# THE CRIME VICTIM'S RIGHT TO ATTEND THE TRIAL: THE REASCENDANT NATIONAL CONSENSUS

*by*
*Douglas E. Beloof*[*]
*Paul G. Cassell*[**]

*Professors Beloof and Cassell contend that crime victims should have an unequivocal right to attend a criminal trial, even in cases where they will be called as witnesses. A victim's right to attend trial has strong historical support, as at common law victims attended trial as private prosecutors. More recently, crime victims' rights legislation passed in the majority of states recognizes the victim's right to attend. Nothing in the Constitution prevents victims from attending trial, and strong public policy reasons support such an approach. Observing the trial can have import therapeutic and other benefits for victims. Any risk of prejudice to a defendant from the possibility of a victim "tailoring" testimony to that of other witnesses can be solved through such means as requiring the victim to testify first and permitting thorough cross-examination by defense counsel.*



[*] Associate Professor of Law, Lewis and Clark Law School and Director, National Crime Victim Law Institute. Professor Beloof extends his thanks to Laura Baldwin for excellent research assistance. All views expressed in this Article regarding federal law are solely those of Professor Beloof.

[**] Professor of Law, S.J. Quinney College of Law at the University of Utah and U.S. District Court Judge for the District of Utah. Professor Cassell extends his thanks to the S.J. Quinney College of Law Research Fund and the University of Utah Research Committee, as well as to Patricia Cassell, Ann Bauer, Tim Conde, Justin Starr, Kimberley Hansen, Shane Krauser, Heidi Nestel, and John Nielsen. Professor Cassell co-wrote this Article as a law professor, not as a judge, and intends no comment on any pending cases and makes no positive commitment on any legal issues that may arise before him.

## I. INTRODUCTION

Crime victims are keenly interested in attending the trials of their victimizers. Yet in recent years, they have often been kept out of the courtroom as potential witnesses in the case. Like other witnesses, the argument runs, victims must be excluded or "sequestered" from the courtroom to keep them from tailoring their testimony to that of other witnesses.

This Article explores the law and policies surrounding victim exclusion from the courtroom. It concludes that victims should be permitted to remain in the courtroom as an exception to the rule excluding witnesses. Historically, vic-

tims could attend trials, and recently a victim's right to attend has re-emerged from victims' rights legislation passed around the country. The Constitution does not forbid this approach, and sound policy requires giving victims the chance to see whether justice is being done at a trial.

This Article proceeds in three parts. Part I explores the history of victims attending trials. America imported the English tradition of private criminal prosecution. Victims frequently filed their own criminal charges as private prosecutors and thus could attend trials as a party to the case. For much of the nineteenth century, victims clearly had a right to attend trial as private prosecutors. But toward the end of the century, as prosecution effectively became an exclusive state function, some states began excluding victims. Victims were increasingly viewed as mere witnesses without a cognizable interest in the case. This trend culminated in the 1970s with the adoption of Federal Rule of Evidence 615 and subsequent parallel rules in the states. Because these rules excluded all witnesses without any special exemption for crime victims, many victims were barred from watching trials even when they had compelling reasons to attend. This unfairness has led to a backlash, with many states (and recently Congress) passing crime victims' bills of rights guaranteeing victims the right to attend trials in all but unusual circumstances. Thus, the victim's right to attend trial has now re-emerged to track the historical practice.

In light of this history, Part II concludes that a defendant's constitutional rights do not require exclusion of the victim from trial. Nothing in the Constitution suggests that victims must be excluded. At the time the Founders drafted the Constitution, they would have envisioned victims attending trials as private prosecutors. Moreover, to the extent any intent can be gleaned from the text, the Constitution suggests that victims would be inside the courtroom where a defendant would have an opportunity to "confront" them at a "public trial." There is, in short, no constitutional bar to victims observing the trial.

Because the Constitution creates no barrier to victims attending trials, the question of victim attendance is simply one of policy. Part III advances the justifications for allowing victims to attend. Observing a trial can have important therapeutic and other important benefits for victims. Weighed against this is some theoretical possibility of prejudice to defendants from emotional displays by victims or victim-witnesses conforming their testimony to that given by other witnesses. Given the ample means of responding to these problems—including exclusion of misbehaving victims, requiring victims to testify first, vigorous cross-examination by defense attorneys, and cautionary instructions to the jury—there is no persuasive reason for excluding victims from the courtroom. Indeed, victims can facilitate the truth-seeking process by assisting prosecutors and reporting lies told by defendants or other witnesses. For all these reasons, victims should be exempt from witness sequestration rules and have the right to attend trial.

## II. THE HISTORY OF VICTIMS ATTENDING TRIALS.[1]

For much of American history, victims have attended criminal trials. While any dividing line can be arbitrary and over-simplified, it may be convenient to divide American history into four phases. In the first phase, extending from the founding of the nation through about 1900, victims were often private prosecutors of their own criminal actions. During this period of time, because victims were essentially parties to the case, they fell outside the rules excluding witnesses during trial. As private prosecution diminished significantly in the later part of the nineteenth century, a new approach developed. In the second era—from about 1900 through 1975—the victim's involvement in a criminal case was essentially limited to assisting the public prosecutor. In that subordinate role, victims were often admitted to trials, but the courts increasingly looked to whether victims would help the prosecutor, not whether victims had some independent reason to attend the trial. A third era began in 1975, with the adoption of Federal Rule of Evidence 615 and parallel provisions in many states. The federal sequestration provision made no special provision for victims, treating them like any other witness in the case. As a result, from about 1975 through 1982, victims were often forced to sit outside the courtroom during criminal trials. The apparent unfairness of requiring victims to stand outside of courtrooms lead to a backlash, most prominently espoused in the 1982 *President's Task Force on Victims of Crime: Final Report*. The Task Force called for victims to be exempted from the operation of witness sequestration rules. In the most recent era dating from the release of that report, most states have enacted some significant protection for a victim's right to attend a trial. Thus, a national consensus has re-emerged that crime victims should attend criminal trials.

### *A. Victims as Prosecutors and Parties: The Founding Through 1900*

From the early days of the Republic through about 1900, victims were entitled to attend criminal trials. Because victims could act as private prosecutors and bring their own prosecutions, they could attend criminal trials as parties. We discuss, first, the history of private prosecution and then, second, the exemption of private prosecutors from witness sequestration rules.

#### *1. The Early American Tradition of Private Prosecution*

The English concept that a crime harmed both the state and the victim crossed the ocean to the American colonies. In his influential *Commentaries on the Laws of England*, Blackstone explained that, "[i]n 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."[2] Proceeding on the basis that crime harms individuals, early American criminal

[1] A disclaimer is appropriate at the outset: we do not claim to be professional historians and have therefore relied on secondary authorities in assembling our history. We encourage others to investigate the history of this interesting subject.

[2] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769).

prosecutions were (as in England[3]) often brought by the victim—a private prosecutor—rather than by a government agency. Histories of eighteenth century criminal justice in the United States—including the period before, during, and after the framing of the Constitution—reveal that victims directly prosecuted criminal cases. As Professor McDonald has recounted, "Even after identification and arrest, the victim carried the burden of prosecution. He retained an attorney and paid to have the indictment written and the offender prosecuted."[4] The system of private prosecution was preferred because it avoided the tyranny of government prosecutors and the expense of providing for public prosecution.[5] Legal scholars of the colonial period report that private prosecution was the dominant form of prosecution.[6]

Professor Nelson's history of a typical Massachusetts county between 1760 and 1810 will serve to illustrate the point.[7] He reports that criminal trials were "in reality contests between subjects rather than contests between government and subject."[8] For example, "the colonial government was not the real party in interest in theft cases" because the sanction was treble damages awarded directly to the victim.[9] Other histories of colonial and post-constitutional criminal justice generally acknowledge the prevalence of private prosecution.[10]

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[3] *See* SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 249 (Lenox Hill Pub. 1973) (1883). Private prosecution continues to be the law in England today. *See* L.H. LEIGH, J.E. HALL WILLIAMS, 3 INTERNATIONAL ENCYCLOPAEDIA OF LAWS, CRIMINAL LAW, UNITED KINGDOM 177 (1993).

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

[5] *Id*. at 653.

[6] *Id*. at 665 n.78. Some of these studies are summarized in Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, The District Attorney, and American Legal History*, 30 CRIM. & DELINQ. 568, 571−72 (1984). *See also,* EDGAR MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620-1692, 92–93 (1993) ("responsibility for prosecuting the case was usually up to the defendant's accusers. . . The accusers. . . told their story, called witnesses, and presented any other evidence relevant to the case.").

[7] William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 451 (1967).

[8] *Id*. at 468.

[9] *Id*.

[10] *See, e.g.*, Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1324−25 (2002); Richard Gaskins, *Changes in the Criminal Law in Eighteenth-Century Connecticut*, 25 AM. J. LEGAL HIST. 309 (1981); Michael S. Hindus, *The Contours of Crime and Justice in Massachusetts and South Carolina, 1767−1878*, 21 AM. J. LEGAL. HIST 212 (1977); William H. Loyd, Jr., *The Courts of Pennsylvania in the Eighteenth Century Prior to the Revolution*, 56 U. PA. L. REV. 28, 46 (1908); Nelson, *supra* note 7, at 450; Erwin C. Surrency, *The Evolution of an Urban Judicial System: The Philadelphia Story, 1683−1968*, 18 AM. J. LEGAL HIST. 95 (1974). *See also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 96 (Anchor Books ed., 1969) ("the officers of the public prosecutor's office are few, and the initiative in prosecutions is not always theirs;"). One possible counter-example we have been able to locate is Professor Spindel's history of the criminal process in North Carolina from 1720 to 1740. She reports that North Carolina had a person other than the victim who conducted prosecution, but the role of this

This practice of private prosecution extended well into the nineteenth century. The most thorough study of private prosecution in the United States—Professor Steinberg's historical review of nineteenth century prosecution in Philadelphia—reveals that direct victim prosecution of some types of crime continued until at least 1875.[11] As Steinberg concluded, victims typically prosecuted cases themselves:

> The discretion of the private parties in criminal cases was not checked by the public prosecutor. Instead, the public prosecutor in most cases adopted a stance of passive neutrality. He was essentially a clerk, organizing the court calendar and presenting cases to grand and petit juries. Most of the time, he was superceded either by a private attorney or simply let the private prosecutor and his witnesses take the stand and state their case.[12]

Steinberg cites numerous examples of private prosecutors handling cases in the daily Philadelphia criminal docket.[13] Thus, in Philadelphia (the only city for which a comprehensive nineteenth century history has been compiled) private prosecution continued for decades after the American Revolution.[14]

Steinberg's detailed historical account of the routine functioning of criminal justice in a major American city is important because it discredits earlier conclusions made by a few authors that public prosecutors functionally replaced private prosecutors shortly after the American Revolution.[15] The historical error can be attributed to the fact that other authors had looked to the statutory creation of the office of public prosecutor as conclusive proof of the end of private prosecution. As has been recognized in the recent literature,[16] Steinberg's break from the previous scholarship focusing on public prosecution stemmed from his shift in sources. The early studies concentrating on legislation that established the office of the public prosecutor "naturally overemphasized the importance of the public prosecutor, since a private prosecution system inherited from the English common law would not appear in legislation. Examinations of prosecutorial practice were cursory and thus skewed."[17] Scholars before Steinberg tended to rely on the most readily accessible information relating to criminal prosecution. This information "predictably con-

person and the role of the victim as private prosecutor is not explored in any detail. *See* Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720−1740*, 25 AM. J. LEGAL HIST. 141 (1981).

[11] ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800−1890, 56-78 (1989).

[12] *Id.* at 82.

[13] *See, e.g.*, *id.* at 49, 50, 51, 72, 63−69.

[14] *Id*. at 25, 224−32.

[15] For illustrations of this flawed view, see Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 371 (1986); ABRAHAM GOLDSTEIN, ENCYCLOPEDIA OF CRIME & JUSTICE: HISTORY OF THE PUBLIC PROSECUTOR 1287 (1983).

[16] *See* Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* Morrison v. Olsen *and the Framers' Intent*, 99 YALE L.J. 1069, 1072 n.14 (1990) (helpfully summarizing this conclusion).

[17] *Id.*

cerned the exceptional, well-publicized cases conducted by public prosecutors, not the vast majority of mundane cases, involving scant paperwork and handled through the simple procedures of private prosecution."[18]

While private prosecutions were important, the office of the public prosecutor also developed in the early nineteenth century. The rise of the public prosecutor can be traced to the problem of abandonment of cases by private prosecutors.[19] According to historian Robert Ireland, "By 1820, most states had established local public prosecutors . . . .Yet, because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century."[20] One reason private prosecution endured so long was because of citizen distrust of the government and concern over the assumption of prosecutorial power by the government.[21] But another reason was the need for victims and their families to secure legal representation commensurate with that of defendants. Ireland notes that:

> [t]he presence of able defense attorneys whose collective talent clearly surpassed that of the public prosecutor often deepened the dilemma of victims of crime or their survivors who desired legal retribution. This imbalance almost compelled those who sought criminal convictions to hire private attorneys to help prosecute if the prosecution was to have any chance to secure a conviction.[22]

Ireland conducted a review of sources and determined that privately funded attorneys were most common in murder cases and cases of sexual assault and occurred throughout the 1800s.[23]

A brief note about the federal system is in order. While private prosecution is firmly entrenched in the history of the colonies and the states, it was not extensively used in the federal system. One important reason is that the early federal criminal code established "crimes against the Federal Government *qua* Federal Government and thus, public officials prosecuted these public crimes."[24] Moreover, from the very inception of the federal system, starting with the Judiciary Act of 1789, public prosecutors—the Attorney General along with U.S. Attorneys—were available to prosecute federal cases.[25] Private citizens, however, still had some limited involved in federal criminal prosecutions.

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[18] *Id.*

[19] *Id*. at 1073.

[20] Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995).

[21] *Id*. at 44−46.

[22] *Id*.

[23] *Id*. at 46, 46 n.7; *see, e.g.*, People v. Tidwell, 12 P. 61, 64 (Utah Terr. 1886) (concluding that the weight of authority allows relatives of the victim of a homicide to employ an attorney to assist in the prosecution).

[24] Dangel, *supra* note 16, at 1083; *accord* Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 293−96 (1989).

[25] *See generally* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1924).

They could initiate prosecutions, by obtaining "bench warrants from magistrates for the arrest of defendants" and by presenting "evidence of crimes directly to grand juries."[26] In addition, they could pursue a private *qui tam* action for some offenses[27] (a vestige of private prosecution that remains viable to this day).

*2. Victims in the Courtroom as Private Prosecutors*

The reason for tracing this history at such great length is that if victims were private prosecutors and hence parties to criminal cases, they could not have been excluded from criminal trials. As explained by a leading authority, "*A fortiori* the party, though he is also to be a witness, cannot be excluded."[28]

Confirming this conclusion is the earliest American authority we have been able to find on sequestering parties—Greenleaf's *A Treatise on the Law of Evidence*. In the first edition of 1842, Greenleaf notes the general sequestration rule. He implicitly seems to assume that the parties (including potentially a private prosecutor) would be present in the court during the trial, as he notes that the names of the witnesses to be summoned by the parties are to be given to the sheriff handling the trial.[29] Moreover, Greenleaf added that "an attorney in the cause, whose personal attendance in Court is necessary, is usually excepted from the order to withdraw."[30]

It might be argued that Greenleaf would have assumed that parties (including victims) could be present in the courtroom because they were not competent witnesses at common law and therefore no need for sequestration would ever arise. The general rule at common law was that a party could not be a witness for himself.[31] But while incompetency of interested parties was the general rule at common law, it disappeared fairly rapidly from the American scene.[32] It was subject to exceptions, including an exception for crime victims. As Greenleaf explained in another section of his treatise:

> The principles, which govern in the admission or exclusion of parties as witnesses in civil cases, are in general applicable with the like force to criminal prosecutions, except so far as they are affected by particular legislation, or by considerations of public policy. In these cases, the State is the party prosecuting, though the process is usually, and in some cases always, set in motion by a private individual, commonly styled the prosecutor. In general, this individual has no direct and certain interest in the event of the prosecution; and therefore he is an admissible witness. . . .

[26] Dangel, *supra* note 16, at 1083.

[27] *Id.*

[28] 1 BISHOP'S NEW CRIMINAL PROCEDURE § 1188.1 (4th ed. 1895).

[29] SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 432 at 479-80 (1st ed. 1842).

[30] *Id.*

[31] *Id.* § 329 at 378-79.

[32] *See* Cornett v. Williams, 87 U.S. 226, 235 (1873) (discussing Act of 1864 providing that in civil actions in courts of the United States there shall be no exclusion of any witness "because he is a party to or interested in the issue tried." (italics omitted)).

> The prosecutor, therefore, is not incompetent on the ground, that he is a party to the record . . . .[33]

The point that parties could remain in the courtroom had become even more clear by Greenleaf's twelfth edition in 1866. There, Greenleaf cited an 1859 English case as authority for the proposition that a party has a right to remain in court for the purpose of instructing counsel.[34] He added (without citation), "[a]nd in those States in which parties are made competent witnesses, it would seem that the order of exclusion should not include them; and it is the better practice as a general rule in those States, so far as it is known to be established, when the witnesses in a case are ordered to withdraw, to except parties from the order."[35] Greenleaf seems to view criminal and civil cases as indistinguishable for purposes of the sequestration rule.[36] Because victims would clearly have been parties in many cases at this time, Greenleaf's view of the prevailing practice at the time suggests that victims were exempted from witness sequestration orders.

To similar effect is one of the earliest American cases substantively addressing party sequestration—an 1880 decision by the Alabama Supreme Court, *Ryan v. Couch*.[37] In this civil case, the court held that "it is obvious that this rule of exclusion ought never to be applied, so as to debar a party to a suit from being present during the progress of his cause. He has a right to be present, for the purpose of aiding and instructing his counsel in prosecuting or de-

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[33] GREENLEAF, *supra* note 29, § 362 at 406-07 (emphasis deleted). Greenleaf goes on to note that "whether any interest . . . [the private prosecutor] may have in the conviction of the offender is sufficient to render him incompetent to testify, will be considered more appropriately under the head of incompetency for interest." *Id.* He notes a number of situations in which crime victims will not be found incompetent for interest. *See, e.g.*, *id.* at § 349 at 395-96 (certain robbery cases); *Id.* § 350 at 397 (victims of fraud such as shipmasters and innkeepers). This supports the seemingly obvious point that victims of crime would be permitted to testify in criminal cases, as otherwise defendants would invariably go free.

In a few states, forgery cases were apparently an exception to the private prosecutor's exemption from the general rule that parties are incompetent to testify under oath. Forgery actions were perceived to be *in rem,* thus giving the victim an interest which required a finding of incompetence. In 1832, Starkie stated that a holdover from the English rule which excludes a party (whose signature is alleged to have been forged) from testifying in support of an indictment for the forgery was adhered to in Connecticut, Vermont, and North Carolina. THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 753−64 (1832).

[34] SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 431 at 474 n.1 (12th ed. 1866) (citing Selfe v. Isaacson, 1 F. & F. 194, [175 Eng. Rep. 688 (1859)]). Earlier English practice, too, appears to have exempted crime victims from the general rule that parties were incompetent to testify under oath, essentially on grounds of necessity. *See, e.g.*, STARKIE, *supra* note 33, at 753−64 ("in an action by a party robbed . . . he is a competent witness as to the fact of the robbery, although he is not only interested, but the plaintiff in the suit"); 1 S. MARCH PHILLIPPS, ESQ., A TREATISE ON THE LAW OF EVIDENCE 64 (3rd. ed. 1849) (citing English cases for the proposition that "[i]n general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness").

[35] GREENLEAF, *supra* note 34, § 431 at 474 n.3.

[36] *See id.* § 431 at 473-74 (discussing both criminal and civil cases).

[37] 66 Ala. 244 (1880), 1880 WL 134.

fending his suit."[38] The court went on to conclude that the trial court's decision in excluding the agent of the plaintiff from the courtroom, while not "in furtherance of justice," was nonetheless not reversible error.[39]

Perhaps the earliest American *criminal* case to have substantively addressed victim sequestration is *State v. Hughes*, an 1880 decision of the Missouri Supreme Court.[40] In considering an appeal from a burglary conviction, the court held that the trial court properly allowed two "prosecuting witnesses" (the victims whose property was taken) to remain in the court at various times during the trial and later to testify. The court explained that:

> These witnesses were the owners of the property taken, and their presence was doubtless necessary to enable the prosecuting attorney to properly conduct the prosecution. The order excluding witnesses from the court room is a matter within the discretion of the court, and may be so molded as to meet the requirements of justice in each particular case.[41]

The following year, however, an 1881 decision of the Kentucky Supreme Court, *Salisbury v. Commonwealth*,[42] reached the opposite conclusion. In this appeal from a homicide conviction, the court held that the father-in law of the murder victim should have been excluded:

> On the motion of appellants, the court ought to have excluded the father-in-law of the deceased while the other witnesses were testifying, because he was an important witness, and afterwards testified and agreed in several material points with his son's testimony, who was but fifteen years old and the only eye-witness to the homicide.
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> We do not mean to intimate that any untruth has been testified to by either of these witnesses, but the policy of the law in requiring the separation of the witnesses on the motion of either party is based upon sound reason and justice. And we know of no exception to the rule of excluding witnesses which allows a prosecutor and a witness in the same person to sit by and listen to the details of a [trial], and then testify himself about the same or connected matters. He, of all others, except the willfully corrupt, is most obnoxious to the rule, for he may have his feelings enlisted or his revenge rankling in his bosom.[43]

The case might be read as standing for the proposition that a victim—even a private prosecutor (i.e., "a prosecutor and a witness in the same person")—should be sequestered. Perhaps this reading would be too broad, however, since a question would remain as to whether a father-in-law in a homicide case is a

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[38] *Id.* at *3.

[39] *Id*.

[40] 71 Mo. 633 (1880), 1880 WL 9743. We have relied heavily on secondary authorities in conducting our search, particularly SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (16th ed. 1899) and John H. Wigmore, *Sequestration of Witnesses*, 14 HARV. L. REV. 475 (1901). In FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES, § 446 (8th ed. 1880), the court's authority to sequester is described in discretionary terms: "[w]itnesses may, by order of court, be sequestered, due ground being shown. . . ."

[41] *Hughes,* 71 Mo. at 633, 1880 WL 9743 at *2.

[42] 79 Ky. 425 (1881), 1881 WL 8263 *1.

[43] *Id.* at *5.

"victim." More important, this Kentucky case is exceptional. Writing in 1901, John H. Wigmore cited *Salisbury* as one of only a handful of cases treating parties as subject to sequestration on the same footing with other witnesses.[44] Indeed, Kentucky itself appears to have overruled *Salisbury* by legislation in 1895, specifically exempting parties from sequestration orders.[45]

In a seminal article published in 1901, Wigmore appears to have stated the generally prevailing rule on the issue of party sequestration. Writing in the *Harvard Law Review*, Wigmore reported that "the party against whom the [sequestration] demand is made has no right to the omission of any specific person *other than himself and his counsel*, from the order of exclusion . . . ."[46] In other words, a party could demand to be exempted from the sequestration order. Because victims were frequently parties to criminal cases—that is, were frequently private prosecutors—the reasonable inference is that victims would not have been excluded from trials. Indeed, Wigmore himself appears to have classified victims as parties in criminal cases. In discussing the *Salisbury* case, he explained that "a few courts treat the party upon the footing of other witnesses,"[47] followed by a footnote noting the *Salisbury* case.[48]

Wigmore also noted that the trial court could authorize individual exemptions to the sequestration order. In addition to the *Hughes* case from Missouri discussed above, Wigmore cited cases in which victims were permitted in the courtroom.[49] *Keller v. State*, a 1898 decision from the Georgia Supreme Court, allowed a rape victim in the courtroom, based on the prosecuting attorney's request for assistance during the trial.[50] Similarly, *State v. Whitworth*, an 1895 decision from the Missouri Supreme Court, upheld a trial court's decision to exempt the father of a sexual assault victim from an exclusion order.[51] The

[44] Wigmore, *supra* note 40, at 491 (1901).

[45] *See id.* at 479 n.3 (citing Ky. C.Cr.P. 1895 §§ 62, 63).

[46] *Id.* at 490 (emphasis added). The *Harvard Law Review* article also appears essentially unchanged in Wigmore's first edition of his treatise on evidence. Because law review articles are generally more accessible, we cite to the law review article here.

[47] *Id.* at 491.

[48] *Id.* at 491 n.3. Before the time of Wigmore's article on sequestration, a few states had barred the common law practice of allowing privately funded attorneys for the victim to assist the public prosecutor. Meister v. People, 31 Mich. 99 (1875), 1875 WL 3625, at *4 ("it is not proper to entrust the administration of criminal justice to any one who will be tempted to use it for private ends . . ."); *but see, e.g.*, State v. Kent, 62 N.W. 631, 633 (N.D. 1895) ("[t]he law has removed criminal prosecutions from the control of private interests, but it has not excluded such interests from all participation therein"). It is unclear whether these cases have any bearing on the victim's ability to attend. Wigmore makes no reference to these cases. Most jurisdictions, including federal courts, continue to allow the practice of privately funded prosecuting attorneys assisting the public prosecutor. *See generally* Ireland, *supra* note 20, at 43; DOUGLAS E. BELOOF, PAUL G. CASSELL, & STEPHEN J. TWIST, VICTIMS IN CRIMINAL PROSECUTION (forthcoming 2005).

[49] Wigmore, *supra* note 40, at 489−90 n.3.

[50] 31 S.E. 92, 92 (Ga. 1898).

[51] 29 S.W. 595, 596 (Mo. 1895).

court explained that "it was entirely competent for the court to so frame its order as to meet the requirements of justice."[52]

The victim exemption from sequestration was the same as the exemption for other parties. In cases involving victim attendance, the prosecuting witness (typically the victim) was effectively considered to be a "party,"[53] and was called the "prosecutor" if male[54] or "prosecutrix" if female.[55] Parties were exempt from the rule not because the concerns about testimony tailoring were absent but rather because of practical concerns requiring their presence. As Wigmore stated:

> It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to expose it are most emphatic for a party who is a prospective witness. On the other hand, the party's aid in the conduct of the cause may be indispensable, and his absence is in any case hardly consistent with his general right to protect his interests by watching the conduct of the trial. . . .[56]

Wigmore was also able to collect a number of state statutes dealing with witness sequestration.[57] Many of these excluded parties from the operation of the rule, including a number that specifically excluded victims. For example, a California statute provided: "[The committing magistrate] must also, upon the request of the defendant, exclude from the examination every person except his clerk, *the prosecutor and his counsel*, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody."[58] The phrase "prosecutor and his counsel" plainly refers to the *victim* and his counsel, as other prosecuting officers are separately covered. Statutes nearly identical to California's appeared in Arizona, Arkansas, Idaho, Kentucky, Montana, Nevada, and Tennessee.[59] Some other state statutes at the time gave the court discretion to exclude witnesses.[60] As of 1901, Iowa's 1897 Code appears to be the lone code that explicitly required sequestration of vic-

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[52] *Id.*

[53] *See* Wigmore, *supra* note 40, at 491.

[54] BLACK'S LAW DICTIONARY 959 (2d ed. 1910); BOUVIER'S LAW DICTIONARY 784 (1897). Coolman v. State, 72 N.E. 568 (Ind. 1904); People v. Montague, 39 N.W. 585 (Mich. 1888); Smartt v. State, 80 S.W. 586, 588 (Tenn. 1904) ("The attorney for the state has a right to such assistance as the prosecutor can give him in the management of the state's case.").

[55] BLACK'S LAW DICTIONARY 959; Puckett v. State, 70 S.W. 1041 (Ark. 1902); State v. Kirby, 69 S.W.2d 886, 887 (Tenn. 1934) ("[T]he wife may become the prosecutor upon the indictment against her husband for defaming her."); Roberson v. State, 49 S.W. 398, 399 (Tex. Crim. App. 1899) (use of terms prosecuting witness and prosecutrix interchangeable).

[56] Wigmore, *supra* note 40, at 491.

[57] *See id.* at 478−80 n.3.

[58] CAL. P.C. CODE § 868, as set forth in Wigmore, *supra* note 40, at 478 n.3 (emphasis added).

[59] *See* Wigmore, *supra* note 40, at 478 n.3 (citing ARIZ. P.C. § 1347; ARK. STATS. 1894 § 1995; IDAHO REV. STAT. 1887, § 6075; KY, C.CR.P. §§ 62−63; MONT. P.C. § 1679; NEV. GEN. ST. 1885, § 4043; TENN. CODE 1896, 5599).

[60] *See, e.g.*, MISS. COMP. L. 1897 § 11852.

tims, as it required sequestration of "all persons except the attorneys and certain officers" if "on defendant's request."[61]

A few courts confronted with an objection to the victim's presence would simply require the prosecuting witness to testify as the first witness in the case, thus eliminating any potential for fabricated testimony.[62] By 1901, however, the procedure of requiring the victim to testify first had not been adopted in most jurisdictions.[63] The fact that the victim might testify later was not a sufficient concern to sequester victims, as rebuttal witnesses were exempt from the sequestration rule.[64] Also, opening statement and argument were stages of the trial exempt from the sequestration rule for all witnesses and parties.[65] It was thus completely lawful for the victim to observe the trial from start to finish.

Finally, a few courts took the view that crime victims were not parties, but were nonetheless interested persons and *presumed* to be of assistance to the attorney for the prosecution during the trial.[66] It is worth noting that if a close relative of the victim wished to remain in the courtroom, case law suggests that the trial court had the discretion to allow his attendance even if he was a witness.[67]

In sum, as best we can determine, from the founding of the nation through at least about 1900, crime victims were almost invariably able to attend trials as an exception to the rule sequestering witnesses.

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[61] IOWA CODE § 5226 (1897), as set forth in Wigmore, *supra* note 40, at 479 n.3.

[62] Smartt v. State, 80 S.W. 586, 588 (Tenn. 1904) ("[I]t is not error to permit the prosecutor to remain in the courtroom after the rule [of sequestration] has been called for; but the court should impose as a condition that the state, if it desires to use the prosecutor as a witness, should examine him first."); *see also* Marcum v. Commonwealth, 1 S.W. 727, 728 (Ky. 1886) ("It was proper for the court to permit the witness and kinsman of the deceased to remain in the courtroom after he had testified, that he might consult with and advise the attorney for the commonwealth as to the witnesses to be examined, and the facts proposed to be established by them"); Dale v. State, 15 S.E. 287, 289 (Ga. 1892) (witness could remain to assist solicitor general in conducting the prosecution after witness had testified).

[63] Wigmore, *supra* note 40, at 491.

[64] *Id*.

[65] *Id*. at 487. *See also* State v. Whitworth, 29 S.W. 595, 597 (Mo. 1895) ("In common with other citizens of the commonwealth, the prosecutrix and her mother had a right to remain in court [during the closing argument] so long as they did not disturb its proprieties.").

[66] The following cases presume the assistance of victims without any predicate showing for attendance: Keller v. State, 31 S.E. 92, 93 (Ga. 1898) (prosecutrix allowed to assist state's attorney); *Marcum*, 1 S.W. at 728 ("It was proper for the court to permit the witness and kinsman of the deceased to remain in the courtroom after he had testified, that he might consult with and advise the attorney for the commonwealth as to the witnesses to be examined, and the facts proposed to be established by them.").

[67] *Keller*, 31 S.E. at 93 (parents of rape victim permitted to attend the trial); *Whitworth*, 29 S.W. at 596 (father of prosecutrix rape victim exempted from the rule in the court's discretion); McGuff v. State, 7 So. 35, 37 (Ala. 1889) (victim's father properly exempted from sequestration in sexual assault case); *see also Dale*, 15 S.E. at 288−89 (in bigamy prosecution, brother of alleged first wife properly allowed to remain in court to help the prosecutor after he testified).

*B. Victims as Adjuncts to Prosecutors: 1900 to 1975*

At some point in the late nineteenth or early twentieth century, American courts clearly began changing their rhetoric—and in some cases their holdings—about victims attending criminal cases. While earlier courts had treated victims as essentially parties because of their right to pursue private prosecutions, by the turn of the century the office of public prosecutor clearly assumed near-monopoly control of criminal prosecutions. As a result, many courts began to reflexively view the victims as mere auxiliaries to public prosecutors, which meant that the victim's right to attend trials, too, came to hinge on the assistance they could provide prosecutors.[68] In addition, victim attendance clearly became a matter of discretion for trial courts.

The transition from victim attendance grounded in party status to attendance grounded in aiding the prosecutor is exemplified in a 1909 Iowa Supreme Court decision. In *State v. Pell*, the court cited both the party-status rationale *and* the aid-to-the-prosecutor rationale as distinct reasons for affirming a trial court's decision permitting the wife and daughter of the murder victim to attend trial:

> It is generally regarded as proper to omit from the rule a prospective witness whose assistance in the management of the case is, under the circumstances, indispensable. 3 Wigmore, Evidence, § 1841; 1 Greenleaf, Evidence (16th Ed.) § 432b. It was clearly, therefore, within the court's discretion to allow the widow and daughter of the deceased to remain in the courtroom for the purpose of assisting the prosecuting attorney in conducting the prosecution by calling to his attention matters about which the witnesses should be examined or cross-examined. We have held that a party to an action should be excepted from the rule. And certainly it is within the court's discretion to except the persons who have the most direct personal interest in securing the conviction of a criminal.[69]

Other decisions around the time made no mention of the victim's own interest in attending trial, focusing exclusively on the prosecution. Illustrative is *Coolman v. State*, a 1904 decision from the Indiana Supreme Court which considered a victim attending trial solely in relation to the prosecutor:

> When an order for separation of witnesses is made in a criminal cause, it is proper to except the prosecuting witness, and to permit such witness to be present during the examination of other witnesses. The information which he may furnish to the prosecuting attorney during the trial may be

[68] We should make a clarifying point. Our argument is *not* that public prosecutors began to be concerned about the goal of preventing wrongful convictions of defendants and therefore subordinated victims' interests. Professor Carolyn Ramsey, in an interesting article about the transition from private prosecution to public prosecution in New York County in the Nineteenth Century, calls such an argument "erroneous" and associates it with the writings of many scholars, including of one of the authors (Cassell). *See* Ramsey, *supra* note 10, at 1319. Our argument is the more modest one that public prosecutors simply assumed control of prosecutions, which lead courts to treat victims as mere adjuncts to the case without legitimate interests entitled to protection.

[69] 119 N.W. 154, 158 (Iowa 1909) (internal citations omitted).

> necessary or advantageous to the state, and the same reasons which make it proper for parties in a civil action, although witnesses, to remain in the courtroom while the evidence in the cause is being heard, justify the court in permitting a witness designated by the state to be present to aid the prosecuting attorney by suggestion and information during the trial of the criminal cause. To exclude the prosecuting witness would in many cases place the state at a great disadvantage, by leaving its representative without aid from anyone having personal knowledge of the case.[70]

In light of this new understanding of the basis for victims attending trials, in the first half of the twentieth century new conditions on victim attendance gradually emerged. The right of a victim to attend began to be replaced by laws excluding victims and other witnesses in criminal cases unless the victim's or witness's presence was needed by the prosecutor.[71] Furthermore, in some jurisdictions victims lost the presumption that they were of assistance to the public prosecutor. As a result, the prosecutor had to affirmatively request that the court allow the victim to remain.[72]

The requirement that the victim be of assistance to the prosecutor was manifested in a variety of terms. Courts would describe the test as involving the question of whether a victim's attendance was "essential," "excused," of "assistance to the prosecution," or "in the interests of justice."[73] The shared meaning

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[70] 72 N.E. 568, 568−69 (Ind. 1904).

[71] *See generally* Jay M. Zitter, Annotation, *Prejudicial Effect of Improper Failure to Exclude or to Sequester or to Separate State's Witnesses in a Criminal Case*, 74 A.L.R.4th 705 § 4 (1990) (collecting cases); G. VanIngen, Annotation, *Prejudicial Effect of Improper Failure to Exclude from Courtroom or to Sequester or Separate State's Witnesses in Criminal Case*, 32 A.L.R.2d 358 (1953) (collecting cases). *See, e.g.*, Greer v. Commonwealth, 85 S.W. 166, 167−68 (Ky. 1905) (while sequestration rules apply in criminal cases, court is given discretion to permit one witness to remain in the courtroom "for the purpose of aiding the commonwealth attorney," including in this case victim of shooting); Druin v. Commonwealth, 124 S.W. 856, 857−58 (Ky. 1910) (father of rape victim permitted to attend; "we are of the opinion that it was proper he should have been permitted to remain and assist in the prosecution of the man who had ruined his daughter."); Hughes v. State, 148 S.W. 543, 553 (Tenn. 1912) (victim properly allowed in the courtroom so that the prosecutor could "have the benefit of . . . suggestions" regarding cross-examination questions); State v. Hoke, 84 S.E. 1054, 1056 (W. Va. 1915) ("No authorities are cited by counsel, and we find none supporting the proposition that it is error to permit the prosecuting witness . . . to remain at the bar of the court for the purpose of prompting the attorney for the state regarding facts which he knows are within the knowledge of certain witnesses to be examined."). Texas cases reach contradictory conclusions: *Compare* Ward v. State, 159 S.W. 272 (Tex. Crim. App. 1913) (brother of murder victim permitted to remain and assist prosecution); Bishop v. State, 194 S.W. 389, 390 (Tex. Crim. 1871) (witnesses "assisting the prosecution" could remain; but conviction reversed because numerous witnesses allowed in the courtroom) *with* Freddy v. State, 229 S.W. 533 (Tex. Crim. App. 1921) ("[w]e have no such rule in criminal practice as to allowing the injured party to remain in the courtroom to aid the state in support of its case.").

[72] *See*, *e.g.*, Smartt v State, 80 S.W. 586, 588 (Tenn. 1904) ("The attorney for the state has the right to such assistance as the prosecutor [victim] can give him in the management of the case, and, *upon his request*, it is not error to permit the prosecutor to remain in the courtroom after the [sequestration] rule has been called for.") (emphasis added).

[73] Holder v. State, 187 So. 781, 782 (Fla. 1939) (it was reversible error to allow victim to remain in courtroom prior to testifying; "no excuse" shown); McKinnon v. State, 299 P.2d

of these phrases appears to have been some notion that the prosecutor's presentation of evidence would benefit through the assistance of the victim. A similar approach was used for case agents (that is, the law enforcement agents who worked with the public prosecutor), expert witnesses, and other witnesses whose presence would be of assistance.[74] The showing required for exempting these witnesses from sequestration was that the "witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness . . . ."[75]

When the court erroneously allowed the victim or case agent to remain without a showing that his or her presence was of assistance, harmless error could be established by showing that the victim was the only one to testify about the matter,[76] that the victim had testified first,[77] that the testimony of the

535, 538 (Okla. 1956) (presence of prosecuting witness in courtroom deemed "essential" to a proper presentation of the case); Dye v. State, 137 S.E.2d 465, 467 (Ga. 1964) (widow of deceased victim permitted to remain in courtroom as she was "extremely familiar with the facts of the case and was in a position to assist in the prosecution"); Massey v. State, 142 S.E.2d 832, 839 (Ga. 1965) (rape conviction reversed; prejudice presumed because there was no evidence that "it was necessary that the witness remain in the courtroom to assist counsel"). *See also* State v. Smith, 180 N.W. 4, 7 (Iowa 1920) (sequestration issue turns on whether father of young victim was "an aid to counsel"); State v. Bonza, 269 P. 480, 482 (Utah 1928) (no error to exempt sister of prosecutrix from sequestration rule to advise district attorney).

[74] *See, e.g.*, Leache v. State, 3 S.W. 539 (Tex. Crim. App. 1886) (experts may remain in courtroom to make informed decisions and form opinions based on the evidence presented); State v. Ede, 117 P.2d 235, 236 (Or. 1941) (corporate officer permitted to remain in courtroom as long as he is shown to possess "special knowledge concerning the case on trial which would render it necessary that he should remain in the court-room"); Powell v. United States, 208 F.2d 618, 619 (6th Cir. 1953) (no reversible error committed by permitting government agent to remain in courtroom and advise counsel); Schoppel v. United States, 270 F.2d 413, 416−17 (4th Cir. 1959) (government agent permitted to remain in courtroom to assist in prosecution); Dickens v. State, 398 P.2d 1008, 1009 (Alaska 1965) (police officer exempt from sequestration when assisting prosecutor). United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969) ("This is not to say that . . . an FBI agent is automatically exempt from [a sequestration] order. . . . Where the agent is the one in charge of the case and his presence is necessary, the court may permit him to remain although other witnesses are excluded;" agent should generally be called as the first witness.). *Cf.* Jackson v. State, 115 S.W. 262, 264 (Tex. Crim. App. 1908) (counsel cannot be excluded from courtroom even when not deemed essential). *See generally* 6 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1841, at 475 (Chadbourn rev. 1976).

[75] *See, e.g.*, Oliver B. Cannon and Son, Inc. v. Fid. & Cas. Co. of New York, 519 F. Supp. 668, 678 (Del. 1981), *cited in* 4 WEINSTEIN'S FEDERAL EVIDENCE, § 615.04[3][b] (Matthew Bender ed., 2d ed. 1997) While this standard is taken from a court decision applying Federal Rule of Evidence 615, discussed in section II.C, *infra*, its seems to track earlier standard.

[76] State v. Williams, 346 So. 2d 181, 185 (La. 1977) (where there is little overlap between testimony, error is harmless); Clary v. State, 150 S.W. 919, 919 (Tex. Crim. 1912) (no error where witness testified to independent facts).

[77] State v. Paolella, 561 A.2d 111, 116 (Conn. 1989) (it was harmless error to allow wife to hear children's testimony in a domestic violence case, even though sequestration technically required, since she had already testified).

victim was not affected,[78] or that no prejudice to the defendant had otherwise resulted from the error.[79] Even if the victim was essential, the court could remove a victim who behaved improperly.[80]

It is worth noting that not all jurisdictions required a showing of assistance to the prosecution. Some states simply allowed victims to attend trials as quasi-parties. For example, in 1966 and again in 1972, Georgia courts affirmed the common law practice of allowing the victim to remain in the courtroom as the "prosecutrix."[81] Furthermore, other states' private prosecutions continued well into the twentieth century.[82] In 1976, one scholar identified some thirty four states that gave victims the right to seek private prosecution as an alternative to public prosecution in certain cases.[83] Case reports even in very recent years reflect cases of private prosecution.[84] In a private prosecution, victims presumably remained exempt from witness sequestration rules.

Finally, a number of courts in this time period speak of victim attendance as simply an issue committed to the sound discretion of the trial court. Illustrative of these cases is a 1936 decision from the Arkansas Supreme Court regarding whether a murder victim's mother could remain in the courtroom after testifying. In affirming a trial court's decision allowing this, the court explained "it has often been held that the enforcement of this [sequestration] rule is a matter within the sound discretion of the court . . . ."[85] The court found no abuse of

[78] Gunn v. State, 243 A.2d 15, 18 (Md. 1968) (doctor's testimony did not affect rape victim's testimony).

[79] Mitchell v. United States, 126 F.2d 550, 553 (10th Cir. 1942), *cert. denied*, 316 U.S. 702, *reh'g. denied*, 324 U.S. 887; Bellamack v. State, 294 P. 622, 625 (Ariz. 1930); People v. Tanner, 44 P.2d 324, 333 (Cal. 1935); Roach v. State, 147 S.E.2d 299, 304 (Ga. 1966); People v. Winchester, 185 N.E. 580, 583 (Ill. 1933) (no showing that defendant was prejudiced); State v. Brevelle, 270 So. 2d 852, 857 (La. 1972); State v. Lewis, 199 So. 2d 907, 911 (La. 1967) (error because the decision was prejudicial to defendant); Swartz v. State, 238 N.W. 312, 313 (Neb. 1931); People v. Cooke, 54 N.E.2d 357, 360 (N.Y. 1944); *Gunn,* 243 A.2d at 18; State v. Bishop, 492 P.2d 509, 511 (Or. Ct. App. 1971); Driscoll v. State, 232 S.W.2d 28, 29 (Tenn. 1950).

[80] *See, e.g.*, Hughes v. State, 148 S.W. 543, 553 (Tenn. 1912).

[81] *Roach*, 147 S.E.2d at 304 (upholding trial court ruling that "she need not go out with the other witnesses because she was the prosecutrix in the case, being so marked on the indictment"); Norman v. State, 175 S.E.2d 119, 120 (Ga. Ct. App. 1970) (allowing victim to stay in courtroom if specified in indictment).

[82] *See, e.g.*, R. MOLEY, POLITICS AND CRIMINAL PROSECUTION 194 (1929); Comment, *Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction*, 65 YALE L.J. 209, 221 (1955) ("[p]rivate prosecution is especially common before magistrates, municipal courts and justices of the peace. . . . Private citizens may initiate criminal actions which result in jail terms up to one year); State v. Ray, 143 N.E.2d 484, 485 (Ohio Ct. App. 1956) ("We know of no statutory or constitutional reason for prohibiting such practice and, in or opinion, it is well and wise that the policy of the law permits the appearance of private counsel, especially in courts with limited jurisdiction.").

[83] *See* McDonald, *supra* note 4, at 665 n.78 (collecting authorities allowing privately employed attorneys to assist the public prosecutor).

[84] *See, e.g.*, Cronan *ex rel.* State v. Cronan, 774 A.2d 866 (R.I. 2001) (allowing private prosecution in domestic violence case). *See generally* BELOOF, CASSELL, & TWIST, *supra* note 48, at chapter 5 (collecting cases involving private prosecution).

[85] Trammell v. State, 97 S.W.2d 902, 905 (Ark. 1936).

discretion in allowing the mother to observe the trial, as did a number of other similar cases.[86]

### *C. Victims as Exiles: 1975 to 1982*

The victims' right to attend trial fell to its nadir in the years shortly after 1975, when Congress adopted the Federal Rules of Evidence. The rules proved to be quite influential in shaping American evidence law. By one count, more than four-fifths of the states adopted evidence codes closely tracking the federal rules.[87] The rules effectively required sequestration of most victims.

As drafted in 1975, Federal Rule of Evidence 615 created a mandatory right to sequestration, subject only to three exceptions:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation to the cause.[88]

As is apparent, the rule rendered crime victims subject to automatic sequestration unless they could be shoehorned into the third category for persons whose assistance was "essential" to the presentation of a party's cause. Victims would not fit the first exemption because they were not considered "parties" to criminal litigation (at least not in modern times). Victims would not fit the second exemption because they were not officers or employees of the government. Thus, to escape sequestration, victims would have to be "essential" to the prosecution.

At one level, enactment of Rule 615 did not dramatically change the law in those jurisdictions that had already determined that the victim must be an essential witness in order to attend the trial. The rule's drafters appear to have intended for the term "essential" to carry much the same meaning as the pre-rule caselaw described in the previous section. Indeed, the drafters appear to have contemplated that a victim might be an "essential" witness. In explaining who might qualify as essential, the Advisory Committee Notes mentioned "an agent who handled the transaction being litigated" or an expert witness.[89] In support

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[86] *See, e.g.*, Butler v. State, 97 N.E.2d 492, 495 (Ind. 1951) (seven-year-old rape victim allowed to remain with her mother in the courtroom during trial); Milo v. State, 214 S.W.2d 618, 618 (Tex. Crim. App. 1948) (rape victim allowed to remain in court after she testified); Burford v. Commonwealth, 20 S.E.2d 509, 512 (Va. 1942) (victim of shooting exempted from operation of exclusionary rule).

[87] CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 1.2 at 4 (3d ed. 2003). *See generally* Kurtis A. Kemper, *Exclusion of Witnesses Under Rule 615 of Federal Rules of Evidence*, 181 A.L.R. Fed. 484 (2005).

[88] FED. R. EVID. 615. It is important to note here that the current version of rule 615 contains an additional, fourth exemption that covers crime victims. *See infra* notes 89–91 and accompanying text.

[89] FED. R. EVID. 615, advisory committee notes.

of exemptions, the Notes cited directly (and exclusively) to a footnote in Wigmore's treatise.[90] This footnote, in turn, included two victim cases: the first, a case in which the victim was allowed, in the court's discretion, to remain in the courtroom during trial;[91] the second, a case in which judicial discretion was abused because the victim was allowed to remain without a showing that the victim would be of "material aid to the state in presenting its case."[92] The Advisory Committee's citation to Wigmore's footnote suggests that a crime victim could still escape sequestration if found to be an "essential" witness under Rule 615. It is noteworthy, however, that the Advisory Committee did not trouble to list crime victims as illustrative of the types of witnesses who would meet this exemption, literally burying victims in a footnote within a footnote.

Yet, at another level, Rule 615 effectively exiled many victims from the courtroom. It did this by exclusively emphasizing the attendance of investigating police officers or "case agents," as a brief review of the legislative history and consequent court interpretations reveals. During Congress's consideration of Rule 615, the Justice Department was concerned that the rule change might lead courts to routinely sequester case agents. At the time, courts treated case agents like crime victims—the court could exercise discretion to allow a case agent to attend trial, provided he was an essential witness.[93] For example, in 1969, a few years before Rule 615 was drafted, the Fourth Circuit explained:

> This is not to say that when witnesses are sequestered from the courtroom an FBI agent is automatically exempt from the order. The matter should not be decided routinely but in a genuine exercise of discretion, according to the attendant circumstances. Where the agent is the one in charge of the case and his presence is necessary, the court may permit him to remain although other witnesses are excluded.[94]

Other cases were to similar effect.[95]

When Congress considered proposed Rule 615, the Senate Judiciary Committee added an influential clarifying statement of legislative history, indicating that case agents would be automatically exempt from exclusion as a designated representative of the government (the second exemption in Rule 615). The Committee first explained its view that historically case agents had been excluded from sequestration rules:

> Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be

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[90] *See id.* (citing 6 WIGMORE, *supra* note 74, at § 1841 n.4.

[91] State v. Sampson, 261 N.W. 769, 770 (Iowa 1935).

[92] Freddy v. State, 229 S.W. 533, 534 (Tex. Crim. App. 1921) (court abused discretion in allowing the victim to remain absent showing of material aid).

[93] *See* cases cited *infra* note 103.

[94] United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969).

[95] United States v. Pellegrino, 470 F.2d 1205, 1208 (2nd Cir. 1972) ("Since the chief investigating agent may be of significant help to the prosecution during the course of a trial, the trial court has discretion to make an exception to the general rule of sequestration of witnesses . . . ."); United States v. Wells, 437 F.2d 1144, 1146 (6th Cir. 1971) (same); United States v. Escobedo, 430 F.2d 603, 608−09 (7th Cir. 1970) (same).

> a witness. The practice is permitted *as an exception to the rule of exclusion* and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty.[96]

This statement seems at odds with prevailing case law, as it ignores the rulings by the Fourth Circuit and other courts noted above that there was no "exception" to sequestration principles for case agents.[97] The assertion is accurate only in the sense that trial judges commonly exercised discretion in favor of case agent attendance.

The Committee continued by offering its view that case agents would not be "essential" witnesses (the third exemption) but would be representatives of the government (the second exemption) as follows:

> Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs. This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House Committee. It is certainly this committee's construction of the rule.[98]

Citing this legislative history, federal cases have since held that Rule 615 severely curtails the trial court's discretion to exclude a case agent.[99]

This legislative history, of course, helped prosecutors keep their case agents in the courtroom.[100] But indirectly, Congress's focus on case agents hampered crime victims seeking to attend trials. By identifying case agents as the automatic "representative" of the government, the legislative history left victims no choice but to argue that they were "essential" to the presentation of the government's case. But with a case agent already exempt from sequestration and at the side of the prosecutor, victims would have a more difficult time

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[96] S. REP. NO. 93-1277, 26, (1974) *reprinted in* 1974 U.S.C.C.A.N. 7051, 7072 (emphasis added).

[97] *See supra* note 74−75 and accompanying text.

[98] S. REP. NO. 93-1277.

[99] United States v. Machor, 879 F.2d 945, 953 (1st Cir. 1989) ("The majority view is that FRE 615 has severely curtailed the discretion of the trial court to sequester the government's case agent [omitting cites]. The practical and policy concerns inherent in the promulgation of the Rule support this concern. [citing Senate Judiciary Committee Clarifying Statement]").

[100] *See, e.g.*, *id.*

proving that their *additional* presence was essential. Perhaps in theory prosecutors could argue that victims were the appropriate representative of the government. But given a choice of who would attend and assist, prosecutors would likely opt for the procedurally easy choice—the case agent.

Moreover, in attempting to show why the case agents would not fit under the third exemption for "essential" witnesses, the legislative history created a greater hurdle for crime victims. For example, the Judiciary Committee asserted that having the case agent testify first was not an adequate alternative because "the agent's testimony could be needed in rebuttal."[101] This assertion seemingly extended sequestration rules to rebuttal witnesses, a subject open to question before.[102] In addition, this assertion embodied a construction of Rule 615 that the mere potential for rebuttal testimony creates grounds for sequestration.

The net effect of all this was that Rule 615 and its essentiality requirement made it more difficult for victims to escape sequestration. Left with no option but to prove that they were "essential" to the conduct of the case and with a need to compete with an automatically-admitted case agent in every trial, victims often lost out. Federal cases under Rule 615 began to treat victims as mere fact witnesses. And attendance at trial by essential fact witnesses, asserted the courts, is more troublesome under Rule 615 than attendance by expert witnesses.[103] Expert witnesses were not perceived to share the potential of tainted testimony which exists when fact witnesses watch other witnesses testify. In addition, Rule 615's elimination of any judicial discretion in sequestration—through its listing of three (and only three) exemptions—left the courts no opportunity to consider the equities of the matter. Finally, Rule 615 made sequestration a matter of right, rejecting the discretionary approach followed in many states.[104] Historically, the rationale for leaving sequestration of witnesses in the court's discretion was

> that trials should be open to the public, the fact that witnesses have an interest in the course of the litigation, and the danger that the rule might be used to unnecessarily delay and obstruct trials. . . . [Therefore] courts should not arbitrarily enforce the rule, nor should litigants or lawyers be permitted to require it arbitrarily.[105]

Rule 615 departed from this approach and gave litigants (i.e., criminal defendants) the option to require enforcement even when it was "arbitrary."

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[101] S. REP. NO. 93-1277.

[102] *Compare* Lee v. State, 488 P.2d 365, 366 (Okla. Crim. App. 1971) (sequestration does not cover rebuttal witnesses); Commonwealth v. Harris, 171 A.2d 850, 853 (Pa. Super. Ct. 1961) (same); LeBlanc v. Gauthier, 174 So. 2d 267 (La. Ct. App. 1965) (same) *with* Jackson v. State, 177 So. 2d 353 (Fla. Dist. Ct. App. 1946) (reversing because of rebuttal testimony by unsequestered police officer).

[103] *See, e.g.*, Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 629 (4th Cir. 1996); Malek v. Fed. Ins. Co., 994 F.2d 49, 54 (2d Cir. 1993); Polythane Sys., Inc. v. Marina Ventures Int'l Ltd., 993 F.2d 1201, 1210 (5th Cir. 1993); Transworld Metals v. Southwire Co., 769 F.2d 902, 910 (2d Cir. 1985).

[104] *See* 75 AM. JUR. 2D *Trial* § 240, at 461 n.58 and accompanying text (1991).

[105] 53 AM. JUR. *Trial* § 31 (1945).

Given the severe effects Rule 615 had on victims, why were they not discussed during the rule's drafting? Part of the reason, no doubt, is that the crime victims' movement was in its infancy during the early 1970s,[106] and thus lacked any institutional lobbying capability. Presumably also important were the facts that most federal crimes were "victimless"[107] and the federal criminal process had no significant history of private prosecution.[108] In any event, we have been unable to locate any explicit consideration of crime victims during the drafting and adoption of Federal Rule 615.

While limited consideration of crime victims was arguably appropriate for the federal courts, it is impossible to justify in state courts. Yet the provisions in the Federal Rules of Evidence were swiftly copied en toto in many states, without any consideration of the ramifications of extending Federal Rule 615 into the victim-laden dockets of state courts. After 1975, a majority of the states adopted state rules mimicking Federal Rule 615. Eleven states adopted the rule verbatim.[109] Six states adopted it with only inconsequential semantic modifications.[110] Eleven states substituted the word "may" for "shall" in the first sentence of the rule, thus retaining judicial discretion over sequestration under the rule.[111] Five states adopted it while adding various unique modifications.[112]

The effect of moving Federal Rule 615 into state evidence codes was to effectively exile most crime victims from the courtroom. Victims were left with the task of arguing that they were "essential' to the prosecution, a burden they were frequently unable to shoulder. It therefore should come as little surprise that many of the "horror stories" about victims being excluded from trial come from this period of time.

An example of the indignities suffered by crime victims is provided by Roberta Roper.[113] Her oldest daughter, Stephanie, was kidnapped, brutally raped, tortured, and murdered in 1982 by two strangers who came upon her disabled car on a country road near their home. Ms. Roper and her husband were subpoenaed by the state and testified as the state's first witnesses, recalling briefly a last family dinner they had with their daughter the night before and identified the family car that she was driving. Ms. Roper and her husband had no knowledge of the individuals charged and no knowledge of the events that

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[106] *See* BELOOF, CASSELL, & TWIST, *supra* note 48, at chapter 1 (reviewing origins of the crime victims' movement).

[107] Since the early 1970s, criminal prosecution has been increasingly "federalized," which has expanded the number of cases with crime victims in federal court. *See generally*, Richard K. Willard, *A National Strategy Against Crime*, 20 HARV. J.L. & PUB. POL'Y 543 (1997).

[108] *See supra* notes 24−27 and accompanying text.

[109] Arizona, Colorado, Hawaii, Mississippi, Montana, Ohio, Texas, Utah, Vermont, West Virginia, Wyoming. GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES, 1 & 71 supp. (1987 & 1994 supp.).

[110] Arkansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota. *Id.*

[111] Alaska, Delaware, Idaho, Iowa, Maine, Michigan, Minnesota, New Hampshire, North Carolina, Oregon, and Washington. *Id*.

[112] Minnesota, New Hampshire, North Carolina, Oklahoma, and Idaho. *Id*.

[113] S.J. Res. 35, 107th Cong. 143 (2002).

led to her daughter's abduction and murder. Yet she and her husband were forced to sit outside the courtroom during the trial. As she later explained it, "[i]nstead of hearing the truth and seeing justice imposed, for six weeks we were banished from the most important event of our lives, and made to feel like second-class citizens."[114] All this was done without protest by the state and without a judge making any finding about the need for sequestration, presumably because Maryland followed something like the automatic sequestration approach embodied in Rule 615.[115]

It is true that very few (if any) reported appellate court decisions from this time reflect victims being excluded from courtrooms. But no doubt the reason for this dearth of authority is that victims were often unable to appeal adverse rulings against them, either because they lacked legal counsel or the legal ability to seek further review.[116] In Roberta Roper's case, for instance, no appellate court record reflects her exclusion. Moreover, the difficulties of victims taking an appeal may have accentuated the chances that a trial judge would exclude a victim. The easiest way to "protect" a record for appeal would be to a grant a defendant's motion to sequester a victim, as such decisions are virtually never reviewed by appellate courts.[117] Nonetheless, despite sparse appellate evidence, the other available evidence suggests that victim exclusion became a common practice in many states at this time.[118]

In sum, after the adoption of Rule 615 in federal court and parallel rules in the state courts, victims were often excluded from trial. In historical perspective, victims had moved from handling their own private prosecutions, to assisting the prosecutor, to being left completely outside the process.

### *D. Victims as Criminal Justice Participants: 1982 to Date*

#### *1. The Backlash Against Excluding Victims*

Only a few years after enactment of Federal Rule of Evidence 615, a strong victims' right movement began to develop in America.[119] The movement received considerable impetus with the publication, in 1982, of the Final Report of the President's Task Force on Victims of Crime. The Task Force Report

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[114] *Id.*

[115] It is worth noting that because of her abysmal treatment in the criminal justice system, Ms. Roper went on to found the Stephanie Roper Committee and Foundation, now known as the Maryland Crime Victims' Resource Center, Inc. This organization has been instrumental in the passage of more than sixty pieces of crime victim's legislation in the State of Maryland. *See generally* Maryland Crime Victims' Resource Center, at http://www.mdcrimevictims.org (last visited May 31, 2005).

[116] *See generally* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy and Review*, 2005 B.Y.U. L. REV.___ (forthcoming 2005).

[117] *Cf.* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1 (1990).

[118] *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT 80 (1982).

[119] *See generally* BELOOF, CASSELL, & TWIST, *supra* note 48, at chapter 1; Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229 (2005).

conveniently demarcates the point at which the pendulum began to swing back and the right of crime victims to attend trials began to re-emerge.

The Task Force strongly opposed sequestration of victims. After holding hearings around the country, the Task Force concluded that victims deserved the right to attend trials, explaining that crime victims "no less than the defendant, have a legitimate interest in the fair adjudication of the case."[120] The Task Force proposed that victims should be exempted from sequestration rules and permitted to attend the entire trial.[121]

The Task Force triggered a wave of reform legislation, designed to protect the right of crime victims to attend trial. While the underlying rationale for these statutes will be discussed at greater length below,[122] it is important to note here that they rested on the view that a crime victim had a *right* to attend trial that was independent of the prosecution. For example, Arizona amended its constitution to provide that "a victim of crime has *a right* . . . to be present at . . . all criminal proceedings where the defendant has the right to be present."[123] Thus, these statutes had the effect of giving victims a legally-recognized interest in being in the courtroom.

*2. The Victim's Right to Attend Trial Under State Statutes and Constitutions*

Because the statutes protecting the victim's right to attend a trial create the current legal landscape, it is worth reviewing these statutes in some detail. The vast majority of states now protect a victim's right to attend a trial, either by constitutional or statutory provision. These states can be conveniently divided into two groups: approximately seventeen states give victims unqualified rights to attend trial and approximately twenty-five states and the District of Columbia give victims qualified rights to attend trial.[124] Before turning to the specifics, however, a general observation is in order.

More than forty states and the District of Columbia now recognize a victim's right to attend a trial. While slightly more than half of these are qualified in some fashion, these qualifications typically are quite narrow and, so far as we can tell, in some cases these qualifications have never resulted in the exclusion of a victim. As a result, it seems safe to say that there is now a reascendant national consensus that victims should generally have the right to attend trials.

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[120] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 118, at 80.

[121] *Id.*

[122] *See infra* notes 314-339 and accompanying text.

[123] ARIZ. CONST. art. II, § 2.1(A)(3) (emphasis added).

[124] We have only categorized based on the nature of the right involved. It would also be possible to categorize based on the nature of the remedies available to vindicate the victim's rights. We do not attempt such a categorization here. For further discussion of the limitations on victims' remedies, *see generally* Beloof, *supra* note 116. We have not included a narrow Pennsylvania victims' statute in our tabulation. *See* 42 PA. STAT. ANN. tit X, § 9738 (West 2004) (victim cannot be excluded on the basis that she will make an impact statement at sentencing, apparently a provision designed to primarily deal with victim impact statements in capital sentencing hearings).

*a. Unqualified Rights to Attend Trial*

Seventeen states have conferred on victims an unqualified right to attend trial.[125] The prototype provision is found in the Michigan Constitution, which guarantees that crime victims have "[t]he right to attend trial and all other pro-

[125] ALASKA CONST. art. I, § 24 ("Crime victims . . . shall have . . . the right to . . . be allowed to be present all criminal or juvenile proceedings where the accused has the right to be present."); ARIZ. CONST. art. II, § 2.1(A) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right: . . .[t]o be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present"); COLO. CONST. art. II, § 16a ("Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process"); IDAHO CONST. art. I, § 22 ("A crime victim, as defined by statute, has the following rights: (4) to be present at all criminal justice proceedings . . . ."); LA. CONST. art. I, § 25 ("As defined by law, a victim of crime shall have the right to . . . be present . . . during all critical stages of preconviction . . . proceedings."); MICH. CONST. art. I, § 24 ("Crime victims . . . shall have the following rights . . . The right to attend trial and all other proceedings the accused has the right to attend."); MISS. CONST. § 26A ("Victims of crime . . . shall have the right . . . to be present . . . when authorized by law, during public hearings."); MISS. CODE ANN. § 99-43-21 (2004) ("The victim has the right to be present throughout all criminal proceedings as defined in Section 99-43-1"); MO. CONST. art. I, § 32 ("Crime victims, as defined by law, shall have the following rights . . . (1) [t]he right to be present at all criminal justice proceedings at which the defendant has such right . . ."); MONT. CODE ANN. § 46-24-106(1) (2003) (" . . . a victim of a criminal offense has the right to be present during any trial or hearing conducted by a court that pertains to the offense. . . . A victim of a criminal offense may not be excluded from any trial or hearing based solely on the fact that a victim has been subpoenaed or required to testify as a witness in the trial or hearing."); NEV. CONST. art. I, § 8(2) ("The legislature shall provide by law from the rights of victims of crime, personally or through a representative, to be (b) [p]resent at all public hearings involving the critical stages of a criminal proceeding. . . ."); N.M. CONST. art. II, § 24 ("A victim of [various offenses] . . . shall have the following rights by law: (5) the right to attend all public court proceedings the accused has the right to attend"); OKLA. CONST. art. II, § 34(A) ("The victim or family member of a victim of a crime has a right to be present at any proceeding where the defendant has the right to be present. . . ."); OR. CONST. art. I, § 42 ("[T]he following rights are hereby granted to victims in all prosecutions for crimes and in juvenile court delinquency proceedings: (a) the right to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present. . . ."); S.C. CONST. art. I, § 24 ("[V]ictims of crime have the right to: (3) be informed of and present at any criminal proceedings which are dispositive of the charges where the defendant has the right to be present."); TENN. CONST. art. I, § 35 ("[V]ictims shall be entitled to the following basic rights: (3) the right to be present at all proceedings where the defendant has the right to be present"); UTAH CONST. art. I, § 28(1) ("[V]ictims of crimes have these rights, as defined by law: (2) [u]pon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging crime has been publicly filed in court"). We include the Utah constitutional provision, UTAH CONST. art. I, § 28(1)(b), in the "unqualified" category despite the fact that it is seemingly qualified by the Utah Rules of Evidence. Section 615 of the Utah Rules of Evidence provides that a victim cannot be sequestered "where the prosecutor agrees with the victim's presence." This seems to suggest that a prosecutor could allow sequestration of a victim by failing to "agree" to the victim in the courtroom. Any such reading of the rule of evidence, however, would be trumped by the state constitutional provision which flatly guarantees—without any qualification—that "victims of crimes have these rights: . . . to be present at [the trial and other proceedings] . . . ." UTAH CONST. art. I, § 28(1)(b).

ceedings the accused has the right to attend."[126] The Michigan provision is worth spotlighting, because the Michigan Victims' Rights Amendment was the first constitutional amendment in this country protecting victims' rights, passed in 1988.[127] Michigan's constitutional provision also typifies these unqualified rights in other states, which are almost invariably protected by constitutional provision rather than statute.[128]

Many states (such as Michigan) give victims a right to attend proceedings that ties into the accused's rights to attend. Given that the accused has a virtually unlimited right to attend the trial, this formulation presumably gives victims an unqualified right to attend trial and perhaps a qualified right to attend other proceedings (e.g., grand jury proceedings[129] and proceedings dealing with purely legal questions[130]). Some states give victims an unqualified right to attend, but qualify the remedies available to enforce the right. For example, many states provide that a victim does not have the right to seek a new trial for violation of her rights.[131] Finally, some of these statutes extend rights not only to victims but also to victim's family members.[132]

*b. Qualified Rights to Attend Trial*

About twenty-five states have given victims a qualified right to attend. These states may be conveniently categorized into six groups, listed in roughly the order in which they protect victims: (1) the right to attend subject to exclusion for interference with the defendant's constitutional rights; (2) the right to attend subject to exclusion if necessary to protect a defendant's fair trial rights; (3) the right to attend unless testimony is affected; (4) the right to attend if practicable; (5) the right to attend subject to the discretion of the court; and (6) the right to attend after testifying. As will be seen in detailed discussion below, even though these rights are qualified, in the vast majority of cases, victims will have the right to attend trial.

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[126] MICH. CONST. art. I, § 24.

[127] *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1384 (1994).

[128] *See, e.g.*, ARIZ. CONST. art. II; § 2.1(A), OR. CONST. art. I, § 42; UTAH CONST. art. I, § 28(1).

[129] *See, e.g.*, FED. R. CRIM. P. 6(d) (grand jury proceedings secret). Of course, a constitutional right takes precedence over conflicting evidentiary rules.

[130] *See, e.g.*, FED. R. CRIM. P. 43(b)(3).

[131] *See, e.g.*, UTAH CONST. art. I, § 28(b)(2) (no cause of action for relief from any criminal judgment).

[132] State v. Uriarte, 981 P.2d 575, 576 (Ariz. Ct. App. 1999) (victim who is a minor has a right to parent's presence at trial, even if the parent will testify and notwithstanding the rule for exclusion of witnesses). *See generally* BELOOF, CASSELL, & TWIST, *supra* note 48 (discussing whether family members qualify as "victims").

*i. The right to attend subject to exclusion for interference with the defendant's constitutional rights*

Six states give victims the right to attend trial, qualified by exclusion for interference with a defendant's constitutional rights.[133] Typical of these provisions is Florida's, which provides: "Victims of crime or their lawful representative . . . are entitled to the right . . . to be present . . . at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."[134] A Florida decision interpreting a victim's right to attend held that the right does not confer a right to be reimbursed by the defendant for the cost of attending trial.[135]

These provisions give victims a very strong right to attend trial. It is unlikely that the defendant will be able to establish a violation of his rights from a victim attending trial. While we will discuss the issue of a violation of defendant's rights at greater length in the following Part of this Article,[136] it is worth noting here that only one reported case has seemingly found a problem with allowing a victim to attend the trial under this statute.[137]

*ii. The right to attend subject to exclusion if necessary to protect a defendant's fair trial rights*

Six states give victims the right to attend trials subject to exclusion if necessary to protect a defendant's "fair trial" rights.[138] For example, Ohio gives a

[133] ALA. CONST. art. I, § 6.01(a) ("Crime victims, as defined by law or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when authorized, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime"); FLA. CONST. art. I, § 16(b) ("Victims of crime or their lawful representatives . . . are entitled to the right . . . to be present . . . at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused."); IND. CONST. art. I, § 13(b) ("Victims of crime, as defined by law, shall have the right to be . . . present during public hearings . . . to the extent that exercising these rights does not infringe upon the constitutional rights of the accused"); KAN. CONST. art.15, § 15: ("Victims of a crime, as defined by law, shall be entitled to certain basic rights, including the right . . . to be present at public hearings, as defined by law, of the criminal justice process . . . to the extent that these rights do not interfere with the constitutional or statutory rights of the accused"); N.H. REV. STAT. ANN. § 21-M:8-k(II)(e) ( "To the extent that they can be reasonably guaranteed by the courts . . . and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights: (e) the right to attend trial and all other court proceedings the accused has the right to attend").

[134] FLA. CONST. art. I, § 16(b).

[135] *See* Koile v. State, No. 5D04-91, 2005 WL 171454 (Fla. Dist. Ct. App. Jan. 7, 2005).

[136] *See infra* notes 296-313 and accompanying text.

[137] *See infra* note 308 (discussing State v. Heath, 957 P.2d 449, 471 (Kan. 1998)).

[138] ARK. STAT. § 16-90-1103 (2004) ("The victim . . . may be present whenever the defendant has a right to be present during a court proceeding concerning the crime charged, other than the grand jury proceeding, unless the court determines that exclusion of the victim or the victim's representative is necessary to protect the defendant's right to a fair trial or the confidentiality or fairness of a juvenile proceedings."); ARK. R. EVID. 616 ("Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime . . . shall

victim a right to be present "whenever the defendant . . . in the case is present during any stage of the case against the defendant . . . that is conducted on the record, other than a grand jury proceedings, unless the court determines that exclusion of the victim is necessary to protect the defendant's . . . right to a fair trial . . . ."[139]

The reference to "fair trial" rights appears to be to the federal constitutional right to a fair trial. The Supreme Court has explained that "[t]he right to a fair trial is a fundamental liberty" guaranteed by the Due Process Clause of the Fifth Amendment.[140] A fair trial is "a trial whose result is reliable."[141] Thus, the

have the right to be present during any hearing, deposition, or trial of the offense."); CAL. PENAL CODE § 1102.6 (2004) ("The right of a victim of crime to be present during any criminal proceeding shall be secured as follows: [various reasons for exemption, including "the defendant's right to a fair trial"]); NEB. CONST. art. I, § 28 ("A victim of crime . . . shall have . . . the right to be present at trial unless the court finds sequestration necessary for a fair trial of the defendant."); OHIO REV. CODE ANN. § 2930.09 (West 2005) ("A victim in a case may be present whenever the defendant or alleged juvenile offender in the case is present during any stage of the case against the defendant or juvenile offender that is conducted on the record, other than a grand jury proceeding, unless the court determines that exclusion of the victim is necessary to protect the defendant's or alleged juvenile offender's right to a fair trial or a fair delinquency proceeding."); OHIO R. EVID. 615: ("(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. . . . (B) This rule does not authorize exclusion of any of the following persons from the hearing: . . . (4) in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute enacted by the General Assembly."); VA. CODE ANN. § 19.2-11.01(4)(b) (Michie 2000) ("Victims shall have the right to remain in the courtroom during a criminal trial or proceeding pursuant to the provisions of § 19.3-265.01"); VA. CODE § 19.2-265.01 (Michie 2000) ("During the trial of every criminal case and in all court proceedings attendant to trial, whether before, during or after trial, including any proceedings occurring after an appeal by the defendant or the Commonwealth, at which attendance by the defendant is permitted, whether in a circuit or district court, any victim as defined in § 19.2-11.01 may remain in the courtroom and shall not be excluded unless the court determines, in its discretion, the presence of the victim would not impair the conduct of a fair trial."); WIS. STAT. ANN. § 950.04 (West 2004) ("Victims of crimes have the following rights: (b) "[t]o attend court proceedings in the case, subject to § 906.15 and § 938.299(1). The court may require the victim to exercise his or her right under this paragraph using telephone or live audiovisual means, if available, if the victim is under arrest . . . or otherwise detained . . . ."); WIS. STAT. ANN § 906.15 (West 2004) ("(1) At the request of a party, a judge . . . shall order witnesses excluded so that they cannot hear the testimony of other witnesses. (2) Subsection (1) does not authorize exclusion of any of the following: (d) a victim . . . unless the judge or circuit court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile. The presence of a victim during the testimony of other witnesses may not by itself be a basis for finding that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile."); WIS. STAT. ANN § 938.299(1) (West 2004) ("Subject to § 906.15, if a public hearing is not held . . . a victim of a juvenile's act or alleged act may attend any hearing under this chapter based upon the act or alleged act, except that a judge may exclude a victim from any portion of a hearing which deals with sensitive personal matters of the juvenile or the juvenile's family and which does not directly relate to the act or alleged act committed against the victim.").

[139] OHIO REV. CODE ANN. § 2930.09 (West 2005).

[140] Estelle v. Williams, 425 U.S. 501, 503 (1976).

[141] Strickland v. Washington, 466 U.S. 668, 687 (1984).

Due Process Clause "always protects defendants against fundamentally unfair treatment by the government in criminal proceedings."[142] There are certain "basic components" in the due process right to a fair trial, including, for example, the right to a presumption of innocence.[143] Due process "embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial."[144] "Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience."[145]

As we discuss below, circumstances in which a defendant's fair trial rights would be implicated by a victim attending trial would be rare—indeed, and in our view, nonexistent.[146] We have been unable to locate any cases from these six states finding that a defendant's fair trial rights were impinged from a victim attending trial.

California's provision is interesting and is worth a bit of discussion. California guarantees a victim the right "to be present and seated at all criminal proceedings where the defendant, the prosecuting attorney, and the general public are entitled to be present."[147] This right is supported by a legislative finding that

> it is essential to the fair and impartial administration of justice that a victim of a criminal offense not be excluded from any trial or any portion thereof conducted by any court that in any way pertains to the offense, merely because the victim has been or may be subpoenaed to testify at the trial, or because of any arbitrary or invidious reason.[148]

In California, exclusion of a victim is allowed only where four criteria are met:

> (1) Any movant, including the defendant, who seeks to exclude the victim from any criminal proceeding demonstrates that there is a substantial probability that overriding interests will be prejudiced by the presence of the victim. "Overriding interests" may include, but are not limited to, the following:
>
> (A) The defendant's right to a fair trial.
> (B) The government's interest in inhibiting the disclosure of sensitive information.
> (C) The protection of witnesses from harassment and physical harm.
> (D) The court's interest in maintaining order.
> (E) The protection of sexual offense victims from the trauma and embarrassment of testifying.
> (F) Safeguarding the physical and psychological well-being of a minor.

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142 Doggett v. United States, 505 U.S. 647, 666 (1992) (Thomas, J., dissenting).
143 *Estelle*, 425 U.S. at 503.
144 Argersinger v. Hamlin, 407 U.S. 25, 49 (1972) (Powell, J., concurring).
145 *Estelle*, 425 U.S. at 503.
146 *See infra* notes 225−313 and accompanying text.
147 CAL. PENAL CODE § 1102.6 (2004).
148 *Id*. at Historical & Stat. Note.

> (G) The preservation of trade secrets.
>
> (2) The court considers reasonable alternatives to exclusion of the victim from the criminal proceeding.
> (3) The exclusion of the victim from any criminal proceeding, or any limitation on his or her presence at any criminal proceeding, is narrowly tailored to serve the overriding interests identified by the movant.
> (4) Following a hearing at which any victim who is to be excluded from a criminal proceeding is afforded an opportunity to be heard, the court makes specific factual findings that support the exclusion of the victim from, or any limitation on his or her presence at, the criminal proceeding.[149]

In light of these stringent requirements, it would be a rare case that victims would be excluded from the courtroom in California.

*iii. The right to attend unless testimony is affected*

Five states and the District of Columbia give victims the right to attend trials unless the court finds that their testimony would be affected.[150] Typical of these provisions is Illinois's, which provides:

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[149] CAL. PENAL CODE § 1102.6.

[150] CONN. CONST. art. I, § 8, *amended by* art. XXIX ("In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights: . . . (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony"); CONN. GEN. STAT. §54-85f (2001) ("Any victim of a violent crime or the legal representative or member of the immediate family of a victim who is deceased shall be permitted to attend all court proceedings that are part of the court record."); DEL. CODE. ANN. tit. 11 § 9407 (2005) ("A victim . . . may be present whenever a defendant has a right to be present during a court proceeding . . . unless good cause can be shown by the defendant to exclude the victim."); D.C. CONST. § 23-1909(b) ("A crime victim has the right to: . . . (4) Be present at all court proceedings related to the offense . . . unless the court determines that the testimony by the victim would be materially affected if the victim heard other testimony or where the needs of justice otherwise require"); ILL. CONST. art. I, § 8.1(a)(8) ("Crime victims, as defined by law, shall have the following rights as provided by law: . . . the right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial"); MASS. GEN. LAWS ANN. ch. 258B, § 3, Preamble (West 2005) ("the victim . . . shall be afforded the following basic and fundamental rights, to the greatest extent possible and subject to appropriation and to available resources . . . (b). . . to be present at all court proceedings related to the offense committed against the victim, unless the victim or family member is to testify and the court determines that the person's testimony would be materially affected by hearing other testimony at trial and orders the person to be excluded from the courtroom during certain other testimony"); MASS. R. CRIM. P. 21 ("Upon his own motion or the motion of either party, the judge may, prior to or during the examination of a witness, order any witness or witnesses other than the defendant to be excluded from the courtroom."); TEX. CONST. art. I, § 30(b) ("On the request of a crime victim, the crime victim has the following rights: . . . (2) the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial."); *see also* 25 P.R. LAWS ANN. § 973a(i) (2004) (victim has right to "[b]e present at all stages of the procedures against the person responsible for the crime when the laws and rules of procedure

> Crime victims, as defined by law, shall have the following rights as provided by law: the right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at trial.[151]

Most of these states give extremely strong protection to a victim's right to attend. Connecticut, Illinois, Massachusetts, and Texas, joined by the District of Columbia, all require that a court find that a victim's testimony "would be materially affected from testifying."[152] This is a standard that is strongly protective of victims for two reasons. First, the court is not permitted to engage in speculation about whether a victim's testimony *might* be affected by attending the trial. Rather, the standard in these states is that a victim's testimony "*would be*" affected from attending the trial. Second, not only must the court find an actual effect on testimony, but that effect must be "material." A "material" effect is conventionally understood to be an effect that is significant or essential.[153] In light of these stringent requirements, it is unsurprising that no reported decision has yet concluded that a victim's testimony "would be materially affected" from attending a trial. Delaware's provision is similar. It requires "good cause shown" to exclude a victim.[154] Presumably the only good cause that could be shown would be a material alteration to testimony.

*iv. The right to attend if practicable*

Two states give victims the right to attend where practicable. Maryland provides that "a victim of crime shall have . . . the right to . . . if practicable . . . attend . . . a criminal justice proceeding . . . ."[155] Similarly, North Carolina law provides that "the court shall make every effort to permit the fullest attendance possible by the victim in the proceedings."[156]

These provisions appear to give victims a very strong right to attend by essentially creating a presumption in favor of victim attendance. The legislative history of the Maryland Rule of Criminal Procedure allowing crime victims to be present throughout the trial clearly states this presumption. As a Maryland appellate court decision later recognized (quoting a committee report on the subject): "This bill creates a presumption that a victim of a crime of violence . . . has the right to be present at trial . . . after the victim has testified."[157] The report continued: "A judge may sequester a victim . . . only after a finding

allow it, except in those cases prohibited by the court because the victim is a witness in the criminal procedure or due to other circumstances. . .").

[151] ILL. CONST. art. I, §8.1(a)(8).

[152] Federal law also applies a similar standard. *See infra* notes 182−210 and accompanying text.

[153] BLACK'S LAW DICTIONARY 991 (8th ed. 1999).

[154] DEL. CODE. ANN. tit. 11 § 9407 (2005).

[155] MD. CONST. Decl. of Rights, art. 47; *see also* MD. CODE ANN., § 11-302 (2004) (formerly MD. ANN. CODE art. 27, §§ 620, 773).

[156] N.C. GEN. STAT. § 15A-832(e) (2005).

[157] Wheeler v. State, 596 A.2d 78, 87 (Md. 1991) (quoting the Floor Report of the Senate Judicial Proceedings Committee on Senate Bill 416, which later was enacted as MD. ANN. CODE art. 27, § 620).

of 'good cause.'"[158] And finally, the report stated the bill's purpose as being "to *minimize* the discretion trial courts may exercise in deciding whether to sequester victims during trial."[159]

Similarly, the North Carolina provision is implemented by a change to North Carolina's sequestration rule—its version of Federal Rule of Evidence 615—by a specific exemption from exclusion for "a person whose presence is determined by the court to be in the interest of justice."[160] The commentary to this provision suggests that it was intended to cover crime victims and their families. As an illustration of the kind of person who would be permitted to attend, the commentary mentions the parent or guardian of a minor child, even where the parent would be later called as a witness.[161] Further suggesting that victims will generally be able to attend is the fact that the North Carolina rule provides that a court "may" order witnesses excluded (rather than providing that a court "shall" order witnesses excluded, as contained in the federal version). The one reported case on this provision concludes that a trial court did not abuse its discretion in exempting from sequestration members of the victim's family.[162]

*v. The right to attend subject to the discretion of the court*

Another group of states give victims the right to attend in the discretion of the court. Five states follow this approach: Georgia, New Jersey, South Dakota, Washington, and Wyoming. Because each of these provisions is slightly different, they are worth setting out briefly.

A Georgia statute provides:

> The victim of a criminal offense may be entitled to be present in any court exercising jurisdiction over such offense. It shall be within the sole discretion of the judge to implement the provisions of this Code section and determine when to allow such victim to be present . . . and . . . to determine the order in which the testimony of such victim shall be given.[163]

New Jersey's victims' rights amendment provides that a "victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing his or her testimony as a witness, the victim is properly sequestered in accordance with law or Rules Governing the Courts of the State of New Jersey . . . ."[164] In turn, the court rule provides that "[a]t the request of a party or on the court's own motion, the court *may*, in accordance with law, enter an order sequestering witnesses."[165] This rule makes sequestration subject to judicial discretion.[166]

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158 *Id.*
159 *Id*. (emphasis in the original).
160 N.C. GEN. STAT. § 8C-1, Rule 615 (2005).
161 *Id*. at Commentary.
162 State v. Gay, 434 S.E.2d 840 (N.C. 1993).
163 GA. CONST. § 24-9-61.1.
164 N.J. CONST. art. I, ¶ 22.
165 N.J. R. EVID. 615 (emphasis added).
166 *Id*. at Comment.

A South Dakota statute provides: "[V]ictims of the crime . . . have the following rights: . . . (6) [t]o be present during all scheduled phases of the trial or hearings, except where otherwise ordered by the judge hearing the case or by contrary policy of the presiding circuit judge."[167]

A provision in the Washington Constitution provides that:

> Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend . . . This provision shall not constitute a basis for error in favor of the defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.[168]

This right is further implemented by the requirement that a court make a "reasonable effort to ensure that victims . . . be physically present in court during trial or, if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified."[169]

Finally, a Wyoming statute gives victims the right "to attend . . . criminal justice system proceedings . . . ." as provided by law.[170] Another statute provides, in turn, that "[u]nless the court for good cause shown shall find to the contrary, the victim, the victim's designee or both shall have the right to be present at all trial proceedings which may be attended by the defendant."[171]

The key issue for interpreting these statutes is what factors ought to inform the trial judge's exercise of discretion in determining whether to allow victim's to attend. As we discuss in Part III of this Article, compelling reasons justify allowing a victim to attend and the defendant's interests in exclusion are insignificant.[172] Accordingly, under these provisions, we would assume that courts will virtually always exercise discretion to allow a victim to attend a trial. Only one reported case appears to have analyzed a discretion-of-the-court provision. A Wyoming Supreme Court decision affirmed a trial court's decision to admit a victim at trial, briefly noting that the victim had given a lengthy pre-trial statement and would be the first witness called in the case.[173]

*vi. The right to attend after testifying*

Finally, in a category by itself, is Vermont. In that state, by statute, a victim "shall be entitled to be present during all proceedings subject to the provisions of Rule 615 of the Vermont Rules of Evidence."[174] Vermont's Rule 615, in turn, largely tracks Federal Rule 615, with its three exemptions that do not

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[167] S.D. CODIFIED LAWS § 23A−28C-1 (Michie 2004).
[168] WASH. CONST. art. I, § 35.
[169] WASH. REV. CODE § 7.69.030 (2005).
[170] WYO. CONST. § 1-40-203(b).
[171] WYO. CONST. § 1-40-206.
[172] *See infra* notes 314–81 and accompanying text (Part III).
[173] Gabriel v. State, 925 P.2d 234, 236 (Wyo. 1996).
[174] VT. ST. ANN. tit. X, § 13-5309 (2003).

seem to readily apply to crime victims.[175] In 1989, however, the Vermont rule was amended to include a provision designed to improve access for crime victims: "however, the witness may remain in the courtroom, even if the witness subsequently may be called upon by the other party or recalled in rebuttal, unless a party shows good cause for the witness to be excluded."[176] The Reporter's Notes to this change explain that the intent was "to authorize greater access to court proceedings by victims and other witnesses."[177] Explaining that "the courts of this state should be open to all who have an interest in attending," the Reporter's Notes indicate a desire to "strike[] a balance between the rights of the parties and the rights of victims and other witnesses."[178] Experience under the rule suggests that this greatly improves victims' access to trial. While prosecutors do not restructure their entire case to accommodate victims, they do make an effort to allow victims who are interested in the trial to testify as early as possible.[179] Particularly important for victims is the fact that they are now essentially guaranteed to see the defendant testify,[180] the single point in the process that is usually of greatest interest to victims.[181]

*3. The Victim's Right to Attend Trial Under Federal Law*[182]

Not only have the majority of states repudiated Federal Rule of Evidence 615 and given victims a right to attend trial, but federal law too now guarantees almost all victims a right to attend trial.

*a. Federal Rule of Evidence 615(4)*

In 1990, Congress passed the Victims' Rights and Restitution Act, which guaranteed victims "the right to be present at all proceedings related to the offense against him, unless the victim is to testify and the court determines that the victim's testimony would be materially prejudiced by hearing other testimony at the trial."[183] Little legislative history surrounds the provisions, which essentially went unnoticed until the Oklahoma City bombing case.

The Oklahoma City bombing trial highlighted this provision but also the weaknesses in it. During a pre-trial motion hearing in the case, the district court sua sponte issued a ruling precluding any victim who wished to provide victim impact testimony at sentencing from observing any proceeding in the case.[184]

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[175] VT. R. EVID. 615.

[176] *Id*.

[177] *Id*. at Reporter's Notes – 1989 Amendment.

[178] *Id.*

[179] Telephone interview with Carolyn Hanson, Deputy State's Attorney in Chittenden County, Vt. (June 1, 2005).

[180] Victims could be excluded during rebuttal for "good cause," but such a showing appears to be difficult to make. *See* State v. Beattie, 596 A.2d 919, 923 (Vt. 1991) (no good cause shown for excluding state's chemist from trial, even where he testified in rebuttal).

[181] Telephone interview with Carolyn Hanson, *supra* note 179.

[182] As noted earlier, the views expressed in this section (among others) are solely those of Professor Beloof.

[183] Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10606(5) (2000).

[184] *See* United States v. McVeigh No. 96-CR-68-M, 1996 WL 366268, at *2 (D. Colo. Trans. June 26, 1996). This section of this Article borrows from Paul G. Cassell, *Barbarians*

The court relied solely on Federal Rule of Evidence 615 in making its determination, apparently unaware of the provision in the Victims' Rights and Restitution Act protecting a victim's right to attend.[185]

Thirty-five victims and survivors of the bombing then filed a motion asserting their own standing to raise their rights under federal law and, in the alternative, seeking leave to file a brief on the issue as amici curiae, noting that the district court had overlooked the Victims' Rights and Restitution Act provision giving victims the right to attend trial.[186] After a hearing, the court denied the victims' motion asserting standing to present their own claims, allowing them only the opportunity to file amicus briefs.[187] The court also denied a motion to reconsider, concluding that victims present during court proceedings would not be able to separate the "experience of trial" from "the experience of loss from the conduct in question," and, thus, their testimony at a sentencing hearing would be inadmissible.[188] Unlike the original ruling, which was explicitly premised on Rule 615, this later ruling was more ambiguous, alluding to concerns under the Constitution, the common law, and the rules of evidence.[189]

The victims then filed a petition for writ of mandamus in the U.S. Court of Appeals for the Tenth Circuit seeking review of the district court's ruling.[190] The Department of Justice also filed both an appeal and a petition for a writ of mandamus. Three months later, a panel of the Tenth Circuit rejected—without oral argument—both the victims' and the Department's claims on jurisdictional grounds. With respect to the victims' challenges, the court concluded that the victims lacked "standing" under Article III of the Constitution because they had no "legally protected interest" to be present at the trial and consequently had suffered no "injury in fact" from their exclusion.[191] The Tenth Circuit also found that the victims had no right to attend the trial under any First Amendment right of access.[192] Finally, the Tenth Circuit rejected, on jurisdictional grounds, the appeal and mandamus petition filed by the Department.[193] Efforts by both the victims and the Department of Justice to obtain a rehearing were

*at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999).

[185] *See supra* note 183 and accompanying text.

[186] Motion of Marsha and H. Tom Kight, et al. and the National Organization for Victim Assistance Asserting Standing to Raise Rights under the Victims' Bill of Rights and Seeking Leave to File a Brief as Amici Curiae, United States v. McVeigh No. 96-CR-68-M, 1996 WL 570841 (D. Colo. Doc. Sept. 30, 1996). One of the authors (Cassell) represented a number of the victims on this matter on a pro bono basis, along with able co-counsel Robert Hoyt, Arnon Siegel, and Karan Bhatia of the Washington, D.C. law firm of Wilmer, Cutler, and Pickering, and Sean Kendall of Boulder, Colorado.

[187] *See McVeigh*, 1996 WL 578525, at *16.

[188] *Id.* at *24.

[189] *Id*.

[190] Petition for Writ of Mandamus, Kight et al. v. Matsch (10th Cir. Nov. 6, 1996) (No. 96-1484).

[191] United States v. McVeigh, 106 F.3d 325, 328 (Colo. 1997).

[192] *Id*. at 334−35.

[193] *Id*. at 335.

unsuccessful,[194] even with the support of separate briefs urging rehearing from forty-nine members of Congress, all six Attorneys General in the Tenth Circuit, and some of the leading victims' groups in the nation.

As a response to the denial of victims' rights, Congress rushed to pass the Victim Rights Clarification Act of 1997 to clearly state that victims should not have to decide between testifying at sentencing and watching the trial.[195] Representative Wexler, a supporter of the legislation, observed the painful choice that the district court's ruling was forcing on the victims:

> As one of the Oklahoma City survivors put it, a man who lost one eye in the explosion, "It's not going to affect our testimony at all. I have a hole in my head that's covered with titanium. I nearly lost my hand. I think about it every minute of the day." That man, incidentally, is choosing to watch the trial and to forfeit his right to make a victim impact statement. Victims should not have to make that choice.[196]

The measure passed the House by a vote of 418 to 19.[197] The next day, the Senate passed the measure by unanimous consent.[198] The following day, President Clinton signed the Act into law,[199] explaining that when someone is a victim, he or she should be "at the center of the criminal justice process, not on the outside looking in."[200]

The victims then promptly filed a motion with the district court asserting a right to attend under the new law.[201] The victims explained that the new law invalidated the court's earlier sequestration order and sought a hearing on the issue.[202] Rather than squarely upholding the new law, however, the district court entered a new order on victim-impact witness sequestration, concluding that "any motions raising constitutional questions about this legislation would be premature and would present issues that are not now ripe for decision."[203] The court also held that it could address issues of possible prejudicial impact from attending the trial by conducting a voir dire of the witnesses after the trial

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[194] *See* United States v. McVeigh No. 96-1469, 1997 WL 128893, at * 3 (10th Cir. Feb. 6, 1997).

[195] Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2000).

[196] 143 CONG. REC. H1048-05 (daily ed. Mar. 18, 1997) (statement of Rep. Wexler).

[197] *See id.* at H1068 (five members not voting).

[198] *See* 143 CONG. REC. S2509 (daily ed. Mar. 19, 1997) (statement of Sen. Nickles).

[199] *See* Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12 (codified as 18 U.S.C. § 3510) (1998).

[200] William J. Clinton, Proclamation on Crime Victims Rights Week (released Apr. 15, 1997), *available at* http://www.clintonfoundation.org/legacy/041597-proclamation-on-crime-victims-rights-week.htm.

[201] *See* Memorandum of Points and Authorities in Support of the Motion of the Victims of the Okla. City Bombing and the Nat'l Org. for Victim Assistance on the Application of the Victims' Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 144614 (D. Colo. Mar. 21, 1997).

[202] *See* Motion of the Victims of the Okla. City Bombing and the Nat'l Org. for Victim Assistance on the Application of the Victims' Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 144564 (D. Colo. Mar. 21, 1997).

[203] Order Amending Order Under Rule 615, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 136343 (D. Colo. Mar. 25, 1997).

and refused to grant the victims a hearing on the application of the new law, concluding that its ruling rendered their request moot.[204]

The district court's ruling left the victims with substantial uncertainties about how attending trial would affect their right to a victim impact statement at sentencing.[205] Attempts to have the court clarify its ruling failed. In the end, a number of victims were forced to give up the right to attend McVeigh's trial. Post-conviction attempts to put their views about the new law before the district court also failed, as the court refused to allow the victims to be represented by counsel during argument on the law or during voir dire about the possible prejudicial impact of viewing the trial.[206] The court, however, did conclude (as the victims had suggested all along) that no victim was in fact prejudiced as a result of watching the trial.[207]

In the wake of the Oklahoma City bombing case, the failure of Rule 615 to reflect victims' rights was called to the attention of the Advisory Committee on the Federal Rules of Evidence.[208] They agreed with the need to include victims in the evidence rules added a new provision stating that Rule 615 does not authorize exclusion of "a person authorized by statute to be present."[209] The Advisory Committee Notes explained that the amendment was "in response to: (1) the Victim's Rights and Restitution Act of 1990 . . . and (2) the Victim Rights Clarification Act of 1997 . . . ."[210]

*b. The Proposed Federal Constitutional Amendment*

Because of failures of statutory victims' rights protections such as those at issue in the Oklahoma City bombing case, proponents of victims' rights began to press for a federal constitutional amendment enshrining victims' rights in the Constitution. While another contribution to this Symposium fully recapitulates

[204] *Id*.

[205] *See* 1997 S.J. Res. 35, *supra* note 113, at 111 (statement of Prof. Paul Cassell); *see also* Motion of the Victims of the Okla. City Bombing and the Nat'l Org. for Victim Assistance on the Application of the Victim Rights Clarification Act of 1997, United States v. McVeigh, 1997 WL 144564 at *1.

[206] *See* Hearing on Victim Rights Clarification Act of 1997, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 290019 (D. Colo. June 3, 1997) (concluding that statute does not "create[] standing for the persons who are identified as being represented by counsel in filing that brief").

[207] *See, e.g.*, Examination of Diane Leonard, United States v. McVeigh, No. 96-CR-68-M, 1997 WL 292341 (D. Colo. June 4, 1997) (testifying that she was not unduly influenced by trial proceedings).

[208] One of the authors of this Article (Cassell) made the initial contact with the Committee on behalf of the Oklahoma City victims.

[209] FED. R. EVID. 615, advisory committee notes (1998 Amendments).

[210] *See* FED. R. EVID. 615, advisory committee notes (1998 Amendments) (stating that the amendment was in response to victims' rights legislation); *see also* United States v. Johnson, 362 F. Supp. 2d 1043 (N.D. Iowa 2005) (granting motion for victims to attend trial under FED. R. EVID. 615(4) because they are "persons authorized by statute" to attend under 18 U.S.C. § 3771).

the effort to pass a constitutional amendment,[211] is it useful here to discuss the provision in the amendment that would have protected crime victims' rights to attend the trial.

As originally proposed, the Victims' Rights Amendment would have given victims a right "to reasonable notice of, and not to be excluded from, any public proceedings related to the crime[.]"[212] This provision was designed to give victims an absolute right to attend trials. As the definitive Senate Judiciary Committee Report explained,[213] the proposal built on the 1982 recommendation of the President's Task Force on Victims of Crime. As with the Task Force, the Senate Judiciary Committee likewise concluded that victims deserve the right to attend trials as a matter of fundamental justice and to avoid secondary harm from being excluded.[214] The Senate Judiciary Committee also rejected fears that victims might somehow "tailor" their testimony to that of other witnesses. The Committee noted the parties in civil cases can attend trial, and that justice does not appear to have been harmed:

> Consider the civil justice system. If a lawsuit arises from a drunk driving crash, both the plaintiff (the victim of the drunk driver) and the defendant (the drunk driver) are witnesses. Yet both have an absolute right, as parties in the case, to remain in the courtroom throughout the trial. Do we value truth any less in civil cases? Of course not. But we recognize important societal and individual interests in the need to participate in the process of justice.[215]

The Committee also endorsed an unqualified right for victims to attend trial. The Committee noted that the alternative qualified right—giving victims a right to attend trials except where their testimony would be "materially affected" by their attendance—had proven inadequate. As support for this point, the Committee recited the history of the Oklahoma City bombing case just discussed. The Committee concluded that: "Rather than create a possible pretext for denying victims the right to attend a trial or extended litigation about the speculative circumstances in victim testimony might somehow be affected, the Committee believes that . . .a victim's right to attend trial should be unequivocally recognized."[216]

One technical point about the federal provision bears mentioning. The right conferred is a negative one, a right "not to be excluded." The reason for the negative formulation was to avoid any implication that the government had an affirmative obligation to provide funding, schedule proceedings according to the victim's wishes, or otherwise affirmatively support a victim's right to at-

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[211] *See* Kyl & Twist, 9 LEWIS & CLARK L. REV. 581 (2005); *see also* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. ___ (forthcoming 2005).

[212] S. REP. 105-409 (Oct. 12, 1998).

[213] S. REP. 108-191 (2003).

[214] *Id.* at 18−19.

[215] *Id.* at 20 (quoting statement of Steven Twist).

[216] *Id.* at 21.

tend.[217] "The amendment, for example, would not entitle a prisoner who was attacked in prison to a release from prison and plane ticket to enable him to attend the trial of his attacker."[218]

At all events, the federal constitutional amendment never became law. As Senator Kyl and Steven Twist discuss in their important contribution to this Symposium, the victims' movement instead decided to pursue a comprehensive federal statute.[219]

*c. The Crime Victims' Rights Act*

In lieu of a constitutional amendment, in October 2004, the victims' movement persuaded Congress to pass a comprehensive statute—The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA).[220] The CVRA guarantees victims the right to attend a proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." The CVRA implements this recommendation by:

> [A]llow[ing] crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pre-trial, trial, or post-trial proceedings.[221]

Under this new statute, it will be virtually unheard of for a victim to be excluded from trial. While the earlier federal statute predicated exclusion on a victim's testimony being materially "affected," the CVRA requires a material "alteration" of the victim's testimony. Moreover, the statute does not permit exclusion based on speculation and surmise. The court must determine that a victim's testimony "would be" materially altered before allowing exclusion. In addition, the alteration of the victim's testimony must be "material," that is, it must be "significant" change.[222] The alteration of the victim's testimony must be proven by a heightened standard of "clear and convincing evidence"—that

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[217] S. REP. 105-409 at 26.

[218] *Id*. *See also* 146 CONG. REC. S2966, S2979 (daily ed. Apr. 27, 2000) (statement of Sen. Kyl) ("We say the government cannot exclude you from the courtroom. . . .We are not really saying you have a right to attend the trial; we are saying you have a right not to be excluded from the trial. There is a difference. The former could lead to assertions that the government should pay for your getting to the trial, that your employer should have to let you off work or pay. . . . We only say if you show up, you get to attend; the government cannot exclude you.").

[219] *See* Kyl & Twist, *supra* note 211, at 592.

[220] Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2261 (codified as 18 U.S.C. § 3771) (2004). *See generally* Kyl & Twist, *supra* note 211.

[221] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[222] *See* BLACK'S LAW DICTIONARY 85 (8th ed. 1999) (defining "material alteration" as "a significant change in something").

is, by proof that is "highly probable or reasonably certain."[223] If all of these points are proven, then the trial court is additionally directed to "make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding."[224] Presumably this refers to the possibility that a victim might be allowed to testify first in a trial and then be exempt from sequestration thereafter.[225] The CVRA also requires that "the reasons for any decision [to exclude the victim] shall be clearly stated on the record."[226]

It is possible that the CVRA will lead to further changes in the Federal Rules of Evidence and perhaps the Federal Rules of Criminal Procedure. One of the authors of this Article has advocated that the provisions guaranteeing a victim's right to attend be folded directly in the Federal Rules of Criminal Procedure.[227] But regardless of how the CVRA is technically implemented, the bottom line remains that federal law now plainly recognizes a nearly-unqualified right for crime victims to attend criminal trials.

In sum, a review of American history shows that things have come full circle for crime victims. Victims attended trials at the start of our history as private prosecutors. Then, they gradually lost their control over criminal proceedings and their right to attend trials as well. But as a backlash to their exclusion, it is now the law in federal court and most states that they can attend trials.

## III. THE CONSTITUTION ALLOWS CRIME VICTIMS TO ATTEND TRIALS

Having traced the relevant history of surrounding the victim's right to attend trials, it is now straightforward to consider the constitutional implications of victim attendance. While the leading critic of the victim's right to attend trial has eschewed any constitutional argument,[228] a few court decisions seemingly rest on the idea the Constitution requires keeping victims outside the court-

[223] *Id.*

[224] 18 U.S.C. § 3771(b).

[225] *See infra* notes 346−77 and accompanying text (explaining how this approach resolves most concerns about victim testimony tailoring).

[226] 18 U.S.C. § 3771(b).

[227] *See* Cassell, *supra* note 211.

[228] Professor Mosteller has written several articles criticizing giving victims an absolute right to attend trials, but has admitted that he questions "whether the practice [of permitting multiple victim-eyewitnesses to remain in the courtroom and hear the testimony of others] would violate a defendant's constitutional rights, although I acknowledge that the result is not entirely free from doubt." Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1701 n.29 (1997). His view should be contrasted with the assertion by Professor LaFave and his colleagues (made in a single sentence in their treatise) that "the defendant's interests in a fair trial must take precedence over any statutory or state constitutional right of the victim to remain in the courtroom." 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 24.4(d) at 1122 (2d ed. 1999 & 2005 Supp.). Unfortunately, it is hard to respond to this assertion because they fail to provide any explanation for this conclusion or of the circumstances in which they believe the defendant's interests would be violated.

room.[229] This Part rebuts any suggestion that the Constitution requires victims be excluded from trials.[230] In section A of this Part, we explain that the Constitution guarantees defendants a "public" trial in which they will have a right to "confront" adverse witnesses. It is hard to see in this specific language any justification for excluding victims. A constitutional argument for excluding victims must therefore rely on the open-ended Due Process Clause. But interpreted in light of either historical understanding or contemporary practices, victim attendance is consistent with due process. In section B of this Part, we explain that the prevailing case law in this country is overwhelmingly consistent with this conclusion.

### *A. The Bill of Rights Does Not Require Excluding Victims*

Given that both historical tradition and contemporary practice favor admitting victims to trials, it would be surprising to find the Constitution somehow forbade victim attendance. And, indeed, no language in the Fifth and Sixth Amendments supports the far-reaching argument that it is positively unconstitutional for a state to allow a victim to remain in the courtroom during a criminal trial. Instead, there are three provisions that support, if anything, the opposite view that a victim of a crime can remain in the courtroom: the Sixth Amendment's guarantee of a "public" trial, not a private one; the Sixth Amendment's guarantee of a right to "confront" witnesses, not to exclude them; and the Fifth and Fourteenth Amendment's guarantee of "due process of law," which construed in light of historical and contemporary standards suggests victims can attend trials.[231]

#### *1. The Right to a Public Trial*

The effort to discover a federal constitutional right to exclude crime victims founders on the very amendment often cited for support. The Sixth Amendment guarantees a defendant the right to a "*public* trial."[232] These words suggest that the admission of persons to a trial—not their exclusion—is the constitutionally-protected value.

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[229] *See infra* notes 231–34 and accompanying text.

[230] In an earlier article designed to explain the meaning of the Utah Victims' Rights Amendment, one of the present authors (Cassell) expressed his tentative view that giving victims the right to attend trial could not create a conflict except in "the most extreme circumstances." Cassell, *supra* note 127, at 1393. This brief statement has been deployed by critics of victims' rights to contend that the constitutional rights of defendants could be violated by victim attendance statutes in certain circumstances. *See, e.g.*, Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 457 (1999). To be clear, Professor Cassell was not actually asserting in his earlier article that a defendant's rights would be violated by victims' attendance statutes.

[231] *Accord* Stephens v. State, 720 S.W.2d 301, 303 (Ark. 1986) ("Nothing in the constitution touches on the exclusion of witnesses during criminal trials. The Sixth Amendment to the United States Constitution . . . guarantee[s] an accused a speedy and public trial and to be confronted with the witnesses against him. Otherwise . . . [the] document contains . . . [nothing] that might be seen as a right to limit those who may want to attend the trial.").

[232] U.S. CONST. amend. VI (emphasis added).

Nor do these words contain any implicit right to closure. As the Supreme Court's leading opinion on this provision explains, "While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial. 'The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.'"[233] In short, "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."[234]

The application of the public trial right has obvious implications for victims of crime. As the Supreme Court has explained, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct . . . ."[235] "Public judicial proceedings have an important educative role . . . . The victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."[236] Victims' concern about the course of a criminal prosecution stem from the fact that society has withdrawn "both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution."[237]

Of course, the right to a public trial can be overcome by competing interests.[238] Indeed, crime victims are often beneficiaries of narrowly-drawn court closure orders.[239] And the Sixth Amendment does not, by itself, confer rights on anyone other than the defendant.[240] But the limited claim here is not that the Sixth Amendment *requires* Congress and the states to admit crime victims—only that it *permits* them to do so.[241] Since the Sixth Amendment suggests, if anything, the victim has a right to demand to be admitted to a trial, surely the opposite reading is completely untenable.

*2. The Right to Confront Witnesses*

The only other language in the Constitution that appears to have direct application to the claim that defendants can exclude crime victims suggests—once again—the opposite conclusion. The Sixth Amendment guarantees that in all criminal prosecutions that "the accused shall enjoy the right . . . to be *con-*

[233] Gannett Co. v. DePasquale, 443 U.S. 368, 382 (1979) (quoting Singer v. United States, 380 U.S. 24, 34−35 (1965)).

[234] Press-Enter. Co. v. Super. Ct., 478 U.S. 1, 7 (1986).

[235] Press-Enter. Co. v. Super. Ct., 464 U.S. 501, 509 (1984).

[236] *Gannett*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

[237] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion).

[238] *See* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606 (1982).

[239] *See, e.g.*, Douglas v. Wainwright, 739 F.2d 531, 532−33 (11th Cir. 1984) (per curiam) (partial closure of trial to public other than press and defendant's family justified for substantial reason of protecting rape victim from insult and embarrassment during testimony), *cert. denied*, 469 U.S. 1208 (1985).

[240] *Gannett Co.*, 443 U.S. at 391.

[241] *See id.* at 385 ("[i]t is important to distinguish between what the Constitution permits and what it requires").

*fronted with* the witnesses against him."[242] The provision guarantees, "[s]imply as a matter of English," that the defendant has "a right to meet face to face all those who appear and give evidence at trial."[243] In interpreting the right to confront, the Supreme Court has recited a passage from Shakespeare concerning a face-to-face meeting between the defendant and victim: "Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .'"[244] The suggestion that the victim should have been excluded from the courtroom, at least while not testifying, hardly finds support in this vision of confrontation.

Naturally, the right to confront witnesses is not absolute. Crime victims are often the beneficiaries of this fact.[245] But, again, the point here is a limited one: specifically that the Constitution surely cannot be read as forbidding the presence of a victim at trial when the only relevant language suggests that, at least at some point in most cases, the victim's presence is required.

Confrontation contains a second component: the right to cross-examine opposing witnesses. Plainly that component of confrontation is satisfied even when victims remain in the courtroom for trial. Defendants sometimes suggest that their right of confrontation is somehow infringed because their cross-examination of the victim conceivably might have been more effective if she had not heard other witnesses testify. Even if such proof could be made,[246] that would not establish a constitutional violation. The Court has repeatedly held that "[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[247] Thus, in *United States v. Owens*, the Supreme Court held that the right of confrontation was not denied by testimony from a witness who could no longer remember why he had accused the defendant. The Court explained, "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee."[248]

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[242] U.S. CONST. amend. VI (emphasis added).

[243] California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring).

[244] Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting Richard II, Act 1, sc. 1).

[245] *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 844 (1990) (permitting child victim of sex offense to testify via closed-circuit television). *Cf.* Crawford v. Washington, 541 U.S. 36 (2004) (expanding Confrontation Clause protections).

[246] *But see infra* notes 344−77, and accompanying text (explaining why tailoring problems are not significant).

[247] United States v. Owens, 484 U.S. 554, 559 (1988) (emphasis in original) (internal quotation omitted); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety. . . .").

[248] *Owens,* 484 U.S. at 560.

*3. The Due Process Clause*

Because the only specific provisions of the Bill of Rights with an arguable connection to this issue suggest a defendant may not eject a victim from trial, the only remaining source of such a right would be the general provision guaranteeing that no person shall be deprived of "life, liberty, or property, without due process of law."[249] Yet the Supreme Court has been clear that if "a constitutional claim is covered by a specific constitutional provision . . . , the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."[250] As just explained, the provisions of the Constitution that seem to bear most specifically on crime victim attendance suggest, if anything, that victims should be allowed in the courtroom, so the due process argument is a virtual non-starter.

Moreover, to ascertain the meaning of this general phrase, one could look either to historical understanding or contemporary societal norms. Under either approach, the Due Process Clause provides no support for a defendant's right to exclude a victim from a trial.

We explored the historical principles surrounding victims attending trial at length earlier.[251] Suffice it to say here that, when the Constitution was drafted, a tradition of private prosecution was well-established. As private prosecutors, victims would not have been excluded from trial. Thus, understood in historical context, it is impossible to argue that due process considerations require that crime victims be excluded from trial.[252]

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[249] U.S. CONST. amend. XIV.

[250] County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). *See also* Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that excessive force claims should be analyzed under the Fourth Amendment rather than the "more generalized notion of substantive due process").

[251] *See supra* notes 1−227, and accompanying text.

[252] We have acknowledged that our historical analysis is preliminary and that further research might shed more light on the subject. So one "fallback" point should also be recognized. Even if new historical research might demonstrate some limited right to request sequestration of victims in certain circumstances existed at the Nation's founding, it seems quite likely that this right would be one addressed to the court's discretion. Historically, this was the approach in England. *See, e.g.*, 3 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, 2389 n. 3 (1904) (citing Cook's Trial, 13 How. St. Tr. 322, 348 (1696) (L.C.J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity")); *id*. (citing Vaughan's Trial, 13 How. St. Tr. 485, 494 (1696) (L.C.J. Holt: "You cannot insist upon it as your right, but only a favour that we may grant")). And early American courts, too, recognized sequestration as a discretionary one. *See, e.g.*, People v. O'Loughlin, 1 P. 653, 657 (Utah 1882) ("The modification of the order [excluding witnesses] was a matter of discretion, as was also the making of it at first."); State v. Fitzsimmons, 30 Mo. 236, 1860 WL 6012 at *2 (1860) (concluding in a criminal case it "is a matter in the discretion of the court whether the witnesses shall be separated or not during their examination"). *See generally* Wigmore*, supra* note 40 at 484 (arguing that the sequestration should be demandable as of right but recognizing that all but a "few courts" hold it "grantable only in the trial court's discretion"). An action placed in the hands of the court's discretion is not the raw material from which a nontextual, due process right to exclude victim can be manufactured.

One technical point must be briefly explored—the issue of incorporation. We recognize that the tradition of private prosecution was not broadly established in the federal system at the time of the nation's founding.[253] It might be argued, therefore, that in drafting the Bill of Rights and the Due Process Clause in particular, the Framers would not have understood that state practices would be affected[254] and, thus, would not have had in mind the flourishing practice of private prosecutors in the state system. As a result, the argument might conclude, the Framers simply never thought about the issue of sequestration rules as applied to victims.

Such an argument would be flawed for two reasons. First, it appears that at least some private prosecution took place in the federal system early in our nation's history.[255] Thus, the Framers would likely have contemplated this problem—if it were indeed a problem. Instead, the more likely conclusion is that the Framers saw no problem at all with victims prosecuting and attending criminal trials.

Second, and more undisputably, it is clear that the Framers thought about Due Process in the context of *civil* trials. The Due Process Clause applies to civil and criminal cases alike.[256] As discussed earlier, a party to a lawsuit has long been exempt from any sequestration order.[257] The rationale supporting such an approach is apparent. "[A] party's presence at the proceedings may be essential in assisting in the presentation of its case and otherwise protecting its interests by observing the conduct of the trial."[258] Accordingly, as the Advisory Committee to the Federal Rules of Evidence has explained, "[e]xclusion of persons who are parties would raise serious problems of confrontation and due process."[259] Criminal defendants are, of course, excepted from the operation of the rule because, as the Supreme Court has noted, "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial."[260]

Given that a party—a witness with a "stake in the outcome of the trial"—has historically not been subject to exclusion, the fallacy of the argument for excluding victims becomes clear. If the victim in a criminal case brought a civil suit against the defendant for the same conduct, she would be a party with a "stake in the trial" and the defendant could not exclude her from the trial. For example, if a woman is raped, she could pursue a civil suit against her attacker

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[253] *See supra* notes 24−27, and accompanying text.

[254] *See* Barron v. City of Baltimore, 32 U.S. 243, 250−51 (1833).

[255] *See supra* notes 2−67, and accompanying text.

[256] *See* U.S. CONST. amends. V, XIV (no person shall be deprived of "liberty" *or* "property" without "due process of law").

[257] *See, e.g.*, State v. Utah Merit Sys. Council, 614 P.2d 1259, 1262 (Utah 1980) ("Statutes in a number of jurisdictions establish the right of a party to an action to remain in attendance during the entire trial.").

[258] *Id.*

[259] FED. R. EVID. 615, advisory committee's note; *see also* Perry v. Leeke, 488 U.S. 272, 282 (1989) ("[t]he defendant's constitutional right to confront the witnesses against him immunizes him from . . . physical sequestration").

[260] Geders v. United States, 425 U.S. 80, 88 (1976).

even while a criminal trial is pending on the same facts. In that civil suit, she would have a right to attend the trial. If she can remain in the courtroom during that civil trial, then the Due Process Clause cannot require a different result in a criminal trial regarding the same facts. Put another way, it would be strange reading of this Clause to say that while due process probably *requires* the victim's presence in a civil action for a crime, it positively *prohibits* her presence in a criminal case for the same conduct.[261] For all these reasons, no historical argument can be made for concluding that the Due Process Clause requires that a victim be excluded from a criminal trial.

While the historical understanding of the Due Process Clause is enough to dispose of the claim that there is a constitutional right to exclude victims,[262] the same conclusion is reached if one looks to contemporary practices. In particular, over the last two decades, Congress and legislatures across the country have acted to insure that a crime victim can remain in the courtroom during a criminal trial.[263] These actions stem from "an outpouring of popular concern for what has come to be known as 'victims' rights' . . . ."[264] In light of these facts, it is hard to see how there is a contemporary understanding that crime victims must be excluded from trials.[265]

A final problem with any constitutional argument for excluding victims is that, taken to its logical conclusion, the argument requires effectively invalidating provisions in the Federal Rules of Evidence and parallel rules in the majority of the states. The constitutional claim for excluding victims rests on some notion that if a victim remains in the courtroom during trial, she can tailor her testimony to conform to that of other witnesses. But this argument applies equally to other witnesses in criminal trials, including in particular police officers who are case agents. Yet under federal and many state rules, case agents are almost invariably allowed to observe trials.[266] The widely-accepted principle that a police officer can remain at trial, even when he is a witness, disproves the position that the Constitution enshrines a right to exclude victims who might "tailor" their testimony to others.

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[261] *See* S. REP. NO. 108-191 at 20. *Cf.* GREENLEAF, *supra* note 30, at 474. (noting that the rule on exclusion of witnesses "in criminal and civil cases is [generally] the same").

[262] *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976) (rejecting defendant's due process claim based on historical understanding).

[263] *See infra* notes 314−21, and accompanying text.

[264] Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled on grounds advocated in the dissent*, Payne v. Tennessee, 501 U.S. 808 (1991).

[265] The Senate Judiciary Committee concurs with this analysis. A preliminary version of this analysis was presented by one of the present authors to the Committee in 1996. *See A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (1997) (statement of Paul Cassell, Professor of Law, University of Utah College of Law). The Committee in various reports agreed that the analysis "appears to be an accurate assessment of constitutional legal principles." S. REP. NO. 108-191 at 21.

[266] *See generally* FED. R. EVID. 615(2) (discussed in *supra* notes 87-118 and accompanying text); JOSEPH & SALTZBURG, *supra* note 109, at 2 ("The second category, a non-natural party's designee, is most frequently applied in criminal cases to permit the government's chief investigating agent to assist the prosecution at trial.").

For all these reasons, the Constitution provides no basis for requiring victims to be excluded from criminal trials.

### *B. Case Law Is Consistent with Allowing Victims to Attend Trial*

In light of this analysis that the Constitution erects no barrier to victims attending trials, it is useful to turn to the cases that have analyzed this issue. Reassuringly, almost all courts that have decided this question have reached the same conclusion. In the first Part of this section, we look at the bulk of the cases, which hold that defendants have no constitutional right to exclude victims. In the second part, we consider some cases that find no constitutional violation in particular situations, yet hint at that possibility in dicta. In the final section, we critique the one case that holds that a defendant's rights were violated by a failure to exclude a victim.

#### *1. No Constitutional Right to Exclude*

While the United States Supreme Court has not spoken at any length on sequestration rules,[267] a number of lower courts have done so. Most cases agree that sequestration of victims presents no federal constitutional question.[268] The reasons were well stated by Judge Posner, who explained that the Constitution does not embody every procedural device that might protect a defendant:

> A refusal to exclude . . . witnesses until they testify is not a denial of due process . . . . [T]he due process clause does not incorporate every refinement of legal procedure designed to make trials fairer or more accurate—not even one hallowed by time . . . . It forbids only egregious departures . . . from accepted standards of legal justice.[269]

Using the same analysis that we have, the Maryland Court of Appeals has rejected a constitutional attack on Maryland's victims' attendance provision.[270] The Court explained:

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[267] The Court has indicated that exclusion of a witness who disobeys a sequestration order is a matter vested in the sound discretion of the trial court, in Holder v. United States, 150 U.S. 91 (1893), a ruling that hardly suggests constitutional underpinnings for the sequestration. The court has also held that a defendant cannot be sequestered because of his right to confront witnesses against him, in Perry v. Leeke, 488 U.S. 272, 282 (1989), and that sequestration does not permit a trial judge to order a defendant not to communicate with his lawyer during an overnight break, in Geders v. United States, 425 U.S. 80, 88 (1976)..

[268] In this section, we consider only cases involving constitutional questions, not discussing a number of decisions that approve victim attendance statutes without explicitly discussing constitutional questions. *See, e.g.*, People v. Coney, 98 P.3d 930 (Colo. 2004) (victim's father excluded at trial, ruling disapproved because the state constitution and statutes allow him to be there); United States v. Spann, 48 M.J. 586, 588−89, n.4 (1998) (victim's rights bill "indicate[s] congressional intent on the balance to be drawn between the victim's right to attend and the opportunity to exclude . . ." in favor of the victim); Brandon v. State, 776 S.W.2d 345, 346 (Ark. 1989) (victim had right to attend trial notwithstanding rule on sequestration).

[269] Bell v. Duckworth, 861 F.2d 169, 170 (7th Cir. 1988) (citations omitted).

[270] Wheeler v. State, 596 A.2d 78 (Md. 1991).

> Nothing in the constitution touches on the exclusion of witnesses during criminal trials. The Sixth Amendment to the United States Constitution and Article 2, Section 10 or our own guarantee an accused a speedy and public trial and to be confronted with the witnesses again him. Otherwise neither document contains anything that might be seen as a right to limit those who may want to attend the trial.[271]

Several courts have similarly concluded that victims can constitutionally attend trials by highlighting the fact that courts are presumptively open to the public. For example, the North Carolina Supreme Court rejected an argument by a defendant convicted of assaulting police officers that the victim-officers should have been sequestered.[272] While acknowledging that the officers testified to the same "hotly debated" issues of fact, were subject to a civil suit filed by the defendant, and had offered differing versions of several key points, the court nonetheless found no constitutional requirement for sequestration. The court explained that "[d]ue process does not automatically require separation of witnesses who are to testify to the same set of facts."[273] Moreover, the court observed that generally "the trial and disposition of criminal cases is the public's business and ought to be conducted in open court. The public, and especially the parties, are entitled to see and hear what goes on in court."[274] To like effect is a capital case from the Eleventh Circuit, involving a sentence proceeding which held that the presence of a murdered police officer's young son did not violate the defendant's constitutional rights:

> We see no error, much less a constitutional deprivation, in the trial court's ruling. Petitioner cites no authority for the proposition that due process requires that in a capital sentencing proceeding, the defendant has a constitutional right to have removed from the courtroom spectators whose presence may remind the jury of the victim. A criminal proceeding is a public hearing; all citizens, including the victim's family, have a right to attend.[275]

The Arizona courts have rejected constitutional challenges to the Arizona victim attendance provision, explaining that sequestration is essentially a matter of legislative judgment: "Inasmuch as the rule permitting the exclusion of witnesses originated with the legislature, we can conceive of no reason why the rule cannot be modified in the same manner . . . ."[276]

The Idaho Supreme Court followed suit recently, at least by implication. In *State v. Gertsch*, the court refused to "address the extent, if any, to which [the defendant's federal constitutional] 'right to a fair trial' conflicts with [the state constitutional right] of victims to be present," because the defendant did not preserve the matter for appeal.[277] When considering whether the matter could

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[271] *Id.* at 88.

[272] State v. Harrell, 312 S.E.2d 230, 236 (N.C. Ct. App. 1984).

[273] *Id.* at 236.

[274] *Id.* (internal quotation omitted).

[275] Willis v. Kemp, 838 F.2d 1510, 1523 (11th Cir. 1988).

[276] State v. Fulminante, 975 P.2d 75, 92 (Ariz. 1999) (internal quotation omitted).

[277] 49 P.3d 392, 400 (Idaho 2002).

be addressed notwithstanding this omission, however, the court determined that it could not, because a failure to exclude was not a "fundamental error," or one "that goes to the foundation or basis of a defendant's rights."[278]

Several older cases have likewise found no constitutional right to sequestration, without elaborating the basis for their holding. A 1965 Fifth Circuit decision, for example, summarily denied a challenge to a trial court's failure to sequester witnesses on the ground that failure to do so "does not amount to a deprivation of [the defendant's] constitutional rights."[279] And a 1971 Tennessee appellate decision concludes that sequestration "raises no constitutional question."[280]

Finally, a 1999 unpublished decision from the Alaska Court of Appeals reviews many of the cases analyzed in this section. It concluded: "numerous courts have considered this issue and have concluded that a defendant has no constitutional right to exclude witnesses from the courtroom during the testimony of other witnesses. We see no reason not to follow the reasoning of these cases."[281]

In sum, a number of cases flatly hold that a defendant has no constitutional right to force sequestration of a victim or witness.

*2. Constitutional Concerns in Dicta*

In addition to the cases discussed in the previous section, a handful of other cases have rejected challenges to victims in the courtroom but added—in ill-considered dicta—that failure to sequester a victim in unusual circumstances might violate the constitutional right of a defendant. These suggestions are dicta, because no violation of rights occurred. These statements should be given little weight in assessing constitutional questions, because "being peripheral, [they] may not have received the full and careful consideration of the court that uttered it."[282] Moreover, these statements are not well thought out because they fail to explain how the constitutional problem arises.

Illustrative of the ill-considered dicta is the decision of the Utah Court of Appeals in *State v. Beltran-Felix*.[283] In that case, the defendant had put a gun to a female victim's head and forced her to perform oral sex on him during the course of a robbery.[284] He moved to sequester her at trial, but the motion was denied. She testified at the trial as the state's last witness. On appeal, he claimed that this denial violated his right to a fair trial under the Fifth Amendment.[285] After a thorough investigation of federal and state case law, the appeals court determined that Utah's victims' rights provisions did not conflict

[278] *Id.* (internal quotation omitted).

[279] Mathis v. Wainwright, 351 F.2d 489 (5th Cir. 1965) (citation omitted).

[280] Rucker v. Tollett, 475 S.W.2d 207, 208 (Tenn. Crim. App. 1971).

[281] Landon v. State, No. A-6479, 1999 WL 46543 at * 2 (Alaska Ct. App. 1999) (unpublished).

[282] Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986).

[283] 922 P.2d 30 (Utah Ct. App. 1996). In the interests of full disclosure, one of the authors (Cassell) represented the victim in this matter. *Id.* at 31.

[284] *Id.* at 32.

[285] *Id*. at 31.

with the defendant's constitutional rights either on their face or as applied.[286] Indeed, the court even stated "there is no constitutional right to require exclusion or sequestration of witnesses."[287] Yet surprisingly in light of this blanket conclusion, the court continued to discuss whether allowing the victim in the courtroom had deprived the defendant of a fair trial. The court ultimately stated that no fair trial violation took place.[288] Then, apparently concerned that it had opened a Pandora's box, the court dropped a footnote explaining that "we are concerned our analysis may give rise to constitutional challenge every time a victim is allowed to remain in the courtroom during a criminal trial. Accordingly, we reiterate the observation made [earlier] . . . that 'inconsistent statements of witnesses, whether they be by the actual victim or others, are in many cases simply a credibility factor that the finder of fact must weigh in determining the outcome.'"[289] Why in "many cases" the presence of a victim would be a mere "credibility factor" yet in other cases it would possibly violate a defendant's fair trial rights was unexplained. The court had it right at the outset. To resolve constitutional challenges to victims in the courtroom, it is necessary to go no further than the conclusion that "there is no constitutional right to require exclusion or sequestration of witnesses"—period.[290]

Similarly unilluminating is *Beasley v. State,* a homicide case in which the Florida Supreme Court asserted that even though the victims' families had a state constitutional right to be at the trial, under certain circumstances "this right must yield to the defendant's right to a fair trial."[291] This yielding never took place, however, because the victim's next of kin's story was recorded in prior depositions, leaving no reason for sequestration.[292] As a result, the court had no occasion for elaborating on its dicta about how fair trial could be implicated.

Likewise unilluminating is the Arkansas Supreme Court's opinion rejecting a defendant's claim that he was deprived of a fair trial when the trial judge allowed a victim to attend trial pursuant to a state statute. After noting that the argument for unconstitutionality of the statute was unsupported by any authority or convincing argument, the court reasoned that, "[n]othing in the constitu-

[286] *Id*. at 33−34.

[287] *Id.* at 34. The court had reached similar conclusions in two earlier cases. *See* State v. Cosey, 873 P.2d 1177, 1181 n.5 (Utah Ct. App. 1994) ("Where the victim testifies first, as in this case, we wholly fail to see how defendant's rights were violated"); and State v. Rangel, 866 P.2d 607 (Utah Ct. App. 1993) (no evidence that victim/witness conformed her testimony to that of others, no prejudice, no infringement of right to fair trial).

[288] *Beltran-Felix,* 922 P.2d at 35.

[289] *Id.* at 34 n.6.

[290] The opinion also had the unfortunate effect of chilling the protection of victims' right to attend trials in Utah. *See A Proposed Constitutional Amendment to Protect Crime Victims: Hearing on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. (1997) (statement of Paul Cassell, Professor of Law, University of Utah College of Law) at 119−20.

[291] 774 So. 2d 649, 669 (Fla. 2000).

[292] *Id*.

tion touches on the exclusion of witnesses during criminal trials."[293] The court added: "Inasmuch as the rule permitting the exclusion of witnesses originated with the legislature, we can conceive of no reason why the rule cannot be modified in the same manner, or by court rule if need be." That would seem to be the end of the story. The court, however, continued:

> We do not suppose that under no circumstances could the victim's presence throughout the trial be seen as putting the fairness of the trial in jeopardy . . . . However, we find nothing comparable here and imply no attitude in that regard.[294]

What circumstances could jeopardize the fair trial right was unexplained.[295]

In short, the dicta from a few cases suggesting constitutional problems might lurk in victim attendance statutes is unilluminating and, in our view, unpersuasive.

*3. A Singular Case Finding a Constitutional Violation*

We turn finally to the three reported cases we have found in which courts arguably *held* it was not proper for victims to be in the courtroom.[296] Two of these cases involve circumstances not bearing on the propriety of victim attendance statutes, so we set them to one side. That leaves a single decision in this country that finds a constitutional violation from a victim in the courtroom—a decision that is singularly unpersuasive.[297]

We immediately set aside two cases that turn not on whether victims should attend trials but on whether identification of a defendant is unduly suggestive. The United States Supreme Court has held that identification procedures cannot be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that they deny due process to the accused.[298] In

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[293] Stephens v. State, 720 S.W.2d 301, 302 (Ark. 1986).

[294] *Id*. (emphasis added).

[295] The court did cite Commonwealth v. Lavelle, 419 A.2d 1269 (Pa. Super. Ct. 1980), as support for its assertion. This case involves eyewitness identification issues, not victim sequestration issues. *See infra* notes 298−307, and accompanying text. In one unreported case, the Arkansas Supreme Court noted in a single sentence that no prejudice had been shown in allowing a victim to attend a trial. *See* Smith v. State, No. CR 01-1283, 2003 WL 1860508 at *1 (Ark. Apr. 10, 2003) (unreported) (no prejudice demonstrated by defendant in allowing victim's family to be present and speak with victim).

[296] We do not consider here cases which have held it is improper to give victims preferential seating in the courtroom at counsel table or inside the bar. *See, e.g.*, Mask v. State, 869 S.W.2d 1, 4 (Ark. 1993); Walker v. State, 208 S.E.2d 350 (Ga. Ct. App. 1974). *But see, e.g.*, State v. Ramer, 860 P.2d 1183 (Cal. Ct. App. 1993) (no prejudice from victim sitting at counsel table). This article argues for victims being *in* the courtroom, not *in front* in the courtroom. Likewise, we do not consider here cases in which victims have behaved improperly, a subject we address in notes 340-45, *infra* and accompanying text.

[297] For the sake of completeness, it should be noted that one trial court in Louisiana declared a victim exception provision to witness sequestration rules unconstitutional on its face, but its ruling was promptly vacated on appeal. State v. Schoening, 770 So. 2d 762, 763 (La. 2000).

[298] Kirby v. Illinois, 406 U.S. 682, 691 (1972); Stovall v. Denno, 388 U.S. 293, 302 (1967).

*Commonwealth v. Fant,*[299] a slim 4-3 majority of the Pennsylvania Supreme Court applied these principles to hold that a trial judge had improperly denied a defense request to sequester eyewitnesses to a shooting. These eyewitness sat in the courtroom and then identified the defendant in court. The majority found an abuse of discretion under the circumstances of that case, because it lead to a highly suggestive, one-on-one identification procedure.[300] The majority also noted that much time had elapsed between the crime and the trial, and that no pre-trial identification procedures had been used. Finally, neither the trial court nor the prosecution offered "any reason in support of the refusal to sequester witnesses."[301] Under the circumstances of the case, the majority found a violation of the Supreme Court's due process requirements that identification procedures not be unduly suggestive.[302] Three dissenting justices found nothing inappropriate in the in-court identification, which was observed by the jury and at which the defendant was represented by counsel.[303]

Applying *Fant*, the Pennsylvania Superior Court held in *Commonwealth v. Lavelle*[304] that failure to sequester bank tellers to whom a defendant had allegedly passed bad checks was an abuse of discretion. The court noted that the in-court identification by the tellers of the defendant was unduly suggestive and that "the trial judge and prosecutor offered no good reason for denying the sequestration motion."[305] Moreover, no pre-trial identification procedure had been used.

It is not clear whether either *Fant* or *Lavelle* are properly characterized as "victim" cases. *Fant* involved eyewitnesses to a killing rather than the victims of any criminal act. *Lavelle* involved bank tellers who were mere conduits for bad checks rather than defrauded victims of a crime. Moreover, neither case involved a victim's rights statute giving victims a protected interest in attending trials. To the contrary, in both cases, no justification whatsoever was offered for refusing the defense motion to sequester. But assuming for the sake of argument that these cases involve victims' issues, it is apparent that they say little about the constitutionality of statutes allowing victims to attend trials. Instead, their focus is on suggestiveness of identification procedures. This law extends into the courtroom no less than other areas.[306] There are ready solutions to any problem that develops, fully protecting both the defendant's rights and the victim's rights, particularly requiring a victim to identify the defendant in a non-suggestive lineup, photo array, or similar procedures.[307]

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[299] 391 A.2d 1040 (Pa. 1978).

[300] *Id.* at 1043.

[301] *Id.*

[302] *Id.* at 1044.

[303] *Id.* at 1044−45 (Pomeroy, J., dissenting).

[304] 419 A.2d 1269 (Pa. Super. Ct. 1980),

[305] *Id* at 1273.

[306] *See* Leroy Lamborn, *Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment*, 34 WAYNE L. REV. 125, 159 n.192 (1987) (raising this argument).

[307] *Cf.* Commonwealth v. Fant,391 A.2d 1040, 1042 (noting failure of police to arrange a line-up to identify the defendant).

With these two cases distinguished, we are left with only one recent case that actually holds that a failure to sequester a victim violated a defendant's constitutional rights.[308] In *Martinez v. State*,[309] a Florida appeals court considered a challenge to allowing a victim in the courtroom during the opening statements of counsel. The victim testified as the first witness in the trial, but a majority of the court nonetheless found error:

> Where, as here, the facts were hotly disputed, the defendant's right to a fair trial outweighed the victim's right to be in the courtroom. The exclusion of this victim during opening statement, which was all he would have missed since he testified first, would have been a small price to pay to insure that the defendant got a fair trial.[310]

The court immediately added, however, in a single sentence that, after reviewing all the testimony, "the error was harmless."[311] The concurring judge found no error in allowing the victim to attend opening statements.[312]

This very brief opinion is singularly unpersuasive for several reasons. For starters, it is impossible to understand how the court could simultaneously find, first, that a defendant's fair trial rights were violated but that, second, the violation was harmless. Either the defendant got a fair trial or he did not. The fact that the alleged "error" produced a harmful effect on the victims proves that no fair trial violation ever occurred. The opinion also fails to explain how any constitutional violation took place. Instead, it simply assumes, from the fact that a defendant's rights were potentially at stake, that a victim should be excluded. How this establishes an actual constitutional violation is unclear.

Finally, the opinion trivializes victims' rights. It says that exclusion of a victim is a "small price to pay" without explaining what that price actually is. Indeed, given that the elected representatives of the people of Florida had just a few years earlier amended their constitution to guarantee victims the right to attend "*all* crucial stages of criminal proceedings,"[313] it is not clear what would

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[308] Two other cases find non-constitutional violations from victims attending trials. Solomon v. State, 913 S.W.2d 288 (Ark. 1996), held that the trial judge erred in allowing the daughters of a murder victim to remain under a victim's rights exception. The court noted that the daughters were not "victims" under the victims' rights provision. More important, the court's holding rests on "presumed" prejudice because of the "possibility" that the daughters shaped their testimony to that of other witnesses. *Id.* at 290. Similarly, State v. Heath, 957 P.2d 449, 471 (Kan. 1998) also involved the family member of a victim, but in a highly unusual circumstance. The court found it was an error to refuse exclusion of the mother of a victim because she was the only other person (aside from her boyfriend, who was the defendant) who could have inflicted the injuries to her daughter. The court noted the "potential" for a violation of the defendant's fair trial rights, which meant that the trial judge abused his discretion in failing to exclude the mother. At the same time, however, the court did not find any prejudice because of the absence of any showing of testimony tailoring. Therefore the error was harmless.

[309] 664 So. 2d 1034 (Fla. Dist. Ct. App. 1995).

[310] *Id.* at 1036.

[311] *Id.*

[312] *Id.* (Stone, J., concurring) (emphasis added).

[313] FLA. CONST. art. I, § 16.

entitle the court to engage in ad hoc balancing of the competing concerns. For all these reasons, the *Martinez* analysis should not be followed by other courts.

In conclusion, the majority of cases considering the constitutionality of victim attendance find it to be constitutional. A handful of cases have raised constitutional concerns in dicta and a single, unpersuasive case finds a (harmless) constitutional violation from a victim attendance statute. Thus, the prevailing case law supports our conclusion that the Constitution does not require that victims be excluded from criminal trials.

## IV. VICTIMS SHOULD HAVE AN UNQUALIFIED RIGHT TO ATTEND TRIALS AS MATTER OF SOUND PUBLIC POLICY

Because the Constitution is silent on the question of crime victims at trial, the issue then falls to Congress and state legislatures to determine as a matter of policy. In this Part, we make the case for giving crime victims an unqualified right to attend trials. The Part begins by explaining the compelling reasons for allowing victims to view trials—essentially to see that justice is being done in their case. The Part then turns to the supposed problems with victims at trial—emotional displays and testimony tailoring. Weighed against the victim's compelling need to attend the trial, neither of these objections is persuasive. The Part concludes by explaining how, far from impairing the fairness of the trial, victim attendance in fact furthers the truth-seeking process by allowing victims to assist prosecutors in uncovering false testimony by defense witnesses.

### *A. The Compelling Need for Victims to Attend Trials*

Given that Congress and the majority of state legislatures have protected a crime victim's right to attend a criminal trial in the last two decades, some sense of popular justice obviously underlies the view that victims belong in the courtroom. That popular sense is easy to understand. More directly than anyone else, the crime victim—the person harmed by the crime—has the greatest interest in the successful prosecution of a criminal case. A crime victim simply deserves to watch the trial of her victimizer. As a general statement of this principle, it is hard to improve on the President Reagan's Task Force on Victims of Crime, which concluded that:

> The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial.[314]

President Clinton, too, expressed support for this concept, when he explained that when someone is a victim, he or she should be "at the center of the crimi-

[314] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 118, at 80.

nal justice process, not on the outside looking in."[315] And the California Legislature has agreed that

> it is essential to the fair and impartial administration of justice that a victim of a criminal offense not be excluded from any trial or any portion thereof conducted by any court that in any way pertains to the offense, merely because the victim has been or may be subpoenaed to testify at the trial, or because of any arbitrary or invidious reason.[316]

As explained earlier,[317] this victim's interest in the prosecution was the basis for exempting victims from sequestration orders in the nineteenth and early twentieth centuries. Even though the state was technically always the party to the prosecution, crime victims had such obvious interests in the prosecution as to be exempt from sequestration rules. Even if today a crime victim is not technically a "party" to a criminal action and has less opportunity to pursue a private prosecution, the victim has many of the same reasons as a party in seeing that justice is done. As Justice Blackmun has explained, "[t]he victim of the crime, the family of the victim, [and] others who have suffered similarly . . . have an interest in observing the course of a prosecution."[318]

Most jurisdictions have recognized this principle by protecting victims' right to attend trial. These actions are part of a much larger trend toward protecting victims' rights to participate in the criminal justice process.[319] The federal government and many states now recognize that crime victims have the right to be treated with fairness, dignity, and respect in the criminal justice process.[320] Most jurisdictions likewise protect victims' rights to be notified for court proceedings and to speak at appropriate points in the process, such as sentencing.[321] These rights implicitly recognize that crime victims are more than passive bystanders to a criminal proceeding, but have genuine and legitimate interests in the outcome. To sequester victims like all other witnesses is to indulge in a fiction that few would accept: that a victim of crime was not harmed by that crime. The reascendant laws of victim attendance are but one piece of evidence that such absurd notions are doomed to fail.

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[315] Clinton, *supra* note 200.

[316] CAL. PENAL CODE § 1102.6 (2004), Historical & Stat. Note.

[317] *See supra* notes 2-86, and accompanying text.

[318] Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part and dissenting in part).

[319] *See generally* Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

[320] *See, e.g.*, 18 U.S.C. § 3771(a)(8) (victim's right to be treated "with fairness and with respect for the victim's dignity and privacy"); ARIZ. CONST. art. II, § 2(A)(1) (victim's right "[t]o be treated with fairness, respect, and dignity"); *see also* ALASKA CONST. art. I, § 24; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; MICH. CONST. art. 1, § 24; N. J. CONST. art. I, ¶ 22; N. M. CONST. art. II, § 24; OHIO CONST. §1.10a; TEX. CONST. art. I, § 30(b); UTAH CONST. art. I, § 28(1)(a); WIS. CONST. art. I, § 9M.

[321] *See generally* BELOOF, *supra* note 48 (reviewing victims' rights); PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES (2001) (cataloging victims' rights statutes).

The modern civil liberty of victim attendance also rests on more pragmatic grounds. To begin with, the right to attend the trial may be critical in allowing the victim to recover from the psychological damage of a crime. It seems reasonable to assume a victim's attendance at a trial may "facilitate healing of the debilitating psychological wounds suffered by a crime victim."[322] The term "closure" is sometimes bandied about too readily when discussing crime victims; but if closure is ever going to occur, attending a trial where the perpetrator is held accountable seems a good place to start.

If, on the other hand, victims are excluded from a trial, insult is added to injury and "secondary harm" can result.[323] Excluding the victim from the criminal trial constitutes an affront to the crime victim's dignity. Imagine, for instance, the feelings of Ms. Roberta Roper, when forced to sit outside the courtroom for six weeks during the trial of her daughter's murderers.[324] This is no isolated example. As the President's Task Force explained after holding hearings around the country, "[t]ime and again, we heard from victims or their families that they were unreasonably excluded from the trial at which responsibility for their victimization was assigned."[325]

This psychological need to allow victims to attend a trial also stems from the fact that the defendant will attend. Excluding a crime victim perpetuates the subordinate position imposed by the perpetrator, as two psychiatric experts have explained:

> The criminal act places the victim in an inequitable, "one-down" position in relationship to the criminal, and the victims' trauma is thought to result directly from this inequity. Therefore, it follows that the victims' perceptions about the equity of their treatment and that of the defendants affects their crime-related psychological trauma . . . [F]ailure to . . . offer the right of [criminal justice] participation should result in increased feelings of inequity on the part of victims, with a corresponding increase in crime-related psychological harm.[326]

Without a right to attend trials, "the criminal justice system merely intensifies the loss of control that victims feel after the crime."[327] It should come as no surprise that "[v]ictims are often appalled to learn that they may not be allowed to sit in the courtroom during hearings or the trial. They are unable to understand why they cannot simply observe the proceedings in a supposedly public forum."[328] As one crime victim put it more bluntly, "[a]ll we ask is that we be

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[322] Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 41 (1987).

[323] *See* Beloof, *supra* note 319, at 294 (discussing the concept of secondary harm).

[324] *See supra* note 113 and accompanying text.

[325] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 118, at 80.

[326] Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 18−19 (1987).

[327] Deborah P. Kelly, *Victims,* 34 WAYNE L. REV. 69, 72 (1987).

[328] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 58 (1987).

treated just like a criminal."[329] In this connection, it is worth remembering that defendants fall outside sequestration rules. Defendants frequently take full advantage of their right to be in the courtroom, appearing quite presentable, often with family members in tow.[330] "When the victim's family is barred from the courtroom during a trial (while the murderer's family is allowed to attend, looking somber and well dressed), it seems that the murderer still somehow has the upper hand, still exerts more power."[331] Indeed, it seems clear that the defense exacerbates the problem in at least some cases by subpoenaing victims and family as ostensible "witnesses" in the case when the only reason for doing so is keeping them out of the courtroom.[332]

The equity concern is particularly acute in sexual assault cases. Dr. Lee Madigan and Nancy C. Gamble have aptly described the feelings of rape victims on discovering that the rule on witnesses has been invoked:

> The defendant is entitled to hear everyone's testimony so as to rebut it later. The [rape] survivor is a witness and is allowed in the courtroom only while she is testifying. Many survivors remarked that this was when they first realized that it was not their trial, that the attacker's rights were the ones being protected, and that they had no control over what happened to their bodies. The structure of the system often results in a second rape.[333]

This "second rape" can be devastating for rape recovery efforts, an essential component of which is the need for a victim to feel that she has taken back control over events in her life.[334]

A basic concern for justice suggests the need for equity between the victim and the defendant, at least as to the issue of attendance at a trial. The Supreme Court recently explained that "[J]ustice, though due to the accused, is due to the

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[329] *Id.* at 59 (quoting crime victim).

[330] *See* LINDA E. LEDRAY, RECOVERY FROM RAPE 199 (2d ed. 1994) ("Even the most disheveled [rapist] will turn up in court clean-shaven, with a haircut, and often wearing a suit and tie. He will not appear to be the type of man who could rape.").

[331] Eric Schlosser, *A Grief Like No Other*, THE ATLANTIC MONTHLY, Sept. 1997, at 52.

[332] *See* Randall Coyne, *Inflicting Payne On Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA L. REV. 589, 615 (1992) ("Testimony by the victim's spouse is likely to be especially damaging to the defendant. In appropriate cases, the spouse may be placed under subpoena as a defense witness. *This tactic should keep the spouse out of the courtroom during the trial*.") (emphasis added); Brooks Douglass, *Oklahoma's Victim Impact Legislation: A New Voice for Victims and Their Families: A Response to Professor Coyne*, 45 OKLA. L. REV. 589, 615 (noting same issue); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, *supra* note 118, at 80 (finding that defense attorneys sometimes used sequestration rules were sometime used merely to "confuse or disturb" victims; Senate Judiciary Committee Hearing, April 28, 1998 (statement of Steve Twist) ("How can we justify saying to the parents of a murdered child that they may not enter the courtroom because the defense attorney has listed them as witnesses. This was routine practice in my state, before our constitutional amendment. And today, it still occurs throughout the country.").

[333] LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 97 (1989).

[334] *See* LEDRAY, *supra* note 330, at 125 ("Taking back control from him" is an important step in the recovery process.).

accuser also . . . . We are to keep the balance true."[335] A one-sided rule—a defendant can attend the trial but a victim cannot—conflicts with this basic sense of equity.

Excluding victims is also a recipe for alienation of victims from the criminal justice process.[336] This point is nicely illustrated by an argument made by Professor George Fletcher, another contributor to this Symposium.[337] In his intriguing book *With Justice for Some: Protecting Victims' Rights in Criminal Trials*, Fletcher urges that victims should be given a role at the trial, such as by making a statement at the beginning of the proceedings or by participating in the examination of witnesses.[338] The justification for such an approach, Fletcher persuasively explains, is that "it would be better to allow the third voice [of the victim] at trial rather than freeze out the party for whom the proceedings may carry greater positive meaning than for anyone else."[339] One need not go as far as Fletcher in urging victim *participation* at trial to at least agree that victim *observation* of the trial is required by basic concepts of justice.

### *B. Displays of Emotion by The Victim*

Opponents of victims' rights often concede the rationales underlying a victim's right to attend trials. They counter, however, that countervailing concerns must trump victims' interests.

One clear explication of this view is Professor Mosteller's.[340] He concedes that in many situations victims ought to be allowed to attend trials, but nonetheless maintains that in some situations victims must be excluded to be fair to the defense.

In Mosteller's view, the "greatest challenge"[341] to victim attendance rights is the possibility that victims might act emotionally in front of the jury, thereby prejudicing the defense. He offers no actual illustrations of the problem, [342] pre-

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[335] Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Snyder v. Massachusetts, 291 U.S. 97 122 (1934) (Cardozo, J.)); *see also* Morris v. Slappy, 461 U.S. 1, 14 (1983) ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims.").

[336] *See* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 34 (1984) ("justice cannot be done without taking the victim's interest into account, and . . . far from being irrelevant, victim participation in and support of the criminal justice system is essential for the system to operate effectively.") (italics omitted).

[337] *See* George P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 LEWIS & CLARK L. REV. 547 (2005).

[338] GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 249−50 (1995).

[339] *Id.* at 250.

[340] *See* Mosteller, *supra* note 228, at 1692.

[341] *Id.* at 1702.

[342] We, too, have found no concrete illustrations of victims creating problems, although victims' friends have occasionally misbehaved. *See*, *e.g.*, State v. Bush, 714 P.2d 818, 821 (Ariz. 1986) (friends and relatives of victim assaulted defendant, vandalized a defense witness's car, disrupted courtroom proceedings by "laughing and making menacing faces" dur-

sumably because courts understand that a victim's right to be present confers no right to disrupt court proceedings or act in ways the impugn the integrity of the court. Courts simply treat victims' rights in the same fashion as defendants' rights. Defendants have a right to be present during criminal proceedings, which stems from both the Confrontation and Due Process Clauses of the Constitution.[343] Yet courts have consistently held that these rights are not absolute and grant defendants no license to engage in disruptive behavior.[344]

Proponents of even absolute rights for victims to attend trial understand that victims can forfeit their rights by improper behavior. The Senate Judiciary Committee urged an unqualified trial attendance right for victims but added that "crime victims will have no right to engage in disruptive behavior and, like defendants, will have to follow proper court rules, such as those forbidding excessive displays of emotion or visibly reacting to testimony of witnesses during a jury trial."[345]

In sum, Mosteller's alleged "greatest challenge" to the victims' right is without any real substance.

### *C. Tailoring of Testimony by the Victim*

The objection most frequently raised to victims attending trial is testimony tailoring.[346] If victims are allowed to attend trials, the argument runs, they will watch what the other witnesses say and tailor their testimony to the detriment of the defendant.[347]

This objection has facial plausibility to it, as the rationale for sequestration rules is, of course, to prevent tailored testimony. The principles underlying sequestration can be traced back as far as Biblical times to the story of Susanna

ing cross-examination, and intimidated the defendant and his counsel when they were entering the courthouse); State v. Boone, 820 P.2d 930, 933−34 (Utah Ct. App. 1991) (victim's wife disruptive during closing argument). Interestingly, these friends were apparently outside the sequestration rules.

[343] *See* Diaz v. United States, 223 U.S. 442, 454−55 (1912); Kentucky v. Stincer, 482 U.S. 730 (1987).

[344] *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970) (defendant waived right to be present by continued disruptive behavior after warning from court); Saccomanno v. Scully, 758 F.2d 62, 64−65 (2d Cir. 1985) (concluding that defendant's obstreperous behavior justified his exclusion from courtroom); Foster v. Wainwright, 686 F.2d 1382, 1387 (11th Cir. 1982) (defendant forfeited right to be present at trial by interrupting proceeding after warning by judge, even though his behavior was neither abusive nor violent).

[345] S. REP. NO.108-191 at 36.

[346] *See* Mosteller, *supra* note 228, at 1702; MUELLER & KIRKPATRICK, *supra* note 87, at § 6.72 at 606.

[347] We distinguish tailoring concerns from concerns that someone in the courtroom might signal other witnesses. *Cf.* State v. Pollard, 719 S.W.2d 38 (Mo. Ct. App. 1986) (victim's mother allowed to stay in court, no prejudice demonstrated and no indication that she communicated with her child). Trial judges are, of course, empowered to prevent any such signaling by any person in the courtroom, be it a prosecutor, defendant, or victim.

and the Elders found in the Apocryphal Book of Daniel.[348] Susanna, who is described as "a very beautiful and God-fearing woman," was the wife of Joakim, a "very rich" man who "the most respected of them all."[349] As the story goes, two elders, who lust after the beautiful Susanna, sneak into her garden while she is bathing alone and say to her, "the garden doors are shut, and no one can see us; give in to our desire, and lie with us. If you refuse, we will testify against you that you dismissed your maids because a young man was here with you."[350] Susanna refuses to "sin before the Lord" and screams.[351] Her servants come running and the two elders repeat their lie. Susanna is tried for adultery, and the two elders are allowed to be present while each testifies, so that their testimony was consistent. Susanna is sentenced to death. But the Lord sends Daniel to rescue Susanna. Daniel sequesters the two witnesses and again questions them, asking each separately what kind of tree Susanna and her young lover were under. The first answers that they were under a mastic tree,[352] and the second an oak tree.[353] The inconsistency was apparently enough to acquit Susanna; and the two elders were sentenced to death instead because they had falsely accused another of a crime punishable by death.[354]

Yet while sequestration may be a useful device in some circumstances, its logic does not require crime victim exclusion. The most powerful point to be made is that a crime victim can be required to testify as the first witness and then watch the remainder of the trial. This approach has venerable roots, as the great Wigmore first proposed this as a solution to the problem of parties (and thus victims) testifying in a criminal trial.[355] Before the adoption of the Federal Rules of Evidence, some courts imposed this requirement as a matter of inherent judicial control over court proceedings.[356] Under Rule 611 of the Federal Rules of Evidence and parallel provisions in most states, courts are now clearly empowered to require that victims testify first. Rule 611 gives trial judges the right to "exercise reasonable control over the . . . order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of truth . . . ."[357] This gives judges the ability to require victims to testify early in the case so that they will not be

[348] *See generally* Wigmore, *supra* note 40, at 475−76; Gregory Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom*, 47 ALA. L. REV. 177, 178 (1995).

[349] *Daniel* 13:1, 5 (New American Bible).

[350] *Id.* at 13:20−21.

[351] *Id.* at 13:22.

[352] *Id.* at 13:54.

[353] *Id.* at 13:58.

[354] *Id.* at 13:62.

[355] Wigmore, *supra* note 40, at 482.

[356] *See, e.g.*, Burford v. Commonwealth, 20 S.E.2d 509, 512 (Va. 1942); Smartt v State, 80 S.W. 586, 588 (Tenn. 1904).

[357] FED. R. EVID. 611; *see also* JOSEPH & SALTZBURG, *supra* note 109, at § 45.1 (cataloging adoption of Rule 611 in many states).

tainted by evidence that follows.[358] Some courts appear to have already adopted this approach.[359] By statute, Washington has implemented this approach; it requires that victims "be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified[.]"[360]

Wigmore's simple solution of victims testifying first handles the great bulk of cases in which a concern can be raised about testimony tailoring. The only exceptions are, first, those cases in which it would be inappropriate to make the victim testify at the outset because of questions about the sequencing of testimony; [361]and, second, those cases in which more than one victim will be exempted from sequestration and therefore it is logically impossible to permit both to testify first.

Before turning to the details of these two situations, it is important to understand how rare they are. The authors have been involved in numerous trials[362] and have never seen a case in which requiring the victim to testify first would have been unfair to the prosecution. Moreover, trials involving multiple victims who are eyewitnesses to the same event are highly unusual. (Remember, multiple *eyewitnesses* to the same event are not covered by victims' rights provisions. Only when the eyewitnesses are also *victims* are sequestration issues implicated.).

But for the sake of argument, let us assume that a trial with either a victim who must testify late or multiple victims who witnessed the same event. Even in such an atypical situation, concerns about testimony tailoring are overblown. For starters, it is highly probable that the victim will have made a previous statement of one sort or another that would preclude her from shifting her story. Victims typically are interviewed by police officers shortly after the crime and then often give further statements at grand jury proceedings or at preliminary hearings.[363] Victims may also agree to meet with defense attorneys or their in-

[358] *See, e.g.*, *In re* United States, 584 F.2d 666, 667 (5th Cir. 1978) (trial court could require case agent to testify early). *See generally* 4 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 75, at § 615.04[2][c] at 615−16. *Cf* United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969) (pre-Federal Rules of Evidence case holding that case agent can be exempted from sequestration, but should generally be called as the first witness).

[359] *See, e.g.*, State v. Barney, No. 97CA12, 1999 WL 378755 at * 6 (Ohio Ct. App. June 7, 1999) (noting crime victim testified first).

[360] WASH. REV. CODE § 7.69.030. We have also been advised, but have been unable to definitively confirm, that in England today as a matter of tradition the victim testifies first and then is allowed to observe the rest of the trial. Personal Interview with Barrister John Hardy (April 1, 2005).

[361] *See* United States v. Parodi, 703 F.2d 768, 775 (4th Cir. 1983) (district court properly allowed case agent to testify at the conclusion of the government's case because only one part of the agent's testimony could logically have been given at the beginning of the case).

[362] Professor Beloof was prosecutor and civil attorney for a number of years; Judge Cassell was an Assistant U.S. Attorney and currently serves as a federal trial judge.

[363] *See, e.g.*, Gabriel v. State, 925 P.2d 234, 235 (Wyo. 1996) (affirming trial court's discretionary decision to allow a victim to attend because, inter alia, the victim had "made a lengthy pretrial statement which had been provided to the defense.").

vestigators before trial. With prior statements locking in the victim's position, the possibilities of any testimony "tailoring" are greatly reduced. Indeed, as one court has explained, the issue of victims tailoring their testimony is nothing more than a "credibility factor" for the trier of fact to weigh in evaluating testimony.[364]

Even where a victim has given no prior statement, the defense has means to respond to tailoring. The interlocking nature of a victim's testimony is certainly fair game for cross-examination and a subject that can be readily communicated to the jury. Indeed, one could possibly craft an argument that in this situation it is, if anyone, the prosecution who is more likely disadvantaged. [365] Presumably perjured testimony is atypical, but defense attorneys will be able to raise the specter of such altered testimony in every case involving a victim who watches other witnesses before testifying, both by cross-examination and arguments to the jury.

A special situation might occur when multiple victims are all going to identify the defendant as the perpetrator of a crime. [366] In such situations, it would seem to be simply a matter for the state to set up a pre-trial identification procedure to identify the defendant. [367] Perhaps in some bizarre circumstances the cross-examination of a victim who has attended trial will be marginally less effective than if the victim were sequestered. But that only leads to the final and most fundamental objection to the entire line of argument: what gives a defendant a right to have cross-examination proceed in this way? It is black letter law that the defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent the defense might wish."[368] Given that the defendant has no constitutional right to exclude a victim and given that the victim has concededly compelling reasons to attend the trial, the defendant simply has no good case to demand sequestration.[369]

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[364] State v. Rangel, 866 P.2d 607, 612 n.6 (Utah Ct. App. 1993).

[365] *Cf.* MUELLER & KIRKPATRICK, *supra* note 87, at § 6.72 at 606 ("Ironically, continual presence throughout trial may taint victim testimony and might even lead to acquittal."). We hasten to add that we do not believe the claim that victim attendance will actual lead to acquittals. If this were a legitimate concern, presumably a victim could be persuaded to remain outside the courtroom after the completion of her testimony.

[366] *See supra* note 363 and accompanying text.

[367] *Cf.* Commonwealth v. Lavelle, 419 A.2d 1269, 1273 (Pa. Super. Ct. 1980) (noting failure to use pre-trial identification procedures as reason for finding prejudice).

[368] United States v. Owens, 484 U.S. 554, 559 (1988) (internal quotation omitted); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of issues, the witness' safety. . . ").

[369] In reaching this considered conclusion, we take issue with the conclusion of two experts on evidence whom we greatly respect. Professors Christopher Mueller and Laird Kirkpatrick have agreed with us that "[i]n light of their special concerns and relationship to criminal proceedings, victims surely are entitled to special consideration when it comes to FRE 615." MUELLER & KIRKPATRICK, *supra* note 87, at § 6.72 at 606. They go on to note that "[o]ne solution, short of exclusion, may be to take victim testimony first or early, but even this attempt to accommodate the relative concerns over victims and defendants may not always work, and some residual power to exclude victims seems essential." *Id.* This ipse

Any doubt about these arguments is resolved by comparing the victim's right to attend trial with the case agent's exemption from sequestration. As noted earlier,[370] since the adoption of Federal Rule of Evidence 615 and parallel provisions in state courts, case agents have been excluded from sequestration. Yet no significant voices have been raised to urge that case agents be sequestered because of testimony tailoring concerns. If a policy-maker were to consider which group would present the greater risk of altered testimony—police officers or crime victims—it is hard to see how we could reach any other conclusion but that police officers would present the greater risk. For example, the unquestionable existence of police perjury has been repeatedly recognized and analyzed in the academic literature.[371] And the LAPD's "Rampart scandal" in the late 1990s brought the serious problem of police perjury to the public at large through widespread media coverage.[372] This is not to disparage the tens of thousands of men and women who serve honorably as law enforcement officers. Our limited point is that if police officers can, as a group, be trusted to be exempted from witness sequestration rules, crime victims can as well.

A final way of confirming that concerns about victims tailoring their testimony are overblown is to examine the data about the factors causing wrongful convictions. While such data must be examined carefully,[373] they can shed light on the reasons innocent persons are convicted—a subject of vital interest.[374] We have examined several of the most prominent catalogues of wrongful convictions to determine whether they contain any cases in which failing to sequester a crime victim caused a wrongful conviction. On a preliminary review of the cases since 1975 (when Federal Rule of Evidence 615 came into play), we have been unable to find any examples of victim perjury leading to a wrongful con-

dixit does not explain why having victims testify will not always "work." More important, it offers no reason for believing that a residual exclusionary power is ever even useful, much less "essential."

[370] *See supra* notes 89–101 and accompanying text.

[371] *See, e.g.*, Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968).

[372] *See* "LAPD Blues," *available at* http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal; Todd S. Purdum, *Los Angeles Police Scandal May Soil Hundreds of Cases*, N.Y. TIMES, Dec.16, 1999, at A16; Public Report, Los Angeles Police Department Board of Inquiry into the Rampart Area Corruption Incident (March 1, 2000).

[373] *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV 121 (1988); Paul G. Cassell, *The Guilty and the Innocent: An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

[374] *See, e.g.*, Daniel S. Medwed, *Up the River without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. ___ (forthcoming 2005); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097 (2003); George C. Thomas III et al., *Is it Ever Too Late for Innocence? Finality, Efficiency and Claims of Innocence*, 64 U. PITT. L. REV. 263, 271−73 (2003); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932) (victim perjury not prominently featured).

viction.[375] More important, the catalogs contain no evidence of victim perjury resulting from exemption from sequestration.[376] Given that victims are now often exempted from sequestration rules, if this were a significant casual factor in wrongful convictions, it should show up the data. The fact that it does not, so far as we can determine, suggests that victims can attend trials without impairing the truth-seeking process.[377]

### *D. Victims Facilitating Truth-Seeking*

In considering victim sequestration and the truth-seeking process, it is important to understand that claims can be made in both directions. On balance, it appears that allowing victims to attend trials can actually facilitate the truth-seeking process more than harm it.

It is worth remembering that even in states without a victim's right to attend trial, victims still may be admitted where their presence is essential to the prosecution. Courts have long recognized that victims can be useful to prosecutors. Victims can assist the prosecution in many ways. In busy urban courtrooms, prosecutors often have to juggle dozens of cases at any one time, and likely will not have complete mastery of the facts at issue, even with the assistance of a case agent. A victim, on the other hand, has only one case to remember. Indeed, the events of that case may be seared into the mind of the victim. Apart from the defendant, *no one* knows more about the crime than the victim herself. The victim, therefore, may be useful—if not indispensable—in crafting appropriate direct and cross-examination questions. As the Justice Department has concluded: "the presence of victims in the courtroom can be a positive force in furthering the truth-finding process by alerting prosecutors to misrepresentations in the testimony of other witnesses."[378] State prosecutors report similar experiences.[379]

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[375] *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003* (2004) (unpublished manuscript) *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf..

[376] *See generally* the sources cited *supra*, note 375.

[377] Interestingly, the catalogues reveal that a far more common problem is police officers committing perjury. The catalogs discuss several cases where an officer's perjured testimony resulted in a conviction of an innocent defendant. *See* BORCHARD, *supra* note 375, at 353-56 (discussing case of John McManus); Gross et al., *supra* note 375, at 10 (discussing wrongful convictions of over 100 defendants); Gross et al., *supra* note 375, at 10-11 (discussing wrongful convictions of 39 defendants whose convictions were based on lies of one narcotics officer). This confirms our intuition, noted above, that police officers are more likely to be untruthful witnesses than are crime victims.

[378] U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 15 (1998) *available at* http://www.ojp.usdoj.gov/ovc/new/directions.

[379] *See, e.g.*, Telephone interview with Carolyn Hanson, Deputy State's Attorney in Chittenden County, Vt. (June 1, 2005) (victims in the courtroom are helpful to organizing the government's rebuttal case and spotting inaccuracies in a defendant's testimony).

An illustration of this point comes from Collene (Thompson) Campbell, currently serving on the California POST Commission and a member of the Advisory Board of the National Institute of Corrections.[380] Her only son, Scott Campbell, 27, was robbed, strangled, and thrown from an airplane in April 1982 by a long-time friend's son, Lawrence Rayburn Cowell. Scott's body was never recovered. There were three trials for the two accused killers, as one trial was overturned and, at least at that time in California, the two defendants could not be tried together. During all three trials, Collene and her husband were excluded from the trial courtroom (even though they had absolutely no information about the murder) because the defense claimed they were going to call each parent as a defense witness. Not surprisingly, the parents were never called as witnesses. Yet every day during the three trials, the victim's parents were forced to leave the courtroom and sit alone in the hallway while the trial was underway.

During the third trial (the second trial for defendant Cowell), Scott's parents were joined at the Orange County Courthouse by Fran Robinson (Fran was the widow of Bob Ferguson, who had also been killed by the defendant, Cowell, in a drug-related car accident.). As the defense testimony was about to conclude, the defense called its last witness—the defendant, Lawrence Cowell. As Cowell was getting ready to take the witness stand, Collene requested that the prosecutor ask the trial judge if both parents could now be in attendance during the remainder the trial. It had become obvious the defense was not going to call either parent, because their last witness was about to take the stand. The judge agreed to allow the parents to return to the trial courtroom and be present during the final witness's testimony.

As the defendant began to testify, Fran, the widow, said, "Collene, Cowell is lying." Collene asked Fran if she could prove it. Fran replied "absolutely," as she had the proof in paperwork at her home regarding the defendant's testimony in the court proceedings of her husband's death.

Collene immediately sent a note alerting the prosecutor to this fact. The prosecutor asked, and the judge agreed, to hold cross examination over to the following morning. When the trial resumed the next day, armed with the evidence from Fran, the prosecutor was able to expose the defendant for what he truly was—a liar and a killer. Afterwards, the jury said in all probability they would not have convicted this dangerous murderer had that truth not surfaced during the final day of testimony. And "that truth" would never have been discovered if the victims had been left outside the courtroom.

In sum, contrary to the position suggested by some opponents of victims' rights, sequestration has no corner on the market of truthfinding. The risk of testimony tailoring by victims must be weighed against the risk of fabricated testimony from defendants. To be clear, we agree that any balance must acknowledge Blackstone's dictum that it is better that the guilty escape than that the innocent be punished.[381] Yet there are ample and conventional ways to re-

[380] The following information was provided to the authors by Ms. Campbell.

[381] BLACKSTONE, *supra* note 2, at 352. *But cf.* Alexander Volokh, *Aside:* n *Guilty Men*, 146 U. PA. L. REV. 173 (1997) (wondering about quantifying the ratio).

spond to a testimony tailoring—cross-examination foremost among them—while there is no other way to convey a victim's information to a prosecutor other than by having the victim at hand and attending trial. If anything, then, the search for truth demands that victims be allowed inside the courtroom rather than kept outside.

## V. CONCLUSION

Victims have been able to attend trials, from the drafting of the Constitution through the nineteenth century. Only in relatively recent decades has the idea of sequestering victims as witnesses developed in some jurisdictions, largely as accidental consequence of the shifting conceptions of the government as the sole party to a criminal case and of inattentive drafting to witness exclusion rules. In recent years, victims' right to attend trials is reascendant around the country, as most states and Congress have recognized that victims have compelling reasons for being inside rather than outside courtrooms. Nothing in the Constitution should hinder this trend. To the contrary, as simple matter of fairness, victims deserve the right to see whether justice is being done in the criminal trial of their victimizer.