Illusions of Justice: Who Represents the Victim?

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ILLUSIONS OF JUSTICE: WHO REPRESENTS THE VICTIM?

JUDITH ROWLAND*

The first time I stood up at a criminal proceeding as a private attorney to announce my presence on behalf of a crime victim's family, I was met with a mixture of curiosity and puzzlement.

As a prosecutor, I had for years been free to speak, to advise, and to recommend. My opinion was sought in court and my turn to express outrage at the criminal and his crime always came. There was always a place for me at the table past the swinging gate. I could walk through that hallowed space in front of the judge called "the well," and if the courtroom was locked when I arrived, I knocked and an armed bailiff always let me in.

Now, I felt so out of place as an attorney for crime victims. I had to wait in the courthouse hallway with the family after being told that only prosecutors and defense attorneys could enter before 9:00 a.m. I sat in the spectators' section beside my clients while the prosecutor and defense attorney held session in the judge's chambers. And I stood behind the swinging gate, on the outside.

Were not these victims and families just like the ones I had spent hours with as a prosecutor, either on the phone or in my office, explaining the process, preparing them to be witnesses, with whom I had laughed and almost cried? I "represented" them, didn't I?

Sure, the state was my employer, and I always reminded jurors that, unlike the defense attorney who had a living, breathing person at the counsel table, my client would not fit in a chair, but was

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'present' nonetheless. And in the final analysis, when the dust settled, wasn’t my success measured by the conviction, and wasn’t that "success" for the victim, too?

In the years since I left the prosecutor's office and began representing crime victims, some things about the criminal justice system have become more clear, while others have not.

It is clear that a prosecutor represents the public in general, and the state in particular. It is clear that a prosecutor carries absolute discretion in exercising the power to arrest, to prosecute or plea, to settle or dismiss. It is also clear that a victim of a crime is not a designated player, or "party," in the legal rule book. Only the defendant and the prosecutor "have an interest" in the criminal justice arena, which gives them "standing." Lastly, it is clear that there is unrest far and wide among citizens, of whom some 35 million are crime victims.¹ Their collective voice should be deafening, but unfortunately it officially cannot be heard.

What is less clear is how this happened; how we as a nation got to this place. Has the criminal justice system always had this rule book? Has the victim's role always been as a nonparty witness? If so, why? If not, can we change it? And should we?

Logic certainly dictates that a crime victim has an "interest" in the criminal justice process to which he or she must respond when called. Logic tells us that something is not right when the victim is not consulted about what happens to the person who raped them, or killed their child while driving drunk, or left them wheelchair-bound after being shot during a robbery. After all, it is the victim who is raped, not the state; it is the drunk driving victim's family whose insurance rates go up, not the state's; and it is the paraplegic, not the state, who can no longer work as a mailman.

My training in the law has taught me that "logic" can be subjective, depending upon who is calling the plays, and for what team. "Justice," on the other hand, is held to a higher standard, and is the scale upon which the results should be weighed.

What I have discovered is that "things" have not always been as

¹ See Bureau of Justice Statistic Reports, U.S. Dep't of Justice, Criminal Victimization in the U.S.: 1991 Preliminary Report 3 (1992) (giving various statistics regarding crime victims); see also America Speaks Out: Citizens' Attitudes About Victims' Rights and Violence, Executive Summary (Nat'l Victims Center, New York, N.Y.), Apr. 18, 1991, at 4 [hereinafter America Speaks Out] (almost 4 out of 10 Americans (39%) have been direct or indirect victims of violent crime).
they are today, but rather we seem to have simply accepted them as universal truths. We have, in fact, merely tipped the balance of justice from one extreme to another.

Historically, crime victims were very much a part of the criminal justice process. When wronged, the entire clan responded to the "hue and cry" of the injured. Consequences were immediate and the course of justice was swift. Later, as the state began to involve itself in the criminal justice system, it "was often to regulate . . . private vengeance, not displace it." Trial by combat served as a substitute for the old-fashioned brawl, like the gentlemen's duel and the shoot-out at high noon.

Why, then, do we now find ourselves locked into a system in which a public prosecutor representing the state is the collective voice which speaks for crime victims in the criminal justice system?

The answer is puzzling. Our legal heritage is derived for the most part from English common law, which has for centuries been firmly rooted in a process of private prosecution. This concept is based on the seemingly obvious premise that the victim is the person actually injured. This practice was prevalent as recently as the opening of the Western frontier. Somewhere between old England and modern America, something went awry.

No one is certain exactly how the system of public prosecution emerged. It is known, however, that these changes began during the American Colonial period when the young nation's democratic-minded countrymen needed unity against a common for-

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See id. (discussing evolution of present criminal justice system to point where state controlled punishment of crime).


The image we have of justice in the old West is that when a crime was committed, they locked the suspect up until the circuit judge arrived. Generally, there was no formal prosecutor. The judge heard from everyone, including victims, witnesses, and the defendant, and then decided a "fair" outcome.
eign enemy. This concept of group unity carried over into the courts. As the state took more and more control over the criminal process, it indicated to the victim that the injury was to both the state and the victim, and that the state would act on the victim's behalf.

In addition to being told that their injury really belonged to the state, crime victims watched their last link to a participatory role in the criminal justice system—restitution—slip away. With the advent of the penitentiary following the American Revolution, prison became the prevailing penalty for many crimes. Gone were a variety of other sanctions, including restitution, which previously had subjected the offender to a more separate accountability. The transformation was then complete, and crime victims were no longer considered to have an interest in the criminal justice process.

Today, as we stand poised on the threshold of the twenty-first century, we find that "what was once a private matter [has] become[] the business of strangers to be handled mainly as they see fit" for the greater good of the state. This is, at best, a breach of the initial agreement under which the state became a partner in the criminal justice process. It also ignores the very real personal interest victims have in both being protected by the state and in having their rights vindicated by the criminal process.

It is ironic that one suspected of a crime enjoys the right to receive physical protection from the government, while the law-abiding citizen is not entitled to such protection. Citizens are told that unless there exists a "special relationship" between the state police protection authority and the victim, there is no general duty to provide an individual with such protection. In 1982, the

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7 See Gittler, supra note 5, at 129-30 (explaining evolution of American public prosecution system).
8 See Aynes, supra note 3, at 72 (noting that state served as surrogate of victim); see also Robert Reiff, The Invisible Victim 134-35 (1979) (discussing how crime against person became crime against state).
9 See Gittler, supra note 5, at 132-33 (explaining decline of restitution).
10 See id. at 133 (discussing development of penitentiaries in early America).
11 Deborah P. Kelly, Victims' Perceptions of Criminal Justice, 11 PEPP. L. REV. 15, 15 (1984). The article is based on over 100 personal interviews with crime victims and proposes reforms in the criminal justice system. Id.
12 See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 197-200 (1989) (explaining that state owes affirmative duties of care and protection in limited circumstances, such as incarceration, institutionalization, or other instances evidencing restraints on personal liberty); see also Martinez v. California, 440 U.S. 277, 285 (1980) (no
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United States Court of Appeals for the Seventh Circuit declared, in part, that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen."13

This position is intolerable and is not supported by our legal heritage or by the United States Constitution. In fact, it has been observed that the wholesale expansion of "the rights of criminal defendants may violate the United States Constitution," because they may hamper law enforcement efforts to provide a minimal level of protection" to the law abiding.14 Today, it is common to hear complaints that suspects involved in serious, and sometimes violent, crimes are back on the streets, ready to strike again, even before the arresting officers have finished their reports. People feel that there is slight truth to "truth-in-sentencing" and that there is a reason why it is called the criminal justice system.

A strong argument can be made that ordinary citizens, along with participatory rights in the criminal process, should receive the same protections that criminals do.15 It is precisely to these tasks that the victims’ rights movement addresses itself.16 It is neither an anti-defendants' rights movement, nor an attempt to undermine the strength and fairness of the criminal justice process. The victims’ rights movement does, however, advocate a re-examination of the victim's place vis-a-vis both the government and its duty to protect and to include victims as parties in interest with standing of their own.

In fact, under what is known as the “restitutive” theory of justice, victims and defendants are the central players in the criminal
duty of protection owed by parole board to murder victim because parolee-murderer was not agent of state).

13 Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); see also Ayres, supra note 3, at 66 ("government and its agents are under no general duty to provide . . . police protection to any particular individual citizen") (quoting Warren v. District of Columbia, 444 A.2d 1, 4 (App. D.C. 1981)).

14 Ayres, supra note 3, at 76-77 n.61 (quoting Andrew R. Willing, Protection by Law Enforcement: The Emerging Constitutional Right, 35 Rutgers L. Rev. 1, 85 (1982)); see also Willing, supra, (discussing threat of violating Constitution through expansion of criminals' rights).

15 See Ayers, supra note 3, at 92. "It is somewhat ironic that one suspected or convicted of a crime . . . enjoy[s] the right to receive physical protection from the government while . . . a law-abiding resident is said not to be entitled to such protection. Id. The argument is that "the protection due to ordinary people should be elevated at least to the same level provided to suspected or convicted criminals." Id.

16 See Gittler, supra note 5, at 118-25 (discussing goals of victims' rights movement, which include greater role of victim in criminal process, protection against intimidation, and overall better treatment of victims and witnesses).
justice process, while the prosecutor functions as mediator and en-
forcer of any judgment.\textsuperscript{17} Since the offender has violated the vic-
tim's rights, the criminal justice system serves to rectify the harm,
or imbalance, that such violation has caused between these two 
parties.\textsuperscript{18} 

The Declaration of Independence provides that the purpose of 
government is to secure inalienable rights which include life, lib-
erty, and the pursuit of happiness. The Constitution imposes a 
duty upon the government to protect these rights for everyone.\textsuperscript{19} 
In return for this protection, the citizen promises allegiance to the 
government.\textsuperscript{20} Further, the Fourteenth Amendment provides that 
no state shall "deny any person within its jurisdiction the equal 
protection of the laws."\textsuperscript{21} As early as 1871, the Fourteenth 
Amendment was interpreted as prohibiting the denial of equal 
protection of the laws "[by] the omission to protect, as well as 
the omission to pass laws for protection."\textsuperscript{22} 

A woman calling 911, for instance, should never be told that 
law enforcement will respond only after her former husband, who 
is already under court order to stay away, is known to have a gun, 
and has informed her that he is going to kill her, actually arrives 
at her home. In this Los Angeles case, the ex-husband was true to 
his word. When the second call was made to 911 seven minutes 
later, the woman and three other family members were dead. A 
victim should never, as happened recently in San Diego, be told 
by the prosecutor's office that there are just so many dollars with 
which to bring charges of rape, and that her case was not good 

\textsuperscript{17} Id. at 138 n.70 (under restitutive theory, state's role is limited to mediating dispute and enforcing judgment).
\textsuperscript{18} Id. at 138 (discussing respective roles of victim, defendant, and state pursuant to resti-
tutive theory of criminal justice).
\textsuperscript{19} U.S. Const. amend. V, § 1. "No person shall be . . . deprived of life, liberty, or prop-
erty, without due process of law . . . ." Id.
\textsuperscript{20} See Aynes, supra note 3, at 75-77 (discussing theory of social contract and govern-
ment's duty to its citizens).
\textsuperscript{21} U.S. Const. amend. XIV, § 1; see also Aynes, supra note 3, at 77-84 (setting forth 
protections mandated by Fourteenth Amendment).
\textsuperscript{22} Aynes, supra note 3, at 84 (quoting United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. 
Alaska 1871) (No. 15,282)).

This was a case handled by the California Crime Victims Legal Clinic. The victim 
decided not to press forward with the case. I was prepared to go public, since the prosecu-
tor's behavior was unacceptable. The victim moved to another city.
24 hours. In this case, which drew national attention because the killer was subsequently identified as an on-duty California Highway Patrol officer, family members discovered the body of the missing child after a night of searching during which three separate law enforcement patrol units refused them assistance.\textsuperscript{46}

These case scenarios are fairly typical. Taken together, they reflect the wholesale omission by the government to protect its citizens through the enactment of either law or policy, which is by any measure equal to that afforded the accused. Were this any other contract, it would certainly have been declared null and void.

It has been argued by opponents of victims' rights that the Constitution was designed only to define the boundaries of governmental power, not to mandate its action.\textsuperscript{45} If we were to accept this interpretation, then today's devastating effect of crime on society was unanticipated by the framers of the Constitution.

If there is a solution within the federal Constitution to re-establish a balance between the criminal and the victim, how should it be done? While the answers are not simple, neither are they as nebulous as the naysayers allege.

The most commanding resolution to an imbalance of rights between the defendant and the victim of a crime is the implementation of a federal constitutional amendment, which would grant standing to crime victims separate from that of the prosecutor and defendant. Under this plan, victims would have no special privileges and would have to use the same rule book as the other players. The evidence code, case law, and legislative interpretation could be used to strengthen the victim's position in the same manner as is currently available to the other parties.

Among the obstacles preventing the passage of such a federal constitutional amendment is the alarming lack of candor by those in the criminal justice system who purport to back these amendments at the state level. There is a saying in the law which holds that a right without a remedy is no right at all. For the most part, these hollow rights have been enshrined in the many so-called vic-

\textsuperscript{46} People v. Peyer, San Diego Sup. Ct., Case # F101454 (1988). This was also a case in which I represented the victim's family. The first trial ended in a hung jury. The family and I went to the District Attorney regarding a second trial, which resulted in a conviction.

victims’ bills of rights which have found their way into state constitutions over the past decade. At best, they serve as mere guidelines which do little more than patronize victims with rhetoric and illusory promises. While some indirect benefits do trickle down to crime victims, they are quite secondary to the power shift occurring between the defendant and the prosecutor.

In 1990, California passed Proposition 115, popularly known as the Crime Victims Justice Reform Act. In addition to the complete absence of any shift of participatory power to the victim, the enactment of this legislation did strip from attorneys the right to conduct voir dire in the jury selection process. However commendable this may be for the curtailment of endless questions put to jurors by defense attorneys, it seriously compromised the ability of both prosecutors and plaintiffs’ civil litigators to identify and to eliminate defendant-biased jurors. This selection process becomes critical in high visibility cases and in those which engender bias, including sexual assault, child molestation, and domestic violence.

In California, crime victims are allowed by law to make a victim impact statement at the sentencing stage of a criminal case. Furthermore, they may appear either in person or by counsel. There is, of course, a catch. This law is not part of the Victims’ Bill of Rights which was incorporated into the California Constitution in 1982. Rather, it is codified in the Penal Code, and therefore is not protected by or enforceable on constitutional

[26] See, e.g., CAL. CONST. art. I, § 28(b); FLA. CONST. art. I, § 16(b); MICH. CONST. art. I, § 24; R.I. CONST. art. I, § 23.
[28] CAL. CIV. PROC. CODE § 223 (West 1992) (providing that in criminal cases, court shall conduct voir dire of prospective jurors).
[30] Id.
[31] See Victims’ Bill of Rights, Initiative Measure Proposition 8 (approved June 8, 1982) (codified at CAL. CONST. art. I §§ 12, 28 (repealed); § 28 (new); CAL. PENAL CODE §§ 25, 667, 1191.1, 1192.7, 3043 (West 1988 & Supp. 1992) (new); CAL. WELF. & INST. CODE §§ 1732.5, 1767, 6631 (West 1984) (new)). In California the so-called Victims’ Bill of Rights was passed by initiative as Proposition 8 in June 1982.
grounds. Most likely this was not an accident or oversight. Once again, there is only the illusion of justice.

In 1987, the first case dealing with the right to present a victim impact statement was addressed by the United States Supreme Court. The case, *Booth v. Maryland,*[^482] was a brutal double-homicide.[^484] In a five to four decision, the Supreme Court determined that a victim impact statement was too prejudicial to the defendant in a death penalty case, and could not be overcome by a relevancy argument.[^485] In other words, the harmful effects of the murder on the victims’ family were held to be unacceptable considerations during sentencing.

Not since the close of the Civil War have the ties that bind the law-abiding in this country to their government been so close to complete collapse. Far from being melodramatic, this observation is supported by a sharp increase between 1988 and 1990 in the public’s perception, as compared to the reality, of the increased risk of victimization.[^488] There were other factors influencing this statistic, but the common theme remaining today is one of lost trust and credibility.

Then, in 1990, in what has been called by some a ‘surrender’ to the pressures of militant crime victim groups and their supporters, and by others as a first step toward a just redistribution of rights between criminals and their victims, the Court reversed itself. The Supreme Court decided *Payne v. Tennessee*[^39] and allowed victim impact evidence admitted during the sentencing phase of a trial.[^483] Justice Thurgood Marshall penned a scathing dissent in *Payne,* condemning his brethren for abandoning legal precedent.[^9] This is a weak argument from a jurist who himself changed our nation by abandoning legal precedent. Separate but equal had seemed so firmly supported by constitutional interpretation before Marshall argued *Brown v. Board of Education.*[^40] How clearly wrong

[^484]: Id. at 497-98. Booth and an accomplice entered the home of an elderly couple and robbed, gagged, and stabbed them to death. Id.
[^485]: Id. at 509. The Court held that a victim impact statement at the sentencing phase of a capital murder trial violated the Eighth Amendment. Id.
[^486]: See *America Speaks Out,* supra note 1, at 3-5 (giving statistics of actual criminal incidents and statistics regarding citizens’ fear of crime).
[^483]: Id. at 2609-10.
[^487]: Id. at 2619.
his predecessors had been, he convincingly argued.

How is it now so different to hold violent offenders morally accountable for their actions and allow a jury to consider victim impact evidence a factor when deciding a capital murderer's fate. Payne had brutally murdered a young mother and her daughter in front of the mother's three-year-old son. The boy, too, had been seriously injured. During the penalty phase of the trial, the surviving child's grandmother testified about the nightmares and fear suffered by the surviving boy, and described how he cried out in the night for his dead mother.

With the *Payne* decision, there is now a starting point from which to begin meaningful victim participation at the sentencing hearing. It is, however, just a starting point. In all but death penalty cases, *Payne* has little influence. As with other "rights," there are neither penalties for failure to notify victims of the sentencing date, nor barriers to proceeding in their absence. In California, a recent study revealed that fewer than three percent of eligible victims avail themselves of the opportunity to make a victim impact statement. Although some have no interest in facing the offender and want nothing to do with the case, my experience strongly suggests that the lack of advocacy and support for crime victims keeps them away from the courthouse on judgment day.

Legal counsel for crime victims must stretch the boundaries of current laws and learn to think more like criminal defense attorneys in the pursuit of new horizons. By exploring the language of a state's victim impact statement statute, a victim's attorney can present his/her case more strongly. In California, a victim has the right to appear "personally or by counsel" to address the appropriate issues. Does this mean that only one or the other may be heard? Or that a lay victim advocate or certified law student would not qualify? I have used them all, and have almost never been challenged.

42 Id. at 2602. The child was stabbed repeatedly, but miraculously survived. *Id.*
43 *Id.* at 2603.
45 *See Cal. Penal Code* § 1191.1 (West 1992) (victim has right to appear at sentencing proceeding "personally or by counsel").
We have learned not to hand out copies of victim impact statements until the case is actually called and all parties appear ready to proceed. Early on, these statements were distributed before the judge took the bench. As often as not, the hearing was continued and the full impact of the statements had been squandered by the time the sentencing actually took place. For much the same reason, the probation report should advise the court that a victim will appear to present an impact statement. However, the statement should not be attached to the report.

A victim’s attorney should encourage the judiciary to consider what limited victims’ rights are available. If the victim or a representative is not present when the case is called, the court should conduct an inquiry on the record to determine what efforts were made, and by whom, to notify the right parties about the sentencing. If the court is satisfied by a preponderance of the evidence that the victim’s absence is knowing and voluntary, the hearing will proceed. However, if the court was misinformed or misled, suggested remedies include sanctions and a sentencing de novo.

I am particularly interested by the word “counsel” in California’s victim impact statute. If, as it seems to suggest, a crime victim has the right to counsel at a sentencing hearing, then it would seem to follow that this right begins upon the court’s acceptance of the entered plea. Everything from that point on concerns sentencing. Therefore, I respond as an attorney of record in regard to any proceedings post-plea. I accompany other counsel into chambers, I request probation reports, and, sometimes I ask that the prosecutor direct communication with the victim through me. This last request prevents a prosecutor from undermining client control, and from not allowing victims to maximize their influence at the appropriate times and places.

I have experienced the least success in securing probation reports prior to sentencing. This scenario will probably lead to a test case on the meaning of “counsel” as it is used in the California statute. I agree with attorney John Stein, Deputy Director of the National Organization for Victim Assistance, that this provision probably makes the victim a recognized party of interest throughout the sentencing phase of the criminal case, and, therefore, gives the victim a “due-process right to examine the [Pre-Sen-

4 Id.
tence Investigation Report] in preparation for the hearing." Should it be determined that a victim has standing during the sentencing phase of a criminal case, what might the effect be on proceedings at earlier stages of the case?

In the summer of 1989, I had the opportunity to participate in a day-long working session on victim participation in the criminal justice process. The session held in Washington, D.C. was hosted by Justice Fellowship, a project of Prison Fellowship. Prison Fellowship was founded by Charles Colson, a former aide to the Nixon White House. Another expert in attendance was Professor Abraham Goldstein from Yale Law School, who had been one of the earliest advocates of victim participation in the criminal arena.

The purpose of the session was to examine a legal concept which Prison Fellowship referred to as "Restorative justice." Although established within a moderately religious framework, the proposed definition was not at all limited by this orientation. "Restorative justice acknowledges the importance of the government's contribution to the justice process but places equal weight on victims, offenders, and the community taking active roles. It addresses the harm sustained by all the parties and underscores their responsibilities to one another. It brings criminal justice back into balance."

When we had completed our session, Justice Fellowship developed the following principles:

- The victim should have access to representation separate from the prosecutor for those stages of the criminal process that relate to the victim's pursuit of restitution or personal protection.
- The decision to prosecute should normally rest with the public prosecutor.
- Sentencing should be constructed so as to increase the

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48 Professor Goldstein is the Sterling Professor of Law at Yale University. He graduated from Yale Law School in 1949 and has written numerous articles on victims' issues. For an interesting discussion on victim participation in the criminal justice system, see generally Abraham S. Goldstein, Defining the Role of the Victim in the Criminal Prosecution, 52 Miss. L. REV. 515 (1982).

likelihood of restitution being paid. In other words, restitution should be normative unless there is a compelling, overriding reason.
— Rights given to victims should not diminish the defendant's rights or limit the prosecutor's right to protect the public interest.
— The right to counsel available to a crime victim in the civil process should also be available to the victim in the criminal process.\(^5\)

This was the first list I had seen which treated crime victims separately and distinguished them from their more common roles as a witness or an element of the crime, or even worse, as the body on a coroner's report.

These principles lead to a most intriguing, yet seemingly sensible, conclusion. Crime victims should have legal counsel of their own. The public prosecutor's absolute discretion and monopoly over the initiation or progress of a criminal prosecution is not an inevitable feature of a fair judicial system. While prosecutors have been at the forefront of the victims' rights movement, and many have demonstrated great sensitivity to the interests of crime victims, they will be the first to acknowledge that they only represent the state.

The interests of the state, with respect to the initiation of prosecution, the offenses charged, the negotiation and acceptance of guilty pleas and sentence recommendations, may be dramatically different from the victim's interests. The dismissal of counts in a multi-count complaint may compromise a victim's right to be compensated by the state restitution fund, since outright dismissal may lead to the conclusion that a crime was not committed. Collection of insurance benefits, as the result of an auto crash, may be difficult if a defendant is allowed to plead guilty to one of two pending drunk driving cases, with the second being dismissed. In California, a restitution order made as part of a plea to a felony can be filed as a civil judgment.\(^6\) This is not true if the plea is reduced to a misdemeanor. In addition, a guilty plea in a criminal case may be introduced in a civil action based on the same facts, without


\(^6\) See CAL. PENAL CODE § 1214(b) (West 1992) (order of restitution may constitute civil judgment enforceable in same manner as money judgment).
any further need to prove liability. If, however, the plea is a *nolo contendere*, liability must be proven before evidence of damages is addressed.

Probably the most disastrous example in my career of how the handling of a criminal case can impact a civil action based on the same facts, is playing out as I prepare this paper. I received a tearful call from a client whose case had made headlines over five years ago. The victim, a woman, had been savagely kicked in the face by a member of the Navy’s SEAL team. Her face was permanently scarred, and she had to undergo several painful surgeries. On the date of the incident, the defendant harassed the victim by making lewd and suggestive comments to her. He eventually pinched her backside when she walked by him. She slapped his face. He knocked her to the ground and kicked her in the face with the heel of his boot. The defendant received a relatively minor sentence, with a promise that, upon successful completion of five years’ probation, his record could be expunged.

The victim had filed a civil suit, but the defendant managed to stall for the entire five year length of his probation. Then, one day last summer he went to court and had his case dismissed. Neither the judge, nor the original case prosecutor, nor the victim’s civil attorney, knew what had happened until after the dismissal. Now, instead of simply introducing the felony conviction as proof of liability and moving straight to damages, this victim may have to prove the case *de novo*. Jurors may be influenced by the fact that this crime took place in a bar, and that the victim somehow deserved what she got because she slapped the defendant. This could adversely affect the award of damages. We are currently looking for a flaw of some kind in the record, which could persuade the court to reinstate the charges long enough to get the civil case to trial.¹²

There are, of course, good days at the office. The president of the local chapter of Mothers Against Drunk Driving (“MADD”) telephoned me when she was subpoenaed by a criminal defense attorney who was trying to prove that pressure on the court by MADD members had resulted in the filing of murder charges in

¹² In March 1993, following court rulings preserving the right to introduce the criminal disposition to prove liability, a jury returned a six-figure judgment in favor of the victim. The defendant immediately filed for bankruptcy and will discharge this obligation.
cases involving primarily Hispanic defendants. She had just spoken to the prosecutor in the criminal case, and had been advised not to look to his office for legal advice. He, too, had been subpoenaed by the defense, and was being represented by the Office of the Attorney General. She stated that she probably would appear because she didn’t know what else to do. I explained that an appearance under these circumstances could set a dangerous precedent. Therefore, I appeared for her and had the subpoena quashed.

In another case, the defendant, already convicted for murder and serving prison time, sued everyone in the criminal justice chain, including the victim. Over the course of these proceedings, he had become a very good “jailhouse lawyer.” The original case prosecutor informed the victim that he was represented by the Attorney General, the police department was represented by the City Attorney, and the judge was represented by the County Counsel. Unfortunately, the victim had no representation. For the next eighteen months, I made six appearances on behalf of this victim. She could not understand how she had been the chief prosecution witness, and later did not receive any assistance from the system for something which directly resulted from her willingness to testify.

Indeed, there is a very real possibility that prosecutors violate the Canon of Ethics when they purport to represent both the interests of the state and the interests of the victim in the same case. A potential conflict of interest arises between these competing interests. In such serious circumstances, a lawyer “should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; . . . .”

“This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.”

The first dramatic example of the legal dilemma presented when a prosecutor for the state doubles as a lawyer for the victim occurred in Oregon in 1988. John Collins, the elected District

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53 Id. at EC 5-14.
54 See In re Collins, 775 P.2d 312, 313-14 (Or. 1989) (in banc) (case involved conflict between District Attorney and how he managed his crime victims’ assistance program); see
Attorney of rural Yamhill County, directed an advocate in his victim assistance program to review the contents of what he believed to be a defense-biased presentence report with the survivors of a victim killed by a drunk driver. The victim had been killed in an early morning crash, when the defendant, who later showed a .11 blood alcohol level, ran a stop sign. The victim's children were not even mentioned in the presentence report, nor was there an accurate enumeration of the defendant's assets, including equity in a house, from which restitution could have been paid.

The presentence report was given by Mr. Collins to a representative of the prosecutor-based victim assistance program, who in turn read parts of it to the victim's family. This, of course, brought up yet another issue. Should victim/witness programs ever be based in any agency considered to be in the criminal justice loop, such as a probation or police department, or a prosecutor's office, where the agency's interests potentially conflict with the victim's?

The Oregon State Bar issued a letter of ethical reprimand, finding that Mr. Collins violated the Code of Ethics by condoning the disclosure to the victim's family of the presentence report beyond the victim impact statement and the sentencing recommendation. According to the Oregon State Bar, Mr. Collins, through the victims' advocate worker in his office, made this information "available" to people not designated by statute as proper recipients of such information.

also Stein, supra note 46, at 1 (discussing details of this "landmark legal ethics case affecting victims' rights").

66 See Collins, 775 P.2d at 313-14. According to Oregon law, the availability of a defendant's presentence report is limited to the sentencing court, the Department of Correction, the State Board of Parole, appellate or review courts, the district attorney, the defendant or defendant's counsel. Id. at 313 n.1. Despite this statute, D.A. Collins instructed his victim advocate to review the victim impact portion of the defendant's presentence report with the victim's wife. Id.; see also Stein, supra note 46, at 1 (same).

67 See Stein, supra note 46, at 1. The accused was apparently "fatigued" from being up all night, playing in a band and partying afterwards. Id. He was driving with a blood alcohol content of 0.11 when he ran a stop sign and collided with the victim's car. Id.

68 Id. at 2. The advocate from the victim assistance program wrote a letter to the judge rebutting some of the presentence report's findings and recommendations. Id.

69 See Collins, 775 P.2d at 313 (lawyer disciplinary proceeding brought by Oregon State Bar against Collins for disclosing information in presentence report); see also Stein, supra note 46, at 5 (same).

70 See Collins, 775 P.2d at 313. The Oregon State Bar's trial panel found that Collins did not violate the Oregon statute in question nor the disciplinary rules. Id. at 312. On appeal by the Bar to the Oregon Supreme Court, the trial panel's decision was affirmed. Id. However, the decision was based solely on the rather dubious ground that Mr. Collins passed
Presentence reports are considered confidential and at one time were available only to the court. Today offenders can challenge report findings and recommendations. As in the Oregon case, victims are often finding these reports biased against their interests, dealing ineffectively with matters of great adverse consequence to them. How can victims' counsel adequately prepare to fully represent the interests of their clients without access to the same information provided to the other participants? At least in states like California, where victims are by statute allowed legal representation at the sentencing hearing, a constitutional challenge needs to be mounted on behalf of victims for equal access to all materials upon which the sentencing is to be decided. Of particular importance is information concerning offender assets, which are crucial to the restitution hearing.

If handled by an attorney with a good grasp of their state's restitution laws, a civil attorney retained for the tort claim can prove unlimited pecuniary damages at the sentencing hearing in the criminal case, and subsequently have the order filed as a civil judgment. These same attorneys should try appearing as early as the first bail hearing to advise the court that care should be taken to preserve the offender's assets so that when the sentencing finally takes place, sometimes years later, there will still be assets to satisfy any orders for restitution.

One of the common responses to victims who are demanding more rights in the criminal justice system is that they should be looking to the civil courts where money damages can be awarded. Again, it appears that we have come to accept as some sort of universal truth the current system of separate venues for criminal and civil cases. A single forum to decide all the issues presented by a case makes much more sense in these times of massive court congestion and recessive economic doldrums. As Josephine Gittler has so wisely observed:

Whatever the significance and wisdom of the traditional distinction between the punishment of criminal offenders

the information by having it read to the victim rather than allowing her to see an actual physical copy of the report. Id. at 315-16; see also John H. Stein, D.A. Collins Wins Ethics Ruling But Faces Supreme Court Appeal, NOVA NEWSLETTER (Nat'l Org. for Victim Assistance, Wash., D.C.), Aug. 1988, at 6-7 (discussing court's distinction between making presentence report information "available" and "revealing" information).

See Gittler, supra note 5, at 137-40 (discussing merger of criminal and tort law).
through the criminal law and the compensation of crime victims through civil tort law, as a practical matter, the wide acceptance and use of restitution within the criminal justice system has already resulted in the partial merger of criminal and tort law.62

Today, more than ever before in American history, the avenue to money damages through civil litigation is threatened. A national trend seems under way, mostly through the initiative process and often propelled by the insurance industry, to curtail civil damage dollars by placing limits on awards for pain and suffering, passing no-fault insurance laws, and by limiting victim access to legal representation through elimination of the contingency fee system.

Victims need lawyers in the criminal justice system who will treat them as their only clients and who will work to secure constitutionally protected due process and equal protection rights, as well as to initiate legislation at the state and national levels to secure equal standing for their clients alongside prosecutors and criminal defense attorneys. Crime victims need an established method of access to the court in criminal cases when competing interests reach an impasse. While this may not mean that three lawyers will appear at the counsel table during a trial, it does mean that a victim will have a chance to address critical issues, some of which may be dispositive of the case, at a time when their interests have not yet been compromised.

Crime victims need to know that their interests are being safeguarded by victim/witness programs which are independent of any agency with potentially competing interests. They should expect that decisions made by state victim compensation boards are subject to the same standards of due process and equal protection afforded defendants in the court system or before other administrative agencies.

The victims' rights movement is one of the largest civil rights movements in the country today. An immediate need exists for lawyers to practice in this new field. Law school curricula must offer courses and materials designed to educate future lawyers about victims' rights issues and to encourage internships and

62 Id. at 139.
clerkships with a legal clinic that represents crime victims. Law students should be encouraged to pursue a career in victims’ litigation, both within the criminal and civil justice arenas.

Crime victim interests need to be reflected in the filing of amicus curiae briefs in appropriate cases throughout the justice system. Victims should have access to lawyer referral panels covering the myriad of issues which may be generated by an original criminal victimization. Many thorny constitutional issues remain to be addressed, including the conflict between the public’s right to know and the victim’s right to privacy, and further challenges to the right of offenders to profit financially from their crimes.

This commentary can serve only to draw attention to the newly emerging field of crime victim litigation, and to the legitimate need for young lawyers, law schools, and the trial bar to consider it “the stuff” from which careers are made. In this vein, I cannot conclude without paying tribute to two outstanding individuals, attorney Frank Carrington and victim advocate Doris Tate. Although they lived on opposite shores and thousands of miles apart, they shared a common vision—that each is important to the other. To that end, Mr. Carrington, often referred to as the “Father of Victims’ Rights,” devoted countless hours to the creation of the first comprehensive training program for victim service providers nationwide, and then saw the project funded in 1991 by the United States Department of Justice. Doris Tate, mother of Manson family murder victim Sharon, devoted her considerable energies to building strong crime victim coalitions and took her message inside prison walls to some of the country’s most violent offenders, showing them that crime victims are real people, have real families, and cry real tears.

We, too, cried real tears last year, when Frank Carrington and Doris Tate died. They will be missed. To them, I dedicate this commentary.