Redeeming an Empty Promise: Procedural Justice, the Crime Victims‘ Rights Act, and the Victim‘s Right to Be Reasonably Protected from the Accused

Mary Margaret Giannini

Available at: https://works.bepress.com/marymargaret_giannini/5/
REDEEMING AN EMPTY PROMISE: PROCEDURAL JUSTICE, THE CRIME VICTIMS’ RIGHTS ACT, AND THE VICTIM’S RIGHT TO BE REASONABLY PROTECTED FROM THE ACCUSED

MARY MARGARET GIANNINI

ABSTRACT .......................................................................................................................... 47

I. INTRODUCTION ........................................................................................................... 48

II. A DIAGNOSIS: THE EMPTY PROMISE OF THE VICTIMS’ RIGHT TO BE REASONABLY PROTECTED FROM THE ACCUSED ....................................................... 52
   A. Rhetoric and Reality ................................................................................................. 52
   B. Constitutional Constraints on a Right to Protection .................................................. 53
   C. State Tort Limits on the Victim’s Protection Right .................................................... 58
      1. Sovereign Immunity, the Public Duty Doctrine and the Special Duty Doctrine .... 58
      2. A State Case Study: Massachusetts, Promises of Protection, and Tort Limits ........ 62
   D. Taking Away What Was Given: Internal Restrictions Within the CVRA ................. 68

III. A THEORETICAL REVIEW: THE VICTIM IN THE CRIMINAL PROCESS ... 74
   A. The Rise and Fall of Victim Primacy ....................................................................... 74
   B. The Public Prosecution Model ............................................................................... 76
   C. Victims Respond: The Emergence of the Victims’ Rights Movement ..................... 82
   D. Procedural Justice and the Victim .......................................................................... 85

IV. A REMEDY: PROCEDURAL JUSTICE AND THE PROMISE OF PROTECTION ......................................................... 96

V. CONCLUSION ............................................................................................................... 103

ABSTRACT

The federal Crime Victims’ Rights Act (CVRA) provides victims with a host of rights, including reasonable protection from the accused.

* Assistant Professor of Law, Florida Coastal School of Law, 2008–present. Indiana University School of Law – Indianapolis, J.D., 2002; State University of New York at Albany, M.L.S., 1993; University of St. Andrews, Scotland, M.A., 1992. I would like to thank Florida Coastal School of Law for the research grant that supported this project, as well as Bjorn Anderson, Victoria Calhoon, Jess Dichter and Andrea Horton for their able research assistance. An earlier version of this paper was presented at the Judge Stephanie K. Seymour Lecture in Law, at University of Tulsa College of Law, Tulsa, OK Spring 2009, and at the National Crime Victim Law Institute’s 2010 Annual Meeting in Portland, OR.
However, the current protection language in the CVRA offers very little to victims in the form of a meaningful, substantive, and enforceable right. Constitutional principles, tort immunity concepts, as well as other statutory limits within the CVRA itself, constrain the extent to which victims can rely on or enforce a right to protection. While the victim’s CVRA right to protection may currently represent an empty promise, this article asserts that the right can be redeemed if it is interpreted and redefined by procedural justice principles. Many of the other rights granted to victims under the CVRA are naturally grounded in procedural justice theory. When framed in this manner, the CVRA affords victims a meaningful role in the prosecution of the offender, while also providing a tangible process by which to enforce their rights. This article proposes ways to bring the victim’s protection right into alignment with procedural justice theory as well as with the other rights granted to victims under the CVRA. Viewing the CVRA’s right to protection through procedural justice principles, the CVRA will cease to be an empty promise and instead, can serve crime victims in a meaningful way.

I. INTRODUCTION

The Crime Victims’ Rights Act (CVRA) represents one of the most far reaching pieces of federal legislation passed by Congress on behalf of crime victims. Among the many rights granted to victims under the statute is “the right to be reasonably protected from the accused.” This language, even when tempered by the word “reasonably,” suggests that the federal government has assumed the duty to protect victims from further harm by defendants. Certainly, some of the political rhetoric supporting and leading up to the passage of the CVRA suggested as much. For example, Arizona Senator Jon Kyl, one of the law’s primary sponsors, noted:

Congress’ concern for the safety of crime victims is appropriate and just. The United States Supreme Court has recognized that the “primary concern of every government . . . [is] for the safety and indeed the lives of its citizens.” In the past, victims have been grievously harmed—even murdered—because courts have been inattentive to their needs while making decisions about pre-trial release of the accused.

2. Id. at § 3771(a)(1).
3. John Kyl, Stephen Higgins & Steven J. Twist, On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, 9 LEWIS & CLARK L. REV. 581, 596 (2005) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)) (alterations in original). In Congressional testimony for a proposed victims’ rights amendment to the U.S. Constitution, which eventually resulted in the passage of the CVRA statute, Senator Kyl argued that providing rights to crime victims was “the least the system owes to those it failed to protect.” A Proposed Constitutional
California Senator Dianne Feinstein, another primary sponsor of the CVRA, indicated that the victim’s protection right was intentionally listed first in the statute in order to emphasize and, as Senator Kyl wrote, “reinforce[] the principle that government’s first and foremost obligation to its citizens is to protect them—especially those who have already been victims of a crime.”

That a victim might rely on such broad rhetoric supporting a right to protection makes a measure of intuitive sense. An initial review of the preamble of the United States Constitution and Declaration of Independence could lead many to believe that “one of the first duties of any government is to offer adequate physical protection to its constituents.” The Declaration of Independence suggests that governments should be formed to protect the citizenry’s rights to “Life, Liberty, and the pursuit of Happiness.” Likewise, the Constitution notes that our founders joined to create the United States of America in order to “establish Justice, insure domestic Tranquility, provide for the common defense, [and] promote the general Welfare . . .” Hence, it should not be at all surprising that the law is peppered with statements articulating the premise that governments are

Amendment to Protect Victims of Crime: Hearing Before the S. Comm. on the Judiciary, 105th Cong. 8 (1997) (statement of Sen. Jon Kyl). See also infra note 218 (regarding the events which lead up to Congress’ passage of the CVRA).

4. Kyl et al., supra note 3, at 595. The CVRA lists a victim’s rights in the following order:

(a) Rights of crime victims. – A crime victim has the following rights:
(1) The right to be reasonably protected from the accused.
(2) 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.
(3) 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.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the Government in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.


6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

7. U.S. CONST., pmbl.
created, in part, to provide protection to their citizens. Nor should it be surprising that victims’ rights advocates would invoke and rely on these laudatory principles when claiming it is appropriate to grant victims a right to protection. However, the suggestion that the government has an affirmative and enforceable obligation to protect its citizens from harm is tenuous.

Despite the grand rhetoric that accompanied the passage of the CVRA, the victim’s right to protection rests on a precarious foundation that undermines the right’s substance and enforceability. However, the inadequacies that currently burden the CVRA’s protection right are not insurmountable. Just as a majority of the rights granted to victims under the CVRA are best grounded in procedural justice theory, the victim’s right to be reasonably protected from the accused can also be viewed through this prism, thereby giving the right substance, meaning, and enforceability.

Section II of this article is diagnostic. This section contrasts the specific protection language in the CVRA and the rhetoric accompanying its passage with the many legal hurdles that limit the right’s scope and a victim’s ability to enforce it. The CVRA’s protection language, thus far, has not received much attention from scholars nor has it been specifically tested in the courts, but several parallel areas in the law highlight the unreliability of a protection right. Constitutional concepts, as well as standard tort

8. United States v. Salerno, 481 U.S. 739, 755 (1987) (noting that a “primary concern of every government [is the] concern for the safety and . . . the lives of its citizens”); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507–08 (1981) (referencing the authority of local government to protect citizens’ legitimate interests in traffic safety); Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) (noting that “[t]he Government of course has an obligation to protect its citizens from harm”); St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 19 (1897) (“If the state is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly, it fails in the protection of property.”) (quoting Mathews v. St. Louis & S.F. Ry. Co., 24 S.W. 591, 596 (Mo. 1893)); Paul v. Virginia, 75 U.S. 168, 176 (1868) (“It is the duty of all governments to pass all laws which may be necessary to shield and protect its citizens.”) overruled on other grounds by United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 543–53 (1944); 515 Assoc’s v. City of Newark, 623 A.2d 1366, 1370 (N.J. 1993) (“Without doubt, local governments bear the burden of providing police protection. . . .”); Ex parte Bushnell, 9 Ohio St. 77, 103 (Ohio 1859) (“On these two principles—allegiance to the state, protection to the citizen—rests not merely all sovereignty, but the very social compact itself.”). Even the Transportation Security Administration notes on its website that its mission is to “protect[] the Nation’s transportation systems to ensure freedom of movement for people and commerce.” See http://www.tsa.gov/who we_are/mission.shtm (last visited Jan. 17, 2011).

9. See supra note 8.

analysis, severely undermine any dependence a victim might place on a promise of protection. Moreover, other portions of the CVRA further constrain, if not entirely foreclose, a victim’s ability to rely on the statutory grant of protection from the accused. What remains is a largely illusory and empty promise.

In an attempt to redeem the CVRA’s unfulfilled promise of protection, Section III is devoted to identifying a theoretic framework upon which victims’ rights, and more particularly, the victim’s right to be reasonably protected from the accused, can rest. In so doing, this section includes a historical review of the victim’s role in the criminal justice system, charting the ebb and flow of the victim’s predominance within criminal procedure and the eventual ascendance of the public prosecution model. One result of the public prosecution model was that its utilitarian and retributive roots rendered the victim a silent, if not forgotten person within the criminal justice system.¹¹ The victims’ rights movement has gone a great distance in correcting this oversight, but criminal justice theorists still struggle to identify how the public prosecution model can appropriately make room for the victim.¹² In addressing this conflict, I assert that the social science concept of procedural justice provides the medium to create a befitting space for victims within the criminal justice system.

Section IV examines how most of the rights afforded to victims under the CVRA are already grounded in procedural justice principles. I also note that there are other areas within federal criminal procedure that approach victims’ rights from a procedural justice posture and could serve as a model for similarly restructuring the victim’s protection right. I then conclude that the victim’s right to protection should also be framed within procedural justice principles. I must acknowledge, however, that how I use procedural justice theory to reshape victim’s protection right undermines an explicit reading of the right as it currently appears in the CVRA. In anticipation of any such criticism, I suggest two slight amendments to the CVRA’s protection and enforcement language. By altering the protection language of the CVRA so that it is better grounded in procedural justice theory, I transform the CVRA’s empty promise of protection into a substantive and enforceable right for victims.

¹² Id. at 661–62.
II. A Diagnosis: The Empty Promise of the Victim’s Right to Be Reasonably Protected from the Accused

A. Rhetoric and Reality

The rhetoric that accompanied the passage of the victim’s CVRA protection right was inspiring because it invoked the notion that governments exist to protect the citizenry. The idea that a core government function is to protect its citizens is not entirely unfounded. The social contract theory of government, as developed by such philosophers as Jean-Jacques Rousseau and John Locke, begins with the general proposition that human beings originally existed in a state of nature, where individuals bore the responsibility to protect their own person and property from the wrongdoings of others. As people joined together in more structured societies and governments, they relinquished certain freedoms such as individual acts of self-help and self-defense in response to criminal acts, in exchange for the mutual protection that came from being part of an organized group.

One core feature of the social contract was the understanding that the citizen’s promise to obey the laws of society imposed upon the government a duty “to protect the citizenry and punish violators” of the contract. John Locke further emphasized that the “formation of the government, by the people joining into the contract, is governed by public good and with the consent of the individuals agreeing to be governed.” Therefore, the trust established between the government and those who had consented to be governed required that the government exercise its power for the good of society. When the government breached this trust by enacting rules that failed to preserve and protect the property and safety of its citizens, the governed had the right “to dissolve the government and create a new one that would protect their rights and guard their safety.” It was upon these very principles that the United States of America was founded.

Despite the underlying idea that governments exist to provide collective protection to its citizens, courts and legislatures have largely rejected any
suggestion that the social contract foundations of our American government should be interpreted as requiring those in power to provide the citizenry with protection from the harms of others. Whether analyzed under constitutional or tort-based principles, the claim that citizens possess an enforceable right to government protection rests on very shaky ground.

B. Constitutional Constraints on a Right to Protection

The Supreme Court has made clear that the social contract theory does not impose a constitutional duty on the government to protect its citizens from the private harm of others. First, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court examined whether a county child protective services department could be constitutionally liable for failing to take action to protect a young child, Joshua DeShaney.  

Joshua was repeatedly beaten by his father, Randy DeShaney. Over a two-year period, county workers were aware of and even responded to reports that Randy was physically abusing Joshua, and at one point temporarily removed Joshua from his father’s custody. However, when Joshua was returned to his father’s care, case workers did not take any further action when evidence indicated that Randy continued to abuse Joshua. Randy eventually beat his four-year-old son so severely “that he fell into a life-threatening coma[,]” suffered permanent brain damage, and was confined to a medical institution for the rest of his life.

Joshua’s mother brought an action against the county and its child services employees, alleging that they “had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known.” The Supreme Court rejected her argument, holding that the Fourteenth Amendment, which provides that the “State [shall not] deprive any person of life, liberty, or property, without due process of law[,]” did not impose on the states a duty to protect an individual from the harms caused by private actors. Impliedly rejecting any suggestion that under a social contract theory the government has a specific duty to protect citizens from

---

22. *Id.* at 191.
23. *Id.* at 192.
24. *Id.* at 192–93.
25. *Id.* at 193.
26. *Id.*
27. *Id.*
“invasion[s] by private actors,”30 the Court noted that the Due Process Clause

is phrased as a limitation on the State’s power to act, not as a guarantee of
certain minimal levels of safety and security. It forbids the State itself to
deprive individuals of life, liberty or property without “due process of
law,” but its language cannot fairly be extended to impose an affirmative
obligation on the State to ensure that those interests do not come to harm
through other means.31

The Fourteenth Amendment’s Due Process Clause, in concert with the Fifth
Amendment’s Due Process Clause, did not confer an “affirmative right to
governmental aid, even where such aid may be necessary to secure life,
liberty, or property interests of which the government itself may not deprive
the individual.”32 Therefore, despite the fact that Joshua received care from

30. Id.
31. Id.
32. Id. at 196 (citations omitted). The Court did acknowledge that in a narrow set of
circumstances, a “duty [to protect] may arise out of certain ‘special relationships’ created or
assumed by the State with respect to particular individuals.” Id. at 197. Under this “special
relationship” exception, “when the State takes a person into custody and holds him there
against his will, the Constitution imposes on it a corresponding duty to assume some
responsibility for his safety and general well-being.” Id. at 199–200. However, this duty of
protection is not based on “the State’s knowledge of the individual’s predicament or from
[the State’s] expressions of intent to help him, but from the limitation which [the State] has
imposed on his freedom to act on his own behalf.” Id. at 200. Hence, most special
relationship cases arise where an individual is in some form of government custody. Id.

It is often difficult for plaintiffs to successfully assert a special relationship claim.
For example, in Jones v. Phyfer, a rape victim brought a federal civil rights action against
state agency employees, “alleging that their failure to warn her about, and protect her from
injury caused by[] the released [defendant] violated her constitutional rights.” 761 F.2d 642,
642 (11th Cir. 1985). The victim claimed that because she had initially been victimized by
the defendant, and was the reporting witness in the case against him, it should have been
foreseeable to the state that the defendant would again attempt to harm her. Id. at 646. The
court rejected her arguments, contending that they were insufficient to “impose a duty on the
state to protect the plaintiff,” or to even warn her of the defendant’s release. Id. at 647; see
also Gatlin v. Green, 227 F. Supp. 2d 1064, 1076 (D. Minn. 2002) (declining to extend
special relationship exception to relationship between informant and police; rather,
exception was meant to be limited to prison, “prison-like,” and other custodial situations).
But see Garrett v. Belmont Cnty. Sheriff’s Office, 374 F. App’x 612, 618 (6th Cir. 2010)
(special relationship exception permitted where woman committed suicide after being
released from a county mental institution where county knew of woman’s suicidal
tendencies); Ex rel Johnson v. South Carolina Dept. of Soc. Serv’s, 597 F.3d 163 (4th Cir.
2010) (special relationship exception applicable to situation in which foster child suffered
sexual abuse after being taken into state custody).

Along with the “special relationship” exception, a number of courts have
recognized that where the state has exacerbated or created the danger which results in harm
to a citizen a Fourteenth Amendment substantive due process claim may stand. See, e.g.,
state actors who had knowledge of his father’s abusive tendencies, there were no constitutional grounds upon which Joshua’s mother could hold those public employees liable for the severe harm Joshua suffered.  

In *Town of Castle Rock v. Gonzales*, the Court reinforced the *DeShaney* holding and further narrowed the scope of protection permitted under the Fourteenth Amendment’s Due Process Clause. In *Gonzales*, Jessica Gonzales was in the process of divorcing her husband, Simon. She had obtained a restraining order against him that limited his ability to come to their former marital home and specifically delineated when he could spend time with their three daughters. The restraining order also contained mandatory language that indicated that the police were required to arrest violators of the order. When Jessica realized her husband had taken their daughters in violation of the order, she contacted the police several times over a period of five hours, asking them to arrest her husband. The police took no direct action in response to Jessica’s repeated pleas for help, and instead merely suggested that she wait to see if her husband brought the girls home. Later that evening, Simon showed up at the police station with a semi-automatic weapon he purchased earlier that day, opened fire, and was shot by police in the ensuing cross-fire. Officers found the bodies of his three daughters, whom he had killed earlier that evening, in the cab of his pickup truck. Jessica subsequently brought an action against the city and police for failing to enforce the restraining order.

---

Okin v. Village of Cornwall-on-Hudson Police Dept., 577 F.3d 415, 438 (2d Cir. 2009); Pena v. Deprisco, 432 F.3d 98, 108 (2d Cir. 2005).

33. *DeShaney*, 489 U.S. at 201.


35. *Id.* at 751.

36. *Id.*

37. The restraining order issued the following command to law enforcement officials:

> You *shall* use every reasonable means to enforce this restraining order. You *shall* arrest, or, if an arrest would be impracticable under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with [notice] of this order or has received actual notice of the existence of this order.

*Id.* at 752 (emphasis added). The language in the restraining order mirrored language that appeared in Colorado statutes mandating that police arrest individuals who violate the terms of a restraining order. See COLO. REV. STAT. §§ 18-6-803.5(3)(a), (b).


39. *Id.*

40. *Id.* at 754.

41. *Id.*

42. *Id.*
In contrast to the action in *DeShaney*, which was premised on the substantive due process clause of the Fourteenth Amendment, Jessica framed her action against the city under the Fourteenth Amendment’s procedural due process clause. First, she asserted that she possessed a property interest in the enforcement of the restraining order. Second, she claimed that the town’s policy of tolerating police unresponsiveness to reports of restraining order violations represented a deprivation of her property without due process. The Supreme Court disagreed. In similar fashion to its *DeShaney* ruling, the Court was unwilling to interpret the Fourteenth Amendment as imposing a constitutional duty of protection on state actors. Not only did the Court refuse to rule that the State of Colorado had created a statutory property interest in the enforcement in the restraining order, but it was equally unwilling to consider that even if the state legislature had intended to create such a property right, that the right was sufficient to rise to a level warranting Constitutional protection. Instead, the Court reasoned that any existing mandatory enforcement duty benefitted society as a whole, rather than the individual holding the restraining order. In like fashion to Joshua DeShaney and his mother, it was held that the state had no constitutional duty to ensure the protection of citizens.

44. In *DeShaney*, and as noted by the Court in *Gonzales*, Joshua and his mother had raised the issue of whether the state’s child protection statutes had created an entitlement in Joshua that could not be deprived without procedural due process of law. 489 U.S. at 195 n.2; see also *Gonzales*, 545 U.S. at 755. However, because this issue was raised in an untimely manner, the *DeShaney* Court declined to address it. 489 U.S. at 195 n.2. Hence, the question of whether the procedural due process clause might permit an individual to sue a state actor for failing to provide protective services remained an open question for review in *Gonzales*, 545 U.S. at 755.
45. *Gonzales*, 545 U.S. at 755.
46. *Id.*
47. *Id.* at 768–69.
48. *Id.* at 758–66. In *Board of Regents of State Colleges v. Roth*, the Supreme Court ruled that states could create property interests protected under the procedural due process clause of the Constitution. 408 U.S. 564, 577 (1972). However, the *Gonzales* Court was unwilling to rule that the mandatory enforcement language which appeared in Colorado law and on Jessica Gonzales’ restraining order were sufficient to create a *Roth*-type of constitutionally protected property interest. *Gonzales*, 545 U.S. at 758–62.
49. *Id.* at 766–68.
50. Justice Scalia noted that

Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people. The serving of public rather than private ends is the normal course of the criminal law because criminal acts, “besides the injury [they do] to individuals, . . . strike at the very being of society. . . .” 4 W. Blackstone, *Commentaries on the Laws of England* 5 (1769).

*Id.* at 765.
Jessica Gonzales was left without a constitutional remedy against the Town of Castle Rock for her daughters’ deaths.51

The DeShaney and Gonzales cases teach that government protection from the wrongful acts of others does not fall within the spectrum of constitutionally protected individual rights.52 This is not to say, however, that the individual states or Congress are barred from imposing a statutory tort duty of protection on government actors. In both DeShaney and Gonzales, the Court begrudgingly suggested as much. In noting that the Fifth and the Fourteenth Amendments were not designed to require the States to protect citizens from one another, the DeShaney Court noted that “[t]he Framers were content to leave the extent of governmental obligation in [this] area to the democratic political processes.”53 Similarly, in Gonzales, the Court stated that the States are not “powerless to provide victims with personally enforceable remedies.”54 Therefore, there is certainly room within the law for governments to craft a protection right for victims. However, even where the states and the federal government have created tort based or legislatively enacted protection rights for citizens, an individual’s ability to enforce this right or seek redress for its violation is precarious and inconsistent.55

52. In concert with the special relationship and state-created danger exceptions, see supra note 32, one additional narrow exception exists. Included within the Fourteenth Amendment is the prohibition that States shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST., amend. XIV, § 1. In DeShaney, the Court aptly noted that “[t]he State may not, . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.” 489 U.S. at 197 n.3 (citations omitted); see also Moore v. City of Chicago Heights, No. 063452, 2010 WL 148623 (N.D. Ill. Jan. 12, 2010) (equal protection claim that city had a policy, pattern and practice of treating victims of domestic violence with less priority than victims of other crimes, survived motion to dismiss); Elliot-Park v. Manglona, 592 F.3d 1003 (9th Cir. 2010) (police officer’s failure to investigate and arrest drunk driver due to racial preferences toward the driver and against the injured party gave rise to an equal protection claim); Price-Cornelson v. Brooks, 524 F.3d 1103 (10th Cir. 2008) (police denied qualified immunity in equal protection action brought by lesbian victim of domestic violence).
53. DeShaney, 489 U.S. at 196; see also id. at 202 (“A State may, through its courts and legislatures, impose . . . affirmative duties of care and protection upon its agents as it wishes.”).
54. Gonzales, 545 U.S. at 768. The Court went on to cite a variety of cases in which state courts had indicated that cities and police officers could be held liable for failing to provide certain protection based services. Id. at 769 n.15; see also Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973) (citations omitted) (noting that legislative bodies “may enact statutes creating legal rights, the invasion of which creates standing even though no injury would exist without the statute”).
C. State Tort Limits on the Victim’s Protection Right

There are certainly reported cases in which state courts have acknowledged that state actors can and should be held liable for harm suffered by citizens at the hands of another. However, there is no ironclad formula to ensure that liability will be imposed when a victim’s right to protection is violated. The sovereign immunity, public duty, and special duty doctrines bog down a victim’s right to claim protection, as do other statutory limits on state actor liability. The end result is that even where a legitimate claim for protection might exist, there is little guarantee that the claim can clear the common law and statutory hurdles limiting its enforcement.

1. Sovereign Immunity, the Public Duty Doctrine, and the Special Duty Doctrine

Sovereign immunity and the public duty doctrine have traditionally limited state actor accountability. Hailing from our English common law roots, the sovereign immunity doctrine originally served as a means of protecting all state actors from any form of liability. As rationalized by Justice Holmes, “[a] sovereign is exempt from suit, not because of any

56. See Peschel v. City of Missoula, 664 F. Supp. 2d 1149 (D. Mont. 2009) (where individual was in custody of police and was subsequently denied medical care, special relationship exception claim can survive motion for summary judgment); Kaho’Ohanohano v. Dep’t of Human Serv’s, State of Hawaii, 178 P.3d 538 (Haw. 2008) (Department of Human Services owed a duty of care to minor once abuse of child was confirmed by investigators); Pile v. Brandenburg, 215 S.W.3d 36 (Ky. 2007) (police officer liable for negligent performance of ministerial act, where woman was killed in collision because officer failed to prevent a handcuffed and intoxicated prisoner left alone in vehicle from taking control of car); Radke v. County of Freeborn, 694 N.W.2d 788 (Minn. 2005) (state Department of Human Services could be charged with negligence in investigation of child abuse reports); Cockerham-Ellerb e v. Town of Jonesville, 626 S.E.2d 685 (N.C. Ct. App. 2006) (officer’s specific promise of protection to plaintiff and her daughter was sufficient to permit plaintiff to sue city for officer’s failure to fulfill promise); Estate of Graves v. City of Circleville, 922 N.E.2d 201 (Ohio 2010) (wanton and reckless actions by city employees can give rise to claims of negligence).

57. See Estate of Graves, 922 N.E.2d 201 (stating, in passing, that sovereign immunity is the “provision of broad statutory immunity to political subdivisions and their employees, subject to certain exceptions.”) (citations omitted).

58. See Cockerham-Ellerb e, 626 S.E.2d at 687–88 (“Generally, the public duty doctrine bars negligence claims by individuals against a municipality or its agents acting in a law enforcement role for failure to provide protection to that person from the criminal acts of third party.”) (citations omitted).

59. See Carcraft, 279 N.W.2d at 806 (“‘Special duty’ is nothing more than convenient terminology, . . . for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance.”) (citations omitted); accord Radke, 694 N.W.2d at 793.
formal conception or obsolete theory, but on the logical and practical grounds that there can be no legal right as against the authority that makes the law on which the right depends.\textsuperscript{60} Most states, as well as the federal government, however, have departed from a rigid adherence to sovereign immunity,\textsuperscript{61} and have exposed state employees to liability for their performance of select tasks and duties. The softening of sovereign immunity is most often exhibited in states’ invocation of the public duty doctrine.\textsuperscript{62}

The public duty doctrine generally provides that a state actor will not be liable for obligations owed to the general public, such as police protection or fire prevention services.\textsuperscript{63} Therefore, while the public duty doctrine

\textsuperscript{60} Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).


\textsuperscript{62} See Stephens & Harnetiaux, supra note 61, at 35–36.

\textsuperscript{63} The public duty doctrine was first articulated by the Supreme Court in \textit{South v. Maryland}, 59 U.S. 396 (1855). The Court indicated that while the police may have had a general duty to protect the public, that broad duty did not translate into liability for failing to
wedged open the tightly closed door of sovereign immunity, it still continues to severely limit the types of claims that can be brought against public officers for the dereliction of their duties. The Supreme Court’s reasoning in both DeShaney and Gonzales echoes strains of the public duty doctrine. In neither case was the Court willing to extend from some broad general-protection duty owed to the public a more specific duty owed to a particular citizen. Whether it was a county’s creation of a department of social services to oversee the well being of children, or a legislature’s command that police officers “shall” arrest violators of restraining orders, the Court made clear that these orders were made for the benefit of the community as a whole and not for the individual benefit of Joshua DeShaney or Jessica Gonzalez and her daughters.

The narrowness of the public duty doctrine has been criticized by academics and softened by courts and legislatures with the special duty doctrine. The special duty doctrine holds that even within the strict confines of the public duty doctrine, a state actor can be liable for private harm where a special duty was established between that specific state actor and the individual requesting assistance. On its face, the special duty

---

64. See Myers v. McGrady, 628 S.E.2d 761, 766 (N.C. 2006) (“The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity.”).


67. See id. at 765.


69. See Cracraft v. City of St. Louis, 279 N.W.2d 801, 806 (1979).

70. See Leone v. City of Chicago, 619 N.E.2d 119 (Ill. 1993) (where plaintiff can
doctrine could further the argument that a victim’s statutory right to protection from the accused should be enforced against state actors. If a statute states “the victim has a right to be reasonably protected from the accused,” then one could argue that a specific duty has been imposed upon law enforcement to protect a particular class of individuals, the victims of crimes, and therefore the police should be liable for the failure to provide that protection. However, in practice, the special duty doctrine tends to be applied narrowly and with varied results.


71. See generally Aaby, supra note 70, at 288–91.


73. See Punger, supra note 70, at 699.

74. See Felman, supra note 55, at 420–25.
2. A State Case Study: Massachusetts, Promises of Protection, and Tort Limits

The Commonwealth of Massachusetts provides but one example of how the special duty doctrine cannot guarantee a protection right to crime victims. Where states have embodied the special duty doctrine in their state tort claim acts, they often do so by carving out only the most explicit of exceptions to the public duty doctrine. Massachusetts fits this model in that its state tort claims act starts out broadly, imposing liability on public employers for the negligent acts of their employees “in the same manner and to the same extent as a private individual under like circumstances.” Massachusetts fits this model in that its state tort claims act starts out broadly, imposing liability on public employers for the negligent acts of their employees “in the same manner and to the same extent as a private individual under like circumstances.”

The statute then narrows the scope of liability by detailing several activities for which public actors will not be liable. The Massachusetts courts have identified this legislative reduction of liability as an embodiment of the public duty doctrine.

Three of the public duty doctrine exceptions are of particular relevance to Massachusetts’s crime victims and their ability to enforce a right to protection. These three exceptions detail that public actors will not be liable for (1) “failure to provide adequate police protection,” (2) “any claim based upon the release, parole, furlough or escape of any person . . . from the custody of a public employee or employer or their agents, unless gross negligence is shown in allowing such release, parole, furlough or escape” or (3) “any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including . . . violent or tortious conduct of a third person . . . not originally caused by the public employer or any other person acting on behalf of the public employer.”

Therefore, the Massachusetts statute presents a bit of an open-the-door then close-the-door approach to public actor liability. The state tort claims act begins with an all-inclusive approach, but then narrows the circumstances under which public employees can be sued.

Within the broad swath of immunity granted to Massachusetts’s state actors, the state’s tort claims act statute nonetheless includes two important counter-exceptions that exemplify the special duty doctrine. First, state employees can be liable for “explicit and specific assurances of safety or
assistance . . . made to a direct victim or member of his family . . . provided the [subsequent] injury resulted in part from [the victim’s] reliance on those assurances.”80 Second, liability will be imposed where “the intervention of a public employee causes injury to the victim or places the victim in a worse position than he was in before the intervention.”81 Massachusetts law also specifically grants crime victims the right “to receive protection from the local law enforcement agencies from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts.”82 Taken in concert with Massachusetts’s special duty exceptions, one might conclude that should a victim suffer harm from the offender during the course of the state’s investigation and prosecution of a crime, state actors could be held liable. Unfortunately, the commonwealth’s highly factsensitive application of the special duty doctrine, coupled with other statutory limits in Massachusetts law, fail to guarantee victims protection or relief.83

A victim’s success in asserting a special duty claim is highly predicated on the facts of the particular case before the court.84 For example, in interpreting the special duty language incorporated into the Massachusetts statute, courts have focused on the requirement that the state actor make “explicit and specific assurances of safety or assistance” to the victim.85 So doing, the Massachusetts Supreme Court has held that “by ‘explicit’ the Legislature meant a spoken or written assurance, not . . . [assurances] implied from the conduct of the parties or the situation, and by ‘specific’ the terms of the assurance must be definite, fixed and free from ambiguity.”86 A victim’s success in claiming she received “explicit and

80. Id. at § 10(j)(1).
81. Id. at § 10(j)(2). These two exceptions to the immunity granted to state officials closely mirror the special relationship and state created danger doctrines often invoked in Fourteenth Amendment substantive due process claims. See supra note 32.
82. MASS. GEN. LAWS ch. 258B, § 3(d).
83. See id. at §§ 2, 10.
84. See generally Basil, supra note 68, at 407. As Mr. Basil notes, each state has come up with its own formulation of what is required to successfully claim that a special duty has arisen between a state employee and a member of the public. Id. at 407; see, e.g., Doe v. Calumet City, 641 N.E.2d 498, 504 (Ill. 1994) (articulating a four part test); Serviss v. State, Dep’t of Natural Resources, 711 N.E.2d 95, 99 (Ind. Ct. App. 1999) (articulating a three part test) vacated on other grounds, 721 N.E.2d 234 (Ind. 1999); Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979) (identifying four factors to be considered in determining when a special duty arises); Summers v. Harris Construction, 381 S.E.2d 493, 496 (S.C. Ct. App. 1989) (articulating a six part test); Ezell v. Cockerell, 902 S.W.2d 394, 402 (Tenn. 1995) (identifying three factors to determine whether a special duty of care exists).
85. MASS. GEN. LAWS ch. 258, § 10(j)(1).
specific assurances of safety” from state employees will therefore always be very fact specific.87

For example, in Lawrence v. City of Cambridge, the Supreme Court of Massachusetts found that the plaintiff–victim had sufficiently pled that police officers and the city had made him “explicit and specific assurances of safety.”88 The plaintiff had been robbed at gunpoint one evening as he was closing his store.89 He agreed to testify against his assailants at a grand jury hearing and the police promised they would protect him when he closed his store in the evenings.90 Relying on this promise, the plaintiff felt safe to return to work.91 An officer was present at the plaintiff’s place of work for several days, but the evening before the plaintiff was meant to testify at the grand jury hearing, the police were absent.92 The police had not informed the plaintiff that they were going to stop protecting him or that they were unable to protect him on that specific evening.93 As the plaintiff was leaving work, someone shot him in the face.94 Based on these facts, the court determined that the plaintiff had not only shown that the police department’s promise was explicit, as the police had verbally promised protection to the plaintiff, but that their promise was also specific.95 According to the court, the officers’ promise that they would “provide the plaintiff protection ‘when [he] closed the store at night’ . . . specifie[d] some of the most important terms of the assurance—when and where.”96 Hence, Lawrence suggested that the special duty language appearing in the state tort claims act could be read with a measure of breadth.97 Subsequent Massachusetts cases, however, have not construed the special duty exception so broadly.

In Ford v. Town of Grafton, Catherine Ford received repeated death threats for nearly two years from her ex-husband, James Davison, despite holding a restraining order against him.98 Catherine repeatedly asked the police to arrest her ex-husband when he threatened her safety, the safety of her family members, and further violated the terms of the restraining order by harassing her.99 However, the police consistently declined to take any action100 despite state law that mandated arrest when police had probable

87. See Basil, supra note 68, at 407.
88. Lawrence, 644 N.E.2d at 3.
89. Id. at 2.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at 4.
96. Id. (alterations in original).
97. Id.
99. Id.
100. Id.
cause that a restraining order was being violated. Instead, the police erroneously asserted that they could not arrest James unless he caused Catherine actual physical harm or the police specifically saw him violating the restraining order.

James’s threats and violence against Catherine eventually escalated to such a level that he shot her, rendering her a quadriplegic. Catherine subsequently brought an action against the town and its police force. She grounded her claim on the portion of the state’s tort claim act that imposed liability on public employees for “any claim based upon explicit and specific assurances of safety or assistance” and state law which mandated that police arrest violators of restraining orders. The court rejected her claim, contending that to the extent that Catherine received any explicit or specific assurances from the police, none were for protection. Rather, “the town assured [Catherine] Ford and her family it could not take any action until it saw [James] Davidson violating the protective order or he actually caused [her] harm.” That the police were wrong on this issue was of no matter. Likewise, the court rejected any argument that the mandatory arrest language in the restraining order statute created any explicit or specific promise of protection. While the court acknowledged that officers are mandated to “act in accordance with the statute[,]” the court found “no language in the statute that holds officers liable for failing

101. Id. at 1049–52, 1054–55. In particular, the Massachusetts statute guided that police use all reasonable means to prevent domestic abuse, including

arresting any person whom the officer has probable cause to believe has committed a felony; . . . arresting any person who has committed, in the officer’s presence, a misdemeanor which involves abuse; . . . arresting any person whom the officer has probable cause to believe has committed a misdemeanor [related to domestic violence].

Id. at 1052 n.4 (citation omitted). Despite this statutory language, the police informed Caroline that there was nothing they could do about James’s harassment, that “they could not babysit her twenty-four hours a day[,]” and that her best option was to buy a gun “because the only way to deal with violence was violence.” Id. at 1049.

102. Ford, 693 N.E.2d at 1050.

103. Id. at 1051. After shooting Caroline, James fatally shot himself. Id.

104. Id. at 1051–52.

105. Id. at 1053 (citation omitted).

106. See id. at 1052 n.4 (citation omitted); supra note 101 (detailing terms of restraining order statute (detailing the terms of the Massachusetts restraining order statute MASS. GEN. LAWS ch. 209A, § 6(4-6) (2007)).

107. Ford, 693 N.E.2d at 1054.

108. Id.

109. Id. at 1050.
Therefore, Catherine’s reliance on the promise of protection in the restraining order was misplaced and could not afford her legal relief.\textsuperscript{111}

In \textit{Ariel v. Town of Kingston}, the Massachusetts Appeals Court was similarly unwilling to give a broad construction to the statute’s “explicit and specific assurances of safety or assistance” language.\textsuperscript{112} There, a driver came upon a road accident where the police were present and directing

\begin{itemize}
  \item[110.] \textit{Id.} at 1054–55.
  \item[111.] \textit{Id.} Not every state is so parsimonious when examining whether a restraining order imposes a tort-based duty on public employees to provide protection to the holder of the order. For example, in Tennessee, the special duty doctrine is applicable, in part, when “a public official affirmatively undertakes to protect the plaintiff and the plaintiff relies on the undertaking. . . .” \textit{Matthews v. Pickett County}, 996 S.W.2d 162, 165 (Tenn. 1999) (citing \textit{Chase v. City of Memphis}, 971 S.W.2d 380, 385 (Tenn. 1998); \textit{Ezell v. Cockrell}, 902 S.W.2d 394, 402 (Tenn. 1995)). In \textit{Matthews}, Mary Matthews was assaulted, beaten and sexually violated by her estranged husband, Bill Winningham, and subsequently obtained a restraining order against him. 996 S.W.2d at 163. The police nonetheless failed to arrest Bill, despite his repeated violations of the restraining order. \textit{Id.} at 164. Mary’s estranged husband eventually burned down her home, and Mary brought an action against the police for failing to enforce the terms of her restraining order. \textit{Id.} In contrast to the Massachusetts court’s analysis in \textit{Ford}, the Tennessee Supreme Court determined that Mary Mathew’s claim fit within the state’s special relationship exception. The court noted:

\begin{quote}[	extit{the order of protection in this case was not issued for the public’s protection in general. The order of protection specifically identified Ms. Matthews and was issued solely for the purpose of protecting her. . . . Ms. Matthews apparently relied on the court’s order of protection. She contacted the sheriff’s department and requested that it provide her with protection pursuant to the order of protection. Accordingly, the special duty exception to the public duty doctrine is applicable to this case.}]\end{quote}

\textit{Matthews}, 996 S.W.2d at 165 (citation omitted).

The state of Tennessee nonetheless imposes other obstacles to a victim’s attempt to enforce a protection right. Like Massachusetts, Tennessee grants victims the right to “protection and support with prompt action in the case of intimidation and retaliation from the defendant and the defendant’s agents or friends.” \textit{TENN. CODE ANN.} § 40-38-102(a)(2) (2006). However, the state’s victims’ rights statute undermines the enforceability of this protection right by mandating that a state actor’s

\begin{quote}[\textit{failure to comply with any provision of [the state’s victims’ rights laws] shall not create a cause of action or a claim for damages against the state, a political subdivision of the state, a government employee or other official or entity, and no such cause of action shall be maintained.}]\end{quote}

§ 40-38-108. So while a victim might be able to seek some refuge under the state court’s application of the special duty doctrine, see \textit{Matthews}, 996 S.W.2d 162, relief pursuant to the state’s victims’ rights laws is limited. § 40-38-108.

\begin{itemize}
\end{itemize}
traffic. The driver continued through the intersection when she had a green traffic signal and was hit by a driver who she claimed had been negligently directed into the intersection by one of the officers. The court conceded that the “police officers’ direction of traffic on a public way constitutes a form of providing police protection to the public.” Nonetheless, the court was unwilling to conclude that police traffic direction was either explicit or specific enough to fall within the scope of the statutory language imposing liability on state actors for failure to protect an individual from harm.

While a Massachusetts victim might be stymied in the ability to consistently seek relief under the special duty doctrine, a victim might attempt to assert that the promise of protection found in the state’s victims’ rights statute is sufficient to fall within the narrow window of liability created in the state’s tort claims act. Unfortunately, other provisions in Massachusetts’s state tort claims act further preclude relief to crime victims.

The state tort claims act directs that liability shall not be imposed for “any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer.” This statutory language indicates liability will be imposed only in those instances when a public employee’s acts fall short of the standards of due care. Therefore, the victim’s protection right is not absolute. An officer’s good faith efforts, which may nonetheless result in injury to the victim, will be shielded. The Massachusetts courts have also indicated that the immunities listed in the state tort claims act operate in the alternative. Even if a victim could make an argument that her protection claim fell within one of the statute’s immunity exceptions, the claim will still be barred if any of the other immunities could shield the state actor from liability.

Finally, specific terms within the Massachusetts’s victims’ rights laws themselves foreclose the victim’s ability to raise a claim against a state employee for failing to comply with the protection duties listed in the

113. Id. at 369.
114. Id.
115. Id. at 370.
116. Id.
117. MASS. GEN. LAWS ch. 258B, § 3(d) (2004) (stating that victims have the right “to receive protection from the local law enforcement agencies from harm and threats of harm arising out of their cooperation with law enforcement and prosecution efforts”).
118. Id. at § 10(j)(1) (stating that liability can be imposed for a “claim based on explicit and specific assurances of safety or assistance . . . made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances”).
119. MASS. GEN. LAWS. ch. 258, § 10(a) (emphasis added).
statute. Despite granting victims a host of “fundamental rights,” the Massachusetts legislature has nonetheless made clear that “[n]othing [within the victims’ rights legislation] shall be construed as creating an entitlement or cause of action on behalf of any person against any public employee, public agency, the commonwealth or any agency responsible for enforcement of rights and provision of services set forth in the state’s victims’ rights laws.” Hence, a victim’s expectation that state law guarantees the direct service of protection from the offender is likely to be satisfied in only the narrowest of situations.

One can extract many lessons from the Commonwealth of Massachusetts. First, even where a victim might be able to raise a special duty claim, success is not guaranteed. The victim will have to prove that the specific facts of her case satisfy the particular manner by which the courts have interpreted the scope of the special duty doctrine. Second, even if state law provides some initial ground upon which a protection right would exist, other statutory provisions often foreclose a victim’s ability to enforce that right or seek relief when the right is violated. Hence, most governmental promises of protection should be described as aspirational goals: “We hope, wish, desire, to provide victims with protection, but we are unwilling to fully guarantee it.”

D. Taking Away What Was Given: Internal Restrictions Within the CVRA

As the preceding discussion indicates, any assertion that the citizenry should expect protection from the government must be limited. Whatever initial glimmers of light the social contract theory might cast on a claim for government protection, they are immediately dimmed by the constitutional limits articulated by the Supreme Court in the DeShaney and

121. MASS. GEN. LAWS. ch. 258B, § 3.
122. Id. at § 10.
123. Such an outright disclaimer of liability is not unusual. An equally potent example of this limited liability can be drawn from an examination of state and federal sexual offender registry programs. Many of these laws specifically recite that they were passed with the goal of “protecting the public.” See Fla. Stat. Ann. § 755.21(3)(d) (2010); 42 U.S.C. § 14071(e)(2) (2006). While each program presents its own jurisdictional varieties, most require convicted sex offenders to register with an appropriate state or local agency, and then that agency is directed to release relevant information to the public regarding the registrant’s residence. However, most of these statutes grant immunity to state actors for their good faith conduct. See, e.g., Fla. Stat. Ann. § 775.21(9); 42 U.S.C. § 14971(f). For example, Ohio’s law guides that except in cases of malicious, bad faith, or wanton or reckless behavior, state actors will be “immune from liability in a civil action to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a power, duty, responsibility, or authorization” under the state’s sex offender registration laws. Ohio Rev. Code Ann. § 2950.12.
124. See supra Section II.A.
Gonzales decisions, as well as by existing statutory torts and the common law. In short, the promise of protection is highly ethereal, and enforced by courts in only the most select situations. Unfortunately, the protection right afforded to victims in the CVRA does little to overcome these problems.

The CVRA states that a victim has “[t]he right to be reasonably protected from the accused.” On its face, this language would appear to impose a statutory duty on the government to provide victims with protection. However, a closer examination of the statutory language and its legislative history reveals that the protection right is actually quite limited in its scope, and its enforceability is even narrower.

Even the framers of the CVRA, who in one breath used grand language regarding victim protection, in the next breath acknowledged that the right is far narrower than suggested from a plain reading of the statute’s terms. For example, in presenting the CVRA to Congress, Senator Kyl commented that: “Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after and during breaks in the proceedings.”

The Federal Attorney General Guidelines regarding victim services under the CVRA echo Senator Kyl’s limiting language. The Guidelines direct that, where possible, separate waiting areas should be provided to victims at trial or at parole hearings. The Guidelines also note that victim protection services could also include “aiding a victim in changing his or her telephone number[,] to the extreme measure of proposing the victim for inclusion in the Federal Witness Security Program.” What is telling about the Attorney General Guidelines, is that

125. See supra Section II.B.
126. See supra Section II.C.
128. See supra notes 3–4 and accompanying text.
129. 150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); see also Kyl et al., supra note 3, at 596. As was brought to my attention by Professor Douglas Beloof, there are certainly grounds to contend that providing victims with a secure waiting area has value. Without the assurance of a secure waiting area, victims might be less willing to voluntarily participate in the criminal proceedings, and thereby might decline to exercise their other rights under the CVRA, such as the right to not to be excluded from the proceedings, and the right to be reasonably heard at plea, sentencing and parole proceedings. See 18 U.S.C. § 3771(a)(2)–(3).
131. Id.
132. Id. at 25. One must question, whether, except for the most extreme of circumstances, crime victims would consider participation in the Federal Witness Security Program a desirable right afforded under the CVRA, much less an appropriate response to their victimization.
they make clear that the Guidelines should in no way be construed to “require personal protection of a victim, such as by bodyguards.” Finally, and perhaps hinting at the “reasonableness” qualification that appears in the statute, the legislative history of the CVRA suggests that the victim’s right to be reasonably protected from the accused includes considering the victim’s safety in the course of court determinations regarding a defendant’s release pending or during trial. As noted by Senator Kyl, “the right to protection also extends to require reasonable conditions of pre-trial and post-conviction [release] that include protections for the victim’s safety.”

Legislative intent and administrative materials analyzing the CVRA suggest that certain actions can be taken on behalf of victims, which might serve as a means to afford them safety. At one end of the spectrum, the CVRA could provide protection to victims by giving them separate waiting areas during the defendant’s trial or at a parole hearing. At the other end of the spectrum, victims could enroll in a witness protection program. And somewhere in the middle, there is the hint that the right to reasonable protection is related to decisions about the defendant’s release or parole. As I will discuss later, it is this latter formulation that I believe gives greatest meaning to the victim’s right to reasonable protection from the accused. However, regardless of how one interprets the current meaning of the CVRA’s protection language, the statute severely limits a victim’s ability to enforce her protection right.

First, the CVRA uses largely deferential language in describing the duties the statute imposes on the courts and Department of Justice employees. Courts are imposed with the seemingly mandatory command that they “shall ensure” that crime victims are afforded their rights. As a matter of statutory construction, the word “shall” is generally interpreted as mandating certain action, while the word “may” is permissive in nature. See, e.g., Alatech Healthcare, L.L.C. v. United States, 89 Fed. Cl. 750, 753 (Fed. Cl. 2009) (quoting BLACKS LAW DICTIONARY); LeMay v. United States Postal Service, 450 F.3d 797, 799 (8th Cir. 2006); Keith v. Rizzuto, 212 F.3d 1190, 1193 n.3 (10th Cir. 2000); see also 82 C.J.S. Statutes § 498 (2009). However, the Supreme Court was unwilling to employ this generally accepted approach to statutory construction when it interpreted the mandatory language appearing in Jessica Gonzales’ restraining order and the identical language appearing in state statute. See supra notes 35–51 and accompanying text. Nonetheless, since the passage of the CVRA, it appears that there have been several courts that have taken the statute’s mandatory language to heart and have taken steps to ensure that victims are
Prosecutors are held to a lesser standard, being directed that they, along with other Department of Justice employees, shall use their “best efforts” to accord victims their rights.\textsuperscript{140} Despite the mandatory “shall ensure” language imposed on the courts, and the more relaxed “best efforts” language directed to other government employees, the CVRA nonetheless relieves all such actors from any individual damage liability for failure to comply with the statute’s terms. The statute further explicitly disclaims that it creates or imposes any specific duties on behalf of the United States or its officers, the breach of which could result in a claim for damages.\textsuperscript{141} At most, employees who willfully or wantonly fail to comply with provisions of the law could be disciplined.\textsuperscript{142} Therefore, regardless of what promise of protection the CVRA makes to victims, it is wholly undermined by the statute’s disclaimer of any actionable duty imposed on government employees to fulfill the law’s terms.

Second, to the extent that the CVRA grants victims a means to enforce their rights under the CVRA, their remedies are limited. Under the statute’s enforcement terms, victims are permitted to submit a motion for relief to the district court in which the defendant is being prosecuted or where the crime occurred.\textsuperscript{143} If the court denies the victim’s motion for relief, the victim is permitted to petition to the relevant court of appeals with a writ of

\begin{itemize}
  \item § 3771(c)(1).
  \item Id. The statute reads:

  
  Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.

  
  Id.
  \item 142. 28 C.F.R. § 45.10(e)(1) (2009). Specifically, the regulation guides that:

  
  If, based on an investigation, the [Victims’ Rights Ombudsman] VRO determines that a Department of Justice employee has wantonly or willfully failed to provide the [victim] with a right listed in [the CVRA], the VRO shall recommend, in conformity with laws and regulations regarding employee discipline, a range of disciplinary sanctions to the head of the Office of the Department of Justice in which the employee is located, or to the official who has been designated by the Department of Justice regulations and procedures to take action on disciplinary matters for that office.

  
  Id. Government employees who fail to provide victims their rights, but do so in a manner that is not willful or wanton manner, must undergo additional training on victims’ rights. See Id. at § 45.10(d).
  \item 143. 18 U.S.C. § 3771(d)(3).
\end{itemize}
mandamus.144 Even if the appellate court finds that the victim’s rights were violated, the victim’s remedies are limited to re-opening a plea or sentencing hearing, and then only if a variety of additional statutory requirements are satisfied.145 Therefore, if a victim believes she has been denied her “right to be reasonably heard at any public proceeding in the district court involving . . . plea [or] sentencing,”146 then the CVRA affords her some relief. However, if the victim believes she has been denied any of her other rights under the statute,147 including the right to be reasonably protected from the accused, she has no specific means to seek redress for those violations.

The CVRA’s protection right presents many of the same problems that arise with the state-based protection rights granted to victims.148 While the terms of the protection right could be read broadly, upon further investigation, it becomes obvious that the promise of protection is by no means clear, and its enforcement precarious. At a minimum, the right promises something that cannot be fulfilled, thereby creating unrealistic expectations in victims regarding what they can expect from the criminal justice system. One can only assume that Jessica Gonzales and Catherine Ford were sorely confused and disappointed to learn that the promises of

144. Id.
145. Id. § 3771(d)(5). Specifically, the statute states:

A victim may make a motion to re-open a plea or sentence only if (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days [of the denial of the right]; and (C) in the case of a plea, the accused has not pled to the highest offense charged.

Id.
146. Id. § 3771(a)(4).
147. The other rights afforded to victims under the CVRA include:

[t]he 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; [t]he 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; . . . [t]he reasonable right to confer with the attorney for the Government in the case; [t]he right to full and timely restitution as provided in law; [t]he right to proceedings free from unreasonable delay; [and] the right to be treated with fairness and with respect for the victim's dignity and privacy.

Id. at §§ 3771(a)(2), (3), (5)–(8).
148. See supra Section II.C.
protection upon which they relied meant very little. Such unfulfilled promises are problematic and should give victims’ rights advocates pause.

When victims’ rights laws make promises to victims that cannot be fulfilled, the very effectiveness, legitimacy and power of those laws are undermined. Most victims enter the criminal justice system traumatized and untrusting as a result of their victimization. Making promises to victims that can quickly and easily evaporate does little to bolster victim participation or trust in the laws passed for their benefit. Hence, a promise of protection may cause more harm to victims than it does to help them.

However, the limitations that currently undermine the victim’s protection right are redeemable. First, the other rights granted to victims under the CVRA, and the means by which victims can enforce those rights, provide a model for how to approach the victim’s protection right. Second, federal law provides analogous examples of how victim safety and protection concerns can be addressed. These alternative examples are best explained through procedural justice theory, and the victim’s protection right should also be viewed in this context.

In order to best understand how procedural justice theory can provide more substance to the victim’s protection right, we must step back and engage in a broader view of how the criminal justice system has incorporated, and currently incorporates, the victim in the prosecutorial process. The ensuing discussion will be both historical and theoretical, charting the rise and fall of the victim within the criminal justice system, the theoretical constructs that have influenced the ebb and flow of victim prominence, and the eventual emergence of the victims’ rights movement. Out of this historical and theoretical review, I conclude that procedural justice theory provides the best explanation for why victims and their interests should be incorporated into standard criminal processes. Therefore, when crafting victims’ rights laws, legislators’ should treat as paramount procedural justice principles. In so doing, procedural justice theory can bring meaning and enforceability to the victim’s CVRA protection right.

149. See supra note 50 and accompanying text regarding Town of Castle Rock v. Gonzales; supra note 110 and accompanying text regarding Ford v. Town of Grafton.
150. See infra note 212 and accompanying text.
151. See infra notes 212–216 and accompanying text.
153. See infra notes 327–334 and accompanying text.
154. See infra Section III.
III. A THEORETICAL REVIEW: THE VICTIM IN THE CRIMINAL PROCESS

A. The Rise and Fall of Victim Primacy

In our earliest criminal justice systems, the victim was responsible for holding the perpetrator accountable for his wrongful acts. In the closely-knit fabric of tribal and family-based cultures, individual victim responses to criminal wrongdoing established the norms for appropriate retaliation and compensation for criminal deeds.155 As these early systems developed, the offender was often required to provide direct restitution to the victim for the harm she suffered.156 Therefore, it made sense that the victim was the primary party vested with the power to bring actions against the liable party. If the person who would benefit most from the proceeding was the victim, then the victim should possess a primary role in overseeing and controlling that event.157

A victim-centered private prosecution model dominated for much of our nation’s early formation.158 However, around the time of the American Revolution, the focus and structure of the American criminal justice system began to evolve.159 Crime shifted from being viewed as an injury suffered by a discrete individual to a violation “which tears at the fabric of our peace and community.”160 Philosophers and governmental leaders stopped viewing crime as a personal and isolated episode between a victim and offender, and instead as an event that implicated broader concerns of how we relate to and function with one another as a community.161 Essentially, crime represented a breach of the social contract.162 The core reason, then, for a criminal justice system was to serve the interests of society by consistently and systematically holding accountable those who breached the

156. See Cellini, supra note 16, at 841 (referencing the requirement of restitution to victims as appearing in Code of Hammurabi, the Old Testament, Greek and Roman penal codes, and early Anglo-Saxon law); McDonald, supra note 11, at 652–53 (“a system of restitution by the offender to the victim... was an accepted goal of the system.”).
159. See Cellini, supra note 16, at 844–47.
162. See supra notes 16–19 and accompanying text.
social contract. Therefore, it was inappropriate to allow individual victims, and their potential desires for revenge and vengeance, to control the process. A criminal justice system that delegates to victims the task of seeking justice could result in unmanageable blood feuds and undermine ordered society. Instead, a state sanctioned system would more likely assure fair and efficient prosecutions.

It is folly, however, to argue that criminal prosecutions should be entirely cleansed of the human desire for vengeance or revenge: “[T]he basic urge for [vengeance] is a cultural universal, across time and place, and it establishes itself early in life.” While there are legitimate reasons to temper individual and unfettered acts of vengeance, “most typical, decent, mentally healthy people have a kind of commonsense approval of some righteous hatred and revenge.” Nor should revenge be viewed entirely as a destructive emotion to be eliminated and banished from the law. In fact, some scholars have contended that revenge should be viewed as “an ennobling, as well as an enabling, concept.” One scholar points out:

Revenge cultures encompassed a sense of self worth; that is, the recognition that no one had the right to inflict unprovoked harm upon another, and that when another did so, it was the victim, and not the community at large, who had primarily been wronged. As such, the victim had the right (or in some cultures the duty), to personally recapture his respect and honor. In effect, cultures which permitted revenge, allowed those victims strong enough (or from families with sufficient strength) to erase the psychological stigma of their victimhood.

163. McDonald, supra note 11, at 652, 655–66; see also Cellini, supra note 16, at 847–56 (discussing a time line of victims’ rights and the development of the law up to present day); Tobolowsky, supra note 155, at 25–26 (discussing reasons for shifting the control of the process).


167. See Eisenstat, supra note 164 at 1148.

168. Id. at 1149.
Therefore, a legal system which acknowledges victim vengeance, or at the very least, the victim’s desire to see justice, should not, in and of itself, be viewed as faulty. The more relevant concern is how a criminal justice system should effectively marshal these core human emotions.

B. The Public Prosecution Model

Most legal theorists have concluded that a state-controlled public prosecution model is the appropriate means by which to impliedly acknowledge the individual victim’s desire for justice, while also emphasizing the social contract ideal that crime represents a wrong committed against all of society and requires a formal, state-sanctioned response. Accordingly, under the development of the public prosecution model, criminal trials shifted from being victim-controlled events to being public affairs, which were initiated, overseen, and marshaled by professional prosecutors. As a result of this philosophical shift, however, the individual harm suffered by the victim was transformed into a proxy of the harm suffered by the collective state. Criminal prosecutions increasingly focused on balancing society’s interests in maintaining safety and civil order against the defendant’s liberty interest, and less on any interests the victims might have had in the proceeding. Victim centered restitution measures fell to the wayside, and incarceration became the dominant form of punishment.

Two competing value systems have shaped the public prosecution model and contributed to diminishing the victim’s place within the criminal justice system. As originally articulated by Professor Herbert L. Packer, the Crime Control and Due Process Models served to collectively assure that the criminal justice system furthered the goals of the social contract. The Crime Control Model is “based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process.” This model focuses on efficient crime control, and suggests that governments prosecute crime to further the broader interests

169. See, e.g., Cellini, supra note 16, at 843–44; Tobolowsky, supra note 155, at 103.
171. Id. at 845.
172. Id. at 846–47.
173. Id. at 847–48; Tobolowsky, supra note 155, at 26.
of society, rather than the interests of individual crime victims. As stated by Professor Packer, “[t]he failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom.” The system’s swift response to criminal behavior serves to correct the offender’s breach of the social contract, and also serves to deter those contemplating future breaches of the social contract. The Crime Control Model also serves to maintain the citizenry’s trust that their government will fulfill the task of holding accountable those who have violated the contract. Through the swift and efficient response to crime, the government sends an important message to the governed: “We acknowledge your harm and seek to eliminate any further harm.”

The Crime Control Model aligns nicely with utilitarian justifications for our criminal justice system. Utilitarian theory broadly states that the primary goal of any moral system is to maximize happiness. In the context of criminal law, utilitarianism posits that there are three primary justifications for why we prosecute and punish offenders. First, prosecution and punishment is justified to deter the current offender from committing future crimes (specific deterrence) as well as to deter members of the public from committing similar wrongs (general deterrence). Second, prosecutions and subsequent incarcerations are justified as a means to incapacitate the offender from committing additional crimes. Finally, a utilitarian approach to prosecution and punishment asserts that the

176. See Packer, supra note 174, at 10–11.
177. Id. at 9.
178. See id. at 10–11.
179. See Roach, supra note 175, at 677.
181. Christopher, supra note 180, at 857.
The rehabilitation of the offender will result in an overall social good.\textsuperscript{183} The Crime Control Model’s goal to repress criminal conduct and maintain social order fulfills these utilitarian ideals.

Conversely, the Due Process Model focuses on “the reliability of fact finding processes.”\textsuperscript{184} If, according to Professor Packer, the Crime Control Model could be likened to an assembly line down “which moves an endless stream of cases,”\textsuperscript{185} the Due Process Model is akin to an “obstacle course.”\textsuperscript{186} While the desirability of repressing crime is not disregarded under the Due Process Model, it emphasizes that in prosecuting crime, the “primacy of the individual [defendant] and the complementary concept of limitation on official power” should be central.\textsuperscript{187} The Due Process Model seeks to prevent and eliminate any mistakes the state might make during the adjudicative process that could result in the government’s abuse of its prosecutorial power.\textsuperscript{188}

By counterbalancing the Crime Control Model with the Due Process Model, the goals of the social contract can be fulfilled in a holistic manner.\textsuperscript{189} In departing from a state of nature and creating structured societies, citizens ceded to the government their individual ability to protect themselves along with the right to fulfill any private vengeance against wrongdoers.\textsuperscript{190} The Crime Control Model assures that crime will be addressed swiftly and efficiently, thereby restoring the social order undermined by the criminal’s acts. However, in order to ensure that the state does not abuse the prosecutorial power granted to it by the citizenry, the Due Process Model imposes limits on the Crime Control Model.\textsuperscript{191} “The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.”\textsuperscript{192} In this regard, the Due Process Model can be aligned with a retributive approach to criminal justice theory.\textsuperscript{193}

\begin{itemize}
  \item[183.] Christopher, supra note 180, at 857.
  \item[184.] Packer, supra note 174, at 14.
  \item[185.] Id. at 11.
  \item[186.] Id. at 13.
  \item[187.] Id. at 16.
  \item[188.] Id.
  \item[189.] See Cellini, supra note 16, at 841.
  \item[190.] Packer, supra note 174, at 10.
  \item[191.] See id. at 13.
  \item[192.] Id. at 15.
  \item[193.] Philosophers tend to argue that one must be either a utilitarian or retributivist when discussing what, how, and why we acknowledge and punish crime. See, e.g., Christopher, supra note 180, at 845–55; Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. REV. 65, 66–67 (1999). Cf. Benjamin B. Sendor, Restorative Retributivism, 5 J. CONTEMP. LEGAL ISSUES 323, 335 (1994) (adopting a “pluralist” approach to criminal theory). Conversely, lawmakers tend to be far more willing to coalesce the theories. See, e.g., 18 U.S.C. § 3553(a)(2) (2006) (showing that United States Sentencing Guidelines combine both utilitarian and retributive justifications for calculating a defendant’s sentence).
\end{itemize}
Retributive theory is generally rooted in a concern that any official response to criminal behavior should be tempered and controlled, rather than represent an unadulterated expression of victim revenge. Retributivists contend that in order to justify the criminal justice system and its resulting punishments, the offender’s punishment must be limited to that which he exactly deserves. In this regard, retributivists invoke Immanuel Kant’s maxim that each should “[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” According to general retributivist theory, criminal prosecutions and their resulting punishment should ensure that the offender bears the burden of his unlawful acts only in direct proportion to the harm he caused. The punishment must fit the crime, no more and no less. Should the punishment advance any other purpose, such as deterring future crime or rehabilitating the offender, retributivists argue the criminal justice system runs afoul of Kant’s maxim that we should not treat one another as means to an end.

When examining how these theories may help further advance the victim’s role in the criminal justice system, and more specifically, give value to the victim’s right of protection from the accused, I place myself in the latter camp. The extensive body of legal and philosophical scholarship makes clear that there likely cannot be one unified or perfect theory for why we prosecute crimes or why we should (or should not) seek to more fully integrate victims into the criminal process. See generally Frase, supra note 180; Haist, supra note 180. However, these divergent and sometimes conflicting theories nonetheless help better inform the conversation of “why,” and hence should not be discarded merely because one or the other cannot perfectly respond to all the challenges posed against them.

194. There is a vast body of literature regarding retributive justifications for the criminal justice system. A quick review of this literature makes clear that even among retributivist scholars, clearly defining retributivism can be a tricky task. See, e.g., Christopher, supra note 180, at 865–67 (noting different variations of retributivism).


196. See Christopher, supra note 180, at 848. It is here where a retributive approach to criminal theory dovetails with Professor Packer’s Due Process Model. See supra notes 184–187 and accompanying text. To the extent that retributive theory seeks to ensure that only the guilty be punished, and only to the extent which they deserve, one can draw a parallel with Professor’s Packer’s Due Process Model, in that when prosecuting crimes, the “primacy of the individual [defendant] and the complementary concept of limitation on official power” must be acknowledged. Packer, supra note 174, at 16.

197. In this regard, retributivists tend to claim their approach to criminal punishment is superior to a utilitarian approach. See Christopher, supra note 180, at 933. However, Professor Russell Christopher raises a compelling argument that retributivists may be just as guilty as utilitarians in treating individuals as a means to an end. Id. In contrast to assertions that utilitarianism uses offenders as a means to achieve positive ends, such as reduced crime rates or a safer community, Professor Christopher accuses retributive theory of using victims as a means to the end—determining the just punishment of the offender. Christopher, supra
Similarly, traditional retributive theory rejects any argument that the criminal justice system should be attuned to victim interests. Shifting our attention from “what does the offender deserve?” to “what does the victim want?” would become immediately utilitarian. For example, an overly vengeful victim may desire an inappropriately harsh sanction for the offender, while conversely, a particularly forgiving victim may not desire any punishment at all. Such a state of affairs would undermine the retributivist goal of ensuring that punishment is imposed based only on desert. Professor Packer’s Due Process Model furthers this retributive goal by imposing throughout the prosecutorial process certain “quality control” checks to ensure that only those genuinely worthy of punishment receive their just deserts. The public prosecution model, shaped by Professor Packer’s theories, strives to ensure that crimes are dealt with swiftly and efficiently, but that defendants are also treated fairly and are not subject to unfettered victim desires for revenge. However, by focusing on the balance between the desires of society and the rights of the defendant, the public prosecution model pushed victims to the sidelines. Victims could report the crime and provide evidence when called upon by the state, but were otherwise expected to “behave like Victorian children—seen but not heard.” Even more harshly put, 

[s]ince crime was conceptualized as an event that threatened and offended the entire community, and was prosecuted by the state on behalf of an abstraction (i.e. “the People”), the real flesh-and-blood victim was treated

---

note 180, at 933–53.
199. See Christopher, supra note 180, at 933.
202. Kenna v. U.S. District Court, 435 F.3d 1011, 1013 (9th Cir. 2006).
just like any other piece of evidence, a mere exhibit to be discarded after the trial.203

Thus, in direct contradiction to Kant’s edict, the victim was rendered a mere means to an end by which the state could fulfill its interest in holding accountable those who had breached the social contract.204

The public prosecution model also stripped victims of any legal or enforceable interest they may have otherwise held in an action against the offender. This reality was highlighted in the Supreme Court’s ruling in Linda R.S. v. Richard D.205 In Linda R.S., a single mother brought an action challenging the state prosecutor’s failure to bring a criminal action against the father of her child for not paying child support.206 The state prosecutor declined to bring such an action, as the state had consistently interpreted the child support statute as applying only to the parents of legitimate children and not to the parents of children born out of wedlock.207 The Supreme Court rejected the mother’s case against the prosecutor, holding that she lacked standing.208 According to the court, even if the mother and her child were indeed victims of the father’s failure to pay child support, the mother did not possess a legally recognized interest to compel any action by the government on her behalf. The Court reasoned that “in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”209 Linda R.S. might have been harmed, but under a public prosecution framework, the lack of official response to her harm was not something about which she had legal grounds to complain.210 At most, she was reporting as a witness, rather than someone with a direct interest in the case and its outcome.

203. Andrew J. Karmen, Who’s Against Victims’ Rights? The Nature of the Opposition to Pro-victim Initiative in Criminal Justice, 8 ST. JOHN’S J. LEGAL COMMENT. 157, 158 (1992); see also Aynes, supra note 5, at 68 (suggesting that victims are not so much forgotten by the criminal justice system, but rather used by it).
204. McDonald, supra note 11, at 650 (“In contemporary criminal justice the victim serves only as a means to an end, namely, a piece of evidence to be used by the state to obtain a conviction. The only concern that the state has for the victim is his willingness to cooperate and his ability to be a convincing witness.”); see also Christopher, supra note 180, at 851 (discussing how retributive theory treats victims as a means to an end).
205. 410 U.S. 614 (1973); see also Belof, Weighing Crime Victims’ Interests, supra note 158 at 1141–44 (discussing the Linda R.S. case).
207. Id.
208. Id. at 619.
209. Id. The Court did note, however, that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” Id. at 617 n.3.
210. Under the public prosecution framework, the prosecutor is also given a great deal of discretion to decide whether and under what circumstances to bring criminal charges. See, e.g., United States v. Batchelder, 442 U.S. 114, 124–26 (1979); Hardwick v. Doolittle, 558
The public prosecution model, therefore, moored in its utilitarian and retributive foundations, largely disregards the interests victims have in criminal prosecutions. Being a victim of crime does not create a right to see that offense prosecuted, or a right to see the offender brought to justice. However, victims have railed against their diminished status. Over the last thirty years, they have reshaped how the criminal justice system responds to, and integrates victims into the criminal process.

C. Victims Respond: The Emergence of the Victims’ Rights Movement

Victim dissatisfaction with their treatment under the public prosecution model spurned the victims’ rights movement. Of course, the direct and immediate impact of crime tends to leave victims awash in feelings of powerlessness, isolation, shame, anger, and fear. However, many studies indicate that victims are often more affected by their treatment throughout the course of their limited involvement in the prosecutorial process than by the crime itself. As noted by the framers of the CVRA,

[i]n case after case we found [that] victims, and their families, were ignored, cast aside, and treated as non-participants in a critical event in their lives. They were kept in the dark by prosecutors to [sic] busy to care enough, by judges focused on defendant’s rights, and by a court system that simply did not have a place for them.

Sociological studies have further indicated that as a result of this so called “secondary victimization,” victims’ self-esteem, faith in the future, trust in the legal system, and belief in a just world are undermined to depths beyond


any personal suffering resulting from the crime itself.\footnote{215} One victim stated that her “sense of disillusionment with the judicial system is many times more painful [than the crime itself]. I could not, in good faith, urge anyone to participate in this hellish process.”\footnote{216} In response to this overwhelming victim dissatisfaction, both individual states and the federal government began passing victims’ rights laws. Over the last thirty years, every state has enacted some form of victims’ rights legislation and nearly two-thirds have passed amendments to their state constitutions granting victims’ rights in the criminal justice process.\footnote{217} The same is true on the federal level. Since the early 1980s, Congress has passed a series of progressively effective victims’ rights laws, the most recent being the CVRA.\footnote{218}

Vic]

Victims’ rights advocates tend to advance two core arguments for why victims’ rights laws are necessary. First, advocates have argued that the justice system needs to do a better job at acknowledging victims’ interests in criminal proceedings.\footnote{219} Even within the context of the public prosecution model, an individual has suffered harm and that harm should be acknowledged.\footnote{220} As aptly expressed by one victim, “The State of New

\begin{footnotes}
\footnote{215} See Marilyn Peterson Armour & Mark S. Umbreit, The Ultimate Penal Sanction and “Closure” for Survivors of Homicide Victims, 91 MARQ. L. REV. 381, 415 (2007); see also Erez & Tontodonato, supra note 213, at 393–94 (noting prevailing victim dissatisfaction with treatment by the criminal justice system); Uli Orth, Secondary Victimization of Crime Victims by Criminal Proceedings, 15 SOC. JUST. RES. 313, 314 (2002) (noting additional psychological harm suffered by victims as a result of contact with the criminal justice system); Tobolowsky, supra note 155, at 27 (noting studies examining “the psychological impact of victimization on victims, as well as the impact of their significant exclusion from the criminal justice process.”); Pamela Tontodonato & Edna Erez, Crime, Punishment and Victim Distress, 1994 INT. REV. VICTIMOLOGY 33, 34–36 (1994) (examining the effect of victim participation in the prosecutorial process on victim distress).


\footnote{217} See, e.g., ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2; CAL. CONST. art. 1, § 28(a)–(b); COLO. CONST. art. II, § 16a; CONN. CONST. art. XXIX; FLA. CONST. art. 1, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. 1, § 8; IND. CONST. art. I, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; ME. CONST. art. 47; MICH. CONST. art. 1, § 24; MISS. CONST. art. 3, § 26A(1); MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. 1, § 8; N.J. CONST. art. 1, ¶ 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. 2, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. 1, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. 1, § 35; Wis. Const. art. 1, § 9m.

\footnote{218} For a more in depth history of Congress’s passage of victims’ rights laws and the collateral attempt to pass a victims’ rights amendment to the U.S. Constitution, see Aaronson, supra note 211, at 626–34; Cassel, supra note 211, at 865–70; Kyl et al., supra note 3, at 583–91.

\footnote{219} 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (arguing that “[v]ictims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm.”).

\footnote{220} See Beloof, Weighing Crime Victims’ Interests, supra note 158, at 1149 (“The
York was not kidnapped, beaten, and raped. I was. Second, advocates have argued that the criminal justice system should seek ways to avoid imposing secondary harm on victims during the prosecutorial process. It is here that Professor Douglas E. Beloof, a leading victims’ rights advocate and scholar, has suggested that, in conjunction with Professor Packer’s models for the criminal justice system, a third model should be added: the Victim Participation Model.

In contrast to the Crime Control Model, which values the efficient prosecution of crime for the benefit of society, and the Due Process Model, which values the procedurally fair prosecution of crime for the benefit of defendants, the core value of the Victim Participation Model is victim primacy. Inherent in recognizing the primacy of the victim is an acknowledgment that the victim should be treated with dignity, respect, and fairness. In this regard, the Victim Participation Model asserts that victims should be granted “due-process like” rights to actively participate in the prosecution of the offender. By providing victims participatory rights, the Victim Participation Model seeks to alleviate the two core harms suffered by victims:

The first harm is primary harm, which results from the crime itself. The other harm is secondary harm, which comes from governmental processes and governmental actors within those processes. . . . The primary harm is a basis for victim participation in the same way that harm to an individual, coupled with a legitimate theory of the liability of another, is the basis for standing in other legal contexts. The potential for secondary harm federal and state victims’ rights laws legitimize crime victim harm upon which victims’ interests in justice and minimizing secondary victimization are based.”


222. See supra notes 215–216 and accompanying text; see also Beloof, The Third Model, supra note 175, at 294–96 (noting that the criminal justice system should take into consideration minimizing secondary harm to the victim); Beloof, Weighing Crime Victims’ Interests, supra note 158, at 1149 (noting that a goal of victims’ rights laws is to minimize secondary victimization); Kelly, supra note 220, at 21 (advocating for increased victim participatory rights in the criminal justice process).

223. See supra notes 174–193 and accompanying text.

224. Beloof, The Third Model, supra note 175, at 292.

225. Id. at 295–96.

226. Id. at 293.

227. Id. at 294. These include the “rights to notice and attendance, and the right to speak to the prosecutor and the judge.” Id.
provides a significant basis for a victim’s civil rights against governmental authority.  

Victim participation in the prosecutorial process acknowledges both of these harms, and in so doing, honors the victim. The question remains how to effectively integrate the Victim Participation Model into a public prosecution system, where utilitarian and retributive foundations have largely disregarded the victim. It is here where I believe procedural justice can serve as the appropriate conduit to expand both the utilitarian and retributivist approaches to the public prosecution model and to provide the victim, through Professor Beloof’s Victim Participation Model, a more grounded role and place within the criminal justice system.

D. Procedural Justice and the Victim

Procedural justice theory generally posits that an individual’s evaluation of the fairness of a decision is not based only on the final conclusion reached by decision makers, but also on the process by which the authorities reached that conclusion. This discipline evolved out of social science research that sought to evaluate litigant satisfaction in case outcomes based on the process by which those outcomes were reached. As procedural justice theory has evolved, its focus has broadened to include concerns not only about a fair decision-making process, but also concerns

---

228. Id. at 294–95 (citations omitted).
229. See infra notes 233–247 and accompanying text.

It should be noted the concept of procedural justice should not be used as shorthand for procedural due process, or as a substitute for the established rules of criminal procedure. Rather, procedural justice is a broader concept that seeks to evaluate individual perceptions of the fairness regarding official decision making processes and their associated outcomes. Of course, it is generally accepted that if a criminal proceeding is held in accordance with the Rules of Criminal Procedure, and affords the defendant procedural due process, the proceeding and its end result can be deemed to be fair. However, because the law is unwilling to formally extend to victims a protectable legal interest in criminal proceedings in the same fashion as is granted to the state and defendant, invocations of procedural due process and standard legal procedure are misplaced. However, under the broader umbrella of procedural justice, crime victims can nonetheless make a case for exercising more of a voice in criminal actions.
about whether those impacted by the decision were treated fairly throughout the process.\textsuperscript{231} 

In their earliest iterations, procedural justice theorists focused on the intersection between an individual’s evaluation of an official decision and the process by which that decision was reached.\textsuperscript{232} As advanced by John Thibaut and Laurens Walker, this “process control” approach to procedural justice asserts that

[a] process in which litigants feel that they have the opportunity to express their point of view fully and in which the decision maker is perceived as having listened to and considered their side’s arguments will promote a sense of fair treatment and thus a sense of satisfaction with the court experience.\textsuperscript{233}

Studies indicated that individuals who received unfavorable outcomes, but who nonetheless perceived that they were able to fully express their views during the proceeding, were more satisfied with their overall experience than those who received favorable outcomes, but had less of an opportunity to express their views.\textsuperscript{234} At a minimum, the former were more likely to think the outcome was fair because of their level of participation in the process.\textsuperscript{235}

But why should it matter that a process is perceived to be fair? Procedural justice theorists contend that a fair process helps the participant shape his or her beliefs about the legitimacy of those making the decisions

\textsuperscript{231} See infra notes 248–275 and accompanying text.

\textsuperscript{232} See, e.g., Casper et al., supra note 230, at 485–87 (discussing “[a] variety of factors [that] are typically said to influence a citizen’s satisfaction with an encounter with a legal institution, including case outcome, distributive justice, and procedural justice.”).

\textsuperscript{233} Id. at 486.

\textsuperscript{234} Id. at 486–87; see also Tom R. Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DePaul L. REV. 661, 663 (2007) [hereinafter The Findings of Psychological Research]. Six criteria are relevant in evaluating the fairness of a legal proceeding. Tom R. Tyler, What is Procedural Justice: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 LAW & SOC’Y REV. 103, 104–05 (1988) [hereinafter What is Procedural Justice]. They include consistency, bias suppression, accuracy of information, the ability to appeal or correct wrong decisions, the ability to have access or input at all levels of the decision making process (sometimes termed “representativeness”), and ethicality. Id. The last factor, ethicality, “refers to the degree to which the decision-making process accords with general standards of fairness and morality.” Id. at 105. The six factors were identified by Gerald S. Leventhal, who built upon the work of John Thibaut and Laurens Walker. See Hea Jin Koh, “Yet I Shall Temper So Justice with Mercy”: Procedural Justice in Mediation and Litigation, 28 LAW & PSYCHOL. REV. 169, 170 (2004); Tyler, What is Procedural Justice, supra note 234, at 104–05.

\textsuperscript{235} See Tyler, The Findings of Psychological Research, supra note 234, at 664 (suggesting that “hav[ing] an opportunity to state their case” makes a legal process fair in the eyes of the public).
and subsequently leads to the participant’s increased compliance with the law and future cooperation with authorities.\textsuperscript{236} For example, in a 1997 study, researchers examined the impact fair procedures had on spousal assault recidivism rates.\textsuperscript{237} The study revisited surveys completed in Minneapolis in the early 1980s, which suggested that if police arrested individuals charged with spousal abuse, rather than taking other actions such as mandating a “walk around the block” to ease tensions or issuing a warning to the parties, the arrestees would engage in fewer subsequent violent acts.\textsuperscript{238} The 1997 follow-up study found that when a defendant was arrested, but felt like the process he or she received was fair, the arrestee’s rate of recidivism was lower than for those defendants who did not believe they encountered fair procedures.\textsuperscript{239} Similarly, the rate of recidivism between those who were arrested but perceived that they were treated fairly, and those who were not arrested, was similar.\textsuperscript{240} Therefore, fair procedures, even if associated with unfavorable outcomes, were more likely to result in long-term compliance with the law.\textsuperscript{241} Hence, from a utilitarian perspective, a system that is perceived as fair may ultimately result in a greater social good. The citizenry will have more faith in the system, be more willing to cooperate with the police and follow the law, and be more likely to comply with any individual sanctions imposed on them.\textsuperscript{242}

One might question, however, whether these process control benefits matter to victims. This strain of procedural justice seeks to gain (or maintain) the favor of those who have been sanctioned in some manner. The hope is that by treating these individuals fairly, the utilitarian goals of specific and general deterrence are furthered.\textsuperscript{243} A fair process and punishment are more likely than a seemingly unfair process or punishment

\begin{itemize}
\item \textsuperscript{236} See \textit{id.} at 676–77.
\item \textsuperscript{238} \textit{id.} at 163–64.
\item \textsuperscript{239} \textit{id.} at 190.
\item \textsuperscript{240} \textit{id.} at 163.
\item \textsuperscript{241} The inverse, therefore, would also be true. “People who have experienced a procedure they judge to be unfair are not only less respectful of the law and legal authorities, they are less likely to accept judicial decisions and less likely to obey the law in the future.” Tom R. Tyler, \textit{The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings}, 46 SMU L. REV. 433, 439 (1992) [hereinafter \textit{Psychological Consequences}].
\item \textsuperscript{243} See, e.g., Paternoster et al., \textit{supra} note 237, at 193–94 (discussing theories that suggest that “compliance is more likely when authorities impose sanctions while still honoring and respecting the dignity of offenders.”).
\end{itemize}
to result in future compliance and cooperation with the law. However, process control appears to be misplaced when applied to victims. It is not necessarily the victim who needs to be deterred, whether specifically or generally, from committing crime.\textsuperscript{244} Therefore, when questioning the value of the process control model of procedural justice to victims, one must reframe the argument.

Even though the public prosecution model has diminished the victim’s place within the criminal justice process, victims still play an important role in an efficiently functioning system. For example, it is often the victim who reports the crime, provides relevant information to the police to assist them in their efforts to apprehend the perpetrator, and serves as a witness for prosecutors.\textsuperscript{245} Victim experiences that do not comport with procedural justice principles may lead victims to question the system’s legitimacy and undermine their willingness to cooperate with authorities in the future.\textsuperscript{246} Hence, pursuant to the purely utilitarian goal of crafting a criminal justice

\textsuperscript{244} Professor Michael M. O’Hear articulates a valid challenge to the common assumption that victims are wholly blameless and free from any personal taint of crime. Michael M. O’Hear, \textit{Plea Bargaining and Victims: From Consultation to Guidelines}, 91 MARQ. L. REV. 323, 327 (2007). He notes that many victims are themselves involved in criminal activity, live in neighborhoods with high crime rates, or are otherwise at high risk for involvement in or exposure to additional offenses. As to such victims in particular, there may be important law enforcement benefits that result from perceptions that legal authorities are worthy of respect and cooperation. (One need only think of the “anti-snitching” movement found in many minority communities to appreciate the consequences of a breakdown in respect for the authorities.)

\textit{Id.} at 327–28 (citation omitted). Hence, there may be a positive deterrent outcome from treating victims fairly.

\textsuperscript{245} Kelly, \textit{supra} note 220, at 20–21 (noting a study indicating that 87% of reported crime comes to police attention through victim reports); \textit{see also} Beloof, \textit{The Third Model}, supra note 175, at 306 (citing statistics indicating that many victims decide not to report crime); McDonald, \textit{supra} note 11, at 650 (stating that “[t]he only concern that the state has for the victim is his willingness to cooperate and his ability to be a convincing witness”). The information provided by victims can be vital to any number of aspects of the criminal process, including framing plea bargains and sentencing decisions. \textit{See generally} O’Hear, \textit{supra} note 244 (discussing the benefits which may arise from providing victims with procedural justice during the plea process). Moreover, victim input at sentencing has the capacity of ensuring that the defendant receives a just sentence, therefore furthering retributive goals of the criminal justice system. \textit{See supra} notes 194–200 and accompanying text.

\textsuperscript{246} \textit{See} Cellini, \textit{supra} note 16, at 851 (citing studies that have shown “negative encounters with the [criminal] justice system cause victims to opt out of future cooperation.”).
system that efficiently responds to criminal wrongdoing, a system that provides victims with procedural justice is important.

Moreover, a criminal justice system that successfully harnesses the individual and collective desires of the citizenry to “bring the offender to justice” will maintain public confidence. Recall Professor Packer’s statement regarding the Crime Control Model: “[t]he failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom.”247 Simply put, from a utilitarian viewpoint effective prosecutions can result in happy—or at least satisfied—victims. Satisfied victims, in turn, help comprise a satisfied citizenry. A satisfied citizenry will continue to support and comply with the rules and processes of their self-created governmental structures.

Procedural justice theory, however, has not focused solely on the question of whether individuals perceive the outcome of their case to be fair based on the processes that led to that outcome. The discipline has also evolved to acknowledge that the process, in and of itself, has great value to those who participate in it.248 This second layer of procedural justice theory asserts that fair treatment should not merely be viewed as a means to an end, such as reaching a favorable outcome, but as an end in itself.249 This alternative approach to procedural justice has been described by Professors Tom Tyler and Allan Lind as the “group value theory.”250 The group value theory asserts that “people care whether their treatment (and not simply their outcomes) is fair because fair treatment indicates something critically important to them—their status within their social group.”251

The core premise of the group value theory is that “people are predisposed to belong to social groups and that they are very attentive to signs and symbols that communicate information about their position

251. Miller, supra note 248, at 529.
within groups. . . . People want to understand, establish, and maintain social bonds.\textsuperscript{252} Being part of a group provides a source of self-validation and further evidence that one is a fully accepted member of their group, which is rewarding, just as it is troubling when individuals perceive that they are being rejected or excluded.\textsuperscript{253} This becomes all the more true when one perceives having been accepted or rejected by an authority figure, such as the state.\textsuperscript{254} In this regard, individuals respond to whether they are treated with respect, politeness, and dignity, and whether their rights as citizens are acknowledged. People value the affirmation of their status by legal authorities as competent, equal, citizens and human beings, and they regard procedures as unfair if they are not consistent with that affirmation. . . . It is important to recognize that government has an important role in defining people’s views about their value in society.\textsuperscript{255}

In examining how an individual evaluates the treatment he or she receives from authorities, procedural justice theorists have proffered a variety of formulations\textsuperscript{256} that can be summarized into four core categories. First, it is important that individuals are provided with an opportunity to tell their side of the story or use their own voice.\textsuperscript{257} Second, those overseeing the judicial process should be neutral.\textsuperscript{258} In this regard, one should ask

\begin{itemize}
\item 253. Tyler, Psychological Models, supra note 250 at 851–52.
\item 254. See id. at 852.
\item 255. Tyler, Psychological Consequences, supra note 241, at 440–41 (citations omitted); see also Larry Heuer, What’s Just About the Criminal Justice System? A Psychological Perspective, XIII J.L. & Pol’y 209, 211 (2005) (explaining that the group value model “assumes that group identification is psychologically rewarding and that individuals are motivated to establish and maintain group bonds.”); Paternoster et al., supra note 237, at 167 (suggesting that “persons who are treated fairly feel attached to the social order, . . . they perceive that they are valued members of the group.”).
\item 256. See, e.g., Burch, supra note 230, at 28–29 (referencing six Leventhal factors often referenced in process outcome settings); Epstein, supra note 252, at 1876–77 (detailing a four factor approach and including the elements of voice, neutrality, consistency, and dignity); Tyler, Psychological Models, supra note 250, at 853 (describing three core factors: neutrality, trust, and standing).
\item 257. Epstein, supra note 252, at 1876, 1878; Heuer, supra note 255, at 211.
\item 258. Burch, supra note 230, at 28; Epstein, supra note 252, at 1877.
\end{itemize}
whether the official creates an even playing field among the participants by treating everyone fairly.\(^{259}\) Therefore, “[n]eutrality involves honesty and a lack of bias. Neutral decision making also uses facts, not opinions, leading to decisions of objectively high quality.”\(^{260}\) Third, authorities should appear to be caring and trustworthy.\(^{261}\) This factor serves to bolster participant confidence in the consistency and fairness of the decision makers: “If people are able to infer a benevolent disposition [in the decision maker], they can trust that in the long run the authority with whom they are dealing will work to serve their interests.”\(^{262}\) Finally, individuals value being treated with dignity, politeness, and respect.\(^{263}\) Taken together, these factors highlight that there is something symbolically important about providing an individual with the opportunity to state her case, to have her statements received with an open mind and be taken seriously by decision makers. Such treatment not only contributes to an individual’s sense of self-worth and standing within her social group, but also enhances her perceptions that the authorities making the decisions are moral and legitimate.\(^{264}\)

The group value approach to procedural justice gets to the heart of many of the asserted goals of victims’ rights laws. A process that transmits a message that the victim has worth and standing within the social group helps not only to temper secondary victimization but also to neutralize the negative social message broadcast by the defendant about the victim’s value when the crime was committed.\(^{265}\)

The group value variation of procedural justice can easily be incorporated into a utilitarian approach to criminal prosecutions. If crime represents, in some part, the offender’s devaluing and marginalization of the victim, then a worthy goal of the criminal justice system should be to reverse that marginalization through the prosecution and punishment of the offender.\(^{266}\) A legal system that treats victims with dignity and allows them to participate appropriately in the prosecution of the offender honors the individual victim’s suffering while responding to the broader societal injury that resulted from the offender’s crime.\(^{267}\) Again, from a utilitarian perspective, the legal system’s official acknowledgment of the victim’s harm increases the overall social welfare of the society.\(^{268}\) Additionally,
victims may feel less traumatized by the crime, suffer less secondary victimization, and therefore be more likely to maintain their trust and confidence in the legal system. However, the group value approach to procedural justice can also accommodate retributive theories regarding the criminal process.

Driven largely out of a concern that official responses to crime should not be influenced by individual desires of revenge or vengeance, retributivists have tended to reject claims that the criminal justice system should acknowledge victims or their interests. However, as retributivists move beyond their core premise that the society should punish only when and to the extent punishment is deserved and onto the larger precursor question of why such punishment is deserved, the victim inevitably becomes a part of the conversation. Pursuant to social contract theory, we are collectively bound to certain social norms. An individual’s breach of those commonly accepted norms harms us all. Therefore, the state is vested with the power to hold accountable the individuals who violate those collective social norms. However, while the norms and the resulting harms may be viewed in the collective, the specific harm still tends to be directly predicated upon the particular injury suffered by an individual victim. Most criminal statutes could not exist without some reference to the harm suffered by an individual human being. A specific woman was raped; a man was beaten; an investor was defrauded. The question thus becomes how retributive theory goes about acknowledging the victim.

Professors George P. Fletcher and Jean Hampton have both articulated forms of retributivism that seek to acknowledge the victim’s place in the criminal justice equation. Although their arguments are distinct, they share the common feature that a retributivist response to crime should be motivated out of a desire to acknowledge the moral harm suffered by the victim and the correlative desire to correct that moral imbalance.

Professor Fletcher suggests that when an individual commits a crime, a particular relationship is established between the offender and the victim in

269. See Heuer, supra note 255.
270. See Christopher, supra note 180, at 937–38; supra notes 194–200 and accompanying text.
272. See Hampton, supra note 271, at 1694.
273. Id.
274. Id.
275. Christopher, supra note 180 at 935.
which “[t]he criminal gains a form of dominance [over the victim] that continues after the crime has supposedly occurred.”

For example,

rape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or he otherwise knows her address. Burglars and robbers pose the same threat. Becoming a victim of violence beyond the law means that what we all fear becomes a personal reality; exposure and vulnerability take hold and continue until the offender is apprehended.

The reason, then, that we arrest, try, and punish offenders, “is to overcome this dominance and reestablish the equality of the victim and offender.”

A failure to respond to criminal wrongdoing would represent “abandoning victims in their suffering and isolation.” Our public prosecution system of criminal justice, therefore, should serve as a means for the entire community to stand in solidarity with the victim.

Here, Professor Fletcher invokes Kant’s example of an island society about to disband, but still has offenders who have yet been brought to justice for their crimes. As described by Kant:

Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves throughout the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Should the state fail to prosecute and punish the wrongdoers, it becomes complicit in continuing the defendant’s asserted dominance over the victim and creates a new, and equally detrimental relationship of dominance and subservience between the victim and the state. Thus, Professor Fletcher’s

276. Fletcher, The Place of Victims, supra note 271, at 57; see also Fletcher, What is Punishment Imposed For?, supra note 265, at 109–10; Sendor, supra note 193, at 334, 354 (discussing Professor Fletcher’s approach to retributivism).

277. Fletcher, What is Punishment Imposed For?, supra note 265, at 110; see also Fletcher, The Place of Victims, supra note 271, at 57–58 (illustrating the offender’s dominance over the victim).

278. Fletcher, The Place of Victims, supra note 271, at 58.


280. Id.


282. Fletcher, The Place of Victims, supra note 271, at 61–63; Fletcher, What is Punishment Imposed For?, supra note 265, at 110. In this regard, Professor Fletcher’s dominance theory of retributivism shares many qualities with Professor Benjamin Sendor’s articulation of restorative retributivism. See Sendor, supra note 193. Professor Sendor
dominance theory of retribution intersects nicely with a group value approach to procedural justice. By responding to criminal wrongdoing through public prosecutions and treating victims with dignity and respect throughout that process, the criminal justice system stands in solidarity with the victim and reaffirms human equality which was otherwise undermined by the defendant’s wrongful acts.  

Professor Hampton’s approach to retributivism echoes some of the themes appearing in Professor Fletcher’s dominance theory, but Professor Hampton focuses more on the expressive nature of retributive responses to crime. According to Professor Hampton, a defendant’s criminal acts send a message, not only to the victim, but to the rest of society, that the victim possesses less value than she should otherwise be accorded. By holding the wrongdoer accountable for his actions, we should seek to “vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event [like a trial] that not only repudiates the acto[r]’s message of superiority over the victim but does so in a way that confirms

the restoration of a moral balance among the offender, the victim, and the community. In other words, under the restorative theory, punishment focuses on the nature of the crime as an injury to relationships among the offender, the victim, and the community and, consequentially, it sends messages about right and wrong conduct to the victim and the community as well as to the offender.

Id. at 351.

It must be noted, however, that Professor Fletcher’s approach to retributivism still does not fully integrate the individual victim into the criminal justice process. When discussing the victim, he does not focus on the needs and interests of a particular victim of a specific crime. Instead, he contends that “[t]he purpose of bringing victims into the analysis is not to hear their particular grievance and sentiments toward the offender, but to simply recognize that crime is first and foremost an action that causes harm to other people.” Fletcher, The Place of Victims, supra note 271, at 55. Rather, what matters to him is “the victim-type, the victims of a class of those who have suffered a particular crime.” Id. Therefore, the victim should be included in the criminal process not to vindicate that specific individual’s harms, but to serve as representative of the general class of individuals who have suffered a criminal invasion of their interests. Id.

283. See Fletcher, What is Punishment Imposed for?, supra note 265, at 110; Heuer, supra note 255, at 211.


285. See Hampton, supra note 271, at 1671.
them as equal by virtue of their humanity." According to Professor Hampton, when reacting to criminal actions, “we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer’s events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.”

Hence, even if retributivism seeks to ensure that defendants are only punished for that which they justly deserve, Professor Hampton’s expressive retributivism acknowledges that our individual and collective outrage at crime can, and should, be incorporated into how our criminal justice system responds to and punishes offenders. It therefore remains vitally important that the state be involved in framing that reaction because how the state treats the victim is equally as potent as how the offender treated the victim. If criminal behavior is expressive, and hence sends message of degradation to those who observe it, “the state’s behavior in the face of an act of attempted degradation against a victim is itself something that will either annul or contribute further to the diminishment of the victim.”

Both Professor Hampton’s and Professor Fletcher’s approaches to retributivism focus on affirming the value of the victim and therefore dovetail beautifully with the group value model of procedural justice and Professor Beloof’s Victim Participation Model. When victims are permitted to use their voice, encounter neutral and trustworthy decision makers, and are treated with dignity and respect during criminal proceedings, the goal of redeeming the denigration suffered by the victim can be fulfilled. These procedural justice practices can minimize any secondary harm suffered by victims, and simultaneously send a positive message to the victim, the defendant, and society regarding the victim’s value.

The public prosecution model is firmly established as the manner by which we respond to crime. Founded upon social contract theory and emanating from a desire to cabin victim vengeance, the public prosecution model has focused on finding the appropriate balance between society’s desires to control crime and respond to criminal wrong doing and the individual defendant’s liberty and due process interests. The result, however, was that the system drifted from its goal of tempering victim vengeance to ignoring the victim altogether. This need not be the case. By viewing utilitarian and retributivist criminal theory through the prism of

286. Id. at 1686.
287. Id. at 1686–87.
288. Id.
289. Id.
290. See Fletcher, The Place of Victims, supra note 271, at 58; Hampton, supra note 271, at 1686.
procedural justice principles, there is ample room to integrate the victim into the prosecutorial process.

IV. A REMEDY: PROCEDURAL JUSTICE AND THE PROMISE OF PROTECTION

Many of the rights afforded to victims under the CVRA already correspond nicely with procedural justice theory. Victims have the right to timely and accurate notice of public court proceedings, including any parole proceeding involving the crime or “any release or escape of the accused,” the right not to be excluded from such public proceedings, the right to be reasonably heard at public proceedings regarding release, plea, sentencing or parole determinations, the “right to confer with the attorney for the Government,” and “the right to proceedings free from unreasonable delay.” Should the prosecutor or court fail to provide a victim with these rights, the victim can file a writ of mandamus with the court of appeals, which must in a timely fashion grant or deny the writ. If the victim’s writ is denied, the court of appeals must issue a written opinion clearly stating the reasons for denial. In allegiance with procedural justice principles, these rights, and the means by which victims can enforce them, ensure that victims can have a voice and role in the prosecution of the person alleged to have harmed them, wholly separate from any witness role the victim serves for the state.

However, none of the rights in the statute give victims the power to control the proceedings or obtain a specific outcome. The CVRA makes clear that the failure to afford a victim the rights embodied in the statute does not establish grounds for a new trial against the defendant. Rather, the rights afforded to victims give them an independent voice, rather than a veto over the criminal proceedings. In this regard, the CVRA remains true to one of the core precepts of the public prosecution model by acknowledging that a criminal action represents a contest between the state and the defendant.

By making clear that the victim merely possesses a voice, and not a veto in the criminal justice process, the CVRA appears to lean more towards embodying a group value rather than a process control approach to

293. Id. at § 3771(d)(3).
294. See id. (explaining the statute’s requirement to file and the court’s obligation).
295. See Aaronson, supra note 211, at 662–66 (explaining further victims’ right to have a role in the prosecution).
298. See Aaronson, supra note 211, at 675–78 (detailing the core precepts of the prosecution model and illustrating how the CVRA and victims fit into the picture).
victim procedural justice rights. Of course, the utilitarian goals underlying the process control model are furthered if victims continue to cooperate with the criminal justice system despite the outcome of the case because they believe they were treated fairly. However, I believe it is the dignitary interests embodied within the group value model that give the CVRA its greatest weight. The commonly asserted reasons for the necessity of victims’ rights laws are that our criminal justice system needs to respond to individual victims’ harms and to diminish any secondary harm that might befall the victims by their participation in the prosecution of the offender.

It is telling, therefore, that the last right listed for victims under the CVRA is “the right to be treated with fairness and respect for the victim’s dignity and privacy.” This language has been interpreted by some as vesting in victims specific and tangible rights, but one could also read this language as signaling that when one views the CVRA rights as a whole, they serve to further a group value model approach to procedural justice. By giving victims independent participatory rights in the criminal justice system, the CVRA sends a powerful state-sanctioned message. The state broadcasts that victims are not merely a means to its goal of prosecuting the offender, but an end, in and of themselves, worthy of recognition and affirmation in the criminal justice process.

We must question then, how the victim’s right to reasonable protection from the accused can be brought within the fold of procedural justice and into alignment with the other CVRA rights. In contrast to the other rights in the CVRA, the statute’s promise of protection has little to do with directly affirming the victim’s dignity through participation in the criminal proceedings. Rather, the protection right suggests that the victim is a passive recipient of an assured government benefit. Hence the right attempts to guarantee a specific outcome, such as protection from harm caused by the defendant, which can be incredibly difficult to ensure. Grounding the victim’s right to reasonable protection from the accused within a procedural justice framework helps overcome these problems.

299. Kyl et al., supra note 3, at 622.
300. See id. at 613–14 (explaining how victim participation can further the utilitarian goals and promote fairness).
301. See supra notes 214–216 and accompanying text.
304. See Cassell, supra note 211, at 876–77 (recognizing the importance of treating victims fairly).
306. However, as noted earlier, providing a victim with a secure waiting area during court proceedings might create an environment where the victim would be more likely to
First, the right needs to be re-written in such a way to emphasize the victim’s participatory role in the criminal justice process, rather than promising a specific outcome. Hence, the CVRA’s statutory language in section 3771(a)(1) should be amended to read: “A crime victim has . . . the right to have the victim’s safety considered in determining the defendant’s release from custody.” Recall that in concert with the CVRA’s current grant to victims that they be reasonably protected from the accused, the statute also grants victims the right to reasonable notice of any public court or parole proceeding involving the crime or any release or escape of the accused, the right not to be excluded from any such proceedings, the right to be reasonably heard at any such proceedings, and the right to confer with the attorney for the government on the case. These are all process-based rights, which, when exercised in the context of a court’s release consideration hearing for a defendant, would give meaning to a right which seeks to prevent the defendant from causing the victim further harm.

If a victim can confer with the government lawyer on the case, and is on notice of upcoming parole or release hearings, the victim can decide whether to exercise the right to be heard at those proceedings. If so, the victim can share safety concerns with the court, which the court can, in turn, consider in making its release decision.

Curiously enough, earlier statutory formulations regarding the victim’s right to be reasonably protected from the accused were phrased in terms that focused far more on the victim’s safety and role in the process of determining the defendant’s release, than on promising a direct right to protection. Two previously proffered versions of the language which eventually appeared in the CVRA read as follows: victims have the right to have “the safety of the victim considered in determining a [defendant’s] release from custody,” and the victim has the “right to adjudicative exercise the participatory rights under the statute. See supra notes 129–130 and accompanying text.

308. Id. at § 3771(a)(3). The statute does indicate, however, that the victim can be excluded if it determines that the testimony offered by the victim “would be materially altered if the victim heard other testimony at the proceeding. Id. The statute also states:

In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described [in the statute], the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

Id. at § 3771(d)(2).
309. Id. at § 3771(a)(4).
310. Id. at § 3771(a)(5).
311. S.J. Res. 65, 104th Cong. (1996); see supra note 218 regarding the history of the passage of the CVRA.
decisions that duly consider the victim’s safety.”

Many state laws parallel this type of language. For example, Alaska grants victims the right to protection through the imposition of appropriate bail or conditions of release by the court, as well as the right to be heard at any proceeding where the accused’s release from custody is considered. Similarly, Colorado and Florida grant victims the right to information regarding the steps they can take to protect themselves from harassment or harm from the offender, and Indiana and Maryland indicate that victim safety should be considered in the process of determining whether to release the defendant from custody. Therefore, altering the statutory language of the CVRA so that it focuses on considering the victim’s safety, rather than making an outright promise of protection, is not unreasonable or unprecedented. Moreover, such an approach furthers the goal of enhancing the victim’s appropriate participation in the criminal process. By framing the victim’s protection right in terms of victim participation, rather than a specific outcome such as protection, the victim’s ability to enforce the right is also more assured.

At least one CVRA case has implied that a victim’s right to be heard in the context of a release determination is enforceable. In United States v. Turner, the court noted that the Government failed to inform the victims of the defendant’s detention hearing under the Bail Reform Act. Acknowledging that there would be other bail-related proceedings prior to...

314. COLO. REV. STAT. § 24-4.1-302.5(1)(m) (2010) (“[e]ach victim of crime shall have . . . [t]he right to be informed about what steps can be taken by a victim or witness in case there is any intimidation or harassment by a person accused or convicted of a crime against the victim, or any other person acting on behalf of the accused or convicted person”); FLA. STAT. ANN. § 960.001(1)(c) (West 2004) (“A victim or witness shall be furnished, as a matter of course, with information on steps that are available to law enforcement officers and state attorneys to protect victims and witnesses from intimidation.”).
315. IND. CODE ANN. § 35-40-5-4 (LexisNexis 2010) (“A victim has the right to have the victims’ safety considered in determining release from custody of a person accused of committing a crime against the victim.”); MD. CODE ANN. CRIM. PROC. § 11-203 (LexisNexis 2008) (“[T]he court . . . shall consider . . . the safety of the alleged victim in setting conditions of . . . the pretrial release of a defendant . . . .”).
317. Id. at 320. It must be acknowledged that, as specifically related to the victim’s right to be reasonably protected from the accused, the facts of Turner are unremarkable as the defendant in that case was charged with mail and financial fraud. Id. at 320. Fraud victims are perhaps not as likely to believe their personal safety is jeopardized, as a victim of violent crime might. Moreover, in deciding to detain the defendant, the court noted it did so not because of the danger the defendant presented to anyone, but rather because of the lack of assurance that he would appear later at trial as required. Id. at 321.
the defendant’s trial, and acknowledging its obligation to ensure that victims are afforded their rights, the court directed the government to provide all alleged victims of the charged offense a written summary (if not a transcript) of the proceedings to date as well as notification of their rights under the statute with respect to future proceedings, including notice of the next scheduled proceeding and of their right to be heard with respect to [the defendant’s] application for release.

At the next hearing, the prosecution affirmed to the judge that each alleged victim had been informed of the proceeding, but “that none had elected to attend and be heard with respect to [the defendant’s] application for release.”

While the facts of Turner do not provide a direct example of specific enforcement of the victim’s right to be reasonably protected from the accused, the court’s actions are nonetheless worth note. From a procedural justice standpoint, the court acknowledged that victim involvement in the process was important, even if, as implied from the opinion, victim involvement might not weigh heavily in the court’s final determination. By acknowledging the victim’s right to notice, to be present, and to be heard at the defendant’s bail release proceeding, even if it did not appear that victim safety was an issue, the court gave a measure of weight to the victim’s right to be reasonably protected from the accused.

In order, however, to make the victims’ re-framed protection right enforceable, the language of the CVRA needs to be altered in another respect. Currently, when discussing how victims can enforce their rights, the statute indicates that the victims can only petition to re-open plea and sentencing hearings. However, other portions of the statute indicate that the victim has the right to be heard at release, plea, sentencing, and parole hearings. Hence, as the statute currently reads, the victim has the right to be heard at several distinct moments during the criminal process, but can only seek relief for the denial of the right to be heard in some of those proceedings. In order to make the protection right enforceable, victims need

318. 18 U.S.C. § 3771(b)(1) (2006) (“[T]he court shall ensure that a crime victim is afforded the rights described in” the statute.).
320. Id.
321. Id. at 332 (noting that even if the court is required to give the victim an opportunity to be heard, it is not compelled to deny the defendant’s release pending trial, if the court is assured that a conditional release will assure the defendant’s later appearance at trial as well as the safety of others).
322. See generally id. at 331–34 (showing the court’s acknowledgement of rights granted by the CVRA).
323. 18 U.S.C. § 3771(d)(5).
324. Id. at § 3771(a)(4).
to be able to seek a re-hearing in all relevant situations where they have the right but were denied the opportunity to be heard regarding their safety. Therefore, section 3771(d)(5) of the statute should be amended to include a victim’s right to be re-heard at release and parole hearings. The suggested change is as follows: “In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a release hearing, plea, sentence, or parole hearing.”

Reframing the victim’s protection right in this manner does not represent a radical change from how the law already seeks to take victim safety issues into account. The Federal Bail Reform Act requires that a court consider whether the defendant poses a danger to any person or the community in the course of determining whether a defendant can be released pending trial. The Bail Reform Act also requires that the court consider whether the defendant’s release raises “a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.” In evaluating whether it believes such a risk exists, the court is meant to consider the nature and circumstances of the offense charged, the weight of the evidence against the accused, the history and characteristics of the person, and “the nature of the seriousness of the danger to any person or the community that would be posed by the person’s release.” While the Bail Reform Act does not specifically mention victims, its broader language regarding the safety of the community, and prospective witnesses and jurors, could certainly include within its scope victim safety concerns.

325. Requiring such a re-hearing right would not run afoul of the Bail Reform Act, which indicates that

the [release] hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known . . . at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of [the defendant] as required and the safety of any other person and the community.

Id. at § 3142(f). See also infra notes 326–334 and accompanying text.

326. 18 U.S.C. § 3142(e) (“If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.”). The statute further guides that under a specific set of circumstances, a rebuttable presumption will arise that “no condition or combination of conditions will reasonably assure the safety of any other person and the community.” Id.

327. Id. at § 3142(f)(2)(B).

328. Id. at § 3142(g)(4).
There is very little direct case law regarding application of safety provisions of the Bail Reform Act. However, there is at least one decision in which the trial court took into consideration the victim’s safety when deciding not to release the defendant pending trial. In *United States v. Zuni*, the defendant was charged with abducting and sexually assaulting his estranged common law wife.\(^\text{329}\) He already had a history of charges for physical assault against his common law wife and others, combined with a history of failing to comply with no-contact and restraining orders.\(^\text{330}\) In evaluating whether to permit the defendant’s release pursuant to the Bail Reform Act, the court determined that there was no condition or combination of conditions that it could fashion which would reasonably assure the victims’ safety.\(^\text{331}\) In light of the defendant’s prior actions against his common law wife, coupled with his failure to comply with previously issued no-contact orders, the court stated:

> If [the defendant] violates his conditions—a prospect all too likely given his past—he poses a high degree of danger to [the victim], given the history of their relationship and their children’s residence with [the victim.] Also, law enforcement may not be able to intercept [the defendant] or warn [the victim] before he [might reach her home]. Allowing [the defendant] out of detention now would pose too great of a risk to [the victim].\(^\text{332}\)

The court in *Zuni* did not reference the victim’s right under the CVRA to be “reasonably protected from the accused,”\(^\text{333}\) nor did it give any indication that the victim or a representative for the victim was present at the defendant’s bail release hearing.\(^\text{334}\) The case nonetheless suggests that courts do factor victim safety into their release decision analyses.

Reconfiguring the victim’s protection right so that it centers on victim participation in the decision making process regarding the defendant’s pre-trial release is supported by current practice.\(^\text{335}\) Whether under the terms of the Bail Reform Act, or other portions of the CVRA that grant the victim the right to be heard on issues regarding the defendant’s release prior to trial or on parole, the case law recognizes that victim safety is an important factor that contributes to a well-functioning and fair criminal justice system.\(^\text{336}\) Altering the statute’s language so that it better reflects these

---

330. *Id.* at *3–4.
331. *Id.* at *6.
332. *Id.* at *7.
334. *Id.* at § 3771(a)(4) (crime victim has the “right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”).
335. See *Office for Victims of Crime*, supra note 130, at 33–35.
336. See *United States v. Turner*, 367 F. Supp. 2d at 323–25 (reflecting the value the
realities will allow the victim’s protection right to shift from being an empty promise to being an enforceable right. Of course, some might resist my retreat from the protection language currently present in the CVRA. However, as I have argued, that language lacks any enforceable substance. Conversely, the narrower statutory phrasing I have crafted embodies a procedural justice approach to victims in the law. This new language focuses on the process by which victims are heard regarding their safety and provides a direct manner by which victims can enforce that right.

V. CONCLUSION

Since its passage in 2004, the CVRA has opened the door of the criminal justice system to victims. The statute allows victims to participate in the prosecutorial process, thereby diminishing the secondary harm they may have previously suffered under the public prosecution model, while at the same time affirming their status as individuals with a direct interest in the proceeding. So doing, most of the rights afforded to victims under the CVRA can be viewed as an embodiment of procedural justice principles. The process rights granted to victims serve, in part, to enhance victim confidence in respect for the criminal justice system. Inversely, but perhaps more importantly, the process rights granted to victims signal the respect and value the system seeks to extend to them. It is time, therefore, to better align the CVRA’s protection right with these procedural justice principles. The CVRA’s promise of protection dishonors victims by granting them an empty and unenforceable right. Conversely, a promise that victims will be heard on issues regarding their safety fills the right with substance and meaning, thereby fulfilling the goals of the CVRA and the victims’ rights movement.

court places on victim safety and well-being).