TOWARDS A VICTIM-ORIENTED CRIMINAL PROCESS

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ABSTRACT

The figure of the victim has played a central role in the consolidation of a uniquely punitive criminal legal system. Over the last decades, however, multiple actors have raised serious concerns about the benefits of this punitive strategy. In particular, U.S. penal abolitionists have called to abandon the current state-driven response to crimes primarily concerned with the imposition of harsh punishment. Instead, they advocate for implementing alternative non-punitive response mechanisms that address the harm crimes inflict on victims and the wider community. In response to these demands, abolitionists have proposed a series of "non-reformist reforms" to unravel the punitive logic that underlies the institutional response to crimes. Despite the merits of abolitionists' proposals, it is reasonable to assume that criminal trials will continue to be a necessary alternative when responding to crimes. Thus, questions about victims' role in this institutional setting continue to be relevant. Against this backdrop, this Article's primary goal is to rethink the scope and aims of the adversarial criminal process in light of victims' quest for recognition. In doing so, this Article contributes to ongoing discussions in three distinctive ways. First, it probes the normative grounds for shifting towards a victim-oriented criminal process. Second, it explores the implications of this shift for the design and structure of the adversarial process. Finally, it analyzes the merits of this shift in light of contemporary critiques of the criminal legal system.

This Article proceeds in four parts. Part I critically examines the prevailing portrayal of victims as inherently weak and punitive individuals to illustrate the limits of this narrative. Building on Nancy Fraser's work, Part II argues that victims' past and present demands can be better understood as part of a broader quest for recognition as full partners in social interactions. Under this theoretical framework, the Article advocates shifting towards a victim-oriented criminal process. This shift has two key implications. First, it puts victims' experiences, interests, and well-being at the center of the institutional response to crimes. Second,

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it affords victims meaningful participation in the legal proceedings. Part III analyzes the impact shifting towards a victim-oriented criminal process has before, during, and after a criminal trial. Specifically, it reviews these victims' duty to participate in the criminal process, reevaluates prosecutors' role and discretion, and discusses the application of victim impact statements. To conclude, Part IV analyzes the benefits and limits of the proposed shift towards a victim-oriented criminal process in light of abolitionists' demand to move beyond punishment when responding to crimes.

INTRODUCTION

During the second half of the twentieth century, the consolidation of a strong victim movement fueled by political elites, victims' organizations, and feminist scholars, among others, led to a series of legal reforms across the country.[1] Throughout this period, victims were afforded a series of procedural and service rights.[2] As a result, victims acquired a different status in legal proceedings. They were no longer "the forgotten person" of the criminal process.[3] Instead, victims

1. *See infra* Part I.

2. Service rights refer to those rights related to support services the state must provide to crime victims (i.e., health or social care) and the treatment public officials should dispense to victims. Procedural rights are the rights associated with victims' direct participation in the criminal process. Andrew Ashworth, *Victim Impact Statements and Sentencing*, CRIM. L. REV. 498, 499 (1993). For a detailed analysis of victims' rights across the United States, see Michael Solimine & Kathryn Elvey, *Federalism, Federal Courts, and Victims' Rights*, 64 CATH. U. L. REV. 909 (2015).

3. *See* Paul G. Cassell & Michael Ray Morris Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 61 AM. CRIM. L. REV. 337, 332–37 (2024).

became active participants, especially at the sentencing stage.[4] The generalized concern around victims' interests, needs, and experiences was such that, as Jonathan Simon explains, "it is in the experience of victimization and (much more commonly) the imagined possibility of victimization that lawmaking consensus has been redefined in our time."[5]

Undeniably, a pro-victim discourse brought about and perpetuates an extremely punitive criminal legal system.[6] However, this is not the only way the concern for victims of crime materializes in the United States. During the last two decades, an emergent abolitionist movement has drawn attention to the negative consequences of the punitive strategy for victims and the political community at large.[7]

The demands of this movement vary. While the call to defund the police has received a fair amount of attention,[8] abolitionist organizers have also expressed particular interest in the need to rethink the design and scope of the state-driven and retributive response to crimes.[9] In the end, a salient characteristic of the contemporary U.S. penal abolitionist movement is that many of the people behind it have experienced state and interpersonal violence.[10] Motivated by their personal histories and encounters with a criminal legal system that revictimizes and even criminalizes them, abolitionists have resorted to alternative response mechanisms that move away from the imposition of punishment and, instead, address harm

4. Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 285 (2003) ("Victims are no longer witnesses providing opinion evidence, but are *participants* with state constitutional and statutory rights to give sentencing recommendations." (emphasis added)).

5. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 77 (2007).

6. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 11 (2001) ("The interests and feelings of victims—actual victims, victims' families, potential victims, the projected figure of 'the victim'—are now routinely invoked in support of measures of punitive segregation.").

7. *See infra* Part I. While the U.S. prison and police abolitionist movement has gained momentum over the last decades, it is important to understand and recognize the global character of this movement. *See* Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 46 (2020) ("Engaging with the work of non-American penal abolitionists may thus provide insights to understand, discuss, and deal with American penal institutions.").

8. The literature on police abolition has grown considerably in recent years. For some examples, see Eduardo Bautista Duran & Jonathan Simon, *Police Abolitionist Discourse? Why It Has Been Missing (and Why It Matters)*, *in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 85 (Tamara Rice Lave & Eric J. Miller eds., 1st ed. 2019); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2020–2021); Tracey Meares & Gwen Prowse, *Policing as Public Good: Reflecting on the Term "To Protect and Serve" as Dialogues of Abolition*, 73 FLA. L. REV. 1 (2021).

9. *See* Chloë Taylor, *Anti-Carceral Feminism and Sexual Assault—A Defense: A Critique of the Critique of the Critique of Carceral Feminism*, 34 SOC. PHIL. TODAY 29, 32, 34–35, 41–42 (2018); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1688, 1694 (2019); Mimi E. Kim, *Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States*, INT'L REV. VICTIMOLOGY, Nov. 2020, at 1, 8–10.

10. As Derecka Purnell rightly points out, those who discredit abolitionists for not worrying about broader safety concerns and victims "tend to forget that we are those victims, those survivors of violence." Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/.

through processes of community accountability.[11] Building on these debates, this work examines the challenges that the demand to de-center punishment poses for theorizing the institutional response to crimes and the role victims occupy therein.[12]

Penal abolitionists' proposal to move beyond the imposition of criminal punishment merits the attention it has received. Alternative responses, such as restorative justice conferences and transformative justice processes, offer an opportunity to address harm and accountability through informal, but not less significant, avenues.[13] However, due to the complexity and challenges that crimes present for political communities, it will still be necessary to conduct criminal trials on some occasions. For example, it is reasonable to assume that not all victims would want to respond through these alternative processes. Legitimate considerations could motivate this decision. Some victims might feel better protected if they confront those who have harmed them through a formal process rather than through the informal face-to-face encounter that these alternatives rely on. In addition, since these alternatives commonly require defendants' admission of guilt, it will be necessary to prove defendants' culpability through a criminal trial whenever they insist on their innocence. Finally, the possibility of these alternatives failing should be considered. Many circumstances could lead to the parties, the facilitators, or the community wanting to avoid continuing an alternative process. If any of these happen, the logical consequence would be to resolve the dispute through a criminal trial.

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11. *See* Emily Thuma, *Lessons in Self-Defense: Gender Violence, Racial Criminalization, and Anticarceral Feminism*, 43 WOMEN'S STUD. Q. 52, 55, 60, 63 (2015); Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 224–27 (2018); Nicole A. Burrowes, *Building the World We Want to See: A Herstory of Sista II Sista and the Struggle Against State and Interpersonal Violence*, 20 SOULS 375, 380, 386, 390, 393 (2018); *see generally* ANN RUSSO, FEMINIST ACCOUNTABILITY: DISRUPTING VIOLENCE AND TRANSFORMING POWER (2018).

12. Directly or indirectly responding to abolitionists' demands, scholars have offered various reasons for expanding victims' influence in responses to their crimes. *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1587 (2020). Capers questions:

> What might it mean to allow . . . a victim of domestic violence to decide whether to pursue charges or not, to decide whether incarceration of her partner is best for her or their children, and to decide whether mandating anger management classes or substance abuse classes might benefit her more?

Id.; *see also* Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions?*, 87 BROOK. L. REV. 1127, 1147 (2022) ("[M]ainstream prosecutors, in the conventional exercise of charging discretion, should solicit and take account of victims' views. Especially in misdemeanor cases with identifiable victims, prosecutors who would otherwise pursue criminal charges should generally honor a victim's reasoned preference for an alternative to prosecution, including by declining or dismissing charges."). In this work, I focus on victims' role in the criminal process and not in their ability to opt for alternative non-punitive response mechanisms.

13. As Mimi Kim explains, "[w]hile the methods of restorative justice and transformative justice and an orientation towards collective responses and repair characterize both of these alternative justice trajectories, their relationship with the criminal legal system remains a central and critical distinguishing feature." Kim, *supra* note 9, at 8. Transformative justice does not rely on law enforcement agencies.

As these different scenarios illustrate, questions about victims' role in the criminal trial and larger inquiries into the theoretical foundations of the criminal process continue to be relevant. Against this backdrop, this Article's primary goal is to rethink the scope and aims of the adversarial criminal process. In particular, by reinterpreting victims' demands as demands for recognition beyond their punitive or non-punitive stance, this Article advocates for shifting towards a victim-oriented criminal process. There are two main implications of this shift. On the one hand, it puts victims' experiences, interests, and well-being at the center of the institutional response to crimes. On the other hand, it affords victims meaningful participation in the legal proceedings.

This Article proceeds in four parts. Part I critically examines the grounds for upholding current depictions of victims as vulnerable and punitive individuals. As the analysis shows, these depictions are simplistic and do not capture the nuanced character of victims' demands. Through the lens of recognition theory, Part II offers an alternative interpretation of victims' demands. Driven in particular by the works of Charles Taylor and Axel Honneth, political theorists of the past three decades have paid significant attention to the concept of recognition.[14] Within this context, they have used this term to "unpack the normative basis of political claims"[15] advanced by different actors within the public sphere.[16] Specifically, Part II builds on Nancy Fraser's work to argue that victims' past and present demands are best interpreted as part of a broader quest for recognition as full partners in social interactions. Under this framework, Part II concludes that despite the multiple legal reforms of the past decades, to redress the injustice that victims experience throughout the institutional response to crimes, it is necessary to shift towards a victim-oriented criminal process.[17]

Part III analyzes three key implications of the proposed process before, during, and after a criminal trial. Section A reexamines the notion that victims have a duty to participate and testify in the criminal trial. While prosecutors can legally threaten victims to participate in this institutional setting, this Section proposes giving victims a right to decide whether and how they want to participate. Section B analyzes two aspects of the figure of the public prosecutor in the U.S. adversarial

14. Patchen Markell, *Recognition and Redistribution*, *in* THE OXFORD HANDBOOK OF POLITICAL THEORY 450, 451–52 (John S. Dryzek et al. eds., 2008).

15. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE 1 (2003).

16. Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, *in* REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 7, 9 (Joel Golb, James Ingram & Christiane Wilke trans., 2003).

17. Other scholars have also relied on recognition theory to theorize the relationship between (criminal) justice and victims. *See* Frank Haldemann, *Another King of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L. J. 675, 677–78 (2008); Nicola Henry, *The Law of the People: Civil Society Tribunals and Wartime Sexual Violence*, *in* RAPE JUSTICE: BEYOND THE CRIMINAL LAW 200, 207 (Anastasia Powell et al. eds., 2015); Anastasia Powell, *Seeking Informal Justice Online: Vigilantism, Activism and Resisting a Rape Culture in Cyberspace*, *in* RAPE JUSTICE: BEYOND THE CRIMINAL LAW 218, 226–27 (Anastasia Powell et al. eds., 2015).

tradition that are in tension with a victim-oriented criminal process. First, this Section focuses on the relationship between prosecutors, victims, and the political community at large. Contrary to the conventional understanding of prosecutors as representatives of the public interest, this Section argues that prosecutors should be seen as independent and impartial state officials who nonetheless have specific duties toward victims. Second, this Section contends that the political community should actively participate in the criminal trial. Finally, this Section examines the possibility of giving victims a right to contest prosecutorial decisions to not pursue charges and veto plea bargains. Section C discusses victims' ability to deliver impact statements at the sentencing stage and parole hearings.

Part IV concludes by exploring the merits of the proposed shift towards a victim-oriented criminal process from the perspective of abolitionists' demand to address harm and foster accountability rather than prioritize the imposition of state punishment. While the shift towards a victim-oriented criminal process might not entirely conform with abolitionists' end-goal, my aim is to show why the proposed shift is part of a longer trend of scholarly work that challenges equating a pro-victim discourse to a punitive or law-and-order agenda.[18]

I. THE VULNERABLE AND PUNITIVE VICTIM: A SIMPLISTIC ACCOUNT

Victims and the fear of becoming one occupy a central role within the U.S. social imaginary.[19] Various factors contributed to consolidating victims and victimhood in such an influential position. The surge in recorded crimes, the media's sensationalist coverage of violent crimes, and the introduction and widespread use of crime surveys, among others, fostered a palpable public anxiety around the possibility of being victimized.[20] These elements, however, must be put in their historical context. It was under a particular moment of social, economic, and political reconfiguration that crime and the associated fear of crime and subsequent victimization became "a major social problem and a characteristic of contemporary culture"[21] that led to a series of unprecedented legal reforms.[22]

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18. *See* Benjamin Levin, *Victims' Rights Revisited*, 13 CAL. L. REV. ONLINE 30, 40–43 (2022), https://www.californialawreview.org/online/victims-rights-revisited ("Many people of many different politics agree that the system doesn't help victims. But, rather than framing that observation as support for more punitive policies, progressive and left commentators increasingly suggest that advancing victims' interests isn't tantamount to embracing the law-and-order politics of yesterday." (footnote omitted)).

19. I follow Charles Taylor definition of social imaginary as "the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations." CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23 (Dilip Gaonkar et al. eds., 2004).

20. *See* JAMES DIGNAN, UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE 14–16 (2005).

21. GARLAND, *supra* note 6, at 10.

22. According to Jonathan Simon, the victim movement in the United States has had such an influence in the political culture of the country that it can be compared to the civil rights movement or feminist movement. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1136 (2000).

Motivated by how discussions around victims' rights unfolded,[23] two depictions of crime victims have become particularly salient. Constructed around conventional understandings of victims' feminized vulnerability,[24] victimhood was turned into a "cramped identity" associated with a "helpless, decimated, pathetic, weak, and ignorant" individual.[25] This characterization is problematic for various reasons. First, the conflation and homogenization of victims into a symbolic "ideal victim" who finds themself in a "subordinated, weak position"[26] have been instrumental in minimizing different experiences of victimization and establishing a hierarchy of victims worth protecting.[27] Second, portraying victims as individuals who need help and support places victims in a relatively passive position within legal proceedings.[28] Relatedly, when judges, even in an attempt to show sympathy to the victim and shame those who have committed a serious sexual offense, highlight victims' vulnerability and refer to them as "ruined" or "broken," they end up stigmatizing, essentializing, and retraumatizing victims while also perpetuating myths about victimhood.[29]

Victims' portrayal as helpless and vulnerable individuals is also notoriously inaccurate. On numerous occasions, victims themselves are the ones pushing state officials to acknowledge the harm they have suffered and respond in consequence. This is clearly exemplified by the central role that survivors of sexual assault have played in the #MeToo movement.[30] Despite ongoing debates over the positive or negative implications of this movement's practice of naming and shaming (i.e., "cancel culture"), it is undeniable that the efforts by individuals who identify as

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23. In response to the panic created around crime, political elites relied on the need to protect and assist victims as a legitimizing tool for introducing significant legal reforms, including constitutional reforms, commonly of a punitive nature. In this process, some victims' organizations, especially those who also endorsed a punitive agenda, played a key role in the expansion of victims' rights. For a more detailed analysis of this history, see, e.g., Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 942–53 (1985); MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 1–10 (2002); Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHX. L. REV. 301, 303–04 (2012); Marie Manikis, *Contrasting the Emergence of the Victims' Movements in the United States and England and Wales*, 9 SOC'YS 1, 3–4 (2019).

24. *See* Erinn Cunniff Gilson, *Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence*, 42 SIGNS: J. WOMEN IN CULTURE & SOC. 71, 71–72 (2016).

25. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993); *see generally* Hadar Dancig-Rosenberg & Noa Yosef, *Crime Victimhood and Intersectionality*, 47 FORDHAM URB. L.J. 85 (2019) (offering a detailed overview of how victims' vulnerable status is represented throughout the legal and social realms).

26. *See* NILS CHRISTIE, *The Ideal Victim*, *in* REVISITING THE "IDEAL VICTIM" 11, 20 (Marian Duggan ed., 1986).

27. *See* Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529, 532–36 (2021) (building on Nils Christie's concept of the "ideal victim" to illustrate the role the media has played in shaping a racialized experience of legitimate victimization in the United States).

28. Jeffrey Kennedy, *The Citizen Victim: Reconciling the Public and Private in Criminal Sentencing*, 13 CRIM. L. & PHIL. 83, 90–92 (2019).

29. *See* Maybell Romero, *Ruined*, 111 GEO. L.J. 237, 265–67 (2022).

30. *See generally* CARLY GIESELER, THE VOICES OF #METOO: FROM GRASSROOTS ACTIVISM TO A VIRAL ROAR 6 (2019) (describing #MeToo's initial mission as providing "a safe space for sexual abuse victims to step away from shame and silence").

victims or survivors of sexual violence have been vital to raise awareness on related issues across the United States and overseas.[31] Put succinctly, while crimes can have lasting implications for those who experience them firsthand, and who are reasonably in need of support and assistance by other members of the political community, it is wrong to assume that victims do not have the capacity nor interest to make important decisions concerning how to respond to crimes committed against them.

Another deeply ingrained assumption is that victims are driven by punitive motivations, such as their emotional need for revenge.[32] If they cannot take crime into their own hands,[33] this narrative presupposes that victims want the criminal justice system to react harshly against crime and those who commit them.[34] This narrative, however, is not as straightforward as its proponents assume. This is illustrated, for example, by comparing the development and consolidation of the victim movement in England and Wales and the victim movement in the United States. Aside from the strategic behavior of political elites, certain institutional and ideological factors present at the time, such as a weak welfare state, a fragmented economic and social policy, and the presence of a strong public prosecutor, explain why a "highly retributive and punitive" victim movement consolidated in the United States.[35]

As it has been pointed out, feminist scholars and advocates have also contributed to consolidate a punitive agenda on behalf of victims.[36] Second-wave feminists'

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31. *See* Tatjana Hörnle, *#MeToo – Implications for Criminal Law?*, 6 BERGEN J. CRIM. L. & CRIM. JUST. 115, 116–22 (2018); Tatjana Hörnle, *Evaluating #MeToo: The Perspective of Criminal Law Theory*, 22 GERMAN L.J. 833, 835–37 (2021); Linda Hasunuma & Ki-young Shin, *#MeToo in Japan and South Korea: #WeToo, #WithYou*, 40 J. WOMEN, POL. & POL'Y 97, 98–106 (2019).

32. According to Michael Tonry too, victims do not only want justice but also revenge since the latter is "the most human of instincts." Surprisingly, Tonry does not provide any evidence to support such claims. *See* Michael Tonry, *'Rebalancing the Criminal Justice System in Favour of the Victim' : The Costly Consequences of Populist Rhetoric*, *in* HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS AND THE STATE 75, 77 (Anthony Bottoms & Julian V. Roberts eds., 2010).

33. John Gardner, for example, considered that criminal law's "*raison d'etre*" is to deny victims and their families, associates, and supporters any capacity for retaliation. This "displacement function," Gardner claimed, is "one of the central pillars of [criminal law's] justification." JOHN GARDNER, *Crime: In Proportion and in Perspective*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 213, 213 n.1, 214 (2007).

34. For Heidi Hurd, victims "may not rest easy until their assailants are made to suffer from quite Draconian measures." Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 408 (2005).

35. *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 77–114 (Alfred Blumstein ed., 2006).

36. Multiple scholars have highlighted this dynamic. *See, e.g.*, *id.* at 115–164; Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS: J. WOMEN CULTURE & SOC'Y 45, 52–58 (2010); Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEORY & SOC'Y. 233, 239–50 (2012); *see also* LOS FEMINISMOS EN LA ENCRUCIJADA DEL PUNITIVISMO 10–12 (Deborah Daich & Cecilia Varela eds., 2021) (examining the relationship between penal expansion and feminism in Latin America); SILVANA TAPIA TAPIA, FEMINISM, VIOLENCE AGAINST WOMEN, AND LAW REFORM: DECOLONIAL LESSONS FROM ECUADOR 1–20 (2022) (examining the same in Ecuador specifically).

hopes that these legal changes would result in more profound social transformations went largely unfulfilled.[37] Instead, many of their proposed reforms represented unintended harmful consequences for women, especially those belonging to racial minorities and other vulnerable groups who found themselves at a greater risk of being criminalized and even abused by police officers in the aftermath of these reforms.[38] Support for punitive practices persist into the present. For example, to address the problem of sexual assault and sexual misconduct in universities, many feminist and student activists, as well as campus administrators, explicitly supported a punitive logic by portraying those students who committed sexual offenses as "monstrous" offenders or campus "predators," while pushing for questionable reforms to universities' disciplinary processes.[39] Something similar can be said about some members of the #MeToo movement who employed a "zero tolerance" strategical approach to gain visibility and support.[40]

Despite "carceral feminists" influence within penal debates,[41] this is not the only way feminists have understood the relationship between the goals of their political project and the criminal legal system. Throughout the last two decades, the United States has witnessed women-of-color, Indigenous, queer, and trans grassroots organizations become the principal force behind the movement to abolish the "Prison Industrial Complex."[42] Undoubtedly, abolitionists' demands have sparked important conversations on how states can guarantee public safety without relying on the imposition of punishment, police, and practices of surveillance and control.[43] At the same time, one of the movement's main concerns lies in building a response to crimes that assists victims, assures their safety, helps them heal, and empowers them so that they can move on with their lives in the aftermath of

37. *See* Kristin Bumiller, *Explaining the Volte-Face: Turning Away from Criminal Law and Returning to the Quest for Gender Equality*, *in* THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME 118, 120–23 (Rosemary Gartner & Bill McCarthy eds., 2014).

38. *See* BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 99–124 (2012); ANDREA J. RITCHIE, INVISIBLE NO MORE; POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); Leigh Goodmark, *Gender-Based Violence, Law Reform, and the Criminalization of Survivors of Violence*, 10 INT'L J. CRIME, JUST. & SOC. DEMOCRACY 13, 15–18 (2021).

39. *See* AYA GRUBER, THE FEMINIST WAR ON CRIME 151–69 (2020); Nickie D. Phillips & Nicholas Chagnon, *"Six Months Is a Joke": Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, 15 FEMINIST CRIMINOLOGY 47, 51, 59, 62 (2020).

40. *See* Aya Gruber, *#MeToo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 282–285 (2020); Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335, 335 (2019–2020).

41. Elizabeth Bernstein initially coined "carceral feminists" to refer to "the commitment of abolitionist feminist activists to a law and order agenda and, as Marie Gottschalk has similarly described within the context of the U.S. antirape and battered women's movements, a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals." Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism"*, 18 DIFFERENCES J. FEMINIST CULTURAL STUD. 128, 143 (2007).

42. According to Angela Davis, "The notion of a prison industrial complex insists on understandings of the punishment process that take into account economic and political structures and ideologies, rather than focusing myopically on individual criminal conduct and efforts to 'curb crime.'" ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 85 (2003).

43. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787–88 (2020); Simonson, *supra* note 8, at 801–13.

crimes.[44] In this line, several abolitionists organizations such as INCITE!, Creative Interventions, Communities Against Rape and Abuse, and Sista II Sista have developed different practices to offer victims of sexual violence alternative ways to deal with their crimes that do not rely on the intervention of the criminal legal system.[45] Building on these efforts, legal scholars have pointed to the urgent need for imagining a different way of conceiving what we mean by "criminal justice" and how we can best achieve it.[46]

Attending to the contemporary abolitionist movement thus illustrates that victims' reactions are not necessarily punitive. Interestingly, this stance is not an exclusive characteristic of those victims who identify themselves as abolitionists. The limited available evidence shows that some victims, for example, believe that spending more resources on prevention and rehabilitation programs, mental health treatments, education, and job creation offers better alternatives to address crime than imprisonment.[47] Multiple case studies from around the world also indicate that victims are willing to resort to restorative justice alternatives when given the opportunity, even in the presence of violent crimes.[48] Additionally, victims commonly offer altruistic motivations for taking part in these alternative schemes, such as helping those who have harmed them acquire better chances of rehabilitation.[49]

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44. *See* Natalie J. Sokoloff, *The Intersectional Paradigm and Alternative Visions to Stopping Domestic Violence: What Poor Women, Women of Color, and Immigrant Women Are Teaching Us About Violence in the Family*, 34 INT'L J. SOCIO. FAMILY 153, 162–63 (2008); *see generally* THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES (Ching-In Chen et al. eds., 2d ed. 2016); BEYOND SURVIVAL: STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., annotated ed. 2020).

45. *See* INCITE! WOMEN OF COLOR AGAINST VIOLENCE, COMMUNITY ACCOUNTABILITY WITHIN THE PEOPLE OF COLOR PROGRESSIVE MOVEMENT 20–27 (2005), https://incite-national.org/wp-content/uploads/2018/08/cmty-acc-poc.pdf; Communities Against Rape and Abuse (CARA), *Taking Risks: Implementing Grassroots Community Accountability Strategies*, *in* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 250 (Incite! Women of Color Against Violence ed., 2016); *see generally* CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE (2012), https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf.

46. As Allegra McLeod claims, "Why is justice cabined by the terms of retributivism rather than considering what is just with reference to the broader contexts in which human beings either flourish or suffer violence, poverty, and despair?" Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1237 (2015).

47. *See* Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing*, 21 FED. SENT'G REP. 288, 289–90 (2009); ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK 2024: A NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 9–15 (2024), https://asj.allianceforsafetyandjustice.org/wp-content/uploads/2024/09/CrimeSurvivorsSpeak2024.pdf.

48. *See* LAWRENCE W. SHERMAN, HEATHER STRANG & SMITH INSTITUTE, RESTORATIVE JUSTICE: THE EVIDENCE 36–42 (2007); Danielle Sered, *A New Approach to Victim Services: The Common Justice Demonstration Project*, 24 FED. SENT'G REP. 50, 50 (2011); Clare McGlynn, Nicole Westmarland & Nikki Godden, *'I Just Wanted Him to Hear Me' : Sexual Violence and the Possibilities of Restorative Justice*, 39 J. L. & SOC'Y 213, 231–34 (2012); RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 6 (Estelle Zinsstag & Marie Keenan eds., 1st ed. 2017) [hereinafter RESTORATIVE RESPONSES TO SEXUAL VIOLENCE].

49. *See* Jonathan Doak & David O'Mahony, *The Vengeful Victim? Assessing the Attitudes of Victims Participating in Restorative Youth Conferencing*, 13 INT'L REV. VICTIMOLOGY 157, 164–65

As this brief analysis suggests, several institutional, ideological, and political factors, and not simply victims' purported inherent traits, are key to understanding victims' attitudes. The truth is that while some victims have punitive attitudes, others do not, and some even have both.[50] Ultimately, victims adopt different, even contradictory, positions. For this reason, a serious and acute discussion of victims' interests and needs requires us to turn our focus away from the widespread and simplistic depictions that present victims as vulnerable and punitive individuals. Victimization is a much more nuanced experience than what we commonly acknowledge. Hence, moving beyond these dominant portrayals of victims and avoiding the conflation of all victims into a single symbolic figure can help us make better sense of victims' demands. This is the main goal in Part II: to reinterpret victims' past and present demands as part of a broader quest for recognition.

II. A QUEST FOR RECOGNITION

To offer a different and better interpretation of what victims want and need when responding to crimes, we must review what we know about victims' demands. Among those victims who report their crimes, some demand to be kept informed during the criminal process or to be consulted by state officials at key moments of it.[51] Other victims instead seek a more active role within legal proceedings. For example, some express wanting to have a voice to narrate how the crime has affected them or even wanting to talk to the person who has harmed them so that they can understand why they had to go through such an experience.[52] Others request greater control over important aspects of the criminal process, such as being able to contest prosecutors' decision to drop charges or enter a plea deal.[53] In short, the demands of those victims who participate within the criminal process

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(2006); JOANNA SHAPLAND, ANNE ATKINSON, HELEN ATKINSON, BECCA CHAPMAN, EMILY COLLEDGE, JAMES DIGNAN, MARIE HOWES, JENNIFER JOHNSTONE, GWEN ROBINSON & ANGELA SORSBY, RESTORATIVE JUSTICE IN PRACTICE: THE SECOND REPORT FROM THE EVALUATION OF THREE SCHEMES 12–14 (2006); RESTORATIVE RESPONSES TO SEXUAL VIOLENCE, *supra* note 48, at 10.

50. *See generally* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019).

51. *See, e.g.*, Haley Clark, *"What Is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs*, 85 FAMILY MATTERS 28, 31–32 (2010); Dr. Asher Flynn, *Bargaining with Justice: Victims, Plea Bargaining and the* Victims' Charter Act 2006 (VIC), 37 MONASH UNIV. L. REV. 73, 78–81 (2019).

52. *See, e.g.*, Shirley Jülich, *Views of Justice Among Survivors of Historical Child Sexual Abuse: Implications for Restorative Justice in New Zealand*, 10 THEORETICAL CRIMINOLOGY 125, 129–31 (2006); Clark, *supra* note 51, at 33–34; Doak & O'Mahony, *supra* note 49, at 164–65; Jonathan Doak & Louise Taylor, *Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing Special Issue: Law and Emotions*, 64 N. IR. LEGAL Q. 25, 30–31 (2013); Clare McGlynn, Julia Downes & Nicole Westmarland, *Seeking Justice for Survivors of Sexual Violence: Recognition, Voice and Consequences*, *in* RESTORATIVE RESPONSES TO SEXUAL VIOLENCE: LEGAL, SOCIAL AND THERAPEUTIC DIMENSIONS 179, 185–87 (Estelle Zinsstag & Marie Keenan eds., 2017).

53. *See, e.g.*, Clark, *supra* note 51, at 34–35; Christine M. Englebrecht, *The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System*, 36 CRIM. JUST. REV. 129, 143–44 (2011); Christine Englebrecht, Derek T. Mason & Margaret J. Adams,

commonly revolve around different issues related to receiving information or assistance and having voice and control.[54]

Not all victims report their crimes.[55] Victims have different motivations for refusing to contact state officials when they are victimized. For example, some victims adopt this position because they do not want other people to find out about what happened to them and be identified as victims.[56] It is also common for victims not to report crimes because they do not trust that state officials and institutions that intervene in the aftermath of crimes will attend to their experiences with sufficient care and respect.[57] Such expectations do not only impede a common desire among victims to receive public acknowledgement that they have been harmed, but they are also well-founded. Especially when it comes to sexual offenses, victims often endure the hostile treatment of state officials who do not believe them or even blame them for the crime they have suffered. In many cases, the above dynamics result in victims feeling excluded and being retraumatized in court.[58]

Victims' demands are not limited to their role within the criminal process and the treatment they receive from state officials. Outcomes also matter for victims. This is clearly illustrated by those victims who demand harsher criminal sentences, harsher prison conditions, and the imposition of collateral consequences, but also by those who seek accountability through other means, such as material compensation or restorative justice conferences.[59] There is an apparent difference between

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The Experiences of Homicide Victims' Families With the Criminal Justice System: An Exploratory Study, 29 VIOLENCE VICTIMS 407, 413 (2014).

54. This is a standard notion among the scholarship. *See, e.g.*, Ian Edwards, *An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making*, 44 BRIT. J. CRIMINOLOGY 967, 970, 978–79 (2004).

55. For example, according to the National Crime Victimization Survey, in the United States, less than half (42%) of violent crimes were reported to the police in 2022. *See* ALEXANDRA THOMPSON & SUSANNAH N. TAPP, DEP'T OF JUST., CRIMINAL VICTIMIZATION 1 (2023), https://bjs.ojp.gov/document/cv22.pdf.

56. *See, e.g.*, Stephanie Fohring, *Putting a Face on the Dark Figure: Describing Victims Who Don't Report Crime*, 17 TEMIDA 3, 8 (2014); Shamus R. Khan, Jennifer S. Hirsch, Alexander Wamboldt & Claude A. Mellins, *"I Didn't Want To Be 'That Girl' ": The Social Risks of Labeling, Telling, and Reporting Sexual Assault*, 5 SOCIO. SCI. 432, 436 (2018); Maria Hansen, Kari Stefansen & May-Len Skilbrei, *Non-Reporting of Sexual Violence as Action: Acts, Selves, Futures in the Making*, 22 NORDIC J. CRIMINOLOGY 42, 54 (2021).

57. *See, e.g.*, Jeffrey S. Jones, Carmen Alexander, Barbara N. Wynn, Linda Rossman & Chris Dunnuck, *Why Women Don't Report Sexual Assault to the Police: The Influence of Psychosocial Variables and Traumatic Injury*, 36 J. EMERGENCY MED. 417, 422 (2009); Jan Jordan, *Here We Go Round the Review-Go-Round: Rape Investigation and Prosecution—Are Things Getting Worse Not Better?*, 17 J. SEXUAL AGGRESSION 234, 236–37 (2011); Adam Cotter, *Criminal Victimization in Canada, 2019*, 85-002-X JURISTAT 4, 16–19 (2021).

58. *See, e.g.*, Jana L. Bufkin & Judith Bray, *Domestic Violence, Criminal Justice Responses and Homelessness: Finding the Connection and Addressing the Problem*, 7 J. SOC. DISTRESS & HOMELESS 227, 230–32 (1998); Rebecca Campbell, *Rape Survivors' Experiences With the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 1, 1–2, 10–11 (2006); Jordan, *supra* note 57, at 238–40; ACLU, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 1 (2015), https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf; Louise Ellison & Vanessa E. Munro, *Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process*, 21 INT'L J. EVIDENCE & PROOF 183, 185–87 (2017); Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88–92 (2020).

59. *See, e.g.*, Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 586–96 (2005).

these two groups of victims. While those in the first group are not satisfied with the severity of the punishment pre-established by criminal laws, those in the latter group are not interested in punishing those who have harmed them. However, both demand different outcomes and results from what the criminal legal system currently offers them.

Read together, victims' past and present demands can be better understood as part of a broader quest for recognition. Political theorists such as Charles Taylor and Axel Honneth conceive recognition in terms of "impaired subjectivity and damaged self-identity."[60] Nevertheless, this is not the kind of recognition that unifies victims' diverse demands. To be clear, I do not deny that some individuals who are victimized want to be recognized as a victim. However, this is not what *all* victims want. Instead, the common element across victims' past and present demands is simply what originates them: their particular and salient standing, and therefore interest,[61] in the response that follows crimes as a result of being directly affected.[62]

Unlike those accounts that focus on the psychological or identitarian aspect of recognition, Nancy Fraser's work captures the normative dimension of victims' quest for recognition. Misrecognition, Fraser explains, "constitutes an institutionalized relation of subordination and a violation of justice."[63] More precisely, misrecognition is the result of being denied the possibility to interact as a peer or as a full partner in social life.[64]

According to Fraser, "parity of participation" requires the satisfaction of two conditions.[65] The first relates to the material resources that guarantee individual members of a political community independence and "voice."[66] This condition precludes social arrangements that institutionalize, for example, exploitation and deprivation.[67] The second condition requires that institutionalized patterns of cultural value "express equal respect for all participants and ensure equal opportunity for achieving social esteem."[68] This condition precludes institutionalized norms that depreciate particular categories of individuals "whether by burdening them with excessive ascribed 'difference' or by failing to acknowledge their distinctiveness."[69]

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60. Fraser, *supra* note 16, at 28. As Nancy Fraser explains, "[f]or both Taylor and Honneth, being recognized by another subject is a necessary condition for attaining full, undistorted subjectivity. To deny someone recognition is to deprive her or him of a basic prerequisite for human flourishing." *Id.*

61. "The concept of victim standing requires one to think about the questions of who has an interest in a criminal trial, how that interest ought to be defined, and precisely what interests any particular party ought to be able to represent." Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 335 (1999).

62. *See* S. E. Marshall & R. A. Duff, *Criminalization and Sharing Wrongs*, 11 CANADIAN J. L. & JURIS. 7, 9 (1998).

63. Fraser, *supra* note 16, at 29.

64. *Id.*

65. *Id.* at 36.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

As Fraser further explains, patterns of cultural values that preclude parity can be institutionalized in various ways. They can be juridified, institutionalized by government policies, or institutionalized informally through established social practices.[70] For example, marriage laws that exclude same-sex partnerships as illegitimate or racial profiling practices that associate certain groups of people with criminality are clear examples of misrecognition. These institutionalized norms and practices clearly deny these individuals' status as full partners in social interactions, whether by presenting them as inferior, excluded, wholly other, or invisible.[71]

Victims do not experience the same kind of devaluation as the above examples illustrate. However, they are still denied their status as full partners in the criminal process and, in particular, the criminal trial. As some criminal law theorists argue, the criminal trial is not simply an instrument to establish "the truth."[72] Instead, the criminal trial can be better understood as a unique instance of communication in which individuals accused of committing a crime are called to answer a criminal charge and, if found guilty, they are called to account for their crime.[73] From this perspective, the criminal trial must be designed to promote a communicative environment where the different parties involved (defendants, victims, state officials, and other members of the community) are treated with respect and have the opportunity to exchange arguments and reasons that will help elucidate defendants' responsibility and determine an appropriate response to implement.[74]

Currently, the role victims play in this communicative enterprise is limited. Despite the numerous procedural rights victims have gained over the past decades, public prosecutors still maintain control of the most important aspects of the criminal process and trial.[75] Ultimately, these state officials decide who to call to account and on what grounds, sometimes ignoring victims' interests in these matters.[76] Consequentially, whether victims' limited influence and control in the legal proceedings results from not taking victims' experiences and harm seriously, not considering them capable of participating because they are too emotional, helpless,

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70. Nancy Fraser, *Rethinking Recognition*, 3 NEW LEFT REV. 107, 114 (2000).

71. Fraser, *supra* note 16, at 29–30, 36.

72. R. A. DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TRADOS, THE TRIAL ON TRIAL: VOLUME 3: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 61–62 (2007).

73. *Id*. at 142–52.

74. *Id*. at 199–224.

75. *See* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 257–58, 293, 334 (2005) (analyzing the lack of review mechanisms victims have at their disposal when state officials do not enforce their rights). *But see* Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 108–34 (2020) (analyzing the amendment of Marsy's Law in Florida that affords victims new protections to ensure their rights are adequately protected).

76. Green & Ruben, *supra* note 12, at 1134 ("Even in making ad hoc decisions about charging and plea bargaining, prosecutors may disregard victims' views entirely on the theory that prosecutors are elected to implement their own views of justice in a consistent way, and that in a system of public prosecution, victims' views should not matter." (footnotes omitted)).

unreliable, vulnerable, and vengeful, or a combination of all of this, victims can be rendered invisible and inaudible unless what they have to say is useful for the goals state officials pursue.

This scenario has significant consequences. Affording victims an instrumental role in this institutional setting sends them an unequivocal message about how much value the political community assigns to their experiences, interests, and needs despite being those individuals most seriously affected by a criminal offense.[77] Simultaneously, not giving victims a prominent role in the response to their crimes underestimates the impact both the debates that take place at the institutional setting and the outcomes that follow this communicative enterprise can have on how victims navigate social life in the aftermath of crimes. In short, the subordinated role victims currently enjoy within the legal proceedings negates victims' salient and particular standing in how the institutional response that follows crimes unfolds.

Having identified the injustice victims experience, the question that arises is how to secure victims' status as full participants in the legal proceedings. As members of a political community, individuals interact among themselves in different capacities and within different spaces. Therefore, what needs to be considered as a full partner will vary according to the context in which individuals interact, and the role individuals occupy within specific social interactions. For this same reason, what is needed to redress misrecognition will vary. Following Fraser again, when misrecognition results from denying a collective group of people their humanity, redressing this injustice is a matter of universalist recognition, but when misrecognition is the result of denying a specific group of people their distinctiveness, it is necessary to recognize their specificity.[78]

In this light, redressing the injustice that victims currently face requires addressing victims' particular and salient standing.[79] To do so, this work proposes shifting

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77. Clark, *supra* note 51. A statement from a victim who did not have their case pursued asserts:

> In the end it was disempowering. In the end I couldn't speak my truth. There was no space to speak my truth whatsoever. And the words that I had spoken, the contexts were twisted and used to say the opposite to what I meant. So it did the opposite. It didn't just not enable me to speak my truth, it actually spoke lies using my words. (Hannah).

Id. at 34. In a different case, a victim's statement explains:

> I really wanted to have the criminal justice system to acknowledge that the crime had been committed and the enormous impact that it had on my life. I didn't want the perpetrator to go to jail or anything like that, I just wanted an acknowledgement or something—but I didn't get it, so I felt pretty ripped off. (Brenda).

Id. at 30.

78. Fraser, *supra* note 16, at 45–46.

79. Gabriel Mendlow also builds on Duff's work to argue that victims have a robust moral standing to call those who have harmed them to account. Hence, Mendlow further contends that while there might be reasons of efficiency and fairness to leave the act of calling an individual to account to the state, victims must retain a degree of procedural control. Undeniably, there are similarities between Mendlow's work and the account I propose in this work. Ultimately, we are both concerned with rethinking victims' limited role in the criminal trial

towards a victim-oriented criminal process. Specifically, this shift requires introducing two key changes to how we currently conceive the design and scope of the adversarial criminal process. First, to acknowledge the impact crimes have on victims and the relevance the institutional response has for them, it is necessary to center the response to crimes around victims' experiences, interests, and well-being. This does not imply disregarding the collective dimension of crimes. However, it does require rethinking the function that the institutional response to crime serves in addressing the collective interest. Second, it is essential to afford victims the influence and control needed to guarantee them the independence and voice required to fully participate in the criminal process. In what follows, I will explore the initial steps that need to be taken in this direction.

III. A VICTIM-ORIENTED CRIMINAL PROCESS

There are multiple ways for state officials to address victims' harm and there is ample room to afford victims greater influence and control in the criminal process. This work does not attempt to offer a full-fledged proposal that identifies every aspect that needs to be changed, and how it should be changed, to guarantee victims their status as full partners in this institutional setting. That exercise would demand an analysis, and extension, that this work cannot provide. However, my goal is to translate the theoretical underpinnings of the account offered in the previous section into tangible implications. For this reason, in what follows I analyze three contentious aspects of the adversarial criminal process, broadly conceived, that must be revaluated in the transition towards a victim-oriented criminal process. These are: (A) victims' duty to participate in the legal proceedings; (B) public prosecutors' role and the limits of prosecutorial discretion; and (C) victims' ability to deliver impact statements. In doing so, my aim is not to fill any gap, but to build on existing legal scholarship to either rebut, reinforce, or complement the proposals scholars have offered in different contexts.

Before moving on, it is necessary to introduce two important clarifications about the scope of this section. First, there is a question about which victims should have more influence and control within the legal proceedings. Victims can be directly or indirectly affected by crimes.[80] In most instances, victims survive crimes, but some

understood as a communicative enterprise. *See* Gabriel S. Mendlow, *The Moral Ambiguity of Public Prosecution*, 130 YALE L.J. 1146, 1165–71 (2021). While I prefer to see Mendlow's work as complementary rather than antagonist to my proposal, there are substantial differences. Most notably, my concern for victims' status as full partners in social interactions sheds light on victims' political rather than moral standing. This is relevant because even if moral intuitions inform our political commitments, it is not evident to what extent the institutions and practices political communities put in place must track moral intuitions. Besides, my account offers reasons to guarantee victims greater participation in the legal proceedings not only because they have a particular moral standing but also because the criminal process and trial have a crucial impact on their lives as members of the political community.

80. As Paul Cassell and Michael Ray Morris Jr. explain, a common way to identify or assign victim status is via the harmful-effects approach or the target-of-the-crime approach. States have adopted different definitions of "victim"; most, however, rely on the harmful-effects approach. Under this approach, the distinction between

might die or become seriously impaired.[81] At the same time, in certain circumstances, the direct victim will be an individual, whether one or more than one. In other circumstances, the victim will be a diffuse, sometimes fictional, collective entity. While the shift proposed in this work demands contemplating the challenges that each type of victim presents for its implementation, here I focus on direct victims of interpersonal crimes who can make decisions about their participation in the legal proceedings. Limiting the analysis to this group of victims allows me to unpack the theoretical implications of my work in more precise terms.

Second, victims' participation in legal proceedings can take different forms, each of which requires us to distinguish how victims act and interact in this institutional setting. Following Michelle Dempsey's work, I assume that victims' participation can be informative, advisory, and authoritative.[82] The first two relate to the participation legal systems nowadays broadly recognize for victims. For example, in some circumstances, victims can provide *information* to state officials. In others, state officials must consider victims' *advice* or opinions. Authoritative participation, however, implies giving victims *control* over some decisions and, consequently, imposing on state officials a duty to follow victims' requests.[83] While victims do not enjoy the latter kind of participation, this Section explains why victims must have an authoritative role before, during, and after the criminal trial takes place. This is not to say that victims should have absolute control over the legal proceedings, but that there are strong reasons for state officials to defer to victims' interests in specific circumstances.

A. Victims' Participation Within the Criminal Trial: A Duty or a Prerogative?

Public prosecutors adopt different positions regarding victims' participation in the criminal process and trial.[84] Some tolerate victims' unwillingness to participate. Others, however, force victims to participate by threatening them with the possibility of arrest or a fine if they do not show up in court to testify.[85] In some circumstances, prosecutors might even resort to legal tools to prevent victims from

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those who bear harm, directly and indirectly, that is to say, between direct and indirect victims, plays a key role at the moment of assigning procedural rights and remedies. *See* Cassell & Morris, *supra* note 3, at 338–39.

81. This raises different kinds of debates. From practical inquiries into who should represent those victims who cannot actively participate to theoretical debates around the rights and remedies afforded to relatives of "primary harm bearers" in dead-victim cases. For a fruitful discussion on the latter, see Lee Kovarsky, *The Victims' Rights Mismatch*, 123 MICH. L. REV. 1, 2, 30–35 (2024).

82. MICHELLE M. DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 194 (2009).

83. *Id*. at 195–96.

84. *See* Green & Ruben, *supra* note 12, at 1138–46 (describing how prosecutors in Prince George's County, Maryland, regard victims' views throughout different stages of the criminal process in misdemeanor cases).

85. For examples of prosecutors' negative reactions to victims' unwillingness to participate within the criminal process, see ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 65–71 (2007); Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627, 633–35 (2019).

attending the criminal trial, even if these individuals have a right to do so.[86] Conjointly, these different scenarios put in evidence that victims are not free to decide on their participation. Instead, it is more accurate to say that, in practice, victims have a prima facie duty to participate and are ultimately subject to prosecutors' benevolence.

Although it is common to take victims' duty to participate for granted, what are the reasons that justify this obligation in the first place?[87] Sandra Marshall explains that members of a political community play different roles in the criminal trial.[88] Despite their differences, all these roles must be understood in terms of their contribution to the satisfaction of the goals of this particular institution.[89] Marshall conceives the criminal trial not just as the setting through which the political community calls someone to account, but also as "an expression, articulation, and application of what are purported to be the shared, 'public' values of the polity."[90] Since these values demand allegiance and respect from all citizens, victims have a responsibility to assist state officials in the legal proceedings: a responsibility victims fulfill by reporting crimes, assisting in the investigation, and giving evidence in court.[91] For this reason, Marshall concludes that victims owe it to themselves and their fellow citizens to participate and collaborate in the criminal process, even if these are burdensome moral duties.[92] Put differently, victims must fulfill these duties as a matter of civic solidarity and dignity.[93]

Writing in the context of domestic violence, Dempsey discards different fair play arguments in favor of imposing on victims a duty to participate in the criminal trial.[94] However, she contends, in some domestic violence cases, the political community has a right to have the victim testify.[95] Specifically, when "[a] prosecution

86. On prosecutors' strategic exclusion of victims, see Edna Erez, Julie L Globokar & Peter R Ibarra, *Outsiders Inside: Victim Management in an Era of Participatory Reforms*, 20 INT'L REV. VICTIMOLOGY 169, 180–81 (2014).

87. DEMPSEY, *supra* note 82, at 197 ("[T]he notion that victims have at least a prima facie duty to testify has been relatively uncontroversial, while academic discussion has focused instead on the justifiability of enforcing the duty through legal mechanisms such as subpoenas, contempt of court, and material witness warrants.").

88. Some, such as judges, police officers, and other civil servants, play an official role for which they need specific professional skills. Other members of the political community also play an official role but in their capacity as citizens. This is the case of lay jurors. Finally, other citizens participate in virtue of their connection to the alleged crime as victims, defendants, or witnesses. Sandra E. Marshall, *Victims of Crime: Their Rights and Duties*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 153, 156–57 (Chad Flanders & Zachary Hoskins eds., 2015).

89. *Id.* at 157.

90. *Id.* at 161.

91. *Id.* at 163–64.

92. *Id.* at 165.

93. *Id.* at 164. It is not clear in Marshall's account what would be the result of victims not complying with their moral duties to report crimes and testify in court. Although she insists that "there seems to be at least a prima facie case for arguing that victims' duties should be legal duties," she also stipulates that this does not mean that failure to discharge these duties should be criminalized. *See id.* at 165–66.

94. DEMPSEY, *supra* note 82, at 198–201.

95. *Id.* at 197.

in which the victim's testimony can realize values which serve substantial community interests and in which no conditions defeat its formation will ground a duty on the part of the victim to testify against her batterer."[96] While this is in principle a moral duty, Dempsey is open to the possibility of prosecutors enforcing this duty in a very limited number of cases.[97]

Marshall and Dempsey offer compelling arguments to justify victims' duty to participate in the criminal trial. However, victims' obligation to act in any particular way during the legal proceedings cannot be easily justified once we take into consideration victims' particular and salient standing. Demanding victims to participate can indeed be useful to advance different values a political community might legitimately want to pursue. Nonetheless, this is not the only aspect to consider. First, the criminal process in general, and the criminal trial in particular, will inevitably put victims in a vulnerable position by, for example, having to face the person who has harmed them and retell what happened multiple times in front of strangers. If this kind of exposure is something victims do not want to experience, having to participate in the criminal trial against their will would hardly help them feel they are valued members of society whose interests and wellbeing matter when responding to crimes. More tellingly, while it is reasonable to demand citizens' allegiance to those values instrumental to sustaining the collective project, it is not obvious how much force this allegiance has when it comes to imposing duties and responsibilities on those victimized. Especially when victims are subject to criminal conduct due to the state's failure to protect them, it seems difficult to uphold that victims still owe anything to the political community.

If victims must be seen as full partners throughout the criminal process and particularly during the criminal trial, then victims must be able to decide how they want to participate in this institutional setting. Hence, under the theoretical framework developed in this Article, a true act or demonstration of civic solidarity and dignity, unlike what Marshall proposes, would be to recognize that victims have an unqualified right to decide on their participation rather than imposing a legal duty to do so.[98] Certainly, this does not mean that victims should not have any responsibility or duty to fulfill while participating in the legal proceedings. There are good reasons to impose on victims some obligations, such as the duty to tell the truth to

96. *Id.* at 204.

97. *Id.* at 208. Dempsey argues:

> [S]pecifically, in cases where the violence at issue is serious and on-going, where prosecution is likely to reduce the violence, where the violence constitutes domestic violence in its strong sense, where the prosecution is part of a habituated feminist response to domestic violence, and where (in addition to the foregoing) exceptionally strong community interests will be served by the victim's testimony.

Id.

98. Currently, not all jurisdictions grant victims an unqualified right to attend trial. *See* Cassell & Garvin, *supra* note 75, at 112.

ensure defendants' right to a fair trial.[99] However, these are not strong enough reasons to impose on victims a general duty to participate in the legal proceedings, and especially in the criminal trial.

Even if there are solid normative grounds to afford victims control over their participation, there are still some concerns and critiques worth considering. Someone could reasonably argue that giving victims control over their participation can hinder state officials' ability to call someone to account and determine whether someone is guilty of committing a crime, particularly in cases where the victim is the only witness. This concern merits two comments. First, affording victims control over their participation should not be reduced to whether victims want to take part or not in absolute terms. Some victims, for example, might be willing to collaborate and give their testimony if they are given certain safeguards, such as not having to face the person who harmed them. Hence, in an attempt to convince victims to participate in the criminal trial, prosecutors should be able to offer victims the possibility to give their testimony through means that will minimize their chances of being revictimized, such as testifying through video calls.[100]

Second, the possible impact a victims' decision not to participate might have on prosecutors' ability to prove someone's guilt must be analyzed within the realm of existing restrictions. For example, prosecutors cannot rely on illegal searches, forced testimonies, or other evidence that has not been produced according to preestablished rules.[101] The reason for limiting what state officials can do to prove someone's guilt follows from a basic and widely shared commitment to protect or preserve defendants' privacy, property, and liberty.[102] Giving victims control over their participation must be understood in similar instrumental terms: not forcing victims to participate is how the political community protects or preserves victims' well-being. From this perspective, a victim's decision not to participate constitutes one more element any prosecutor will have to factor in when building the criminal case against a defendant.[103]

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99. DEMPSEY, *supra* note 82, at 198 ("Certainly, of course, victims (and others) have a duty not to *interfere* with just prosecutions by, for example, engaging in witness tampering or jury intimidation; but this duty is not specific to victims nor is it best understood as a duty to participate.").

100. *See* Matthew Hall, *The Use and Abuse of Special Measures: Giving Victims the Choice?*, 8 J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION 33, 46–51 (2007). This practice, known as shielding, is not currently available to all victims and sometimes depends on judges' discretion. *See* Amanda Konradi & Tirza Jo Ochrach-Konradi, *Victims and Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 373, 385–87 (Ronald F. Wright et al. eds., 2021).

101. As the American Bar Association states: "A prosecutor should not use illegal or unethical means to obtain evidence or information, or employ, instruct, or encourage others to do so." *Fourth Edition (2017) of the Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ (last visited Feb. 4, 2025) (citing Standard 3-4.1(b)).

102. Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 837 (1999).

103. This is not necessarily different from what happens in practice. Victims frequently fail to appear in court, which leads to a significant number of cases being deferred or dismissed. *See* Lindsay Graef, Sandra G Mayson, Aurélie Ouss & Megan T. Stevenson, *Systemic Failure to Appear in Court*, 172 U. PA. L. REV. 1, 7 (2023).

Undeniably, if there are no consequences prosecutors can impose on victims for not participating, some victims might consider the possibility of not showing up to court and giving their testimony. However, this is the wrong way to approach the problem of victims' lack of participation. As shown, many victims, decline to report their crimes because they do not want to be identified as victims, or because they do not trust the actors and institutions that constitute the criminal legal system.[104] Thus, to address victims' lack of participation, the focus must be on identifying those reforms that can make victims feel safe and confident enough to report their crimes and adopt an active role in the legal proceedings. It is not obvious how giving victims control over their participation might make things worse in this matter. Instead, affording victims the right to decide whether they want to participate and how they want to participate could put pressure on political communities to implement policies that minimize secondary victimization.

B. Rethinking Public Prosecutors' Role and Discretion

So long as criminal trials remain a necessary alternative when responding to crimes, someone must be in charge of prosecuting criminal cases. The shift towards a victim-oriented criminal process raises one key question: what prosecution system should be followed? There are three possible alternatives to consider. One option is to implement a system of private prosecutions that resembles the system in place during colonial times.[105] This alternative, recently endorsed by Bennett Capers, faces some problems.[106] First, there is a risk that only victims with the resources and information needed to pursue a criminal case will benefit from a system of this sort, and this would go against the goal of securing all victims meaningful participation in the criminal process.[107] Furthermore, a system in which prosecutors solely represent the interests of victims could conceivably put defendants in a vulnerable position. Under this model, it is possible to imagine a scenario in which some powerful and resourceful individuals could pursue malicious prosecutions.[108] Finally, this system presents serious questions regarding how much

104. *See supra* notes 56–57 and accompanying text.

105. *See* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 762–65 (1976); John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317 (1973).

106. *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1586–88 (2020). It is worth noting that Capers does not advocate for a completely private model of prosecution but one in which private prosecutions are a possible alternative for some victims. *See id*.

107. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 864 (2018) ("[A] criminal enforcement regime that relied heavily on private plaintiffs would be one skewed against redress for poor victims who cannot bear litigation costs to vindicate their own interests.").

108. R. A. Duff & S. E. Marshall, *Private and Public Wrongs*, *in* ESSAYS IN CRIMINAL LAW IN HONOUR OF SIR GERALD GORDON 70, 81 (Elspeth Reid et al. eds., 2010) ("[U]nless private prosecutions were subject to some kind of official control or veto, it would open the way to frivolous or utterly ill-founded prosecutions that would unreasonably burden their targets.").

work would fall on victims' backs.[109] For these reasons, a system of private prosecution does not seem to be a good alternative that redresses the injustice victims currently experience.

A second possibility, common in countries within the civil law tradition,[110] but rare within the United States,[111] is to allow victims to directly participate in the criminal process as accessory prosecutors alongside public prosecutors. This alternative presents shortcomings similar to those already discussed. Victims who are prohibited from being accessory prosecutors will not be able to participate in meaningful ways in the criminal process. In addition, allowing victims to be accessory prosecutors could lead to a potential scenario in which defendants have to deal with the accusations of multiple prosecutors at the same time. This situation can put defendants at a clear disadvantage, especially when the system of public defense is poorly funded, as is the case across the United States.[112] These shortcomings shed some doubt on the benefits of adopting a system of accessory prosecution as a complement to the current system of public prosecution.

The third alternative is to continue with a system of public prosecution.[113] This option guarantees victims that their cases will be pursued independently of the means and legal knowledge they possess, and it does not disadvantage defendants by having to face multiple prosecutors for the same crime. Nevertheless, as currently conceived, two foundational aspects of a system of public prosecutions need to change to constitute a viable alternative that affords victims meaningful participation in legal proceedings. First, the premise that prosecutors should pursue the collective interest even if it goes against victims' interests is at odds with centering the response to crimes around victims' experiences, interests, and well-being. Second, the idea that victims should have authoritative control at some stages of the criminal process is in tension with the broad power of discretion public prosecutors currently enjoy.

Against this backdrop, the main goal of this Section is to suggest possible ways to overcome the limits that the model of public prosecution presents for implementing a victim-oriented criminal process. This Section proceeds in two steps. First, it reconceives the relationship between prosecutors, victims, and the political

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109. Corey Rayburn Yung, *Private Prosecution of Rape*, 13 CALIF. L. REV. ONLINE 86, 90 (2022), https://www.californialawreview.org/online/private-prosecution-of-rape. Responding to Capers' work in favor of private prosecutions, Rayburn stated, "it is reasonable to worry that whatever extra role that victims must take on will impede their recovery." *See id.*

110. There are significant differences regarding what victims and their representatives can do as accessory prosecutors or civil parties. While victims have full prosecutorial power in some jurisdictions, in others, they are simple companions of public prosecutors. *See* Máximo Langer & David Alan Sklansky, *Epilogue* to PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 300, 334 (David Alan Sklansky & Máximo Langer eds., 2017).

111. Brown, *supra* note 107, at 864–69.

112. *See* Langer & Sklansky, *supra* note 110, at 335.

113. It was in the nineteenth century that public prosecutors acquired the centrality they currently have. For a detailed analysis of how the public prosecutor emerged and consolidated within the United States, see JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980).

community at large under a victim-oriented criminal process. Second, it focuses on public prosecutors' discretionary powers. In particular, it advocates for affording victims the right to challenge some of the decisions these state officials make throughout the criminal process.

1. Prosecutors, Victims, and the Political Community

According to the adversarial model that structures the criminal procedure in most countries within the common law tradition,[114] the criminal process constitutes a dispute between two parties "before a passive decision-maker."[115] In this "procedural culture," prosecutors represent one of the parties in the dispute and have a particular interest in the outcome of the process.[116] Since crimes are commonly conceived of as public wrongs,[117] prosecutors are commonly seen as representatives or advocates of the public's interest or the State's authority.[118] Not surprisingly, in some jurisdictions across the United States, it is common to refer to prosecutors as representing "the People" or label criminal cases as "the People v. the Defendant."[119] In this line, in *Berger v. United States*, the Supreme Court stated that prosecutors represent "sovereignty,"[120] not victims. Meanwhile, within the inquisitorial model, common among civil law countries in Europe and Latin America, the criminal process constitutes an official investigation led by impartial state officials with the objective of finding the "truth."[121] Therefore, under this procedural culture, prosecutors are seen as impartial and neutral ministers of justice.[122]

Anti-inquisitorialism has played, and will possibly continue to play, an important role in defining the contours of U.S. criminal procedure.[123] However, it is a mistake to assume that the prosecutorial role is limited to an ideal adversarial type.[124] Even if in vague terms, prosecutorial standards in the United States are

114. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 10 (2004) ("[T]he adversarial and the inquisitorial can be understood as two different *structures of interpretation and meaning* through which the actors of a given criminal justice system understand both criminal procedure and their role within the system.").

115. *Id*. at 4.

116. *Id*. at 10.

117. Ambrose Y. K. Lee, *Public Wrongs and the Criminal Law*, 9 CRIM. L. & PHIL. 155, 155 (2015).

118. As Andrew Ashworth explains, within this conventional approach, the primary task when responding to crimes is to address the public's interest, and state officials are the ones in control of the most relevant aspects of the response to crimes. Ashworth, *supra* note 2, at 503.

119. *See* Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 271–79 (2019).

120. Berger v. United States, 295 U.S. 78, 88 (1935).

121. Langer, *supra* note 114, at 4.

122. *Id*. at 10.

123. *See generally* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

124. As David Sklansky points out, a salient characteristic of prosecutors is that they blur the boundaries between adversarial and inquisitorial procedures. *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 499–502 (2016).

based on the assumption that these state officials are "administrators of justice" in charge of "seeking justice."[125] This is why it is more accurate to say that prosecutors have a conflictive "dual role": as representatives of one of the parties in the dispute, prosecutors must win cases; as state officials in charge of seeking justice, they must also ensure the fairness of the adversarial contest.[126]

Understanding prosecutors in more inquisitorial terms carries two key advantages for theorizing the role of these state officials within a victim-oriented criminal process.[127] Firstly, conceiving of prosecutors as representatives of victims could be problematic for defendants. Aware of victims' interests and needs, prosecutors could feel pressured to pursue a criminal process and obtain a criminal sanction even when there is not enough evidence to proceed.[128] However, as impartial and neutral ministers of justice, prosecutors' ultimate goal would not lie in procuring a criminal conviction at all costs, but rather in making sure that the procedure is followed and corresponding rights and protections are fairly implemented throughout the different stages of the criminal process.[129]

Secondly, conceiving of public prosecutors as impartial and neutral ministers of justice allows for an institutional structure where prosecutors are accountable to victims. Being impartial and neutral does not preclude prosecutors from considering victims' interests and, therefore, having a duty to hear them, keep them informed about the status of the criminal process, and explain to them any aspect of the proceedings they may not understand due to their lack of technical knowledge. Relatedly, engaging with direct victims of crimes in ways that avoid or minimize revictimization does not go against prosecutors' impartial role.[130] There is an obvious problem: prosecutors and their staff are not necessarily trained on how to

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125. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 URB. L.J. 607 (1999). However, it is worth noting that the image of the impartial and neutral prosecutor of the inquisitorial tradition is weaker in the United States compared to other countries that share an adversarial tradition, such as England and Wales. *See* Langer & Sklansky, *supra* note 110, at 320–26.

126. *See* Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1420–22 (2018).

127. Recently, various legal scholars have argued in favor of adopting different measures to bring the U.S. adversarial prosecutor closer to the impartial and neutral prosecutor of the inquisitorial tradition. *See, e.g.*, *id.* at 1422–26 (arguing that prosecutors should abandon their adversary role and favor their "seeking justice role"); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020); Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627 (2021); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 191 (2022) ("Although historically used to ramp up incarceration, the minister of justice mandate can still be useful to support the reforms that progressive prosecutors are implementing.").

128. *See* Langer & Sklansky, *supra* note 110, at 335 (discussing the "prosecutorial monopoly" on decision-making authority).

129. Fish, *supra* note 126, at 1480 ("Prosecutors should behave as morally responsible agents in situations where they exercise discretion. They should implement the law in situations where they lack discretion. But they should never act as partisan advocates."); Bellin, *supra* note 127, at 1236 ("In sum, as a servant of the law, the prosecutor . . . would be indifferent to winning a case, and zealous only in ensuring that the laws are followed and the adjudicatory process created by those laws functions properly."); Hasbrouck, *supra* note 127, at 668 ("[P]rosecutors [must] approach decisions implicating constitutional rights with a commitment to equal justice, fairness, and neutrality.").

130. While during the last four decades many of these duties have materialized in a series of laws that guarantee victims diverse rights throughout the criminal process, victims continue to lack the tools required to

address victims and their needs throughout the criminal investigation and process.[131] To guarantee that prosecutors and their staff can fulfill such duties towards victims, it is necessary to review the training public prosecutors receive and, more tellingly, rethink the structure and composition of prosecutors' offices. Multiple changes might contribute to this goal. For example, the evidence suggests that the presence of victims' advocates can help mitigate secondary victimization and foster victims' cooperation in the criminal process.[132] Extending the presence of victims' advocates and promoting the creation of interdisciplinary prosecutors' offices is then an imperative within a victim-oriented criminal process.

One relevant question remains unanswered: who is in charge of addressing the legitimate interests of other members of the political community? Whether crimes are seen as a direct attack on the state's authority[133] or the civil order,[134] among other possible interpretations, crimes are commonly conceived as a problem for the political community at large.[135] Under a victim-oriented criminal process, the collective interest is not the only, nor the most relevant interest to consider. However, this is not to suggest that the collective interest is irrelevant when responding to crimes nor that the institutional response to crimes has no effect beyond those individuals who are directly implicated. On the contrary, crimes can have profound social and institutional implications.[136] For this reason, it is necessary to devise institutional arrangements that allow members of the political community to participate in the legal proceedings in active ways.

Jocelyn Simonson's work is indicative on this front. As she argues, contrary to common assumptions, it is problematic to understand the role of prosecutors as

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enforce these rights and hold prosecutors accountable when they fail to comply with their duties. Konradi & Ochrach-Konradi, *supra* note 100, at 375.

131. *See* U.S. DEP'T OF JUST., FRAMEWORK FOR PROSECUTORS TO STRENGTHEN OUR NATIONAL RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE INVOLVING ADULT VICTIMS (2024) (providing guidance to prosecutors in addressing the victims of certain crimes).

132. *See* Campbell, *supra* note 58, at 10–11; Christina M. Camacho & Leanne Fiftal Alarid, *The Significance of the Victim Advocate for Domestic Violence Victims in Municipal Court*, 23 VIOLENCE & VICTIMS 288, 290, 297 (2008); Oona Brooks & Michele Burman, *Reporting Rape: Victim Perspectives on Advocacy Support in the Criminal Justice Process*, 17 CRIMINOLOGY & CRIM. JUST. 209, 209–10, 214 (2017).

133. *See* Malcolm Thorburn, *Punishment and Public Authority*, *in* CRIMINAL LAW AND THE AUTHORITY OF THE STATE 7, 25 (Antje du Bois-Pedain et al. eds., 2017); STEPHEN P. GARVEY, GUILTY ACTS, GUILTY MINDS 1–19 (2020).

134. *See* R. A. Duff & S. E. Marshall, *Crimes, Public Wrongs, and Civil Order*, 13 CRIM. L. & PHIL. 27, 36 (2019).

135. *See* Markus D. Dubber, *Criminal Law Between Public and Private Law*, *in* THE BOUNDARIES OF THE CRIMINAL LAW 191, 206–11 (R. A. Duff et al. eds., 2010).

136. In some circumstances, certain crimes can have significantly wider social implications beyond the ones experienced by those individuals who experience the crimes first-hand. For example, it is reasonable for an individual to feel unsafe when walking down the street after they find out that another individual had been sexually harassed or assaulted in the neighborhood the previous night. In some circumstances, crimes may also have direct institutional implications. A coup is probably the clearest example, but a series of related crimes might also put into question the state's authority to guarantee public safety. Nonetheless, it is not obvious how many crimes or of what sort would effectively compromise the state's authority or the normative context allowing individuals to live as free, equal members within the political community.

representatives of "the People" because even if prosecutors may speak for the interests of some members of the political community, they rarely represent the interests of the political community as a whole.[137] This is especially true for the most marginalized and vulnerable groups of society.[138] As Simonson further argues, another problem with prosecutors' alleged representative character is that it assumes that "the public" only speaks through prosecutors, when in reality, members of the community participate within the criminal process in a myriad of ways, at times even in opposition to prosecutors.[139] Examples of this opposition include community bail funds, participatory defense practices which are aimed at interceding in favor of defendants by supplying relevant information to judges and prosecutors, and the documentation of proceedings in local courts to hold prosecutors accountable in the aftermath of criminal trials.[140] To address this lack of complete representation, Simonson favors moving beyond the idea of representation and instead implementing mechanisms that would guarantee the active participation of members of the community within the criminal process.[141] This could be done in different ways. While one possibility is to institutionalize some of the communal contestation practices already described,[142] another possibility is to favor the participation of members of the public as lay jurors, not simply at the moment of the verdict but throughout different stages of the criminal process.[143]

No matter how participation materializes, there are benefits from allowing members of the political community to play an active role within the criminal process. By giving the political community an opportunity to monitor prosecutors' work and intervene in the criminal process, victims and defendants are protected against prosecutors' abuses. In addition, this kind of participation could serve to legitimize the operations of the criminal justice system and help the political community understand the realities of those individuals involved in the legal dispute. For these reasons, a victim-oriented criminal process that seriously considers the social and institutional dimensions of crime should favor implementing community participation mechanisms without relying on intermediaries.

2. Reevaluating Prosecutors' Discretion

Public prosecutors are key figures in contemporary academic debates. The reason for criminal law scholars' concern with these state officials stems from the

137. Simonson, *supra* note 119, at 279–82.
138. *Id*. at 280–81.
139. *Id*. at 282.
140. For a more detailed account of these practices, see *id*. at 266–70.
141. *Id*. at 290–94.
142. *See id*. at 294–97.
143. *See* LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 8 (2015). *See generally* Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655 (2017) (arguing for the use of juries at other procedural stages in the criminal justice process).

power they wield within the criminal process.[144] While police officers are commonly the first contact individuals have with the criminal legal system,[145] public prosecutors play an important role in deciding which cases to pursue and which cases to dismiss.[146] Prosecutors also determine the charges that will fall upon those individuals whose cases they decide to pursue, which "sets the parameters for the entire case."[147] The power these prerogatives confer to prosecutors is such that their decisions can have profound implications for the political community at large. This is evident in the United States, where a series of laws that granted public prosecutors significant discretion and incentives to impose long prison sentences has played a significant role in the consolidation of a system of mass imprisonment and surveillance.[148] It is not surprising then for legal scholars to conceive these state officials as the most important or powerful actors within the criminal legal system, even if this is a contentious claim.[149]

Scholars have taken different avenues to address prosecutors' significant power. Some have proposed a series of reforms to advance fairer decisions by limiting prosecutors' discretion, including mandating prosecutors follow specific guidelines, obligating them to give reasons for their decisions, and demanding that they incorporate empirical evidence, such as racial impact studies, into their decision-making process.[150] Another avenue some scholars have explored is to shift to a system of community prosecution.[151] Under this approach, public prosecutors retain final decision-making authority but seek input from the larger political

144. *See, e.g.*, Sklansky, *supra* note 124, at 480–98.

145. In the United States, the most common ways individuals and police officers initiate contact are through traffic stops or when individuals report crimes, disturbances, or suspicious activities. *See* ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP'T. OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1 (2018).

146. "The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances." AM. BAR ASS'N, *supra* note 101 (citing Standard 3-1.2(b)).

147. Nora V. Demleitner, *Prosecutors and Sentencing*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 153, 155 (Ronald F. Wright et al. eds., 2021).

148. For a more detailed analysis of public prosecutors' discretion and the role they have played in the United States' unique punitive criminal justice system, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 127–59 (2017); FRANKLIN E. ZIMRING, THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION 44–60 (2020).

149. For an exhaustive review of scholars' portrayal of prosecutors as the most powerful actors within the criminal justice system and a critique of this idea, see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019).

150. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (arguing for the implementation of racial impact studies in prosecution offices); Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323 (2007); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 893–921 (2009).

151. *See* Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002); Ronald F. Wright, *Community Prosecution, Comparative Prosecution*, 47 WAKE FOREST L. REV. 361 (2012).

community.[152] Ultimately, the goal is to establish an ongoing relationship between prosecutors and the broader public to exchange their views on crime, the operations of the criminal legal system, and prosecutorial policies in the hopes that these debates would help both parts understand their respective expectations and concerns and forge a relationship of mutual accountability.[153]

Most notably, we can also observe a growing demand for structural changes in how public prosecutors understand their function within the criminal legal system and how they use their discretionary power. A distinctive aspect of the United States is that local prosecutors are appointed through elections in almost all fifty states.[154] Nevertheless, one of the main problems with prosecutorial elections is that there is no real contestation: incumbent prosecutors typically win and manage to remain in power for an extended period.[155] Lately, several individuals have challenged incumbent prosecutors and have even won.[156] Interestingly, many of them have campaigned under the commitment to use prosecutorial discretion as a means to reduce mass incarceration, eliminate racial disparities, and seek justice for certain vulnerable populations.[157] The enthusiasm these wins inspired has even led criminal law scholars to actively support electing "progressive prosecutors" as a crucial step to transform the criminal justice system.[158]

The figure of the "progressive prosecutor" draws attention to important aspects of how prosecutorial discretion could be used differently.[159] For example, some newly elected prosecutors have shown concern for certain groups of vulnerable victims by promising to use their power to prosecute specific crimes such as police killings.[160] However, except for a few progressive prosecutors who advocate for

152. Ronald F. Wright, *Community Prosecution and Building Trust Across a Racial Divide*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 413, 416 (Ronald F. Wright et al. eds., 2021).

153. *See* Thompson, *supra* note 151, at 360–63.

154. *See* UNIV. OF N.C. SCH. OF L., THE PROSECUTORS AND POLITICS PROJECT: NATIONAL STUDY OF PROSECUTOR ELECTIONS 4 (2020), https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf.

155. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–93 (2009); PFAFF, *supra* note 148, at 140–42.

156. *See* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7 (2019) (providing examples of individuals such as Kim Foxx who have recently defeated incumbents in prosecutorial elections).

157. Despite the growing interest in the figure of the progressive prosecutor among scholars and some members of the public, there is no uniform position regarding what being a progressive prosecutor entails. For a helpful discussion about different ways of conceiving what constitutes a progressive prosecutor, see Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021).

158. *See, e.g.*, Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 1 (2018), https://fordhamlawreview.org/wp-content/uploads/2018/09/Davis-BP.pdf; EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

159. Whether progressive prosecutors can achieve radical results in the administration of criminal justice is something that scholars have also put into question. *See, e.g.*, Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803 (2020); Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020).

160. Levin, *supra* note 157, at 1439–40.

allowing victims to decide how to respond to the crimes committed against them, most prosecutors are not necessarily preoccupied with victims as decision-makers.[161]

Against this backdrop, my goal for the remainder of this Section is to explain why under the proposed victim-oriented criminal process victims should enjoy greater influence and control over prosecutorial decisions. In particular, this Section argues that victims should be able to contest prosecutorial declinations and veto plea deals.

a. Prosecutorial Declinations

Declining criminal charges is an essential aspect of prosecutors' discretionary power.[162] My intention is not to argue otherwise. That the decision should be left to impartial and neutral state officials seems a reasonable institutional arrangement when the freedom of other individuals is at stake.[163] However, two main reasons justify affording victims a right to contest prosecutors' decisions not to pursue criminal charges.

First, because victims have a particular and salient interest in calling those who have harmed them to account for their actions, prosecutorial declinations preclude victims from initiating this accountability process. Not surprisingly, decisions not to prosecute can frustrate victims' expectations and affect the confidence they deposit in the state institutions and authorities that intervene in the aftermath of crimes.[164] Second, by declining criminal charges, prosecutors foreclose victims' ability to engage in meaningful conversations with those who have harmed them, and with other members of the political community, through an institutional setting that affords victims certain protections. In other words, as a result of prosecutorial declinations, victims are left without a crucial opportunity for dialogue that can be extremely beneficial for how they continue to navigate social life within the political community to which they belong.

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161. *See* Godsoe, *supra* note 127, at 223–26.

162. Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133 (2022). I agree with Green and Ruben's proposal that a victim's decision not to pursue criminal charges should be respected by prosecutors. *See* Green & Ruben, *supra* note 12, at 1147–48. Unlike these authors, however, I believe that a victim's decision not to pursue criminal charges should not be limited to misdemeanor crimes. *See* Santiago Mollis, Affording Victims Control (2025) (unpublished manuscript) (on file with author).

163. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010) ("Justice requires not only rules but also fine-grained moral evaluations and distinctions. Judges and juries should make more of these judgment calls than they do now, but prosecutors also deserve large roles.").

164. *See* Clark, *supra* note 51, at 34. A statement from a victim who did not have their case pursued asserts:

> You know, I'm a person being violated in, I would say, one of the worst ways a person could be violated, and I get this little letter to say, "Sorry it's not really important." For the criminal justice system to say, "Well it's not worth our pursuing," that's the bit that's been the hardest. Apart from the abuse itself, that part has been really hard. It almost felt like being abused again. (Penny)

Id.

Currently, there are no uniform grounds on which victims can review prosecutorial declinations across those states that give victims this oversight.[165] In effect, administrative review of a prosecutor's decision not to prosecute only exists at the federal level.[166] Victims in England and Wales, however, can seek review of such decisions through two different mechanisms. One option they have is to pursue judicial review of prosecutors' declinations.[167] Another possibility is for victims to initiate an administrative review process in accordance with the Victims' Right to Review (VRR) scheme. This mechanism consists of two stages: a local stage within the Crown Prosecutors Service and an independent stage within the Appeals and Review Unit or Area Chief Crown Prosecutor.[168] If the prosecutor's decision not to prosecute is found to be wrong, it can then be reversed, but if the decision is found to be correct, victims are provided with an explanation of why this is the case.[169]

A victim-oriented criminal process must incorporate these two review mechanisms of prosecutorial declinations. The advantage of the administrative review mechanism over the judicial one is that it offers victims a simple tool to contest prosecutors' decisions on their own merits.[170] Although an administrative review mechanism can present certain doubts as to the independence of the reviewer, a two-stage process like the one the VRR contemplates guarantees an impartial decision.[171] In addition, the possibility of judicially reviewing the decisions that result from the administrative scheme still guarantees victims a last resort to contest the initial decision made by the prosecutor. Like in England and Wales,[172] the standard of review required for the administrative mechanism to overturn prosecutorial declinations should be relatively low. The contrary would render the administrative review process futile. However, since the goal is to maintain the independence of powers, it is reasonable to demand a stringent standard of review when courts are in charge of reviewing prosecutors' decisions.

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165. *See* Brown, *supra* note 107, at 880–83.

166. *Id.* at 878–79, 884–90 ("[O]nly the federal justice system provides for a process of administrative review somewhat comparable to those in E.U. member states.").

167. While some victims have managed to review prosecutors' decisions through this mechanism successfully, there is certain skepticism about how accessible this mechanism is for victims overall. For a detailed analysis of this judicial review mechanism and its limitations, see Marie Manikis, *Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process*, 1 PUB. L. 63, 71–73 (2017).

168. Marie Manikis & Mary Iliadis, *Analysing the Victim Review Scheme of Decisions Not to Prosecute in England and Wales and Within Comparative Jurisdictions*, *in* VICTIMS' ACCESS TO JUSTICE: HISTORICAL AND COMPARATIVE PERSPECTIVES 138, 144–46 (Pamela Cox & Sandra Walklate eds., 2023).

169. *Id.* at 144.

170. *Id.*

171. *Id.* at 146.

172. In England and Wales, the standard of proof for the administrative review is correctness (whether the decision was right or wrong). *See* Manikis, *supra* note 167, at 72–73. In contrast, the standard of proof for the judicial review is reasonableness ("obvious perversity or failure to follow a policy"). *Id.*

b. Plea Bargaining

In the last five decades, "trial-avoiding conviction mechanisms" have proliferated around the world.[173] In the United States, according to recent estimates, more than ninety percent of criminal cases do not go to trial but are instead decided through a plea deal.[174] More tellingly, there are serious questions about the legitimacy and validity of this instrument. The lack of oversight and accountability over prosecutors, together with laws that foresee the imposition of harsh criminal punishments, allow these state officials to overcharge and threaten defendants to plead guilty.[175] This has led multiple scholars to denounce how prosecutors' abuse of plea deals undermines the voluntary aspect of defendants' decisions and perpetuates an unequal distribution of wealth and power.[176] Fewer scholars, however, have criticized how plea bargains exclude victims from the negotiation.[177]

Prosecutors in twenty-two states have an obligation to confer or consult with victims before they close a plea deal.[178] What this conferral or consultation implies for direct victims varies across jurisdictions. In some states, this right simply translates into prosecutors having to hear victims, without much precision about when and how they have to do it.[179] In others, victims can present written statements to prosecutors outlining their opinions about the plea agreement and prosecutors have an obligation to provide victims with the reasons for entering a plea deal.[180] In some other jurisdictions, victims can speak to the court before the court accepts the plea deal.[181] Although it also varies, if victims are not consulted or heard, they can challenge prosecutors' or judges' decisions on procedural grounds.[182] But despite

173. Máximo Langer, *Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY 377, 377–81 (2021).

174. RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 1 (2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf.

175. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303 (2018).

176. *See* Brian D. Johnson & Raquel Hernandez, *Prosecutors and Plea Bargaining*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 75, 78–81 (Ronald F. Wright et al. eds., 2021) (offering an overview of the different critiques that have been raised against prosecutors' power in plea negotiations).

177. In this line, see Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1406–08 (2003); CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 177–79 (2021).

178. O'Hear, *supra* note 150, at 324.

179. Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 117–26 (2014).

180. Marie Manikis, *Recognizing Victims' Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime*, 58 CRIM. L.Q. 411, 415–16 (2012).

181. *See* Jones, *supra* note 179, at 121–23.

182. *See* Manikis, *supra* note 167, at 68–70.

such information and consultation mechanisms, victims do not have the power to oppose plea bargains on substantive grounds.[183]

George Fletcher prominently supports giving victims a veto power. According to him, this could result in prosecutors taking victims seriously when negotiating a plea deal and, simultaneously, fostering reconciliation between the parties involved.[184] Yet, giving victims this type of control over plea agreements has not been well received.[185] The framework developed in this work, however, provides complementary reasons that better explain why victims should have a veto power.

As with prosecutorial declinations, entering a plea agreement denies victims the opportunity to pursue an indispensable accountability process to confront those who have harmed them and engage in a fruitful communicative enterprise.[186] However, this is not the only problem with plea deals. Agreements reached on the basis of criminal charges and facts determine the criminal sentence guilty individuals will have to face. At the same time, these agreements determine, at least from a legal point of view, the crime committed. This is not a minor consideration. Due to prosecutors' incentives to overcharge and force defendants into accepting plea deals, some of the deals prosecutors and defendants arrive at are construed in linguistic and definitional parameters that do not reflect what victims have experienced.[187] In this way, the political community also communicates to victims that their experiences, interests, and well-being are not necessarily a primary concern when responding to crimes.[188] In short, this veto power represents another way in which the political community provides victims their particular and salient standing in the institutional response that follows the crimes committed against them.

Affording victims authoritative control over plea deals can be subject to different critiques. For example, someone could argue that defendants are in a vulnerable position by having to wait for victims' consent since they do not know what victims might want. This critique merits two comments. First, when entering a plea agreement, prosecutors must have enough evidence that the defendant could be guilty of committing a crime. Pursuing a criminal trial then should not represent

183. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV 559, 574 (2005).

184. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 247–48 (1995).

185. *See, e.g.*, Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825 (1995); Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1606–07 (1996).

186. For many victims, the trial might be the only alternative to have their voices heard.

187. *See* HESSICK, *supra* note 177, at 177–79.

188. Christine M. Englebrecht, *The Struggle for "Ownership of Conflict": An Exploration of Victim Participation and Voice in the Criminal Justice System*, 36 CRIM. JUST. REV. 129, 143–44 (2011). One victim noted:

> When we talked about what could happen, [the prosecutor] would always say, "I am just consulting you, but the final decision is mine." But I told him very firmly that I did not want to plead with [the defendant]. That was unacceptable to me. During this time it got real heated and we exchanged one very angry phone call where I was screaming and swearing.

Id.

an unexpected or unfair consequence for those accused of committing a specific crime. It is simply the logical consequence of the investigative process. Second, people accused of committing a crime do not have an unqualified right to a plea deal. This is why, for example, in some jurisdictions judges have the power to review plea agreements and even reject them.[189] Giving victims a veto power must be understood in these terms. Notwithstanding, it is also important to change some of the practices prosecutors tend to follow if victims are given such veto power. For example, they should include victims in the negotiations. Not only because victims have a right to participate on equal terms throughout the criminal process and because this could foster reconciliation, but also because considering victims' opinions could contribute to avoiding future vetoes.

Another potential issue with victims' veto power is that it may conflict with one of the main reasons for having plea bargains: the need to manage growing caseloads.[190] Certainly, a drawback of my proposal is that victims' veto power could exert more pressure over the workings of the criminal legal system. But this is not a problem of the veto power. Instead, it is a problem of a system that criminalizes too many things and too many people.[191] In other words, victims should not bear the costs of flawed criminal policies.[192]

C. Delivering Impact Statements

Victim Impact Statements (VIS) gained popularity during the expansion of victims' rights.[193] Despite initial skepticism,[194] VIS rapidly became a prominent feature of the adversarial criminal process across the United States, allowing victims to intervene at the sentencing stage of the criminal trial and at parole hearings.[195] However, there still are "normative and conceptual uncertainties" regarding this

189. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326 (2016) (showing how judicial involvement in plea negotiations has become institutionalized and part of courts' practices across different states).

190. Johnson & Hernandez, *supra* note 176, at 76 ("The rise of plea bargaining is often viewed as the direct result of growing caseloads, though historian and legal scholars continue to disagree .... In all likelihood, caseload pressure is important but not the sole explanation for plea bargaining.").

191. *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008).

192. This first response to the problems that victims' veto power could create may read as very superficial and detached from reality. As described in the beginning of this subsection, I acknowledge the complicated racial and economic dynamics of plea bargaining in the United States. As such, the implementation of a veto power of this sort in victims' hands presents a series of very difficult challenges. I address some of these in Part IV. However, the point I intend to highlight in this first approach is that, at least in theory, giving victims a veto power does not need to affect defendants' rights.

193. For a historical overview of the advent of VIS in the United States, see Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, 68 UCLA L. REV. DISCOURSE 302, 308, 311–14 (2020).

194. *See* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On ...*, 3 INT'L REV. VICTIMOLOGY 17 (1994).

195. Solimine & Elvey, *supra* note 2, at 915–16.

instrument.[196] Should victims be allowed to deliver these kinds of statements? If so, should they be mandatory or optional? Are there any limits to what victims can say? How much consideration should judges give to these statements when determining the applicable criminal sentence? Should this instrument be limited to the sentencing stage? In what follows, I contribute to such debates by revisiting these questions from the distinct victim-oriented approach defended throughout this work.

Several reasons justify giving victims the ability to deliver these statements at the sentencing stage. First, it constitutes a straightforward mechanism to recognize victims' status as full partners who can speak with authority in this institutional setting. Second, doing so not only allows victims to manifest their voice, but also helps them defy the narratives imposed on them.[197] Finally, the evidence shows that delivering these statements increases victims' feelings of confidence, both in relation to themselves and others, as well as levels of satisfaction with the overall operation of the criminal process.[198] These reasons, however, do not resolve the most contentious aspects around this instrument: its obligatoriness, its content, and the level of consideration judges must give to these statements.

According to Julian Roberts and Edna Erez, it is possible to distinguish between two types of VIS models: the communicative or expressive model and the impact model.[199] The communicative or expressive model sees these statements as a means for victims to communicate a message to those who have harmed them, as well as other actors involved in the criminal process.[200] Under this model, victims' statements do not have any influence on the applicable sentence but serve to promote victims' welfare.[201] In contrast, the impact model regards victims' statements as inputs that aim to influence judges' decisions regarding the applicable criminal sentence.[202] In accordance with this classification, Roberts and Erez attribute to the communicative or expressive model a non-punitive ideology focused on promoting the "interests of victims from a restorative justice perspective," while they view the impact model as responding to a conservative law and order ideology that grants victims' rights to express their voice in order to achieve harsher sentences.[203]

However, as Marie Manikis points out, these two models do not capture the complexity of VIS schemes in different jurisdictions.[204] Put differently, it is unclear whether VIS schemes strictly follow one model, or tend to integrate

196. Kennedy, *supra* note 28, at 88.

197. *See supra* Part I.

198. JULIAN V. ROBERTS & MARIE MANIKIS, VICTIM PERSONAL STATEMENTS: A REVIEW OF EMPIRICAL RESEARCH 25–27 (2011).

199. Julian V. Roberts & Edna Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, 10 INT'L REV. OF VICTIMOLOGY 223, 225 (2004).

200. *Id.*

201. *Id.* at 225–27.

202. *Id.* at 227–28.

203. *Id.* at 225.

204. Marie Manikis, *Victim Impact Statements at Sentencing: Towards a Clearer Understanding of Their Aims*, 65 U. TORONTO L.J. 85, 90 (2015).

different aspects of both. More tellingly, the impact VIS model does not only serve a punitive function. While victims' statements can aggravate the applicable sentence, victims can also use this opportunity to ask for leniency for the defendant. The information victims provide in these statements can, therefore, help judges determine restorative outcomes or even protective measures for victims.[205] In an attempt to reconcile the communicative and impact VIS models identified by Roberts and Erez, Manikis proposes a "multi-functional" model that conceives VIS as a mechanism that allows victims to inform judges about how they have been affected by the crime and, simultaneously, offers victims the possibility to communicate with those who have harmed them.[206]

The multi-functional model seems promising from the perspective defended in this work for various reasons. First, it does not impose on victims an obligation to deliver an impact statement.[207] Second, it gives victims ample room to decide what they want to say and how they want to deliver their statements.[208] This, however, does not imply that judges must follow victims' desires. Aside from informing victims about what elements of their statement are relevant for determining the criminal sentence to impose, this model protects those guilty of committing a crime by imposing on judges a duty to filter the content of victims' statements and by allowing cross-examination in specific circumstances.[209] Finally, giving victims the opportunity to express their voice at this stage can also serve to initiate a conversation on alternative outcomes that do not include the imposition of criminal punishment and instead foster reconciliation.[210]

The utilization of VIS at parole hearings presents other challenges. Two main questions commonly inform parole boards' decision to grant or deny a request for early release: Does the petitioner represent a risk, and will the release promote the petitioner's prospects for rehabilitation?[211] Victims are not well positioned to evaluate the merits of this decision, although they might be well positioned to provide relevant supplementary information to parole boards. For example, victims could inform the parole board if the person requesting the release has, either directly or indirectly, intimidated or even threatened them in some way. Nonetheless, this is not the only information victims sometimes provide to parole boards. In some jurisdictions, victims are allowed to disclose their opinion on whether the release should be granted or not.[212]

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205. *Id.* at 93–94.

206. *Id.* at 109–11.

207. *Id.* at 111.

208. *Id.* at 112–13.

209. *Id.*

210. *See* Mundy, *supra* note 193, at 331–36 (proposing several reforms to encourage reconciliation-oriented VIS).

211. Julian V. Roberts, *Crime Victims, Sentencing, and Release from Prison*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 112, 113 (Joan Petersilia & Kevin R. Reitz eds., 2012).

212. *Id.* at 114–15.

Leaving considerations about the impact of victims' opinions aside,[213] victims do not have a strong reason to have an advisory or authoritative role during parole hearings. The trial has concluded, and the individual found guilty of committing the crime has received a criminal sentence that they have partially fulfilled. Victims might have a legitimate interest in the decisions parole boards make, but not necessarily a strong reason to being allowed to intervene authoritatively. This is not to say that other considerations, such as how the release might affect a victim, are not relevant. Especially when it comes to victims of violent crimes, knowing that the person who has harmed them has been released can have a significant impact on their well-being and feelings of security. This information could be useful for parole boards when finalizing the release plan or for implementing measures oriented to assist victims,[214] but it should not be used to determine whether the release must be granted or not.[215]

IV. THE BENEFITS AND LIMITS OF A VICTIM-ORIENTED CRIMINAL PROCESS

The impact of penal abolitionism on U.S. legal scholarship is indisputable.[216] Building on abolitionists' critiques, demands, and efforts to transform current practices and institutions, scholars have articulated various proposals. As a result,

213. The effect of VIS at parole hearings is unclear. While some research indicates that these statements have an influence on parole boards' decisions to deny a request for early release, other research does not find a significant influence. *See, e.g.*, Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL'Y 333 (2005); Joel M. Caplan, *Parole Release Decisions: Impact of Positive and Negative Victim and Nonvictim Input on a Representative Sample of Parole-Eligible Inmates*, 25 VIOLENCE & VICTIMS 224 (2010); Roberts, *supra* note 211, at 118; Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 502 (2019). Multiple reasons might explain the possible impact victims' statements can have on parole boards' decisions. *See* Roberts, *supra* note 211, at 119–20.

214. Kathryne M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 487–88 (2016) ("[S]etting parole conditions is a very different process from deciding whether an inmate should be released, and it offers an opportunity to enact respect for victims' individual needs and experiences.").

215. Legal scholars have argued in favor of limiting the information victims can provide at parole hearings and how parole boards can use the information. *See* Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *The Future of Parole Release*, 46 CRIME & JUST. 279, 316–19 (2017); HADAR AVIRAM, YESTERDAY'S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE 219–22 (2020).

216. *See* Christopher Slobogin, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531, 532–34 (2024) ("Sometimes dated from Allegra McLeod's 2015 article *Prison Abolition and Grounded Justice*, modern abolitionist scholarship in the legal academy has generated well over three hundred articles since then, an average of forty per year." (footnote omitted)).

police,[217] prosecutors,[218] courts and trials,[219] the juvenile system,[220] defense attorneys,[221] prisons,[222] and pretrial detention,[223] among others, have been under scrutiny.[224]

An important characteristic of the United States' penal abolitionist movement is its structural critique: to address the injustices perpetuated by the criminal legal system, it is necessary to understand the role that prisons and police, for example, play in larger systems of social, political, and economic oppression.[225] It is within this context that these penal abolitionists advocate for, among other things, implementing a response to crimes that prioritizes harm and accountability over the imposition of state punishment.[226] Against this backdrop, to conclude, I argue that while shifting towards a victim-oriented criminal process might not conform with abolitionists' end-goal, this shift does not necessarily equate victims' rights with a punitive agenda.

In my account, the commitment to moving away from punishment materializes in different ways. For example, victims are given the right to decide whether they want to participate in the criminal trial and, if so, how they want to participate.

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217. *See, e.g.*, Akbar, *supra* note 43, at 1787; Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 124–31 (2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/73-Stan.-L.-Rev.-Online-120-Eaglin.pdf; Simonson, *supra* note 8.

218. *See, e.g.*, Molly Sherwood, *The Missing Link: How Prosecutors Contribute to the Carceral System and Why They Must Be Included in the Abolition Movement*, 34 GEO. J. LEGAL ETHICS 1315, 1329–36 (2021); Godsoe, *supra* note 127, at 217–30.

219. *See, e.g.*, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. 1, 4–7, 22–29 (2022).

220. *See, e.g.*, Durrell M. Washington, Toyan Harper, Alizé B. Hill & Lester J. Kern, *Achieving Juvenile Justice Through Abolition: A Critical Review of Social Work's Role in Shaping the Juvenile Legal System and Steps Toward Achieving an Antiracist Future*, 10 SOC. SCIS. 211, 218–23 (2021).

221. *See, e.g.*, Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 NYU REV. L. & SOC. CHANGE 159, 174–86 (2021); Eli Salamon-Abrams, *Remaking Public Defense in an Abolitionist Framework: Non-Reformist Reform and the* Gideon *Problem*, 49 FORDHAM URB. L. J. 435, 453–64 (2022); Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953, 1958 (2022).

222. *See, e.g.*, McLeod, *supra* note 46, at 1172–73; Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019); Subini Ancy Annamma & Jamelia Morgan, *Youth Incarceration and Abolition*, 45 NYU REV. L. & SOC. CHANGE 471, 472–73 (2022).

223. *See, e.g.*, René Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention*, 53 CONN. L. REV. 667, 670 (2021).

224. Scholars have also raised different critiques and doubts about some of the goals and tactics of this movement. *See* Langer, *supra* note 7, at 57–70; Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America* 4–8 (Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 23-17, 2023); Daniel Fryer, *Idealizing Abolition*, 17 CRIM. L. & PHIL. 553, 555 (2023); Slobogin, *supra* note 216.

225. DAVIS, *supra* note 42, at 112; McLeod, *supra* note 46, at 1163 ("A prison abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems—interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security."); Akbar, *supra* note 43, at 1787 ("Rather than aiming to improve police through better regulation and more resources, reform rooted in an abolitionist horizon aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for human needs.").

226. See *supra* note 11.

Allowing victims to control their participation contributes to addressing their harms and well-being. Giving victims this right not only represents a direct recognition of their particular and salient interest but also serves to prevent secondary victimization by letting them participate on their own terms. Relatedly, the multifunctional impact statements model I endorsed opens up the possibility for stipulating alternative outcomes that directly address victims' needs and, simultaneously, avoids the imposition of punishment.

Besides, under my account, the criminal trial is a communicative enterprise through which victims and the community can call others to account for their actions. From this perspective, allowing victims to contest certain prosecutorial decisions guarantees them the opportunity to initiate this communicative process and actively engage in conversations that can significantly impact how they navigate their own experiences in the aftermath of crimes. However, my victim-oriented criminal process is not solely concerned with the individual victim. By advocating for the community's active participation in legal proceedings, my proposal also acknowledges a legitimate collective interest in how the response to crimes unfolds. In addition, the community's direct intervention can serve as an extra protection defendants have if the victim, the state, or both, attempt to pursue malicious prosecutions. Similarly, the political community's presence could also serve to protect victims from powerful defendants.

However, there is one aspect of my account that still presents challenges from an abolitionist perspective: some trials might result in the imposition of punishment. In doing so, it can be argued, a victim-oriented criminal process reaffirms the punitive logic that underlies the state-driven institutional response to crimes.[227] This objection merits two observations. First, punishment is not inherent to my account of a victim-oriented criminal process. Understanding the criminal trial as a communicative enterprise presents one key advantage: it does not conflate the response to crimes with the imposition of punishment. In other words, what matters is the institutional setting that allows the different parties involved to come together, interact with one another, ask questions and demand answers, all with the goal of addressing the resulting harm and holding those who commit a crime accountable for their actions. This process does not need to end with punishment, and even if punishment is one possible outcome, it does not have to be the only outcome available.

Second, for a shift towards a victim-oriented criminal process not to have negative implications on other members of the political community beyond victims of crime, it must occur within a larger context of legal transformations. While the shift proposed does not grant victims a more influential participation within

227. Benjamin Levin raises this concern in response to Capers' work. *See* Levin, *supra* note 18, at 33, 40–43 ("If a victim chose to seek punishment, it would be the state, not the victim, who would do that punishing. Any private power to bring charges or seek punishment would operate against the backdrop of brutal, state-run jails and prisons.").

criminal trials as a way to redistribute pleasure and pain in more just or efficient ways,[228] this shift cannot undo a deep-rooted reliance on criminal punishment and other punitive practices. This limitation puts in evidence a fundamental aspect of any attempt to abolish or even reform a punitive criminal legal system: it is a mistake to expect individual reforms to accomplish any of these goal singlehandedly. Due to the scale of developing a victim-oriented criminal process, it is necessary to understand how certain practices and institutions really operate to decide which proposals to implement and when to implement them.

For example, if we genuinely consider giving victims the right to contest prosecutorial declinations and veto plea bargains, we should engage in serious conversations about decriminalizing certain offenses and implementing alternative paths to reduce the number of individuals who would need to go to trial in the first place.[229] At the same time, we should advocate for policies that limit the use of pre-trial detention.[230] Similarly, we must not overlook discussions on the length and severity of prison sentences. Ultimately, any attempt to either abolish or reform the criminal legal system due to its punitive character must involve multiple conversations at the same time. What should be done about criminal trials and the role victims should play in this institutional setting are only some of these discussions.

CONCLUSION

It is undeniable that a discourse around victims' rights has played a fundamental role in the expansion of the uniquely punitive U.S. criminal legal system. However, it is a mistake to equate a pro-victim discourse with a punitive agenda. As penal abolitionists remind us, victims also support the development of alternatives based on notions of community accountability that do not rely on criminal punishment but instead focus on the harm crimes inflict on victims and the wider community. This work does not offer a defense of alternative response mechanisms. While there is merit in these alternatives, there are good reasons to assume that criminal trials will continue to be a necessary means to respond to crimes in certain circumstances. Instead, this work explores important theoretical and practical inquiries into the structure of the adversarial criminal process and victims' roles within it.

By reinterpreting victims' past and present demands as part of a broader quest for recognition, this work argues that the institutional response to crimes should center victims' interests, experiences, and needs. This shift has significant

228. *See* Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1531 (2024) (explaining that some critiques of the carceral state do not necessarily see criminal law as fundamentally objectionable. Instead, these commentators embrace the role criminal law can serve as a vehicle to shift power, and distribute pleasure and pain with the goal of achieving an equal society rather than as a tool for control and oppression).

229. Mediations, restorative conferences, and other transformative processes are possible candidates.

230. *See* Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709 (2022).

consequences for how we envision the function of the criminal process and victims' roles within it. At the same time, this shift implies reconceiving prosecutors' role and discretion, as well as the political community's intervention.

Taken together, this work aims to illustrate that it is possible to rethink the design and scope of the institutional response to crimes so as to address harm and foster community accountability. While punishment is not a necessary feature of the victim-oriented criminal process proposed, the reality is that this shift cannot guarantee that punishment will not have a role to play in how we respond to crimes. To end our reliance on punishment, other structural transformations are necessary.