

Fundamentals Of Victims' Rights: A Brief History of Crime Victims' Rights in the United States

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I. Victims' Rights at Common Law

At common law, it was well recognized that victims played a central role in the criminal justice process. The practice of private prosecution, whereby the crime victim initiated and controlled criminal prosecutions, dates back to the Middle Ages.¹ Although notions of prosecuting on behalf of the Crown began in the eleventh and twelfth centuries, even at that time most crime was viewed as a wrong against the individual victim rather than against the King or society as a whole.² A crime victim's right to initiate and conduct criminal proceedings remained the norm in England well into the nineteenth century.³ The rationale for this victim-centered approach to criminal justice was the view that crime was a harm inflicted primarily against the individual.⁴ Gradually, this view shifted and crime was seen as a harm against the individual and the state.⁵ Although no longer the norm, private prosecution continues in England today.⁶

II. Victims' Rights in the American Criminal Justice System

As with English common law, the concept of private prosecution became part of early American jurisprudence, and the American criminal justice process began as one in which crime victims controlled the investigation and prosecution of the crimes against them.⁷ This system of victim as private police and prosecutor existed as the norm in the United States through the 19th century.⁸ The United States Supreme Court has acknowledged this private prosecution model as the foundation of our criminal justice system.⁹

By the early 20th century, however, the American system had evolved to one in which crime victims were no longer central players in most jurisdictions, and a public prosecution system became the norm.¹⁰ The victims' role progressively reduced until they essentially had no formal legal status beyond that of witness or piece of evidence.¹¹ At one point, the United States Supreme Court observed in dicta that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."¹²

Starting in the late 1970s, a strong victims' rights movement developed, and changes began to be made to state constitutions, statutes, and rules, as well as federal statutes and rules, to define and afford explicit legal status to crime

victims.¹³ This movement emerged in response to the observation of many that somewhere along the way, the American criminal justice system had become “appallingly out of balance,” “serv[ing] lawyers and judges and defendants, [while] treating the victim with institutionalized disinterest.”¹⁴

Since then, 34 states have amended their constitutions to afford victims’ rights,¹⁵ and all 50 states along with the District Columbia and the federal government have enacted statutory and rule-based protections for victims.¹⁶ The scope of these protections varies considerably from jurisdiction-to-jurisdiction, but all are aimed at re-integrating the victim into the criminal and juvenile justice systems in a manner more closely aligned with the more victim-centric approach in existence at the founding of the American justice system.¹⁷

¹ See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol’y 357, 359 (1986); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 9 (2007).

² See *id.*

³ See Cardenas, *supra* note 1, at 360; Michael E. O’Neill, *Private Vengeance and the Public Good*, 12 U. Pa. J. Const. L. 659, 665-73 (2010).

⁴ See Cardenas, *supra* note 1, at 359-60.

⁵ See, e.g., 4 William Blackstone, *Commentaries on the Laws of England* *5 (“In all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.”); Cesare Beccaria, *On Crimes and Punishments* 8 (David Young trans., 1986) (“Here then, is the foundation of the sovereign’s right to punish crimes: the necessity of defending the depository of the public welfare against the usurpations of private individuals.”).

⁶ See O’Neill, *supra* note 3, at 673.

⁷ See *id.* at 673-77; Davis, *supra* note 1, at 9-10; Douglas E. Beloof and Paul G. Cassell, *The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus*, 9 Lewis & Clark L. Rev. 481, 484-87 (2005); Cardenas, *supra* note 1, at 366-68.

⁸ See O’Neill, *supra* note 3, at 673-77; Roger A. Fairfax, *Delegation of the Criminal Prosecution of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 422 (2009); Beloof and Cassell, *supra* note 7, at 486-87; see also, e.g., Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 49 (1995) (observing that by the end of the 19th century, courts of last resort in 15 states had affirmatively sanctioned privately funded prosecutions); *People v. Black*, 282 N.Y.S. 197, 201 (N.Y. Cnty Ct. 1935) (allowing prosecution of misdemeanor case by non-attorney inspector and noting: “If it were intended that every time a rabbit be snared or a frog speared after dark that the heavy artillery of the offices of the Attorney General or the district attorney be wheeled into action, then the said Legislature was flying in the face of common sense and upsetting a century-old institution.”). Up through the 19th century, another norm for crime victims was the navigation of one formal criminal justice system regardless of the age of the offender; the first juvenile court system in the country was adopted in 1899, bringing changes to the societal concept of justice when the offender was a juvenile. See *Application of Gault*, 387 U.S. 1, 14-16 (1967) (exploring the historical foundation of the juvenile justice system and observing that the early reformers believed that “society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career[;]’ . . . [and] [t]he rules of criminal procedure were therefore altogether inapplicable”).

⁹ See, e.g., *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring) (“[I]n England, in the American Colonies, and in the United States, private persons regularly prosecuted criminal cases.”); *United States v. Marion*, 404 U.S. 307, 329 n.2 (1971) (Douglas, J.,

concurring) (noting private prosecution history and quoting 1 J. Stephen, *History of the Criminal Law of England* 493 (1883)).

¹⁰ See O'Neill, *supra* note 3, at 681-82.

¹¹ See O'Neill, *supra* note 3, at 681-82; Cardenas, *supra* note 1, at 371-72. This transformation led one scholar to observe in 1976 that the crime victim was "seen at best as 'the forgotten man' of the system." William F. McDonald, *Toward a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 Am. Crim. L. Rev. 649, 650 (1976). Scholars have offered different explanations for what caused this evolution. See, e.g., O'Neill, *supra* note 3, at 681-83 (offering several plausible explanations, including "the democratic impulse, economic factors, or the mounting complexity of the law"); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss. L.J. 515, 549-50 (1982) (arguing that the present "'monopoly' of criminal prosecution by the district attorney is more the result of a misunderstanding of history than of explicit legislative direction"). See generally Douglas E. Beloof, Paul G. Cassell and Steven J. Twist, *Victims in Criminal Procedure* 11-17 (3d ed. 2010) (excerpting from scholarly works that provide various explanations).

¹² *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that the victim of criminal non-payment of child support lacked standing to challenge the constitutionality of the state's refusal to prosecute the non-paying parent). Nevertheless, today some states still permit victims to conduct private prosecution of crimes. See O'Neill, *supra* note 3, at 683-99 (discussing examples and noting some limits and restrictions). Two years after the *Linda R.S.* opinion, Congress adopted the Federal Rules of Evidence, and Rule 615 as initially drafted allowed for exclusion of crime victims from the courtroom unless their "presence is . . . essential to the presentation of a party's cause[;]" thereafter, a majority of states adopted rules that were similar or identical to Federal Rule 615. Beloof and Cassell, *supra* note 7, at 498, 502. In practice, these rules of evidence "effectively exile[d] most crime victims from the courtroom." *Id.* at 502.

¹³ See generally Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 Utah L. Rev. 861, 865-69 (2007) (discussing the crime victims' rights movement that started in the 1970s); Goldstein, *supra* note 11, at 516-17, 521-29 (discussing the then new crime victims' movement and experimental victim-oriented programs and projects).

¹⁴ 1982 President's Task Force on Victims of Crime, Final Report vi (1982).

¹⁵ See Ala. Const. Amend. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16(b); Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. 15, § 15; La. Const. art. I, § 25; Md. Const. Decl. of Rights, art. 47; Mich. Const. art. I, § 24; Miss. Const. art. III, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8; N.J. Const. art. I, ¶ 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; N.D. Const. art. I, § 25 Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, § 42; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; S.D. Const. art. VI, § 29 Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

¹⁶ See, e.g., 18 U.S.C. § 3771 (the Crime Victims' Rights Act); Ala. Code §§ 15-23-60 to -84; Alaska Stat. Ann. §§ 12.61.010-900; Ariz. Rev. Stat. Ann. §§ 13-4401 to -4441; Ark. Code Ann. §§ 16-90-1101 to -1115; Cal. Penal Code §§ 679-680, 1102.6; Colo. Rev. Stat. §§ 24-4.1-301 to -304; Conn. Gen. Stat. Ann. §§ 54-85b to -85d, 54-85f to 85g, 54-86d to -86e, 54-91c, 54-126a, ; Del. Code Ann. tit. 11, §§ 9401-9424; D.C. Code §§ 23-1901 to -1906; Fla. Stat. Ann. §§ 960.001, .0015, .0021; Ga. Code Ann. §§ 17-17-1 to -16; Haw. Rev. Stat. Ann. §§ 801D-1 to -7; Idaho Code §§ 19-5302 to -5307; 725 Ill. Comp. Stat. Ann. 120/2-120/9; Ind. Code Ann. §§ 35-40-1-1 to -14-4; Iowa Code Ann. §§ 915.1-.100; Kan. Stat. Ann. § 74-7333; Ky. Rev. Stat. Ann. §§ 421.500-.576; La. Rev. Stat. Ann. §§ 46:1841-:1846; Me. Rev. Stat. Ann. tit. 17-A, §§ 1171-1177; Md. Code Ann., Crim. Proc. §§ 11-101 to -619; Mass. Ann. Laws ch. 258B, §§ 1-13; Mich. Comp. Laws

Ann. §§ 780.751-.834; Minn. Stat. Ann. §§ 611A.01-.06; Miss. Code Ann. §§ 99-43-1 to -49; Mo. Ann. Stat. §§ 595.200-.215; Mont. Code Ann. §§ 46-24-101 to -218; Neb. Rev. Stat. Ann. §§ 81-1843 to -1851; Nev. Rev. Stat. Ann. §§ 176.015(3)-(4), 178.569-.5698; N.H. Rev. Stat. Ann. § 21-M:8-k; N.J. Stat. Ann. §§ 52:4B-34 to -38; N.M. Stat. Ann. §§ 31-26-1 to -16; N.Y. Crim. Proc. Law §§ 380.50(2), 390.30(3), 440.50; N.Y. Exec. Law §§ 640-649; N.C. Gen. Stat. §§ 15A-825, -830 to -841; N.D. Cent. Code §§ 12.1-34-01 to -07, 12.1-35-01 to -06; Ohio Rev. Code Ann. §§ 2930.01-.19; Okla. Stat. Ann. tit. 21, §§ 142A-142B; Or. Rev. Stat. §§ 147.410-.430, .500 - .575; R.I. Gen. Laws §§ 12-28-1 to -13; S.C. Code Ann. §§ 16-3-1505 to -1565; S.D. Codified Laws §§ 23A-28C-1 to -9; Tenn. Code Ann. §§ 40-38-101 to -303; Tex. Code Crim. Proc. Art. 56.01-.15; Utah Code Ann. §§ 77-37-1 to -4, 77-38-1 to -14; Vt. Stat. Ann. tit. 13, §§ 5301-5321; Va. Code Ann. §§ 19.2-11.01 to .2; Wash. Rev. Code Ann. §§ 7.69.010-.032, .040, 7.69A.010-.050; W. Va. Code §§ 61-11A-1 to -8, 62-12-23; Wis. Stat. Ann. §§ 950.01-.055; Wyo. Stat. Ann. §§ 1-40-201 to -209.

¹⁷ See generally Cassell, *supra* note 13, at 865-70 (discussing events leading up to the passage of the federal Crime Victims' Rights Act in 2004); U.S. Department of Justice, Office for Victims of Crime, *New Directions From the Field: Victims' Rights and Services for the 21st Century* 3-37 (1998), available at https://www.ncjrs.gov/ovc_archives/directions/pdfxt/direct.pdf (examining the progress made in the previous two decades on the establishment of victims' rights laws and policies in the country and identifying recommendations to ensure the expansion and enforcement of victims'

rights in both the adult and juvenile justice systems).

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