PRIVATE RIGHTS OR PUBLIC WRONGS?
THE CRIME VICTIMS RIGHTS ACT OF 2004
IN HISTORICAL CONTEXT

Christopher J. Truxler, Lewis & Clark College
PRIVATE RIGHTS OR PUBLIC WRONGS?
THE CRIME VICTIMS RIGHTS ACT OF 2004 IN HISTORICAL CONTEXT

by
Christopher J. Truxler

Historically, crime victims served as policemen, investigators, and private prosecutors, and were regarded as law enforcement’s most dependable catalyst. The Crime Victim’s Rights Act of 2004 grants crime victims eight substantive and procedural rights and breathes new life into the common law idea that crime is both a public wrong and a private injury. The Act has, however, elicited ardent criticism. Opponents contend that the Act is both bad policy and, most likely, unconstitutional. Without commenting on the Act’s policy or constitutionality, this Note places the Crime Victims’ Rights Act within a broader historical context where victims’ needs can be understood to compliment, rather than obstruct, the state’s prosecutorial duties. Contrary to the common belief of many, the Note demonstrates that public prosecution is both a historical latecomer and a mere extension of the ancient common law right to privately prosecute crime.

I. INTRODUCTION

II. THE ORIGINS OF PUBLIC PROSECUTION

A. The Mediaeval Background

B. Private Prosecution in England

1. Legal & Political Justifications

2. Public Officials as Assistants

C. Public Prosecution on the European Continent

1. The Inquisition and the Invention of Public Prosecution

2. Cesare Beccaria’s Dei delitti e delle pene

III. CRIMINAL PROSECUTION THE UNITED STATES

A. Private Prosecution in Early America: 1614–1900


C. The Crime Victims’ Rights Act of 2004


2. Rights Provided by the CVRA

IV. CONCLUSION
I. INTRODUCTION

“Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

Justice Cardozo, Snyder v. Massachusetts

The American experience with the administration of justice has been far more concerned with defendants’ rights than victims’ needs. Given the Framers’ experience under colonial rule, this is not surprising. British abuses of general warrants and writs of assistance—which empowered petty officers to conduct searches and seizures without particularized suspicion—have attained mythic status as the justification for two of the hallmarks of the American legal system: limited government and constitutionally grounded defendant rights.

But these abuses, and the reforms they provoked, paint a partial picture of the administration of justice in early America. Historically, crime victims played a central

---

1 Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).
2 The Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments limit law enforcement officers’ power during their interactions with criminal suspects and governs the adjudication of criminal cases. Over emphasis on defendant rights has led to the virtual exclusion of crime victims. As one commentator observed:

[C]riminal law is cast essentially as a battle between prosecutors and defendants. In fact, a recent survey of eighteen criminal procedure textbooks indicated that the cast majority of the texts do not mention victims at all in their indexes, several include only a single paragraph or note on victim involvement in criminal trials, and only one treats victims with any degree of sophistication. These omissions reflect the realities of the American criminal justice system, in which victims have gradually been sidelined during the past century.

3 In the opinion of James Otis (1725–1783), general warrants and writs of assistance represented “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book . . . .” Emily Hickman, Colonial Writs of Assistance, 5 THE NEW ENGLAND QUARTERLY 83 (1932). The writs’ history and enduring legal significance has been repeatedly invoked in numerous appellate and Supreme Court decisions. See, e.g., Boyd v. United States, 116 U.S. 616, 624-629 (1874), McDonald v. United States, 335 U.S. 451, 455 (1948), Stanford v. Texas, 379 U.S. 476, 482-83 (1965), Warden v. Hayden, 387 U.S. 294, 301 (1967), and U.S. v. Gervato, 474 F.2d 40, 40 (3rd Cir. 1973).
role in the criminal justice system. Victims served as policemen, investigators, and private prosecutors. They were the key decisionmakers at every stage of prosecution and were regarded as law enforcement’s most dependable catalyst. In England, victims were considered the legitimating source of the state’s police power, a deterrent to criminal activity, and a check to governmental overreaching. As a result, crime victims satisfied important social and legal needs by balancing the duties of public law enforcement with the needs for protection and redress.

For better or worse, this tradition has been lost. Today, crime victims are virtually excluded from the criminal process. This has contributed to a growing consensus that both crime victims and the administration of justice suffer as a result. The Crime Victims’ Rights Act of 2004 (“CVRA”) potentially corrects this historical asymmetry. The CVRA grants crime victims eight substantive and procedural rights and breathes new life into the common law idea that crime is both a public wrong, which concerns the state and the defendant, and a private injury of immense importance to the victim. Among other things, the Act seeks to reform the federal justice system’s culture by ensuring that victims are treated with respect and guaranteeing that they are notified of, and may

---

4 William F. Mc.Donald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649 (1976); Robert Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995); Susan Howley & Carol Dorris, *Legal Rights for Crime Victims in the Criminal Justice System*, in *VICTIMS OF CRIME* 299 (Robert C. Davis, Arthur J. Lurigio, & Susan A. Herman, eds., 3d. 2007) (“During colonial times . . . [t]here was no need to provide separate rights for victims, because they were so closely involved in the pursuit of justice. In contrast, our founding fathers had great interest in the rights of criminal defendants, who had been powerless under the English system of jurisprudence.”).

5 See infra Section II–III.A.

6 See infra Section II.B.1.

7 O’Hara, supra note 1, 299; BELOOF, ET AL., VICTIMS IN CRIMINAL PROCEEDURE 3-5 (2d Ed. 2006).

8 See infra Section III.C.


10 See infra Section III.C.
participate in, proceedings involving their crime.\textsuperscript{11}

The CVRA has, however, elicited ardent criticism. Its opponents argue that the Act usurps prosecutorial discretion, disrupts the adversarial process, and unduly empowers “bloodthirsty” victims.\textsuperscript{12} In addition, opponents of the CVRA have raised serious questions about the Act’s constitutionality. Professors John Bessler and Stuart Green, for example, argue that crime victim rights violate criminal defendants’ Fourteenth Amendment Due Process right to an impartial prosecutor.\textsuperscript{13} Professor Joseph Kennedy, on the other hand, contends that the Act violates the Fourteenth Amendment’s Equal Protection Clause by providing the wealthy with preferential access to justice.\textsuperscript{14} Another recurrent concern questions whether the CVRA’s delegation of prosecutorial power violates provisions of Article II.\textsuperscript{15} Given these concerns, the CVRA’s constitutionality will undoubtedly be challenged; and, it is highly likely that the Act’s scope will be ultimately delineated by the Supreme Court.

The difficulty, however, is that the current system of public prosecution was not cut from whole cloth. Neither the Constitution nor any previous federal statute

\textsuperscript{11} Id.


definitively address crime victims’ proper role in the prosecutorial process. And, with fifty states, a federal system, and countless state counties, prosecution has taken myriad forms. As a result, to properly assess the CVRA, a historical framework is required. This Note provides that frame. While it addresses neither the constitutionality nor the wisdom of the Act, it concludes that criticisms of the CVRA, which needlessly pit victims’ rights against the public good, are historically unfounded and shortsighted. A historical perspective provides ample precedent and policy justifications supporting at least limited crime victim participation in the prosecutorial process. As demonstrated below, public prosecution is but an extension of ancient common law rights that arose as a de facto system to aid rather than replace private prosecution. As a result, the debate surrounding the CVRA may greatly benefit from an informed historical perspective, which reveals that victims’ rights are neither distinct from nor inherently opposed to the government’s duty to administer justice.

The Note proceeds in four parts. Following the Introduction, Section II examines the origins of public prosecution in the ancient system of private prosecution. Throughout the medieval period, in both England and the European Continent, crime victims rather than state officials administered justice (Section II.A). This practice became entrenched in England’s common law and lasted throughout most of the Twentieth Century. Although officials aided private prosecutors, they operated off of the assumption that public officials acted on behalf of, and not in spite of, private rights (Section II.B). Criminal proceedings on the European continent, however, operated differently. Following the Catholic Church’s adoption and popularization of the inquisitorial system and the Enlightenment’s redefinition of crime as a public, rather than a private offence,
public officials began prosecuting crime, which contributed to the creation of the Dutch *schout* and French *procureur* (Section II.C).

Section III, then, discusses the history of private prosecution in the United States. Following the historical phases identified by Professors Beloof and Cassell, the Note discusses, the dominance of private prosecution, which lasted from colonization through 1899, the rise public prosecution, beginning in 1900, and finally, the emergence of the victims’ rights movement in the 1960s. Because there is no wellspring of American prosecution, criminal prosecution appeared in myriad forms. Like the Dutch *schout*, American prosecutors represented local governments. Like the French *procureur*, American prosecutors exercised the exclusive authority to file criminal charges. And, like England’s criminal justice system, early American prosecutors were primarily crime victims. Only with the dawn of the Twentieth Century did crime victims assume a secondary role in prosecution. A conclusion follows.

II. THE ORIGINS OF PUBLIC PROSECUTION

Public prosecution is an indispensible feature of the modern criminal justice system. The practice, however, is a historical latecomer and the product of long evolution. Historians have variously pictured the American prosecutor descending from the English attorney general, the French *procureur* or *ministère publique*, and the

---

Dutch *schout*.\(^{19}\) With no definitive evidence that the practice descended from one particular institution at one particular time, this section examines the broader nexus of cultural, historical, and legal factors underlying modern prosecution. It concludes that modern public prosecution is but an extension of private rights, which were transformed by the Inquisition and Enlightenment notions of crime and statehood before landing in the United States. The section discusses, first, the inception of private prosecution in the early Middle Ages, second, England’s tradition of private prosecution, and finally, the origin of public prosecution on the European Continent.

### A. The Mediaeval Background

Crime victims’ rights have played an important role in the administration of justice since the Code of Hammurabi (*c.* 2000 B.C.E.)\(^{20}\) The development of the common law in the early middle ages is no exception. Following the collapse of the Roman Empire, the victim and the criminal process were intimately interwoven. Although crime was understood as both a private and a public matter, no formal governmental structure existed.\(^{21}\) Criminal justice depended on self-help, familial ties, and broad cultural conceptions of right and wrong. As a result, criminal prosecution was the crime victims’ prerogative.

---

\(^{19}\) See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (“Wickersham Commission”) 7 (1931); W.S. Van Alstyne, *The District Attorney: A Historical Puzzle*, 1952 WIS. L. REV. 125, 125 (1952).

\(^{20}\) Victims played an important role in the Code of Hammurabi, the oldest surviving code of law. Developed by King Dungi of Sumer (*c.* 2000 BC), it was adopted by Hammurabi (1792–1750 BC). The victim’s rights provision in Hammurabi’s Code decreed that offenders should make their victims as whole as possible. Victims, in turn, were to forgive offenders and not exact vengeance. ELAINE CASSEL & DOUGLAS A. BERNSTEIN, CRIMINAL BEHAVIOR 237 (2d. Ed. 2007).

\(^{21}\) WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 50 (2nd Ed. 1878). See also Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INTL. CRIM. J. REV. 190, 191 (2008) (“All crimes were by the Anglo-Saxons considered in a twofold light: first, as a damage or mischief done to the individual; next, as an offense against the peace of the whole state . . . .”).
Private prosecution, however, did not arise as a de facto system. The victim’s right to prosecute crime stemmed from the Teutonic belief that each individual had an “inalienable” “right . . . to redress his wrongs.” Following a crime, the law left offenders unprotected while crime victims, either through self-help or with the assistance of extended family, exercised the right of “blood feud.” Despite the name, blood feuds did not license unbridled violence. They were, however primitive, a legal mechanism. In theory, blood feuds obeyed specific rules, were initiated with prudence, and were distinct from going to war with the offender. In fact, Tacitus’ *Germania* (c. 98 A.D.) portrays blood feuds as a method of crime prevention.

---

24 This is often overlooked. Several sources depict blood feuds in terms that lead readers to equate the practice with near lawlessness. See, e.g., Levine, *supra* note 12, at 4 (asserting that victims were left “to their own devices” to pursue “revenge, retribution, compensation, or vindication”); Ma, *supra* note 22, at 191 (summarizing blood feuds as the system of “‘wild justice of vengeance’); and O’Hara, *supra* note 1, at 235 (“The victims’ desire for revenge, condemnation, vindication, and validation could all be satisfied privately”). Anglo-Saxon prosecution was, however, a facet of an established legal system, albeit primitive, and not merely the product of irrational desires. This confusion is likely the result of late Nineteenth century legal histories. Taylor’s *Origin and Growth of the English Constitution* (1899) and Forsyth’s *History of Trial by Jury* (1878) refer to the system as “wild justice.” Although this characterization is, from our perspective accurate, the epithet primarily serves to distinguish Taylor and Forsyth’s own refined legal system from the Teutons’ and Anglo-Saxons’ rather than to belittle the intricacies of an ancient system they examined with care. The phrase “wild justice,” in other words, likely reveals more about historians than history.
25 Pollock & Maitland, 2 *The History of English Law Before the Time of Edward I*, 450 (2nd Ed. 1899); see also Taylor, *supra* note 24, at 195 n. 1 (“The Teutonic nations set themselves the task of regulating the Right of Feud. They could not entirely abrogate it, . . . but they defined, and as far as possible, limited, its sphere and the extent of its action.”). Although primitive, the system was measured and calculative. In the event of a homicide, for example, victims were entitled retribution and compensation only in proportion to the harm suffered and the social standing of the victim. Further, various injuries were weighted and categorized. The level retribution permitted was, therefore, not entirely subjective. In certain circumstances, a blood feud might require the death of the perpetrator as well as the expropriation of personal property. In other circumstances, a blood feud might only require the expropriation of personal property. Id.; see also Lynne N. Henderson, *The Wrongs of Victims’ Rights*, 37 *Stan. L. Rev.* 937, 938-42 (1985).
26 Tacitus, *Agricola and Germany* 48 (Trans. A.R. Birley 1999) (“It is an obligation to take over the father’s of kinsman’s feuds and friendships. But feuds do not go on with no reconciliation. In fact, even homicide can be atoned for with a fixed number of cattle or sheep. The whole family receives this compensation. This is an advantage for the community, since feuds are rather dangerous where freedom exists.”).
collective and rested on the entire family, pressure to reasonably resolve the dispute increased.\textsuperscript{27}

The government, however, played no role in the dispute. Prosecution and the dispute’s resolution were private.\textsuperscript{28} In fact, the right to private redress was so deeply rooted that early attempts to eradicate the right by legislation failed.\textsuperscript{29} Accordingly, although the practice of blood feud faded, the underlying right endured. As the Teutons moved west and became the Anglo-Saxons, a system of monetary compensation, known as \textit{bot} and \textit{wergild} (i.e., “life-price” or “man-price”) developed.\textsuperscript{30} First codified by \textit{Æ}thelbert,\textsuperscript{31} the seventh century King of Kent, \textit{wergild} and \textit{bot} preserved the individual’s prosecutorial prerogative by requiring crime victims to seek compensation before instigating violence.\textsuperscript{32} Every bodily injury, from the loss of a nail to the loss of life, had a

\begin{flushright}
\textsuperscript{27} TACITUS, THE GERMANIA 75 n. 5 (Trans. Duane Reed Stuart 1916). Reflecting on Tactus’s observations in the \textit{Germania}, Taylor’s history, \textit{The Origin and Growth of the English Constitution}, suggests that blood feuds limited crime victims’ propensity to senseless revenge or violence. Since the entire family was involved, blood feuds may have involved an element of collective bargaining and resolution by consensus. TAYLOR, supra note 24, at 195 (observing that “the Teutonic states [developed blood feuds] to mitigate the evils of private warfare through the agency of family.”).

\textsuperscript{28} TAYLOR, supra note 24, at 195 (observing that the family, \textit{maegth} or \textit{maegburh}, constituted what we would today consider the police force). Taylor asserts, however, that the state did act “as mediator by guaranteeing to the person injured . . . satisfaction for the injury received.” \textit{Id}. This is questionable. Ma notes that debt satisfaction was almost always the crime victim’s prerogative. Further, when discussing \textit{wite}—fines payable to the state for breaching the peace—Professor Ma notes that these fines were based on the state’s desire to collect revenue rather than a perceived duty to seek justice. \textit{See infra} note 38, and accompanying text.

\textsuperscript{29} TAYLOR, supra note 24, at 195.

\textsuperscript{30} \textit{Id}. at 195; PAULINE STAFFORD, COMPANION TO THE EARLY MIDDLE AGES: BRITAIN AND IRELAND, C. 500 – 1100 C. 100 (1st Ed. 2009).

\textsuperscript{31} WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 48-50 (2nd Ed. 1873); Ma, supra note 22, at 191-92. Æthelbert’s dooms, conventionally dated to as early as 603-03 AD, are the earliest extant law code. ANN LYON, CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM 2 (1st Ed. 2003). A copy of the dooms can be found at the Internet Medieval Sourcebook sponsored by Fordham University: http://www.fordham.edu/halsall/source/560975dooms.html#The%20Laws%20of%20Æthelberht. This system was not unique to the Teutons or Anglo-Saxons. \textit{See}, e.g., STAFFORD, supra note 32, at 99 (discussing a variant of \textit{wergild} in Ireland called \textit{folog n-othrusa} requiring assailants to indemnify victims against sickness.”).

\textsuperscript{32} A murderer, for example, was given a year to pay the victim’s family the value of the victim’s life before the family could begin the blood feud. Further, modifying previous law, the family of the murderer was exempt from the feud unless they assisted or harbored him. POLLOCK & MAITLAND, supra note 27, at 451.
\end{flushright}
prescribed price.\textsuperscript{33} If the assailant refused to pay, the law of blood feud applied; and if the victim resorted to violence without first seeking compensation, they were severely punished.\textsuperscript{34}

Although this new system preserved the victim’s exclusive right to prosecute, Æthelbert’s code also marks the clearest beginning of state intervention in criminal law. \textit{Wite}, a fine due to the sovereign for breach of the peace, was occasionally imposed alongside \textit{wergild} and \textit{bot}. The fine, however, was essentially a tax and not a criminal sanction. Prosecution remained a private prerogative.\textsuperscript{35} The state had no obligation to pursue criminal wrongdoers\textsuperscript{36} and, as the basic structure of the code suggests, law and order were primarily concerned with compensating victims, rather than maintaining public peace. If, for example, an assailant “depart[ed] from the land,” and thus neutralized any threat to the public welfare, the victim or the victim’s family’s right to collect \textit{wergild} or \textit{bot} from the assailant’s family remained.\textsuperscript{37} No similar right was afforded to the state.\textsuperscript{38} As a result, despite the state’s limited intervention, the new system left the victim-centered structure of the old system intact.

\textsuperscript{33} As under the law of blood feud, the level of compensation varied markedly depending on the victim’s social status and the nature of the injury. \textsc{LYON, supra} note 33, at 2. Generally, the term \textit{wergild} only applied in cases involving death. For lesser offenses, offenders paid \textit{bot}. \textsc{Henry St. Clair Feilden, A Short Constitutional History of England} 75 (1882).

\textsuperscript{34} \textsc{Taylor, supra} note 24, at 195.

\textsuperscript{35} \textsc{H. W. Lucas, No. XLVIII (CLXII) The Month and Catholic Review} 406, 410 (December 1877) (“[I]t is plain that [with wite] we see the state beginning gradually to assert its claims as against the historically prior claims of the family.”)

\textsuperscript{36} Professor Ma attributes state involvement to the sovereign’s desire to collect revenue rather than a perceived duty to seek justice on behalf of the injured party. \textsc{Ma, supra} note 22, at 195. \textsc{See also, Pollock & Maitland, supra} note 27, at 453 (“One of the many bad features of the system of pecuniary mulcts was the introduction of a fiscal element into the administration of criminal law. Criminal jurisdiction became a source of revenue . . . .”).

\textsuperscript{37} \textsc{Stafford, supra} note 32, at 100.

\textsuperscript{38} Professor Ma corroborates this by noting a similar practice in France. In the case of death, official prosecutions were permitted “if there were no family members left to avenge the deceased.” \textsc{Ma, supra} note 22, at 197. Prosecution was brought, however, on behalf of the victim rather than the state. \textsc{Id.}
The methods of private prosecution instituted by the blood feud and *wergild* established lasting precedents governing criminal prosecution generally.\(^39\) Although early forms of law enforcement resembling public prosecution, like outlawy\(^40\) and the ealdormen,\(^41\) appeared alongside *wergild*, Hannis Taylor’s *Origin and Growth of the English Constitution*, suggests that these public prosecution models were but an extension of private prosecution that resulted from changed circumstances rather than changed laws or policies:

As the force of family associates weakened, and as the family itself became dispersed, a time came when neighbors were not necessarily kinsmen. When that point was reached, the deficiencies in the old system had to be supplied by a more definite form of organization, in which the power of the family survived as a potent influence.\(^42\)

In Taylor’s view, public prosecution grew out of, and was justified by, the basic theory animating private prosecution. Although outlawy and the ealdormen involved public enforcement mechanisms, they were, in Taylor’s view, public in appearance alone.

Professor Ma corroborates Taylor’s assessment. Despite public prosecution’s ascendency,

---

\(^{39}\) **Hugh Chisholm**, 7 *Encyclopedia Britannica* 455 (11th Ed. 1910) (“These laws [i.e., the blood feud and *wergild*] formed the foundation of the criminal law of Germany, including the Netherlands, of England and of Scandinavia.”). Remnants of the wergild system requiring the forfeiture of goods as punishment for murder survived in England until 1532, under Henry VIII’s reign. **Archer M. White**, *Outlines of Legal History* 208 (1895).

\(^{40}\) As described by Pollock and Maitland, outlawy was more brutal than the private prosecution of crime by blood feud and required the entire community to go to war with the assailant:

> He who breaks to law has done to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a ‘friendless man,’ he is a wolf.

**Pollock & Maitland**, supra note 27, at 449.

\(^{41}\) Ealdormen were royal officials, whose office predated the Eighth-Century. They exercised jurisdiction over the shire, led armies, were responsible for the administration of justice, and assisted victims pursuing legitimate blood feuds. **Lyon**, *supra* note 33, at 5.

\(^{42}\) **Taylor**, *supra* note 24, at 197.
which extended the right to prosecute beyond the victim and his relatives, public prosecution was justified by the notion that the citizens—not the government—were obligated to uphold the law.\footnote{Ma, supra note 22, at 194.}

Accordingly, even with the emergence of primitive law courts, which permanently supplanted blood feud, bot, and wergild, crime remained a private matter. Victims, not state officials, initiated legal proceedings.\footnote{Id. at 192; \textsc{Van Caenegem}, \textsc{Legal History: A European Perspective} 1 (1st Ed. 1991) ("[M]ost criminal offences were considered as violations of private rights . . . . [T]he right to bring [criminal] complaint belonged to a private person . . . .").} And, despite the emergence of a police force, arrests were conducted not by virtue of a public office but according to the rights and interests of private parties.\footnote{Ma, supra note 22, at 195.} As Pollock and Maitland observe, this is attributable to the Anglo-Saxon’s conviction that crime harmed the individual, not the state: “we find that the idea of a wrong to a person or his kindred is still primary, and that of offence against the common weal secondary, even in the gravest crimes.”\footnote{\textsc{Pollock} \\& \textsc{Maitland}, supra note 27, at 46.}

\textbf{B. Private Prosecution in England}

The Teutonic and Anglo-Saxon belief that individuals possess an “inalienable” “right . . . to redress [their] wrongs” deeply influenced England’s criminal justice system.\footnote{\textsc{Taylor}, supra note 24, at 194-95.} Although elements of public prosecution existed, prior to the Crown Prosecution Service’s establishment in 1985, which instituted England’s current system of public prosecution, prosecution was a private matter.\footnote{Ma, supra note 22, at 196.} Public prosecution, however, was not the product of modern (or even Enlightenment) theories. In England, the absence of any formal structure for prosecuting crimes, coupled with victims’ increasing reluctance to exercise their prosecutorial prerogative, created a de facto system of state
prosecution.49 The general theory underlying prosecution, accordingly, endured. Public
officials acted through—and not in spite of—private interests.50 This subsection
addresses, first, the justifications for private prosecution and, second, official assistance
offered to private prosecutors.

1. Legal & Political Justifications

Despite the Norman Conquest in 1066, certain Anglo-Saxon traditions, including
the individual’s private right to prosecute crime, survived. Although the Normans
introduced new procedural formalities, the basic Anglo-Saxon criminal justice system
remained largely intact: through oral “appeals” or written “indictments,” crime victims
initiated criminal proceedings,51 and a formal trial presided over by a king-appointed
judge followed. The parties, however, presented oaths and promises. They attested that
the accuser or accused was trustworthy, and therefore credible, rather than providing
evidence to prove that their position was factually or legally correct.52 Perhaps because
the Anglo-Saxons and Normans were sensitive to the personal dimension of crime and
justice, vindicating one’s reputation with peers and family members, rather than proving
one’s case by argument, was the trial’s purpose. Accordingly, if the victim so desired,
disputes could be, and often still were, resolved violently.53 Under the court’s

49 Id. at 195; Tyrone Kirchengast, Private Prosecution and the Crime Victim, MACQUARIE LAW
prosecution was limited by the rise of a stable metropolitan police force and, particularly, the ODPP.”).
50 Id.; PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 17 (1958).
51 Juan Cardenas, The Crime Victim in the Prosecutorial Process, 9 HARV. J. L. & PUB. POL’Y 357,
360 (1986).
52 Ma, supra note 22, at 192.
53 Cardenas, supra note 53, at 360.
supervision, accuser and accused engaged in combat and the winner was declared the successful litigant.\textsuperscript{54}

Surprisingly, litigation-by-combat was not abolished until 1819 and criminal proceedings were almost entirely initiated and conducted by crime victims through 1897.\textsuperscript{55} Although it is impossible to know exactly why private prosecution endured as long as it did, two factors explain its continued predominance. On the one hand, despite the Norman Conquest, England retained the Anglo-Saxon’s understanding of crime as an offence to both the state and the individual. This is not unsurprising. In 1620, Francis Bacon issued his clarion call in the \textit{Novum Organum} to uproot traditional “idols and false notions.”\textsuperscript{56} Law, like religion and philosophy, should in Bacon’s view become scientific, secular, and modern. Similarly, the publication of Cesare Beccaria’s \textit{On Crimes and Punishments} (1764) seized on Enlightenment ideologies and ignited a movement to redefine crime as a public rather than a private offence.\textsuperscript{57} Nevertheless, in 1769, Blackstone’s \textit{Commentaries on the Laws of England} enshrined the Anglo-Saxon’s traditional understanding of harm as both a private and a public offense in the common law: “[i]n all cases the crime includes an injury: every public offense is also a private

\begin{footnotes}
\footnote{54 \textit{Id.}}
\footnote{55 Cardenas, \textit{supra} note 53, at 360 n. 14; JAMES STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 501 (1883); but see PENDLETON HOWARD, CRIMINAL JUSTICE IN ENGLAND: A STUDY IN LAW ADMINISTRATION 38 (1931) (“It is apparent from . . . the powers and duties of the Director of Public Prosecutions [created in 1897 that Parliament never intended that he should be a prosecuting official of the type made use of in most other countries. The legislation creating his office and defining his authority failed to set up a national system of public prosecutions under the direction of a minister of justice. It did not provide for local officials to manage prosecutions throughout the country, not did it commit the government to the police of undertaking any except the most important criminal proceedings, or those in which a public interest was involved.”).”}}
\footnote{56 FRANCIS BACON, NOVUM ORGANUM, XXXVIII (1620).}
\footnote{57 \textit{See infra} Section II.C.2 (discussing Cesare Beccaria’s \textit{On Crimes and Punishments}).}

wrong, and somewhat more; it affects the individual, and it likewise affects the community.”

On the other hand, despite Blackstone’s recognition that crime victimizes both society and individuals, private prosecution endured because it served essential public services that official prosecution could not achieve. It protected individual liberties, enhanced government accountability, checked government overreaching, and resonated with the values enshrined in Magna Carta. Prosecution was, therefore, delegated to private parties because it was “infinitely preferable” to a system “dependent on the caprice” of government bureaucrats and political parties. In one commentator’s view, private prosecutors represented law enforcement’s most dependable catalyst:

---

58 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769). It is notable that, despite Beccaria’s immense influence, Blackstone refused to redefine crime as a strictly public offense. See Anthony J. Draper, Cesare Beccaria’s influence on English discussions of punishment, 1764–1789, 26 HIST. OF EURO. IDEAS 177–199 (2000) (“The most significant adoption of [Baccaria’s] ideas in the 1760s was in the work of William Blackstone, whose fourth and final volume of Commentaries on the Laws of England contained direct references to Beccaria, and supported several of his positions. Yet the presence of Beccaria in Blackstone’s work . . . by no means implies that all Beccaria’s central tenets had been accepted. [T]he use and lionizing of Beccaria in England was in some quarters deceptive, with much attention being paid to his early utilitarianism whilst crucial positions . . . remained unmentioned.”). However, Blackstone did make concessions to Beccaria and the Enlightenment. Observing that the public nature of some crimes outweighs their private nature, Blackstone explained:

Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for other to do the like. Robbery may be considered in the same view . . . [because] the public mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public.

BLACKSTONE, supra note 60, at 5. Yet, despite these and similar distinctions, the importance of the victim’s personal harm cannot be overlooked. Victim harm continues to play an important role in England’s criminal prosecutions, even when the victim is not involved in the proceedings. Tyrone Kirchengast, Private Prosecution and the Crime Victim, MACQUARIE LAW WORKING PAPER SERIES 11-12 (April 2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126439. (“Though committed against the public-at-large, order offences still require supporting evidence as to the harm caused by the accused. This will have to move from the public or police. As victimless offences still require particularity of the criminal wrong, the victim perspective is maintained, even though this may be constructed in terms of the ‘public peace.’”)

[N]o stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to everyone by the English system, of testing the legality of any conduct of which he disapprove, either on private or on public grounds, by a criminal prosecution.\(^\text{60}\)

Although government officers participated in prosecution since at least the Twelfth-Century, government involvement was designed to supplement rather than supplant private prosecutors.\(^\text{61}\) The basic concern was that uninjured public officials, unlike injured private parties, would prosecute for political rather than criminal purposes. Prosecution would, therefore, threaten rather than protect the public and so violate the public trust.\(^\text{62}\)

Accordingly, William Carey Jones’s 1916 edition of Blackstone’s *Commentaries* attributes private prosecution’s prevalence to England’s adoption of the adversarial system.\(^\text{63}\) Unlike the inquisitorial system operating on the European Continent, victims rather than the government, initiated and conducted court proceedings. In Jones’s view, the adoption of the adversarial system, which relied on private rather than public prosecutions, won Blackstone’s approbation that, in England, justice is “more nearly

\(^{60}\) Stephen, supra note 57, at 496.

\(^{61}\) J.M. Beattie, *Crime and the Courts in England: 1660–1800* 38 (2008) (“[Public Prosecutors] did not relieve the victim of the burden of pursuing the suspect and organizing his prosecution; they were meant to encourage, not replace, the private prosecutor.”) However, Juan Cardenas argues that the reform may have also failed because “[o]pponents of reform resisted the creation of a public prosecutor’s office because they feared that the office would be a political tool for the State and a mere coffer of patronage.”).

\(^{62}\) This concern is especially poignant today in light of the SEC’s repeated failure to prosecute banks despite the repeated urging of injured private parties. See, e.g., Peter J. Henning, *The Revolving Door and SEC Enforcement, available at: http://dealbook. blogs.nytimes.com/2010/04/08/the-revolving-door-and-s-e-c-enforcement/* (discussing the re-peated failures of public law enforcement as embodied by the SEC).

advanced to perfection.”64 Because the English criminal system was dependent not on state administrators but common people—relying on Grand Juries and requiring a public trial, examination of witnesses in open court, cross examination, the privilege to remain silent, and a jury verdict—it was less authoritarian and, presumably, more democratic.65 For Blackstone, this was a mark of superiority.66

Not surprisingly, then, legislation establishing public prosecutors was rejected as late as 1818.67 In one committee member’s words, the office of public prosecutor is “an office of odious appellation.”68 The Eighteenth-Century lawyer and writer, Joseph Chitty, harbored a similar view.69 Whereas private prosecutions began with a private complaint and required a Grand Jury indictment, formal proceedings, which operated independently of the people, evoked the Star Chamber’s regrettably authoritarian methods.70 Chitty, accordingly, concluded that private prosecutions were not only the safest and most constitutional means of law enforcement but also, as Professor Van Alstyne suggests, the surest source of individual liberty.71

64 William Carey Jones, supra note 129, at 2157. Contrasting the King’s rights with the rights of a private prosecutor, Blackstone emphasized the extraordinary liberties that English law afforded to crime victims: “[O]n an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject . . . the king can no more pardon it than he can remit the damages recovered in an action of battery.” COMMENTARIES, supra note 129, at 316

65 Id. See also MIREILLE DELMAS-MARTY, EUROPEAN CRIMINAL PROCEDURES 450 (2002) (linking the adversarial system with private prosecution in modern England)

66 This point is significant because is discrédits erroneous arguments that crime victim rights both disrupt and are alien to the adversarial process. See, e.g., Blondel supra note 12; Joan E. Jacoby, 1 The American Prosecutor in Historical Context, at *3, available at: http://www.mcaa-mn.org/docs/2005/AmericanProsecutorHistoricalContext52705.pdf (“The British system of private prosecution . . . was designed to protect the monarch, not the individual.”).


68 Id.

69 JOSEPH CHITTY, 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 133-34 (1819); W.S. Van Alstyne, supra, note 19, at 126.

70 Id.

71 Id.
Other commentators maintain similar positions. F.W. Maitland presents the principle of private prosecution as constitutionally significant. Because prosecution is a private prerogative, Maitland understood the right as actively limiting government corruption and, thus, potentially increasing government accountability. In his *Constitutional History of England*, Maitland writes:

> [I]t is in the power of any man to begin a criminal prosecution by presenting a bill of indictment to a grand jury . . . . This principle is an important one: if I think that the Home Secretary has been guilty of any criminal offence . . . I can present a bill to a grand jury—simply as a member of the public, and although the alleged crime has done me personally no harm . . . .

The Nineteenth-Century historian, James Fitzjames Stephen, also believed private prosecution was necessary to protect individual liberties. Echoing Chitty, Stephen stated that private prosecution as one of the safest and most democratic methods for resolving disputes: “[s]uch [private prosecutions], both in our days and in earlier times, have given a legal vent to feelings in every way entitled to respect, and have decided peaceably, and in an authentic manner, many questions of great constitutional importance.”

Historical evidence confirms this view. One of the earliest attempts to introduce some form of public prosecution came in 1534 from Henry VIII. He proposed that sergeants, rather than private parties, should be responsible for enforcing penal statues

---

72 F.W. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND: A COURSE OF LECTURES DELIVERED 481 (1908).
73 Id
74 Ma, supra note 22, at 195.
and initiating criminal proceedings.\textsuperscript{75} Parliament, however, rejected the proposal, preferring that the power remain with crime victims.\textsuperscript{76} This is not surprising. Aversion to government prosecution was deeply rooted and, furthermore, constitutionally questionable. Since 1215, Magna Carta held that “[n]o bailiff for future shall, upon his own unsupported complaint, put anyone to his law, without credible witnesses brought for this purposes.”\textsuperscript{77} Public prosecutors would have, therefore, at least required grand jury indictments to be constitutional, creating a dependency on the people Henry VIII probably did not desire.\textsuperscript{78}

Later reforms also failed. Jeremy Bentham, Robert Peel, and Edwin Chadwick fervently fought for the establishment of public prosecutors in 1798.\textsuperscript{79} The reformers argued that private prosecution spawned unacceptable evils: “arrangements between attorneys and police to secure prosecutions; mismanagement of prosecutions for want of effort, talent, or money; initiation of prosecutions for revenge and personal animosity; and abandonment of prosecutions after corrupt settlements . . . .”\textsuperscript{80} But, as Peel himself was forced to acknowledge, custom’s force and public opposition were too great.\textsuperscript{81} Private prosecution, as a result, remained England’s primary means for enforcing the criminal code until the Crown Prosecution Service was established in 1985.

\textsuperscript{75} Kress, supra note 18, at 423.
\textsuperscript{76} Ma, supra note 22, at 195.
\textsuperscript{77} MAGNA CARTA § 38.
\textsuperscript{78} See CHITTY, supra note 119, at 133-34 (discussing the prosecution’s requirement of grand jury indictments as a sign of its safety and constitutionality).
\textsuperscript{79} LEON RADZINOWICZ, 3 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: CROSS-CURRENTS IN THE MOVEMENT FOR THE REFORM OF THE POLICE 258-59 (1956)
\textsuperscript{80} Cardenas, supra note 53, at 362.
\textsuperscript{81} RADZINOWICZ, supra note 81, at 259. Peel, in his own words, explained that “[i]f we were legislating de novo, without reference to previous customs and formed habits, I for one should not hesitate to relieve private individuals from the charge of prosecution in the case of criminal offences justly called by writers upon law—Public Wrongs.” Id. at 259 n. 2.
2. Public Officials as Assistants

Although crime victims occupied a hallowed place in the English legal system, they did not act alone. Various government officials, like the constable, justice of the peace, attorney general, police, and Director of Prosecutions, assisted private prosecutors.\(^82\) In this regard, the constable—the parish’s chief law enforcement officer—is exemplary.\(^83\) Dating from the Thirteenth-Century, constables maintained law and order and could make arrests, but only when offenders were caught in the act.\(^84\) Operating individually, the constable’s powers were severely limited because investigation was a private and not a public duty.\(^85\) Although this changed with time,\(^86\) the underlying theory remained. As Lord Justice Patrick Devlin explained in 1958, state officials acted through, not in spite of, private prosecutors:

The constable was merely a citizen whose business it was to keep order. It is the duty of all citizens to uphold the law, of course, and the only thing that distinguished the constable in this respect from any other of his fellow citizens was that the law granted him a slightly greater power of arrest.\(^87\)

\(^{82}\) BEATTIE, supra note 64, at 38 (2008) (“[Public Prosecutors] did not relieve the victim of the burden of pursuing the suspect and organizing his prosecution; they were meant to encourage, not replace, the private prosecutor.”) However, Juan Cardenas argues that the reform may have also failed because “[o]pponents of reform resisted the creation of a public prosecutor’s office because they feared that the office would be a political tool for the State and a mere coffer of patronage.”

\(^{83}\) Ma, supra note 22, at 193.

\(^{84}\) Id.

\(^{85}\) Id. Investigators were occasionally given official assistance but only if there was a death, in which case the coroner was obligated to investigate. See infra note 142 and accompanying text.

\(^{86}\) See STEPHEN, supra note 57, at 193 (“Any constable may arrest any person whom he suspects on reasonable grounds of having committed any felony, whether in fact any such felony has been committed or not. The common law did not authorize the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace . . . .”).

\(^{87}\) PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 17 (1958).
By the Fourteenth-Century, justices of the peace appeared. The office was partly the product of statute and partly the product of custom. As the descendant of the coroner’s office, justices of the peace could, unlike constables, inquire into crimes committed in the local community. It was their duty to receive appeals, on behalf of private parties, and inquire into homicides, on behalf of the public. But, like constables, justices of the peace stepped in on behalf of private individuals only when individuals failed to prosecute. Moreover, when private parties did prosecute, official involvement was limited. Because private parties bore cost of prosecution, initiating and conducting criminal proceedings rested on private shoulders.

During the Fifteenth-Century, however, an “insignificant” institution of public prosecution, known as the Attorney General, was established. Throughout the Middle Ages, the Crown had hired various attorneys, attornati Regis, to represent his interests in

---

88 Melville cites a statute enacted by Edward III as the origin of the office of the justice of the peace: “In every county in England, there shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy men in the county, together with some learned in the law, and they shall have power to restrain offenders, rioters, and other barretors, and to pursue, arrest, take, and chastise them, according to their trespass or offence; and to cause them to be arrested and duly punished according to the law and custom of the realm . . . .” WILLIAM LAURISTON MELVILLE, A HISTORY OF POLICE IN ENGLAND 43 (1901). But see STEPHEN, supra note 57, at 497 (claiming “[t]he coroner was the predecessor of the justice of the peace . . . .”).

89 Established in the Twelfth-Century under Richard I, the coroner’s office represented the pleas of the crown in each shire, which gave the Crown its first permanent foothold in the counties. The coroner’s responsibilities covered “all those crimes triable by the king’s justices and all matters involving the king’s feudal prerogative.” LYON, supra note 33, at 43-44. The coroner’s main responsibility, however, involved investigation after death. If the death was not clearly due to natural causes, he would hold an inquest and present evidence to a jury that would issue a finding. If the death was clearly the result of murder or manslaughter, the coroner was also responsible for apprehending the suspect(s) and bringing them before the king’s justices. Id. at 44.

90 Ma, supra note 22, at 193–94;
91 STEPHEN, supra note 57, at 497.
92 Ma, supra note 22, at 194.
93 STEPHEN, supra note 57, at 498 (“One circumstance which practically left the whole business of originating and conducting prosecutions in private hands, and so gave to the whole procedure its character of a private litigation, was the fact that till about a century ago private persons had to pay all the costs of every prosecution.”).
94 Ma, supra note 22, at 195; Hugh H. L. Bellot, The Origin of the Attorney-General, 25 L. Q. Rev. 400, 403 (“The earliest use of the term ‘attorney-general’ with which I have met occurs in the certificate signed by the Duke of Norfolk’s four attorneys general (attornes generalx) testifying to his embarkation on his banishment in 1398”).
Attorneys were appointed *ad hoc* and primarily addressed local rather than statewide affairs; but they appeared in the Crown’s name. Attorneys General determined whether a case implicated a royal interest and, where appropriate, they had the power to commence prosecutions. The office also acted as a counterweight to potentially abusive private prosecutions. The Attorney General could, as a representative of the Crown, enter a *nolle prosequi* and a stay of proceedings. But, as Blackstone explains, neither the Crown nor Attorneys General could dismiss cases brought by private prosecutors.

The advent of the Industrial Revolution transformed law enforcement. As England urbanized, the constable and justices of the peace became increasingly ineffective. On the one hand, the “hue and cry” of victims and witnesses—which had since Anglo-Saxon times alerted others to criminal conduct and obligated law enforcement officers and bystanders to pursue offenders—became a tool of mob violence. On the other hand, the considerable cost of prosecution, combined with the draconian severity of England’s criminal code, incentivized nonprosecution. In the opinion of a late Eighteenth-Century London magistrate, Henry Fielding, even when victims identified and apprehend assailants, prosecution’s costs and an understandable
reluctance to see criminals hung for minor offenses, discouraged prosecution. As a result, crime victims and their assailants organized informal settlements. Sometimes, criminals were subjected to direct and immediate physical punishment. Other times, monetary settlements were arranged. Either way, private criminal settlements were both illegal and, in Fielding’s view, eroding England’s legal system.

As a result, the London Metropolitan Police were established in 1829. The police system improved upon the prior system by enabling police to directly prosecute criminals. But, like the prior system, police prosecutions were theoretically private prosecutions. The police operated off of “the centuries-old idea that it was the duty of all citizens to uphold the law” and, consequently, it was private rights rather than public duties that were enforced. Accordingly, even in the Nineteenth-Century, police power, like the newly created office of Director of Public Prosecutions, was limited to the scope of private rights: “The police in their different grades are no doubt officers appointed by law for the purpose of arresting criminals; but they possess for this purpose no powers which are not also possessed by private persons. [ . . . ] [Police] stand upon precisely the same footing as private persons.”

102 Beattie, supra note 64, at 35.
103 Id. at 39.
104 Id. at 40.
105 Id. at 39, 35. Additional incentives curbed prosecution. See 4 Leon Radzinowicz, A History of English Criminal Law and Its Administration from 1750: Grappling for Control 36 (1968) (“If the offender were caught, the victim had still to face the expense, the travelling and the loss of time involved in the cumbersome and protracted criminal procedure of the time, often with doubtful prospects of reimbursement, as well as the ordeal of giving evidence in one of the higher courts. To this was added, until the latter part of the 1830s, the unacceptable harshness of the capital laws, which made many reluctant to prosecute at all . . . ”).
106 Ma, supra note 22, at 194.
107 Id.
108 Id.
109 Id.
110 Stephen, supra note 57, at 493–94. See also Cardenas, supra note 53, at 364 (“Police prosecutions are, at least in legal theory, private prosecutions. English common law maintains that police
C. Public Prosecution on the European Continent

Before the Thirteenth Century, English and continental criminal proceedings were indistinguishable. Victims and their families initiated, conducted, and enforced criminal prosecutions. After the Thirteenth Century, however, continental proceedings embraced a new attitude towards law enforcement. Beginning in 1198, Pope Innocent III issued decretals reforming the ecclesiastical court system and permitted magistrates to summon and try suspects without formal accusations. The Fourth Council of the Lateran affirmed the practice in 1215 and a new standard for law enforcement and judicial proceedings was established. Europeans discarded the accusatorial system, which merely regularized private combat, and adopted the inquisitorial system, which was—in the reformers’ view—“more scientific and . . . better adapted to the needs of social repression.” As a result, a dramatic shift occurred. Public officials, rather than private parties, began enforcing the criminal code. This subsection discusses, first, the invention of public prosecution by the Catholic Church and, second, its secular philosophical justification.

111 Ma, supra note 22, at 196.
113 Id.
114 Adhémar Esmein et al., A History of Continental Criminal Procedure with Special Reference to France 7-8 (1913).
1. *The Inquisition and the Invention of Public Prosecution*

In contrast to England’s system of private prosecution, which relied entirely on disputing parties, the continent’s system of public prosecution required a centrally organized bureaucracy to initiate proceedings and investigate crimes. This was supplied by Pope Innocent III’s reorganization of the ecclesiastical courts.\footnote{VOGLER, *supra* note 114, at 24.} Rather than relying on superstitious attestations and oaths, ecclesiastical proceedings “followed . . . a rational process of judicial probing by questions to the specific details of the affair, [in an] essentially modern manner.”\footnote{JOHN HENRY WIGMORE, 4 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 3073 (1905).} Simultaneously, however, the Continent’s system of private prosecution collapsed.\footnote{Id. at 3074 n. 36.} Crimes went unpunished and criminals roamed free.\footnote{Id.} As a result, a de facto system of public prosecution arose: “public prosecutors, acting *ex officio*, laid hold of the weapon just invented by the canon lawyers . . . and applied it to their secular criminal procedure.”\footnote{Id. at 30–1.} Accordingly, in Professor Wigmore’s words, the institution of public prosecution unintentionally and unexpectedly “slipped in.”\footnote{VOGLER, *supra* note 114, at 23.}

The application of the inquisitorial process (*processus per inquisitionem*)\footnote{Id. at 30–1.} withdrew proceedings into the private offices of powerful officials and created two distinct classes of legal professionals: the Roman-canon judges and prosecutors.\footnote{ESMEIN, *supra* note 116, at 78–9.} Although France was the first nation to appropriate the Church’s procedure, neighboring nations soon followed.\footnote{Id. at 30–1.} By the Fifteenth Century, state prosecutors appeared in Spain...
and Italy.124 One of the most influential offices of public prosecution was, however, the Dutch office of *schout* (pronounced “skout”).125 *Schout*, or *schout*-fiscal, was a quasi-judicial and administrative office tasked with enforcing local ordinances and resolutions and collecting the relevant fines.126 Originally, the position was a court appointed functionary responsible for fiscal and administrative tasks.127 Although *schout*’s origin is uncertain, it was almost certainly influenced by France’s adoption of the inquisitorial process.128 Others, however, attribute its development to something like a sheriffs’ office.129 Accordingly, in addition to its fiscal responsibilities,130 *schout* investigated crimes, apprehended suspects, and publically accused defendants.131

*Schout* was not a civil servant so much as a respected local.132 As a result, their responsibilities were not always distinctly legal. When the Dutch colonized the New World, at least one *schout* enforced moral as well as legal codes. At the behest of wealthy landowners, *schout* “was authorized to admonish those who ‘should misbehave themselves, especially those who through quarreling or fighting, through laziness or dinking, neglect the profit of their patroon [landowner].’”133 At other times *schout* was

124 VOGLER, supra note 114, at 31.
125 Van Alstyne, supra note 19, at 128 n. 13. See also SIMON VAN LEEUWEN, ET AL., 1 COMMENTARIES ON ROMAN-DUTCH LAW 17 (1881) (tracing the name’s etymological origin to the German words, sgult, sgoltes, and sgout, which relate to the collection of public debt).
128 See ESMEIN, supra note 116, at 78 (discussing France’s influence on its neighbors).
129 See Jacoby, supra note 66, at *5.
131 Id.; Stefan Bielinski, supra note 129, at 3.
132 Kress, supra note 18, at 105.
133 Id. at 4.
also responsible for “proper supervision over all the men, farms, animals . . .” 134 Accordingly, schout supplied absentee landowners with peace of mind and much desired information concerning their estates. 135

Whereas the Dutch office of schout arose out of local needs, the French office of procureur, like the Church’s inquisitors, descended from the government’s national interests. 136 Like the English Attorney General, French kings employed procureur du roi (the king’s prosecutor) wherever royal interests were implicated. 137 As the kings solidified their territory, however, royal officials grew increasingly interested in local affairs. 138 Gradually, procureurs began asserting jurisdiction in what had traditionally been purely private matters. By the Sixteenth-Century, procureurs exclusively controlled local prosecution, although private individuals retained the right to damages for criminal acts. 139

The French Public Prosecution Service, which is represented by the ministère publique was, however, only founded in 1808. 140 Unlike public prosecutors in Holland and England, the ministère publique is a judicial rather than an executive officer. 141 Accordingly, ministère publique, not unlike American prosecutors, serves seemingly contradictory tasks. On the one hand, the French Constitution stresses that the ministère

---

134 Id.
135 Id.
136 Interestingly, public prosecution in France did not arise out of a concern for the public peace or a conviction that crime was an offense against the state. As Montesquieu wrote in the Spirit of Laws, public prosecution originated from the royal’s interests: “[W]e have today an admirable law: it consist in what the prince wants, laid down to see that the laws are carried out, and which places an officer in each court to prosecute all crimes in his name . . .” MONTESQUIEU, SPIRIT OF THE LAWS, BOOK 14, § 8 (1748).
137 Ma, supra note 22, at 197.
138 Id.
139 Id.
141 Id.
*publique* acts independently and ought to approach criminal cases impartially. On the other hand, the *ministère publique* oversee the police (either the *police nationale* and *gendarmerie nationale*) and are charged with investigating and prosecuting criminal offences. But, unlike other public prosecutors, the *ministère publique* does not have a monopoly on prosecution. Crime victims may demand reparation of the damage cause by criminal offences and may, by exercising the right of *action civile*, either join the criminal prosecution initiated by the *ministère publique*, take the case to an examining judge independently, or summon the accused to appear in a criminal court.

2. *Cesare Beccaria*’s *Dei delitti e delle pene*

Although Europeans publically prosecuted crime as early as the Twelfth Century, public prosecution’s secular justification, which required distinguishing civil law from canon law and Catholic orthodoxy, did not arrive until 1764 when Cesare Beccaria published *Dei delitti e delle pene* (“On Crimes and Punishment”). The work’s importance cannot be overstated. It elicited effusive praise from Jeremy Bentham, influenced Blackstone, and shaped both the United States Constitution and the French Revolution. As a member of the Enlightenment, Beccaria sought to reform traditional institutions according to rationalistic principles. Building off of Montesquieu’s *Spirit

---

142 *Id.*
143 *Id.*
144 *Id.*
145 After finishing Beccaria’s text, Bentham allegedly declared, “Oh, my master, first evangelist of Reason . . . you who have made so many useful excursions into the path of utility, what is there left for us to do?” CALVIN J. LARSON & GERALD R. GARRETT, CRIME, JUSTICE & SOCIETY 178 (1996).
146 See WILLIAM SEARLE HOLDSWORTH, 11 A HISTORY OF ENGLAND LAW 658 (1938) (explaining that Beccaria helped Blackstone “crystallize” his ideas).
148 GEORGE A. BERMANN & ETIENNE PICARD, INTRODUCTION TO FRENCH LAW 104 (2008).
149 William F. McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 AM. CRIM. L. REV. 649, 654 (1976); Philip Jenkins, Varieties of Enlightenment Crimonology, 24 BRIT. J. CRIMINOLOGY 112, 112–116 (1984). In fact, Beccaria concluded *On Crimes and Punishment* with the observation that custom is incompatible with social utility, which was, in his view, the chief aim of
of Laws (1748) and Rousseau’s Social Contract (1762), Beccaria’s On Crimes and Punishment combined utilitarianism and social contract theory. He argued that the government’s social contract requires criminal proceedings to ensure “the greatest happiness of the greatest number.”

Discarding the Church’s theological criminology, Beccaria viewed justice in pragmatic and preventive terms. In his words, justice should be an antidote to barbarism, primitive blood feuds, and “that bond which is necessary to keep the interest of individuals united, without which men would return to their original state of barbarity.”

Departing from the Middle Ages’ theologically inspired criminology, On Crimes and Punishment emphasizes the importance of precision, proportionality, certainty, and scale. Unlike previous penal systems, which based punishment on notions of sin and demonology, Beccaria strives to develop a calculus of crime and punishment. In his view, “there must . . . be a proper proportion between crimes and punishments.” He objected to the traditional system, which inflicted punishment according to its offensiveness to God. In its place, he sought to inflict punishments proportionate to their harm to the social contract. Crimes threatening society’s existence most seriously, he concluded, ought to be punished most severely. Similarly, he argued that punishment

---

150 Id. at 118 (noting the utilitarian formula was articulated by Beccaria but only made famous by Bentham); McDonald, supra note 150, at 654.
151 BECCARIA, supra note 150, at 18.
153 Jenkins, supra note 174, at 112; GOLDIE, supra note 153, at 554.
154 BECCARIA, supra note 150, at 28.
155 GOLDIE, supra note 153, at 553; McDonald, supra note 174, at 655.
should be certain and pardons, therefore, infrequent.\textsuperscript{156} Although they were “one of the noblest prerogatives,” Beccaria believed that pardons were ultimately “tacit disapprobation[s] of the laws . . . and the cause of [criminals] considering every punishment inflicted as an act of injustice and oppression.”\textsuperscript{157}

What most distinguishes Beccaria’s \textit{On Crimes and Punishment} is, however, its lurking scientism. Like Bacon’s \textit{Novum Organum} (1620), which sought to uproot, eradicate, and reorganize traditional practices according to scientific principles, Beccaria regards custom as erroneous, if not dangerous.\textsuperscript{158} Accordingly, many of the policies underlying traditional forms of crime and punishment, which evolved through centuries of practical application—like private prosecution—were disregarded not because they were ineffective or outmoded but because they were unscientific.\textsuperscript{159} This directly influenced Beccaria’s understanding of crime as a public rather than a private offence. Because he viewed society as defined by the social contract, and the criminal justice system as the primary means for preserving that contract, crime constituted a contractual breach threatening society generally. Accordingly, Beccaria believed that private parties could neither prosecute crimes, since crime was an offense against society, nor pardon criminal acts, since punishment sought to deter crime:

\begin{quote}
A small crime is sometimes pardoned if the person offended chooses to forgive the offender. This may be an act of good nature and humanity, but it is contrary to the good of the public: for although a private citizen may
\end{quote}

\begin{flushright}
\textsuperscript{156} \textit{Id.} at 158–60.  \\
\textsuperscript{157} \textit{BECCARIA, supra} note 150, at 158–59.  \\
\textsuperscript{158} \textit{BECCARIA, supra} note 150, at 159–60. This is express most succinctly by one of Beccaria’s admirers and commentators, M.D. Voltaire, who concluded his commentary \textit{On Crimes and Punishment} with the following: “Look around us where we will, we find nothing but a confused scene of contradiction hardship, uncertainty, and arbitrary power. Thence arises our desire to render more prefect the law upon which our lives and fortunes depend.” \textit{Id.} at 259.  \\
\textsuperscript{159} \textit{Id.}
\end{flushright}
dispense with satisfaction for the injury he has received, he cannot remove the necessity of example. The right of punishing belongs not to any individual in particular, but to society in general . . . . He may renounce his own portion of this right, but cannot give up that of others.\textsuperscript{160}

Beccaria did not simply advance a new system of government or suggest a new way to structure the administration of justice. At the heart of \textit{On Crimes and Punishment}, like so many Enlightenment texts, is a desire to rewire basic cultural habits and public perceptions. Although crime and punishment had, by Beccaria’s day, evolved over hundreds of years, he reconceptualized the product of that process and altered society’s basic attitude towards it. Accordingly, Beccaria concluded \textit{On Crimes and Punishment} with the observation that utility and the administration of justice are incompatible with custom, and that crime and punishment must, as a result, become public.\textsuperscript{161}

\section*{III. CRIMINAL PROSECUTION IN THE UNITED STATES}

Criminal prosecution in the United States adopted myriad forms. On the one hand, at least three different countries, each with their own system of prosecution, contributed to the administration of justice in early America. Like the Dutch \textit{schout}, American prosecutors represented local governments. Like the French \textit{procureur}, American prosecutors had the power to initiate criminal proceedings. Like England’s attorney general, American prosecutors represented the state’s interests. And, like England’s criminal system, most prosecutors were often crime victims. On the other hand, criminal prosecution never solidified into a single, uniform system. With fifty states, a federal government, and countless state counties, criminal prosecution in the United States is best

\textsuperscript{160} Id. at 160.
\textsuperscript{161} Id. at 160.
understood as an amalgamation of competing values, historical accidents, and concession to the felt necessities of the time, rather than the product of a single design or original intention. This section explores the evolution of public prosecution in the United States. It follows the historical phases identified by Professors Beloof and Cassell and discusses, first, the dominance of private prosecution, which lasted from colonization through 1899, second, the rise public prosecution, beginning in 1900, and finally, the emergence of the victims’ rights movement in the 1960s.

A. Private Prosecution in Early America: 1614–1900

Although historians have pictured the institution of public prosecution in America as originating in the English attorney general, the French procureur or ministère publique, and the Dutch schout, public prosecution in the United States is best understood as the result of a confluence of forces. On the one hand, the Connecticut Assembly instituted the first permanent office of public prosecutors in 1704 and by 1711 Virginia followed. But, on the other hand, the practice of private prosecution

163 See JACOBY, supra note 18, at 17.
164 See Kress, supra note 18, at 103; see also Vogler, supra note 115, at 31 (discussing the inception of public prosecution in France).
165 See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION (“Wickersham Commission”) 7 (1931); W.S. Van Alstyne, The District Attorney: A Historical Puzzle, 1952 WIS. L. REV. 125, 125 (1952).
166 See Reiss, supra note 131, at 8 (hypothesizing that English pilgrims may have accidentally imported the office of schout to the new world after spending years of exile in the Netherlands or that disaffected Presbyterians, whom James I settled in northern Ireland, and later emigrated to the southern colonies may have imported the notion from Scotland).
167 Kress, supra note 18, at 103 (quoting the original statute, Kress writes: “Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie courts, to be attorney for the Queen to prosecute and implead in the lawe all criminals and to doe all other things necessary or convenient as an attorney to supprese vice and immoralitie . . . .”).
extended well into the nineteenth century. Following the English tradition, many jurisdictions (including Virginia) recognized that private prosecution promotes society’s interest in efficiently enforcing criminal law. Accordingly, like prosecution in England and on the European continent, public prosecution in the United States appears to have arisen as a de facto system after a period of long evolution.

The first appearance of public prosecutors in colonial America occurred when the Dutch founded the colony of New Netherland in 1614. Although the colony is often associated with modern-day New York, the original colony was expansive: it included western Connecticut, southern New York, and parts of New Jersey, Pennsylvania, Delaware, and all of the modern urbanized sections of the northeastern United States. Dutch rule, however, was relatively short-lived. In 1674, the Dutch ceded the territory to England, through the Duke of York. And, although the Dutch system of public prosecution survived, it is unclear why. One the one hand, Professors Reiss and Van Alstyne believe that the English blindly adopted the system of Dutch prosecution, perhaps to ease the transition of power. On the other hand, other commentators suggest

---

169 See ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA 1800–1890, 56–78 (1989) quoted in Douglas E. Belof & Paul G. Cassell, The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus, 9 LEWIS & CLARK L. REV. 481, 486 (2005) (“The discretion of the private parties in criminal cases was not checked by the public prosecutor. Instead, the public prosecutor in mist 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 superseded either by a private attorney or simply let to private prosecutor and his witnesses take the stand and state their case.”).


171 See supra Section II.B.1; Dession, Comment—Private Prosecution: A Remedy for District Attorney’s Unwarranted Inaction, 65 YALE L. J. 209, 224 (1955); see also id. at 219 n. 55–57 (listing jurisdictions that allow private prosecutors to at least assist public prosecutors in crimes as serious as murder, robbery, and rape, where the state’s interest is, arguable, at its highest).

172 W.S. Van Alstyne, supra note 19, at 125–138.

173 Id.; Reiss, supra note 131, at 6.

174 Id. at 6.

175 Id. at 6–8; W.S. Van Alstyne, supra note 19, at 125–138.
that public prosecution prevailed because private prosecution was simply untenable in the New World. Discussing Connecticut’s creation of public prosecutors in 1704, Judge Walter M. Pickett writes, “the Connecticut founders considered that the English common law was not suited in many instances to the conditions and situation of the new land.”

One reason for this may have been, as Adhémar Esmein suggests, the general lack of social cohesion in the New World on which the English system depended.

If true, however, neither Pickett nor Esmein’s observations accurately reflect prosecution in other colonies. In Massachusetts, for example, Professor Nelson reports that even though public officials initiated criminal trials, they were “in reality contests between subjects rather than contests between government and subject.”

As in England, the colonists preserved private prosecution to safeguard individual liberty. Private prosecution, like the jury system, checked the government’s arbitrary exercise of power by creating an independent and impartial judiciary. Private prosecution served an analogous role. The absence of public prosecutors, Nelson explains, neutralized state power by eliminating “any direct . . . interest in the outcome of most criminal cases.”

---

176 Walter M. Pickett, Office of Prosecutor in Connecticut, 17 AM. INST. CRIM. L. & CRIMINOLOGY 384350–51 (1926). Quoting Brown’s Appeal, 72 Conn. 148, 151, Pickett writes, “The foundation of our common law in respect to crimes was laid at the establishment of our commonwealth in 1639. The English common law as then existing was not adopted here.” Id. at 350.

177 ESMEIN, supra note 116, at 7 n. 5 (“But there is a public prosecutor in the United States. The insecurity and impunity resulting in a country new and composed of such diverse elements, from the English system of prosecution, which leaves represson to the initiative of the citizens, has taught the United States the necessity of committing to a special functionary the duty of prosecuting repression.”).


179 Id. at 467.

180 Id.

181 Id.

182 Id. at 467–68.
Historical evidence indicates that this concern was real. As one Philadelphia journalist remarked, private prosecutors protected the people from “the terrors of anonymous prosecutors.” As in England, early Americans ostensibly continued to fear the arbitrary and authoritarian methods once employed by the English government through the Star Chamber—a concern now enshrined in the Confrontation Clause. Other histories of eighteenth century criminal justice system reveal comparable circumstances. Professor McDonald, for instance, concludes that “[e]ven after identification and arrest, the victim carried the burden or prosecution. He retained an attorney and paid to have the indictment written and the offender prosecuted.”

In fact, Private prosecution appears to have been so firmly entrenched in the history of the colonies that it survived both the Revolution and the inception of the federal system. According to Professor Steinberg, private prosecution was the dominant form of criminal prosecution in Philadelphia until at least 1875. As Alexis De Tocqueville recounted following his famous visit to the United States in 1831, “the officers of the public prosecutor’s office are few, and the initiative in prosecutions is not always theirs.” This firsthand report is significant because it rebuts assertions made by Professors Cardenas, Goldstein, and Jacoby that public prosecution displaced private

184 See infra Section II.B.2.
186 McDonald, supra note 24, at 571–72. As Professors Beloof and Cassell observe, North Carolina presents an exception to the pre-Revolutionary rule of private prosecution. Citing Professor Spindel’s history of the criminal process in North Carolina from 1720 through 1740, they note that the state appointed someone other than the victim to prosecute crimes. The role, however, is not explored in any detail. Beloof & Cassell, supra note 157, at 485–86 quoting Donna J. Spindel, The Administration of Criminal Justice in North Carolina, 1720–1740, 25 AM. J. LEGAL HIST. 141, 141 (1981).
prosecution shortly after the Revolution.\textsuperscript{189} In fact, on Steinberg’s account, the Revolution actually popularized private prosecution.\textsuperscript{190} It provided minorities, the poor, and the working class with an opportunity for redress and sense of empowerment that they were previously denied.\textsuperscript{191} And, although much of the litigation was petty,\textsuperscript{192} judges regarded the open access to justice, which private prosecution provided, as ensuring public peace. Without the private right, “revenge . . . would assume its place, and murder would be sanctified by the inefficiency of justice.”\textsuperscript{193} Interestingly, this assessment of the benefits of private prosecution mirrors Tacitus’ two-thousand-year-old claim that the right to privately prosecute crime prevented, rather than perpetuated, crime.\textsuperscript{194}

Accordingly, following the Constitution’s ratification in 1789, which vested the Executive with the duty to “take care that the laws be faithfully executed,”\textsuperscript{195} private prosecution was still understood as a legally viable and politically important right. Even after The Judiciary Act of 1789, which instituted the federal system, private prosecutors still participated in the federal system, albeit on a limited basis.\textsuperscript{196} By obtaining bench warrants from magistrates for the arrest of defendants by presenting evidence of crimes directly to grand juries, private prosecutors still initiated proceedings.\textsuperscript{197} In addition, they

\begin{footnotesize}
\begin{enumerate}
\item Cardenas, supra note 53, at 371; ABRAHAM GOLDSTEIN, ENCYCLOPEDIA OF CRIME & JUSTICE: HISTORY OF THE PUBLIC PROSECUTOR 1287 (1983). See also Jacoby, supra note 66, at *3, stating, “The origin of a public prosecutor presents something of a historical puzzle. What is clear is that private prosecution was inconsistent with the American concept of a democratic process. [I]t never took root in the colonies.” Although Professor Jacoby has produced invaluable scholarship, this claim—like others—is facially suspect. See, e.g., id. (“The British system of private prosecution . . . was designed to protect the monarch, not the individual.”). This is simply not true. See supra Section II.B.1.
\item Steinberg, supra note 177, at 131.
\item Id. at 234.
\item Id.
\item Id. at 241 quoting the Public Ledger of 1847.
\item See infra Section II.A.
\item Art. II, sec. III, cl. 4
\item See generally Ireland, supra note, at 43–9.
\item Beloof
\end{enumerate}
\end{footnotesize}
could peruse a private *qui tam* action—a vestige of private prosecution—that remains viable to this day.\(^{198}\)

**B. The Rise of Public Prosecution: 1900–1975**

Although the American legal community initially embraced private prosecutors, attitudes changed during the late nineteenth and early twentieth century. In 1849, in *Commonwealth v. Williams*, one of the earliest cases to criticize private prosecutors, the Massachusetts Supreme Court concluded that it is the public prosecutors’, not private parties’, responsibility to enforce the law.\(^{199}\) The court explained that private counsel many be retained, but only with court permission and under the right circumstances. Moreover, the private attorney’s role was not to prosecute but merely to aid the public prosecutor.\(^{200}\) In 1875, in *Meister v. People*, Michigan became the second state to condemn private prosecutors on similar grounds.\(^{201}\) And, thirteen years later, in *Biemel v. State*, the Wisconsin Supreme Court followed.\(^{202}\) For these three courts, the role of the public prosecutor was like that of an impartial judge: to seek justice rather than a conviction.

Not surprisingly, these three decisions appeared alongside the publication of George Sharswood’s 1854 text, *An Essay on Professional Ethics*.\(^{203}\) Sharswood’s goal, like Cesare Beccaria’s,\(^{204}\) was to translate republican\(^{205}\) and utilitarian ideals into more concrete prosecutorial ethics. In Sharwood’s opinion, prosecutors occupy an office of

---

\(^{198}\) *Beloof*

\(^{199}\) 56 Mass. (2 Cush.) 582 (1849).

\(^{200}\) *Id.* at 585.

\(^{201}\) Meister v. People, 31 Michigan 99, 103–04 (1875).


\(^{203}\) GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854).

\(^{204}\) See infra Section II.C.1.

\(^{205}\) “Republican” here means the generally political philosophy of republicanism, as distinct from the Republican political party.
“public trust” that requires them to stand “as impartial as a judge.”\textsuperscript{206} The American Bar Association eventually based its first code of ethics on Sharwood’s essay.\textsuperscript{207} In his 1926 article, \textit{The Office of Prosecutor in Connecticut}, Judge Pickett articulated a new, complimentary definition of crime. According to Judge Pickett, crime is an offense against the state, which has little—if anything—to do with the crime victim.\textsuperscript{208} Quoting \textit{Malley v. Lane}, Judge Pickett declared, “[t]he victim . . . is not a ‘party’ to the prosecution nor does he occupy any relation to it other than that of a ‘witness’ . . . . The peace is that state and sense of safety which . . . [the] government [alone] is instituted to secure.”\textsuperscript{209}

Nonetheless, it is unclear why states uniformly adopted public prosecutorial schemes. Professor Jacoby cites the advent of Jacksonian democracy in 1828.\textsuperscript{210} This period witnessed the transition of the local judge from an appointed to an elected official, which effectuated a significant change in the office of the local prosecutor.\textsuperscript{211} Once a member of the judicial branch, prosecutors were now considered executive figures subject to the whims of the ballot box.\textsuperscript{212} Professors Beloof and Cassell, however, cite cases like \textit{State v. Pell} (1909), where the Iowa Supreme Court decided that crime victims cannot prosecute crimes because, as potential witnesses, they must be sequestered from the trial.\textsuperscript{213} Other hypothesis abound. Steinberg, on the one hand, asserts that the system

\textsuperscript{206} \textit{SHARSWOOD}, supra note 65, at 94.
\textsuperscript{208} Pickett, supra note 171, at 356–57.
\textsuperscript{209} \textit{Id}.
\textsuperscript{211} \textit{Id}.
\textsuperscript{212} \textit{Id}.
\textsuperscript{213} 119 N.W. 154, 158 (Iowa 1909).
of private prosecution declined “because it was an ineffective means of law enforcement in the matter of breaches of the public order.”

Roscoe Pound, on the other hand, attributes the rise of public prosecution to an aversion to all things English and cites as historical evidence laws from New Jersey, New Hampshire and Kentucky prohibiting citation to English authorities in legal argument. From this aversion, others have inferred the French procureur was imported in favor of England’s private prosecutor.

One thing, however, is certain. Any attempt to trace the origin of the nation’s current system of public prosecution to a single predecessor yields confusion. Public prosecution, therefore, appears to have arisen as a de facto system after a period of long evolution. Defining historical moments—like Connecticut’s establishment of an office of public prosecutor in 1704 and Sharswood’s publication of An Essay on Professional Ethics in 1854—certainly exist. But, there is simply no moment, statute, or decision clearly establishing the public prosecution model as the United States’ model. For better or worse, private prosecution existed throughout much of the nation’s history. One reason may be, as Professor Beloof posits, citizen distrust of the government and the victim’s desire to “secure legal representation commensurate with that of the defendants.”

One of the most serious problems plaguing early prosecutors’ offices was, however, as Professor Ireland argues, want of talent: “[m]ost states provided inadequate funds and...
assistance for their public prosecutors and this meant that the office often attracted young, inexperienced attorneys or older, generally incompetent ones.”

Accordingly, Ireland cites debates in Illinois and Kentucky complaining that the states’ attorneys’ offices were frequently “filled by mere legal boys, or novices in the profession.”

Furthermore, where public prosecutors existed in early America, they did not have a monopoly on prosecution. From the colonial period and through the Civil War, public prosecutors had no exclusive rights in criminal proceedings. Only with the outbreak of the Civil War did Congress grant the United States Attorney General “superintendence and direction of the United States Attorneys” and, thus, lay the foundation for the United States Department of Justice. Practice at the state level, however, remained largely unchanged. Private parties retained the right to prosecute or complain directly to a grand jury into the twentieth century. However, total victim exclusion from criminal proceedings and prosecution was not the result of changing views on the role of the state’s interest in prosecution. Rather, only with the federal and state adoption of Federal Rule of Evidence 615 in 1975, which required witnessed sequestration, were crime victims completely excluded from the administration of justice.

---

219 Ireland, supra note 4, at 43.
220 Id. at 44.
221 Abraham S. Goldstein, Prosecution: History of the Public Prosecutor in ENCYCLOPEDIA OF CRIME AND JUSTICE.
222 Id.
223 Id.; see also Beloof & Cassell, supra note 211, at 484–504.
224 Id. at 502.
C. The Crime Victims’ Rights Act of 2004

The Crime Victims’ Rights Act of 2004 (CVRA) is the product of a forty-year civil rights movement to restore the criminal justice system’s “essential balance.”\textsuperscript{225} The movement began both in opposition to the legal fiction that criminal offences harm only the state\textsuperscript{226} and in recognition of the fact that the criminal process often ignored or exacerbated victims’ injuries.\textsuperscript{227} The movement’s primary aim is to transform the criminal justice system’s treatment of crime victims by incorporating victims’ needs into the administration of justice.\textsuperscript{228} This section examines, first, the history of the victims’ rights movement, and, second, the rights afforded by the CVRA.


As the Warren Court announced a series of decisions between 1961 and 1967, which clarified the nature of law enforcement officers’ interactions with criminal defendants,\textsuperscript{229} an analogous interest in crime victims emerged. Interest groups,\textsuperscript{230}
psychologists, and advocates spearheaded a national movement to reexamine and reform crime victims’ interactions with police, prosecutors, and courts. Victim assistance programs, serving women and young victims of sexual and domestic violence were founded throughout California’s Bay Area, Washington, D.C., and St. Louis.\textsuperscript{231} Academic programs, exploring the psychological impact of victimization and victims’ exclusion from judicial proceedings, appeared in the works of Hans von Hentig and Benjamin Mendelsohn.\textsuperscript{232} By the 1970s, victim-centered legislation—which provided compensation for victims of violent crimes, created additional victim assistance programs, and established national victim organizations—began to pass.\textsuperscript{233}

Interest was warranted and change sorely needed. Just as the Warren court found criminal defendants’ interactions with local, state, and federal government constitutionally deficient, the victims’ rights movement exposed victim treatment as morally, if not legally, questionable. Victims suffered insensitive treatment by police and prosecutors, insufficient protective measures following trial, and virtual exclusion from the criminal justice process, except in their limited role as witnesses.\textsuperscript{234} Such treatment

---

\textsuperscript{230} Groups involved in this movement included women’s organizations concerned with securing victims’ equal rights, Mothers Against Drunk Driving (MADD), members of the civil rights movement, and other advocating for children, consumers, homosexuals, and the elderly. Levine, supra note 14, at 11.

\textsuperscript{231} Kyl, supra note 223, at 584.


\textsuperscript{233} Tobolowsky, supra note 24, at 29.

\textsuperscript{234} Aaronson, supra note 14, at 625. The rule excluding crime victims from the courtroom is, historically speaking, relatively new. Because crime victims served as private prosecutors during the nation’s founding, they were included in all proceedings involving the crime. With the rise of public prosecutors after 1900, however, crime victims’ roles diminished. During this stage, victims were generally permitted to remain in the courtroom, provided they were of some assistance to the prosecutor. Here, crime victims essentially served as adjuncts. With the 1975 Federal Rules of Evidence, however, victims were,
not only offended basic notions of decency, fairness, and respect, but it exacerbated victims’ injuries by inflicting a “secondary harm” caused by deficiencies in the very process that ostensibly sought to protect and vindicate victims’ interests.\textsuperscript{235} Worse still, crime victims grew increasingly alienated from the criminal justice system, which threatened to undermine the institution’s basic integrity. Senate testimony is illuminating:

\begin{quote}
My life has been permanently changed,” one witness told the Subcommittee. “I will never forget being raped, kidnapped, and robbed at gunpoint.” [ ¶ ] “However,” she went on, “My sense of disillusionment with the judicial system is many times more painful. I could not in good faith, urge anyone to participate in this hellish process.”\textsuperscript{236}
\end{quote}

As a result, a national consensus that the criminal justice system was failing both crime victims and basic standards of justice materialized. President Reagan issued a proclamation establishing the first National Victims’ Rights Week in 1981 and the President’s Task Force on Victims of Crime in 1982.\textsuperscript{237}

\textsuperscript{235} Beloof, The Third Model of Criminal Process: The Victim Participation Model, supra note 18, at 249. In Professor Beloof’s words, “potential for secondary harm provides a significant basis for a victim’s civil rights against governmental authority.” Id. Further, as Professor Beloof notes, the legitimacy and significance of “secondary harms” are recognized by the Supreme Court. In Claderon v. Thompson, the Court observed:

\begin{quote}
Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forwards knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the “powerful and legitimate interest in punishing the guilty,” an interest shared by the State and the victims of crime alike.
\end{quote}


\textsuperscript{237} Kyl, supra note 223, at 584.
Following extensive hearings, the Task force concluded that the criminal justice system had lost its “essential balance” by depriving the “innocent, the honest, and the helpless of its protection.” It conceded that the problem presented no quick fix and proposed over sixty action recommendations, including abolition of the exclusionary rule and a federal constitutional amendment. Other recommendations addressed federal and state executive and legislative branches, criminal justice agencies, and professional groups that interact with crime victims, like health care personnel, clergy, and educators and encouraged greater victim access to and inclusion in the criminal justice process.

Despite national recognition and two decades of state and federal action, including amendments to thirty-three state constitutions, problems persisted. Federal legislation, like the Victim and Witness Protection Act of 1982, the Victims of Crime Act of 1984, and the Victims’ Rights and Restitution Act of 1990 (VRRA) addressed but failed to fully protect victims’ interactions with police, prosecutors, and courts. During Timothy McVeigh’s trial, for example, surviving victims sought to exercise their federal right to attend trial under the VRRA. The VRRA purported to provide substantive and procedural rights for crime victims. The court, however, interpreted the Act narrowly. Relying on the VRRA’s malleable “best-efforts”

---

238 President’s Task Force on Victims of Crime: Final Report 114 (1982).
239 Id. at 114.
244 See Kyl, supra note 223, at 583-93 (outlining previous victims rights legislation and the history of the CVRA).
standard, victims were barred from the courtroom and the Act was rendered unenforceable. State constitutional amendments similarly failed to deliver needed reform. Although a majority of states adopted constitutional victims’ rights amendments, the rights stood in the shadow of defendants’ superior federal constitutional rights. In the words of former Attorney General Janet Reno:

[E]fforts to secure victims’ rights through means other than a constitutional amendment have proved less than fully adequate. Victims’ rights advocates have sought reforms at the state level for the past twenty years . . . However, these efforts have failed to fully safeguard victims’ rights. These significant state efforts simply are not sufficiently consistent, comprehensive, or authoritative to safeguard victims’ rights.

Because of these setbacks, interest groups and lawmakers pursued a federal constitutional amendment. First suggested by the Reagan Administration, the proposed amendment would augment the Sixth Amendment by adding, “Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings.” As introduced by Senators Feinstein (D-CA) and Kyl (R-AZ) in 1996, the amendment embodied eight core principles:

---

245 Under the VRRA, victims were only entitled to rights subject to prosecutors and law enforcement officer’s “best efforts.” Kyl, supra note 223, at 583.

246 United States v. McVeigh 106 F.3d 325, 335 (10th Cir. 1997); see also Kyl, supra note 223, at 586 and Aaronson, supra note 14, at 629 (characterizing United States v. McVeigh’s exclusion of victims as a pivotal moment in the crime victims’ rights movement). According to the 10th Circuit, the Victims’ Rights and Restitution Act was unenforceable because it failed to “grant standing to seek review of orders relating to matters covered by the Act.” McVeigh, 106 F.3d at 335.

247 Kyl, supra note 223, at 588 (“The reasons for the failure of the state amendments, which establish rights that always stand in the shadow of defendants’ superior federal constitutional rights, include the lack of effective enforcement mechanisms.”)

248 Kyl, supra note 223, at 588.

249 PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, supra note 30, at 114.

250 Id. at 588–89.
presence at proceedings, right to be heard, notice of release or escape, restitution, speedy trial, priority for victim safety, and standing.\textsuperscript{251}

Passing the amendment, however, proved difficult. Although both Republican and Democratic presidential candidates endorsed a crime victims’ rights amendment during the 2000 elections, no one agreed on the precise language.\textsuperscript{252} The Clinton Administration, for example, rebuffed Cassell’s efforts to clarify the amendment by adding, “Nothing in this article shall be construed to deny or diminish the rights of the accused as guaranteed by the Constitution. In cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced.”\textsuperscript{253} Further, although a majority of states had already passed their own constitutional amendments, Senators Feinstein and Kyl repeatedly withdrew motions to proceed to consideration of the measure because they lacked the required sixty-seven votes.\textsuperscript{254} By mid–April of 2004, the movement to amend the constitution died. The CVRA thus emerged on the crest of a national consensus but in the wake of failed legislation.

2. \textit{Rights Provided by the CVRA}

In lieu of a constitutional amendment, Senators Feinsten, Kyl, and several victims’ rights interest groups reorganized to enact a compressive statute.\textsuperscript{255} As a result of these efforts, the House and Senate passed the CVRA by a vote of 393 to 14 and 96 to 1, and, on October 30, 2004, President Bush signed the bill into law.\textsuperscript{256} Although the CVRA binds federal, and not state, law enforcement officers, it was enacted to both “transform

\textsuperscript{251} Id. at 589.
\textsuperscript{252} Id. at 590.
\textsuperscript{253} Id.
\textsuperscript{254} Id. at 591. As Professor Aaronson observed, although victims’ rights enjoy broad support in Congress, legislation, which can be amended and funded restricted, was preferred over a constitutional amendment because amendments are, generally, permanent. Aaronson, \textit{supra} note 14, at 631.
\textsuperscript{255} Kyl, \textit{supra} note 223, at 591.
\textsuperscript{256} Id.
the federal criminal justice system’s treatment of crime victims” and serve as a model for subsequent state constitutional amendments.\textsuperscript{257}

Section 3771(a) of the CVRA amends the federal criminal code and grants crime victims eight substantive and procedural rights

\begin{enumerate}
\item The right to be reasonably protected from the accused.
\item The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding involving the crime or of any release or escape of the accused.
\item The right not to be excluded from any such public court 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.
\item The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
\item The reasonable right to confer with the attorney for the Government in the case.
\item The right to full and timely restitution as provided in law.
\item The right to proceedings free from unreasonably delay.
\item The right to be treated with fairness and with respect for the victim’s dignity and privacy.\textsuperscript{258}
\end{enumerate}

\textsuperscript{257} \textit{Id.} at 593; see also 150 CONG. REC. S4260, 4262 (2004) (statement of Senator Feinstein). Without state adoption, the CVRA would have a negligible impact on the overall treatment of victims since law enforcement is primarily dealt with on the state level.
The CVRA ensures victims protection by offering a broad definition of “crime victim” and those who can serve as a representative of the victim:

[T]he term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative.259

The use of the phrase “a person directly and proximately harmed” was intended to have a broad application. As Senator Kyl explains, “[u]nlike the former VRRA, which allowed a single member of the family to represent a victim’s interests, the CVRA allows family members to so serve.”260 This right is based on the fact that in the event of a homicide, for example, all family members are affected.261

As suggested by the Act’s legislative history, the rights provided by the CVRA seek to restore rather than reinvent the justice system. On the one hand, floor statements emphasize that the CVRA “do[es] not come at the expense of defendants’ rights.”262 But, on the other hand, the Act also prevents courts from not enforcing victims’ rights and

---

259 18 U.S.C. § 3771(e).
260 Kyl, supra note 223, at 594.
261 Id.
262 150 CONG. REC. S4262 (statement of Sen. Feinstein).
“treat[ing] victims of crime with the respect they deserve.” Accordingly, although the CVRA does not grant crime victims party or intervenor status, it provides victims with standing at the trial and appellate levels. As Senator Feinstein explained during debate: “[The CVRA] ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim’s rights in a timely way.” The CVRA thus breaths new life into the common law idea that crime is both a public wrong, concerning the state and defendant, and a private injury of particular importance to the victim.

IV. Conclusion

This Note has attempted to provide the basic historical framework for understanding and evaluating the Crime Victims’ Rights Act of 2004. Victims’ rights can be a polarizing topic. On the one hand, since Connecticut instituted the first office of public prosecutors in 1704, the United States has established a time-honored tradition of entrusting at least some criminal prosecutions to local, state, and federal attorneys. As envisioned by George Sharswood in 1854, these attorneys not only seek criminal
They should be experts in their field and guardians of the public trust. On the other hand, fantastic news stories, which expose botched prosecutions and relaxed enforcement standards at the expense of crime victims, abound. Consequently, it is unsurprising that the victims’ rights debate feels, at times, strained. Whereas victims’ rights proponents appeal to our sense of humanity, opponents assert the importance of impartiality and fairness that pervade both the judiciary and the prosecutor’s duty to see that justice is done.

History counsels, however, that this dichotomy represents a false choice. As discussed above, crime victim participation in the administration of justice is not, and never was, “a dangerous return to the private blood feud” or “a slow but insidious trend towards a] bloodthirsty concern for the ‘rights’ of ‘victims’ to revenge and punishment of the most extreme kind.” On the contrary, even when blood feuds were the norm, the practice represented—in the words of the Roman senator and historian, Tacitus—a method of crime prevention. In England, it preserved the promises enshrined by Magna Carta and protected individual liberties from government overreaching. The right to privately prosecute crime was so deeply entrenched that neither Henry VIII nor Jeremy Bentham could eradicate it. In Revolutionary America private prosecution similarly represented individual freedom by protecting the people from “the terrors of anonymous

---

267 See supra Section III.B.
268 Id.
269 Id.
270 James M. Dolliver, Victims’ Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come, 34 WAYNE L. REV. 87
272 See supra Section II.A.
273 See supra Section II.B.1.
274 Id.
Prosecutors’\textsuperscript{275} while also ensuring the public peace and deterring personal revenge by providing the poor, working class, and minorities with open access to the courts.\textsuperscript{276}

A historical perspective further demonstrates that public prosecution was not only a latecomer but, most likely, the product of various institutions from diverse times and places. Like the Dutch \textit{schout}, American prosecutors represent local governments. Like the French \textit{procureur}, they have the power to initiate criminal proceedings. Like England’s attorney general, they represent the state’s interests. And, until the late Nineteenth Century, they were—even in the United States—almost exclusively crime victims. Even on the European Continent, where public officials have prosecuted crime since the Twelfth Century, Professor Wigmore concludes that the public model unintentionally and unexpectedly “slipped in”\textsuperscript{277} as a de facto system of prosecution. Accordingly, assessing the CVRA, as well as the proper role of the crime victim in the administration of justice, requires a historical framework in which the various offices, policies, and historical contingencies that have shaped the American prosecutor can be understood. Although more work needs to be done, this Note has offered a glimpse into the confluence of forces that have shaped an indispensible feature of the modern criminal justice system.

\begin{flushright}
\textsuperscript{275} See supra Section III.A.  \\
\textsuperscript{276} Id.  \\
\textsuperscript{277} See supra Section II.C.1.
\end{flushright}