, or preclude damages liability. Whatever the specific combination, however, the point is always to make the state unaccountable for its nominal rights guarantees.

These provisions are morally dubious, for at least two reasons. First, and more obviously, if a state is going to create rights against it, it shouldn't categorically bar legal accountability for its own failure to honor them; there should be at least some enforcement. Second, these provisions reflect a strange understanding of victimization. It is an understanding of victimization that blinds itself to the social and economic constraints on a victimizer's choices. If criminal victimization has structural causes, then the state should have more accountability for the institutional response, not less.[358]

Surely, one impediment to such accountability is the breadth of rights for which the state must account. The smaller the scale of rights ownership, the less intimidating the specter of morally desirable enforcement. Because dead-victim cases award the whole victims' rights menu to a large and poorly marked set of harm bearers, there is an especially large cost to accountability. Paring down rights in dead-victim cases therefore produces a counterintuitive outcome: it gets easier to hold the state's feet to the fire.

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[356] 18 U.S.C. § 3771(c)(6).

[357] See, e.g., Ala. Const. art. I, § 6.01(b) ("Nothing in this amendment or in any enabling statute adopted pursuant to this amendment shall be construed as creating a cause of action against the state or any of its agencies, officials, employees, or political subdivisions."); Ill. Const. art. 1, § 8.1(d) ("Nothing in this Section or any law enacted under this Section creates a cause of action in equity or at law for compensation, attorney's fees, or damages against the State, a political subdivision of the State, an officer, employee, or agent of the State or of any political subdivision of the State, or an officer or employee of the court.").

[358] This observation, of course, has broader implications for the way we funnel social responses to victimhood through criminal process—not just in dead-victim cases. If victimhood is environmentally caused, at least in part, then there is extra normative urgency behind more public, socialized response of victim compensation. I nonetheless forego this line of argument because it works the same way, at least largely, in living-victim cases.

CONCLUSION

If criminal punishment is to be a public encounter between the state and an offender, then modern levels of victim influence are already an awkward fit. Familiar justifications for these victims' rights practices collapse in dead-victim cases. Deontologically speaking, secondary harm bearers cannot "assume" dead-victim interests in expression and confrontation, their participation does not calibrate systemic responses to retributively significant harm, and the inevitable influence of social status undermines commitments to victim equality. From a consequentialist perspective, there is no (plausible) causal story in which secondary victim involvement promotes deterrence or incapacitation, and they can be no legitimacy dividend when the law sensitizes punishment to the social worth of victims.

For these reasons, the victims' rights practices and their justifications are mismatched when the primary bearers of interpersonal harm are dead. The mismatch persists because American jurisdictions continue to assign the same bundle of rights to anyone formally denominated as a victim, even if those victims are not the primary bearers of interpersonal harm. The response is straightforward: victims' rights should be tiered. Living victims should have one bundle, and those asserting rights in dead-victim cases another. The latter's bundle should turn on their first-party interests, and not on some third-party theory of rights that belong to decedents.