A Crime Victim Rights Framework in the USA

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Abstract

Today, the Catholic Church hierarchy arguably finds itself in a similar situation as the United States did in the 1960s regarding crime victim rights. In short—it does not have them. This chapter argues that the Church hierarchy would benefit from affording victims of clergy abuse substantive and procedural rights in the canonical system. Such steps would ensure the legitimacy of that system in the eyes of the world. Failure to do so will only confirm the longstanding perception that the system is by design neither transparent nor just. Although this would be a major change for the Church, such major changes have previously been made in the American criminal justice system which have served to only benefit the system as a whole.

Throughout the majority of American criminal justice history, the crime victim had no explicit rights, while the accused had numerous Constitutional and statutory rights. Indeed, by the 1980s, the President's Task Force on Victims of Crime described the system as "appallingly out of balance" with a "neglect of crime victims [that was] a national disgrace". However, by then the country found itself plagued by crime, with national crime rates at their highest levels. The general public came face to face with the horrors of violent crime and few American households were spared being touched by crime

The United States was able to reform some aspects of its system to be more protective of victim-survivors, enshrining them with certain rights on both the state and federal levels. This chapter outlines the basic parameters of federal crime victims' rights in America in order to offer an introductory understanding of these rights, their history and the importance of fulfilling their promise. It then argues the canonical system should adopt such a framework. This is particularly critical given the extensive trauma inflicted upon victims of child sexual abuse by offenders, a Church that failed to protect them and a system that re-traumatises them.

The crime itself, the failure of the system to protect the victims, the behaviour of the institutions in ignoring the problem and the re-traumatisation by the systems in place to adjudicate these cases share a common truth. They all flow from an absolute failure to recognise the inherent dignity of the victims as human beings. Adopting such a system of rights will do much to rectify that hypocrisy.

Keywords: *victims' rights, child sexual abuse, Catholic Church, canon law, protection of victims*

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1. Introduction[1]

Today, the Catholic Church hierarchy arguably finds itself in a similar situation as the United States did in the 1960s regarding crime victim rights. The American criminal justice system is a defendant-based system. That is to say, the system is designed to err on the side of the accused rather than that of the crime victim.[2] Possessing over 20 constitutional rights and numerous statutory ones, the American criminal defendant has many mechanisms in place both pre and post-trial which function to attempt to protect his/her rights. Throughout the majority of American criminal justice history, the crime victim had no such rights. Indeed, by the 1980s, the President's Task Force on Victims of Crime described the system as "appallingly out of balance" with a "neglect of crime victims [that was] a national disgrace".[3]

As with the canon law system, the American criminal justice system focused on the defendants for many years, and victim-survivors functioned as merely witnesses for the prosecution. However, in the late 1980s the country found itself plagued by crime, with national crime rates in America at their highest levels. The general public came face-to-face with the horrors of violent crime and few American households were spared being touched by crime. At the same time, a growing number of Americans became outraged at a system which seemed to "treat [] the victim with institutionalized disinterest".[4]

Similarly, the Church hierarchy has been forced to face the breadth of abusive crime within its ranks and a public outraged by its continued lack of regard for the victim-survivors left in its wake. Recently, the Church hierarchy professed a desire to convert from a system of secrecy and clericalism to one more protective of victim-survivors and marked by transparency and accountability.[5] Yet, as with the American criminal justice system half

1 This paper builds upon a previous book chapter entitled, Crime Victim Rights, The State of Criminal Justice 2015, American Bar Association (2015).

2 "It is better that ten guilty persons escape than that one innocent suffer." William Blackstone, Bl Comm (3rd ed., Callaghan & Company 1884).

3 Lois H. Herrington, Final Report of the President's Task Force on Victims of Crime, U.S. Department of Justice 1982, v-vi.

4 Ibid. [vi].

5 Francis, Letter of His Holiness Pope Francis to the People of God, 20 August 2018, available on https://www.vatican.va/content/francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html, access 06.08.2022.

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a century ago, it finds its procedural system not designed for the task of providing a victim-centred approach.[6] This reality is compounded by the historical reality that the Church hierarchy is not merely unpractised in serving the needs of victims, but in many ways is itself guilty of fostering the abuse inflicted. Thus, it encounters a public not only sceptical of its ability to avoid re-traumatising victims, but doubtful of its real desire to do so.

Indeed, that is why the Church hierarchy must transform the victim-survivor experience from one of indifference to victim-centred. This will demonstrate to the greater world that it can reform its system to be one of justice and accountability, where victim-survivors can regain some of the dignity taken from them by their abusers and the clerical system that allowed the abuse to flourish.

The United States was able to reform some aspects of its system to be more protective of victim-survivors, enshrining them with certain rights on both the state and federal levels. This was done within the context of the aforementioned defendant-based system that possesses mechanisms favouring the release of ten guilty men so that one innocent man is not convicted.[7] While much work remains to be done, the American experience can provide some examples of how to transform from a defendant-based system to one that expands its concept of justice to include all stakeholders including victim-survivors.

This chapter outlines the basic parameters of federal crime victims' rights in America in order to offer an introductory understanding of these rights, their history and the importance of fulfilling their promise. First, it outlines the brief history of the victims' rights movement in the United States, which is critical to understanding today's state of victim-survivor rights. Second, the paper focuses on federal rights as a framework for discussion, while also outlining the federal rights currently afforded to victims. However, that is not to say that crime victims always enjoy these federal rights. In the analysis of the Crime Victims' Rights Act (CVRA), the chapter discusses some of the practical challenges to obtaining them. As with so many other aspects of criminal rights and procedures, it is

6 Human Trafficking Task Force e-Guide (OVCTTAC), available on https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/, access 02.08.2022 (A victim centric approach is defined as "the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner.").

7 William Blackstone, Bl Comm, Callaghan & Company 1884, 46.

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important to underscore from the outset that the manifestation of these rights, the mechanisms used to affect them and the level to which they are adhered varies greatly among jurisdictions.

The prevalence of child victimisation is abhorrent. The number of crimes against children and vulnerable people in the United States is staggering, with an average of over 5 million victims of violent crime per day in the last three years.[8] Equally as shocking, if not more so, are the tens of thousands of victims of clergy abuse throughout the world.[9] These statistics reflect more than simply a tragic reality of modern life; they represent a significant cost to the victim-survivors and society at large—both in the crimes themselves as well as the re-traumatisation of these victim-survivors. The crime itself, the failure of the system to protect the victims, the behaviour of the institutions in ignoring the problem, and the re-traumatisation of the victims by the systems in place to adjudicate these cases share a common truth. They all flow from an absolute failure to recognise the inherent dignity of the victims as human beings.

2. A Brief History of Victims' Rights in America

The public prosecution model in the American adversarial system has not always been the model in the United States. It replaced the early colonial system in which mainly individual citizens handled issues of justice by utilising the services of public officials for a fee. The responsibility—and cost—to investigate, charge and prosecute offenders fell to the victims themselves.[10] These prosecutions could have resulted in the victim receiving damages from the offender. However, as American life became increasingly more urban and diverse, this "private prosecution" method was both inadequate and risked corruption. Consequently, the law migrated to a "public

8 Rachel E. Morgan / Alexandra Thompson, Criminal Victimization, 2020 and Criminal Victimization, 2021, 2.

9 E.g., Sylvie Corbet, French Report: 330,000 Children Victims of Church Sex Abuse, AP News, 5 October 2021, available on https://apnews.com/article/europe-france-child-abuse-sexual-abuse-by-clergy-religion-ab5da1ff10f905b1c338a6f3427a1c66, access 06.10.2021; Laurie Goodstein / Sharon Otterman, Catholic Priests Abused 1000 Children in Pennsylvania, Report Says, NY Times, 14 August 2018, available on https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html, access 06.10.2021.

10 Peggy M. Tobolowsky et al., Crime Victim Rights And Remedies, Carolina Academic Press 2010, 4.

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prosecution" model in which professional government law enforcement agencies conducted investigations while government prosecutors replaced the victims as justice initiators and the societal interests of deterrence, incapacitation, rehabilitation and retribution replaced victim redress.[11] This new system relegated the victims' role to that of a government witness possessing, in stark contrast to the accused, no unique rights or protection.

In the mid-20th century, many separate influences converged to plant the seeds of reform. In the 1950s, a new discipline emerged: victimology, which studied victimisation; the relationship between victims and perpetrators; the relationship among victims, law enforcement and the criminal justice system; theories of victimisation; and risks regarding victimisation.[12] This field developed and expanded to advocate for alterations to the criminal justice system, to become more responsive to the needs of crime victim-survivors, to increase their role in the process of adjudication and to offer them more restorative remedies addressing their actual needs.[13]

In the 1960s, these reforms gained some traction as increasing crime rates garnered the attention of society and empowering social change movements proceeded, such as the women's rights movement, the anti-domestic violence movement and the civil rights movement.[14] With the commencement of the Crime Victimization Survey and its disclosure that actual crime levels exceeded those found in the FBI's Uniform Crime Reports, due in large part to victims' distrust of the criminal justice system, the victims' rights movement continued to gain momentum.[15] This manifested in some of the early statutes regarding victim compensation, the first of which was California's compensation programme in 1965. Many states later followed this model.[16] Such programmes were seen as a component of society's duty

11 Lynne N Henderson, The Wrongs of Victim's Rights, Stanford L. Review 37 (1985) 937.

12 Tobolowsky et al. (n 10), 6–7; Marlene Young / John Stein, History of the Crime Victims' Movement in the United States, National Criminal Justice Reference Service 2004.

13 Tobolowsky et al. (n 10), 7.

14 Ibid. 7–8; Young / Stein (n 12): Noting that the women's movement "was central to the development of a victim's movement. Their leaders saw sexual assault and the poor response of the system as potent illustrations of a woman's lack of status, power, and influence."

15 The federal government first published the National Criminal Victimization Survey in 1973.

16 Department of Justice, Landmarks in Victims' Rights and Services, Resource Guide, 2020, 2.

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to victim-survivors and also a form of encouragement to victim-survivors to report crimes.[17] Legal reform on behalf of victim-survivors emerged in varying forms including restitution laws, rape reform, the increased severity of some penalties and the allowance of victim impact statements.[18] The movement also grew to include the establishment of victim assistance programmes, victim impact procedures and victim services.[19] Various societal programmes also emerged in different local jurisdictions throughout the country, such as mandatory arrest for domestic violence, state victim compensation boards and battered women's shelters.

In the 1970s, the movement took on a more national tone with the creation of national crime victim organisations often founded by victims, such as the National Coalition Against Sexual Assault, National Coalition Against Domestic Violence and Mothers Against Drunk Driving. Numerous examples of victim-oriented legal reform began to take shape, including the reform of rape laws, the emergence of drunk-driving laws, the use of comfort items, support people or victim attorneys for child victims, and the creation of victim impact statement procedures for sentencing.[20]

Critically, these reforms took place against the backdrop of increasing crime rates and national concern. The President's Task Force on Victims of Crime (the "Task Force") was established in 1982. The Task Force held hearings throughout the country to receive commentary from victim-survivors and those who serve them, as well as examined the existing victimology literature. It issued its Final Report (the "Task Force Report") in December 1982 and found *inter alia* that "victims of crime have been transformed into a group oppressed and burdened by a system designed to protect them".[21] To alleviate this injustice, the Task Force recommended over sixty action items for all levels of government (federal, state and local law enforcement agencies) and professions involved in victim services.

17 Department of Justice, Section 5. Landmarks in Crime Victims' Rights and Services, National Crime Victims' Week Resource Guide, 2014, 2, available on https://www.ncjrs.gov/ovc_archives/ncvrw/2014/index.html, access 06.10.2021; Young / Stein (n 12).

18 Charles Doyle, Crime Victims Right Act: A Summary and Legal Analysis of 18 U.S.C. § 3771, Congressional Research Service, RL 3367921, 2021, 20.

19 Ibid. 2–4.

20 See, e.g., Charles Doyle, Crime Victims Right Act, Nova Science Pub Inc 2008, 3; Landmarks in Victims' Rights and Services (n 16), 4–5; Tobolowsky et al. (n 10), 8–9; EH v Slayton 468 P.3d 1209 (Ariz 2020) (Allowing victim's attorneys to sit before the bar).

21 Herrington (n 3), 114.

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At the time of the Report's issuance, over thirty-seven states had some form of victim compensation. However, other provisions such as victim notice, direct victim services and victim impact statement procedures were inconsistent throughout the country.[22]

Some of the Task Force Report's recommendations were effectuated on the national level, including the establishment of the Department of Justice's Office for Victims of Crime to coordinate the federal government's response to the Task Force Report. In the same year of the Task Force Report, Congress enacted several pieces of legislation, such as the Victim and Witness Protection Act, which required victim impact statements in pre-sentencing reports, restitution and outlined victim rights; and the Victims of Crime Act of 1984, which was part of the Comprehensive Crime Control Act of 1984. These acts established a crime victim fund and some reformed defendant-based criminal practices. The Victims of Crime Act outlined many rights, but never achieved full success, however, because it was placed in the Public Health and Welfare Title of the US Code, rather than the Criminal Code. Additionally, the Mandatory Restitution Act of 1996 required restitution for certain federal offences, and the Victim Rights Clarification Act of 1997 precluded judges from excluding victim-survivors from trial because they may participate in the sentencing hearing.[23]

Although efforts at a federal Constitutional amendment failed, several states passed constitutional amendments and even more passed state legislation outlining the exact nature of crime victim protection. Congress passed a well-supported alternative to a Constitutional amendment as part of the Justice for All Act of 2004, which was later amended through the Justice for Victims of Trafficking Act.[24] The Crime Victims' Rights Act of 2004 ("CVRA") created or modified specific substantive and participatory rights for crime victim-survivors and enforcement mechanisms for the statute's implementation.[25] Today's rights include (1) the right to be reasonably protected from the accused; (2) the right to reasonable notice of certain

22 Tobolowsky et al. (n 10), 11.

23 Ibid. 8–9; Paul Cassell, The Victims' Rights Amendment: A Sympathetic Clause by Clause Analysis, Phoenix L Review 5 (2012) 301, 304–307; e.g., 18 USC §§ 3510, 3525, 3663–3664; One Task Force Report recommendation that did not come to fruition on the federal level: an amendment to the United States Constitution articulating a crime victim's Bill of Rights.

24 Justice For All Act of 2004, Public L No 108–405, 118 Stat 2260.

25 18 USC § 3771; These rights are also reflected in the Federal Rules of Criminal Procedure 60; Jordan v Department of Justice, 173 F. Supp 3d 44, 49 (S.D.N.Y. 2016).

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court proceedings; (3) the right to not be excluded from most court proceedings; (4) the right to be reasonably heard at certain public proceedings; (5) the right to confer with the government attorney; (6) the right to full restitution; (7) the right to proceedings free from delay; (8) the right to be treated with fairness and respect for the victim's dignity and privacy; (9) the right to notice of a plea and deferred prosecution agreements; and (10) the right to notice of the aforementioned rights and statutory rights and services.[26] They responded to a system that had become "out of balance—while criminal defendants [have] an array of rights under the law, crime victims have few meaningful rights".[27] Moreover, these were accompanied by reforms to the Rules of Criminal Procedure and the Federal Rules of Evidence to decrease trauma for witnesses in criminal trials.[28] While the CVRA outlines some of the rights of crime victims, the Crime Victims' Rights and Restitution Act (VRRA) outlines mandatory services for victims.[29]

The very crux of the CVRA's purpose is essential to modern concepts of justice. The Act's goal is to "encourage crime victim participation in the criminal justice process".[30] The significance of the CVRA lies not only in its explicit articulation of specific victims' rights, but also in the other provisions. The CVRA defines "victim" broadly. It also discusses the courts' obligation to "ensure that the crime victim is afforded" the rights found within the statute, providing various provisions and limitations. Furthermore, it demands the federal government effectuate several actions to ensure compliance with these rights. Finally, it is located in the Criminal Code and contains specific enforcement provisions when prosecutors fail to pursue victim-survivors' rights.[31]

Every state has some form of victims' rights legislation, and more than thirty-two states enacted a Crime Victim Bill of Rights or similar amendment to their state constitution.[32] Some of these and all the remaining states

26 18 USC § 3771.
27 150 Congressional Record S4260–0, comments Senator Feinstein, 22 April 2004.
28 E.g., Federal Rules of Criminal Procedure 12(1), 4(13); Federal Rules of Evidence 412.
29 42 USC § 10607.
30 US v Minard, 856 F.3d 555 (8th Cir. 2017); US v Stevens, 239 F Supp 3d 417, 422 (D.Conn. 2017).
31 Cassell (n 23), 309.
32 National Victims' Constitutional Amendment Passage (NVCAP), State Victim Rights Amendments, available on http://www.nvcap.org/states/stvras.html, access 03.08.2022.

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have legislative protection for victims, many of which include rights provisions, compensation and restitution provisions, and service provisions.[33]

In the United States, criminal litigation occurs on two levels: the federal level or individual state level. In this public law system, crime victim rights may vary among jurisdictions. What will not vary is that victim-survivors are now at least recognised by the government as people possessing rights, and the risk of re-victimisation within the legal institutions that are supposed to protect them is significant. A crime victim possesses "the right to be treated with fairness and with respect for the victim's dignity and privacy".[34] This statement is more than aspirational. It is also more than a well-intended platitude to appease a politically important, if not powerful, community group. This paper outlines central obligations of the criminal justice system—and all the actors within it—to crime victims, recognising their inherent dignity and delivering them respect.

3. Basic Crime Victims' Rights Framework

The following discussion is an introductory description of victims' rights found in federal law. Although the states have arguably been more successful in their pursuit of victim-survivors' rights, these ten rights within the CVRA serve as one of the several accepted basic frameworks for crime victims' rights. However, the CVRA only provides a framework. Because each state and the federal government have distinct victim rights provisions in their codes, constitutions or rules of criminal procedure, determination of a particular victim's rights often turns on the facts of the victimisation and procedural status of the case.[35]

Threshold Issues

A. Definition of "Victim"

The issue of *who* qualifies as a victim is central and indicates how well a given jurisdiction understands the gravity of victimisation. Jurisdictions should reject the temptation to conceptualise the victim as only the person

33 *See generally* Tobolowsky et al. (n 10), 11–12.
34 18 USC § 3771(8) (2014).
35 Landmarks in Crime Victims' Rights and Services (n 17).

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directly harmed by the wrongful act. This is particularly true with child abuse as this is a crime that tears at the family framework, having a ripple effect on the immediate family of a victim as well as anyone in relation with him/her. While defining "victim" that broadly is impossible, extending the definition beyond just the individual directly harmed by the offender to include those proximately harmed is possible. In the United States,

[T]he term "crime victim" means a person directly and proximately harmed as a result of the commission of a[n] …offense. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.[36]

Thus, the federal CVRA recognises only those directly or proximately harmed by a federal crime.[37] As such, the statute arguably suggests that, with children, the incompetent, incapacitated or deceased others can assume the rights of victims who cannot do so themselves. Because these people are proximately harmed, they possess their own rights as well.[38]

Courts have attempted to interpret the term "victim". "[T]he government must show not only that a particular loss would not have occurred but for the conduct…but also that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally)".[39] "Not too attenuated" injects a risk of subjectivity which raised questions of inconsistency. Given the value of uniformity, the better course is to follow the wisdom of courts that recognise the gravity of victimisation. Some states, such as California, have broad definitions encompassing any victim of any crime and including relatives or representatives of a deceased, incompetent, incapacitated or minor victim.[40] It should be noted that the status of victim may be based on allegations, not proof to assert rights because victims'

36 18 USC § 3771(e) (2014); Federal Rules of Criminal Procedure 1(b) (12).
37 US v Maldonado – Passage, 4 F 4th 1097, 1103 (10th Cir 2021) (Noting that defendant caused victim emotional harm with threats and no physical harm necessary); In re Stuart, 552 F.3d 1285, 1288 (11th Cir 2008).
38 Tobolowsky et al. (n 10), 16.
39 US v Robertson, 493 F.3d 1322, 1334 (11th Cir. 2007).
40 California Constitution article I, § 28(e).

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rights begin well before conviction.[41] That approach recognises the dignity of all those harmed by an offender and the metastasising nature that criminal victimisation has on all human persons.

B. Responsibilities

The CVRA is more comprehensive than a list of rights. It also encompasses duties and responsibilities for the government and other actors. For example, certain officials are charged with engaging in "best efforts" to inform victims of their rights.[42] Rights mean nothing if not explicitly shared with those who have them. This collection of rights is notably not a list of exclusive rights. Many other statutes exist which may allow for specific remedies such as access to a crime victim fund, the right to sue civilly, or the right to obtain restitution after a criminal conviction. But with regard to these rights, the prosecutor and courts must fulfil their responsibilities of informing victims and engaging in certain actions to ensure the execution and realisation of the rights.

C. Limitations

The rights are not absolute. As will be discussed, at times they will come into tension with other rights. Although the rights are not absolute, however, they are not abandoned if difficult to execute. For example, the Act provides that if, due to the number of crime victims, compliance with these rights would be impractical, then the CVRA authorises courts to fashion "a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings".[43] Just as it is never acceptable to discard the rights of the accused, once these duties are labelled *rights* for the victim-survivors, it is also unacceptable to discard them. Courts and adversaries must reasonably accommodate them as rights, not simply preferences.

41 US v Sultsmon, No. 07 – CR-641 (NGG), 2007 WL 423985, alx, (EDNY Nov. 27, 2007).
42 See Section III D.
43 18 USC § 3771(d) (2) (2014); See e.g. US v Babich, 301 F.Supp. 3d 213 (D Mass 2017).

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I. Victims' Rights

Federal statues provide for the following minimum rights. Victim-survivors receive their rights on their own and should not need to request or fight for the following.

1) The Right to Be Reasonably Protected From the Accused

This right has been subject to minimal litigation on the federal level. While no system can guarantee the safety of any victim, this right still has significant value. The legislative history behind this provision indicates its purpose, including not only a general right of reasonable protection efforts but that it is also designed to obligate the government to provide victims with protection from the accused during proceedings. Such rights may include the right to separate and secure waiting areas during trials and hearings as well as the right to reasonable conditions of pretrial and post-trial release.[44] It could even include some protection for witnesses from uninvited inquiries from the defendant's lawyers. While it may seem as though this is an unnecessary right in canonical cases, such a view ignores the Church hierarchy's repeated failure to protect children from clergy abuse and, in some cases, facilitates it by knowingly affording known sexual offenders access to children. Therefore, this canonical process should be concerned with protecting the victims from further harm by addressing the offender's previous abuse and removing them from a role of ministry as a means of that protection. Similarly, offenders often try to influence victims through others in authority or the community. Given the difficulty of abuse allegations within a faith community, Church leaders should help to realise this right using transparent public statements and direction to the community to protect the victim from undue influence, harassment or worse. Additionally, it should also think of this as a right for the victim-survivors during the process by protecting victim-survivors from contact with the offender during the actual process of the hearing, while still affording them a significant role. In the United States, even proceedings closed to the public allow crime victims to be notified of a defendant's arrest, adjudication and disposition such that they can protect themselves from actualisation of

44 150 Congressional Record S10910, statement of Senator Kyl, 9 October 2004.

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a threat.[45] For example, in the United States, juvenile proceedings cannot be open to the public. However, in C.S., the court allowed a church (the victim) to be notified of a juvenile's threat to it, as well as the status of proceedings.[46]

Many states provide broad rights by articulating specific forms of protection, such as freedom from harassment, stalking or further abuse. Moreover, many states execute this right by providing victims with necessary information regarding the release of the accused in question. Thus, protection is included within the concept of notice to the victim of any release hearing and other such events which may impact victim safety.[47]

2) Right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime or any release or escape of the accused.[48]

An important word in this section is "public". All these rights presume a public process which is transparent. A public proceeding is necessary for accountability, and such a proceeding must be one in which victims are welcome. Any process that does not have some public aspects is doomed to failure in achieving accountability.

Putting the qualifier of "public" aside, this right is intertwined with the right to protection as notice affords victims the ability to take self-protective measures. However, this right also accomplishes another significant goal of the criminal justice system—to facilitate the participation of victims in the system and ensure that they are involved and informed stakeholders. "The obvious purpose for the right to notice was to provide a gateway to the…other rights".[49]

This is confirmed when read in conjunction with § 3771(c), which charges "officers, employees of the United States engaged in the detection, investigation, or prosecution of crime" to make their "best efforts" to notify

45 US v CS, 968 F.3d 237, 242 (3d Cir 2020).
46 Ibid.
47 National Crime Victim Law Institute (ed.), Fundamentals of Victims' Rights: A Summary of 12 Common Rights, *Victim Law Bulletin* November 2011, available on https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12, access 04.09.2022.
48 18 USC § 3771(a) (2) (2014).
49 Doyle (n18), 19.

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crime victims of all ten of the rights outlined in the CVRA.[50] Additionally, a prosecutor *"shall"* advise a victim that he or she can seek the advice of counsel regarding those rights.[51] Although this section was originally conceived as a victim-survivor counterpart to the Miranda rights of suspects, noticeably absent from this section is the requirement that the victim be informed of his or her rights.[52] Not only does the right rest in the list of crime victims' rights, but Rule 60 of the Rules of Criminal Procedure specifically directs that "[t]he government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime".

This section is also subject to other limitations. In addition to the aforementioned limitation in cases with a large number of victims, notice need not be given if doing so would endanger the safety of another person.[53] The phrase "involving the crime" is a rather general phrase which can be interpreted broadly. In cases with large numbers of victims, procedures using technologies such as websites to update victims have been approved.[54] While the word "public" might suggest a narrowing of hearings that victims can attend, such is not the case. This choice of wording seems to exclude already closed proceedings, such as grand jury proceedings and national security matters.[55] Another flaw with this phraseology is that within the criminal justice system, significant legal events can occur through pleading filings and not in court events. Written decisions, for example, are not considered public proceedings.

Two aspects of notification are essential. First, it must be clear that the right to notification is automatic, i.e., victims need not request notice in order to receive it. Victim-survivors must be informed of all events.[56] Second, notice provisions must be clear, precise and funded. "[T]he absence of clearly articulated notification procedures and sometimes limited resources" negatively impacts the effectiveness of such provisions.[57] Finally,

50 18 USC § 3771(c) (1) (2014).
51 18 USC § 3771(c) (2) (2014).
52 Doyle (n 20), 10.
53 18 USC § 3771(c) (3) (2014).
54 E.g., US v Skilling, No. 11–04–025-SS, 2009 WL 8066757, at 1–2 (SD Tex. Mar 6, 2009); *US v Olivares,* No. 3:13-cr-00335, 2014 WL 2531559 (W.D.N.C. 2014).
55 Doyle (n 18), 19.
56 E.g., State ex rel Hance v Arizona Bd. Of Pardons and Parole, 178 Az 591 (Az Ct App 1993).
57 Tobolowsky et al. (n 10).

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sanctions must exist for the failure to notify. "The incentive to perform notification requirements must also be reduced by the absence of victim remedies or sanctions for violation of notification rights.…"[58]

3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

A natural tension exists between a victim's dual status as both victim and witness. Victims had traditionally been allowed to attend trials and court proceedings, but in the United States' federal court, this practice changed in 1975 with the adoption of the Federal Rule of Evidence 615.[59] This provision effectively made sequestration routine.[60] In many jurisdictions, witnesses are excluded from the courtroom during trials, sentencing or other proceedings so as not to improperly influence their testimony.[61] Conversely, the Constitution affords defendants the right to be present at all stages of their public trials. It may risk a defendant's constitutional rights to a public trial and due process to fail to sequester witnesses. However, defendants do not have the constitutional right to exclude witnesses from the courtroom.[62] Moreover, the right to a public trial is not only a right for a defendant, but has also been interpreted as being of benefit to the general public.[63] Of all the members of the public, the victim of the crime charged possesses the most vested interest in observing the court proceedings. Yet, victim-survivors were often barred from proceedings. Consequently, victim-survivors were not only afforded fewer rights than the accused,

58 Ibid.

59 Federal Rules of Evidence 615 ("At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or (d) a person authorized by statute to be present.").

60 Victim Law Bulletin (n 47).

61 See Federal Rules of Evidence 615 (requiring the court to sequester witnesses upon a request of either party but excepting "persons authorized by statute.").

62 US v Jim, No. CR 10–2653, 2012 WL 119599 (D New Mexico 2012) *2.

63 See, e.g., Globe Newspaper Co v Superior Court, 457 U.S. 596 (1982); see also Maldonado (n 38), 1103.

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but they possessed even fewer rights than average members of the public unaffected by the crime.

The CVRA addressed this tension by providing victim-survivors with a right to not be excluded from a proceeding unless a court determines through clear and convincing evidence "that the testimony by the victim would be materially altered if the victim heard other testimony at that proceeding".[64] The Ninth Circuit described this burden as "clear and convincing evidence that it is highly likely, not merely possible, that the victim-witness will alter his or her testimony".[65] F.R.E. 615 has an exception to this Rule of Sequestration. It does not authorise excluding "a person authorized by statute to be present".[66] The CRVA provides such an exception.[67] This right is underscored by § 3510, which precludes a trial court from excluding a victim from a trial because he or she may testify at the sentencing or death phase of the trial.[68] The CVRA further provides that, prior to the court making the determination of the risk of altered testimony, "the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim".[69] In other words, sequestration is an act of last resort. Should the court deny a victim-survivor his or her right of attendance, it must state its reasons on the record.[70]

While canonical proceedings are not public, this right underscores the importance of transparency. By allowing the public, or at least the victim, broadly defined to attend, the procedural system demonstrates the value of the victim-survivor and his or her inherent dignity.

4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.[71]

The aforementioned right to attendance is distinct from the right to be heard. Although this right evokes the ability to speak at sentencing, it

64 18 USC § 3771(a) (3) (2014).
65 In re Mikhel, 453 F.3d 1137, 1139 (9th Cir. 2006); Jim (n 63).
66 Federal Rules of Evidence 216.
67 Jim (n 63).
68 18 USC § 3510 (2014).
69 18 USC § 3771(b)(1) (2014).
70 18 USC § 3771(b)(1) (2014); Federal Rules of Criminal Procedure 60.
71 18 USC § 3771(a)(4) (2014).

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encompasses much more than that. The CVRA specifically outlines certain public proceedings where the victim has a "right to be reasonably heard". These include "proceedings involving release, plea, sentencing or any parole proceeding".[72] While the text of the statute is silent on the method through which a victim can be heard, legislative history is fairly clear that "[t]his provision is intended to allow crime victims to directly address the Court in person. It is not necessary for the victim to obtain permission from either party to do so".[73]

Although canonical proceedings do not typically consider issues of release, they do consider questions of agreements, punishment, remedy and whether the offender will be released back to society with the imprimatur of clergy with or without limitations or a different status. The nature of these rights is therefore translatable to that process. Therefore, canonical procedures should offer victim-survivors the right to be heard prior to any agreement or remedy being determined.

This right is qualified by the word "reasonably". However, it still possesses significant breadth. This qualification recognises that judges must balance the rights between victim-survivors and others while striving to reach a reasonable compromise and allow a victim a voice.

With over 90 % of federal cases being resolved with a guilty plea, victim input before a plea is critical. These pleas significantly impact victims regarding restitution and harm suffered. The right is clearly not one of veto power, but one that simply ensures victim-survivors are heard prior to parties entering into a plea agreement and a court accepting it. It is no coincidence that the first right afforded victims in the CVRA is protection; the importance of being able to address the court in public hearings, which could lead to a defendant's release, includes not only bail review, but also sentencing and parole.

In passing the Act Congress made the policy decision that victims have the right to inform the plea negotiation process by conferring with the prosecutors before a plea agreement is reached. This is not an infringement on the government's independent prosecutorial discretion; instead it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.[74]

72 18 USC § 3771(a)(4) (2014).
73 150 Congressional Record S4268, remarks of Senator Kyl, 9 October 2004.
74 *In re Dean,* 527 F.3d 391 (5th Cir 2008).

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The main thrust of litigation in this space relates to victim impact statements at sentencing. Victim impact statements serve several important purposes and must be a component of any justice system. They "provide information to the sentencer, have therapeutic and other benefits for victims, explain the crime's harm to the defendant, and improve the perceived fairness at sentencing".[75] The Supreme Court explicitly repudiated an earlier case that denied victims the right to speak at a death penalty sentencing, describing it as wrongly decided.[76]

The components of this Act that allow for victim impact statements at sentencing were upheld by the Ninth Circuit Court of Appeals in *Kenna v. U.S. District Court for the Central District of California,* which held, *inter alia*, that (1) the intent of Congress was to allow victims to speak at sentencing hearings, not simply provide written statements; and that (2) the remedy for not allowing a victim to speak is vacating the sentence and having a new hearing in which the victims speak.[77] Initial concerns that such a right would cause administrative inefficiencies and be overly burdensome have proved to be misplaced. Additionally, the value and importance of this opportunity for victim-survivors far outweigh any administrative costs.[78] "Among the purposes of the CVRA is to make victims 'full participants' in the sentencing process and to ensure that the district court doesn't discount the impact of the crime on victims".[79] These statements are beneficial to all stakeholders. Judges and prosecutors have commented supportively on victim impact statements as at times providing increased information, defendants having increased awareness and, most importantly, victims having increased empowerment.

The language of the statute does not give courts discretion as to whether they must accept the impact statement, other than requiring the qualifier of reasonableness. The Supreme Court has tried to balance victim impact statements during the penalty phase of a capital case.[80] However, even if such a statement is not required to be admitted because of, for example, the status of the witness, courts retain the discretion to admit them.[81]

75 Cassell (n 23), 324.
76 Payne v Tennessee, 501 U.S. 808 (1991).
77 Kenna v United States District Court, 435 F.3d 1011, 1016–17 (9th Cir 2006).
78 Tobolowsky et al. (n 10), 11.
79 US v. Yamashiro, 788 F 3d 1231, 1234 (9th Cir 2015).
80 See, e.g., Tennessee (n 77), 826–827.
81 Victim Law Bulletin (n 47).

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5) The reasonable right to confer with the attorney for the Government in the case.

The Task Force Report noted a common criticism of the public prosecution model was the failure of prosecuting attorneys to consult with victim-survivors.[82] Such a situation has several negative effects. Most obviously, such a failure could lead to the prosecutor acting upon inadequate information. As such, the resolution may be disproportional to the harm caused. Proportionality is a fundamental principle of modern criminal justice. Therefore, the failure of the prosecution to be fully informed of the harm caused by a crime and the wishes of the harmed party—the victim—undermines some of the goals of the criminal justice system. More intangible, but equally as important, the failure to confer decreases victim participation in the justice system and can further victimise him/her by again eliminating his/her sense of input over the outcome or the process to achieve the outcome.

This right makes clear that Congress made the policy decision that victims—and their families—have the right to confer with the prosecution.[83]

This right has actual substance to it. Itmeans more than that a prosecutor need only answer phone calls or emails if a traumatized victim has the venue to initiate a conversation with the prosecutor about the case. Instead the right to confer with the prosecutor should be read in light of one of the CVRA's primary purposes: to give victims a meaningful voice in the prosecution process.[84]

Indeed, the law requires the prosecution to "respect the rights and interest" of a victim and his/her family.[85]

Importantly, this right does not allow a victim-survivor to dictate the direction of the prosecution.[86] The state prosecutes an offender for crimes against the community. These rights do not authorise victims to veto pro-

82 Herrington (n 3), 8–9; Tobolowsky et al. (n 10), 74–76.

83 E.g. In re Dean, 527 F.3d 391, 395 (5th Cir 2008); Jordan v Dept of Justice, 173 F.Supp.3d 44, 51 (SPNY 2016).

84 US v Stevens, 239 F Supp 3d 417, 421–422 (D Conn 2017).

85 Ibid. 422.

86 150 Congressional Record S4268, statement of Senator Kyl, 9 October 2004; United States v Degenhardt, 405 F.Supp.2d 1341, 1345 (D Utah 2005): "Some courts reject the idea that written statements comply with this right. "Such a construction…would defy the intention of the CVRA's drafters, ignoring the fact that defendants and prosecutors make oral statements at sentencing and disregards the rationales underlying victim allocution."

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secutorial discretion or to control or approve decisions.[87] It simply affords them the right to confer. This tension then between the individual victim and the collective societal victim is inherent but workable.

Notably, this provision is not limited to conferring with any representative of the government, but specifically mentions the attorney. Similarly, it is not limited to conferring only about outcome, but may include other issues such as testimony, safety concerns, privacy issues or other matters of importance to the victim. The Department of Justice Guidelines for Victim and Witness Assistance specifically direct prosecutors to make reasonable efforts to proactively notify identified victims "and consider victims' views about prospective negotiations".[88] The stated goal is to provide a meaningful opportunity "to offer views before a plea agreement is reached".[89] The right is not unlimited, however. Recognising the reality of busy criminal dockets and the inability of a prosecutor to meet with a victim at every request, some legislative history suggests the right is intended to cover critical stages in criminal cases after charging.[90]

Although this right may be unfamiliar in the canonical system, its prosecutors must change their perspectives as American prosecutors have had to do. "Prosecutors should consider it part of their profession to be available and consult with crime victims about the concerns victims may have which are pertinent to the case proceedings or dispositions".[91] This rethinking of the role of advocates has been beneficial to the legitimacy of the criminal justice system and could do the same for the canonical system.

6) The right to full and timely restitution, as provided in law.

As the Holy See considers how to accompany victim-survivors of clergy abuse, the concept of restitution may seem misplaced. However, the reality is that many of the cases in this system have not been addressed in the criminal or civil law systems due to statutes of limitations. The Holy See could consider that in such situations, hearings could provide access to a

87 United States v Thetford, 935 F.Supp.2d 1280, 1282 (ND Ala 2013).
88 Attorney General Guidelines for Victim and Witness Assistance, 2011 ed. (2012) 20 (hereinafter "Guidelines").
89 Ibid.; see also ABA Standards of Criminal Justice, Please of Guilty, Standard 14–3.1(s): "The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims before reaching a plea agreement."
90 150 Congressional Record S4268, statement of Senator Kyl, 9 October 2004.
91 150 Congressional Record 7301, statements of Senators Feinstein and Kyl, 2004.

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victim fund to provide restitution type remedies to victim-survivors. While this may not be able to be a provision of the canonical outcome, it is included in this paper so that readers can have some understanding of its importance in the American system as a right victim-survivors possess.

Restitution is money the offender pays to the victim to cover the losses the victim suffered as a result of the crime.[92] Courts order restitution as part of the resolution of a criminal matter. This is distinct from civil remedies, which a victim can obtain by successfully litigating a civil lawsuit against an offender in civil court for financial loss. Restitution can be mandatory or discretionary and its availability often depends upon the offence in question. "The primary goal of restitution is remedial or compensatory but it also serves punitive purposes".[93]

It is axiomatic that victimisation can have long-term financial, emotional and physical effects. The costs of crime can include mental and physical health, property loss, lost productivity and victim services. Restitution can be critical for victim recovery.

The CVRA provides victims the right to "full and timely restitution as provided by law".[94] This language reflects concerns about nominal restitution orders to comply with the law but does not adequately compensate victims. It also reflects the other end of the spectrum when restitution must be limited by either practical realities or legal limitations, such as a case with multiple victims and inadequate resources.

The CVRA must be read within the context of other mandatory restitution schemes in the federal criminal code. The Mandatory Victim Restitution Act of 1996 (MVRA) mandates restitution, regardless of a defendant's ability to pay, for out of pocket expenses of victims of certain types of crimes.[95] Furthermore, the Guidelines direct prosecutors to utilise asset forfeiture provision to recover assets to return to crime victims.[96] Additionally, Congress has also demanded mandatory restitution for certain types of crime, such as all crimes within Chapter 110 of the US Criminal Code, crimes of sexual exploitation and abuse of children.[97] However, in 2014 although the Supreme Court explicitly recognised the plaintiff as a victim,

92 18 USC § 3771(a)(6) (2014).
93 Paroline v United States, 134 S. Ct. 1710, 1726 (2014).
94 18 USC § 3771(6) (2014).
95 18 USC § 3663A (2014).
96 Guidelines (n 89), 45.
97 18 USC § 2259 (2014).

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it ruled that a victim of child pornography was not allowed restitution from a child pornography possessor, and called upon Congress to clarify the statute.[98] In response, Congress passed the Amy, Vicky and Andy Child Pornography Victim Assistance Act,[99] which created a Child Pornography Victim Reserve Fund and several mechanisms for victims to access that restitution.

Prior to the Task Force Report, only eight states mandated victim restitution.[100] Today, every state has some statutory provision for restitution, and many states have such a provision within their constitutional amendments.[101] They differ in both scope and applicability. While some states allow restitution in nearly every crime, others limit it to specific crimes. Not all restitution rights are mandatory and often granting the provision is at the discretion of the court.

Some states include not only direct victims but spouses, children and unemployable adults among those who can have access to crime victim funds.[102] Others still allow victims to access the fund even if the offender was acquitted.[103] As the law develops, this expansive notion of restitution reflects the realistically comprehensive conceptualisation of victims. Understanding that many people are victims of a given crime and the ways they are victimised is essential. To have legitimacy, the canonical system should reflect this common understanding.

7) Right to Proceedings Free From Unreasonable Delay

While defendants in the United States possess a 6th Amendment right to a speedy trial, which is further supported by speedy trial statutes on both the federal and state levels, there was no correlative right for victims. Notably, delays in cases often operate to the detriment of crime victims, jeopardising their interest in achieving justice for their harm suffered. "Delay often works to the defendant's advantage. Witnesses may become unreliable, their memories fade, evidence may be lost, changes in the case may be

98 See, e.g., HR Report No 113–4981 (2013); Senate Report No 113–2344 (2014); Senate Report No 113–2301 (2013).
99 Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Public L. No 115–299, 132 Stat.4384.
100 Tobolowsky et al. (n 10), 152.
101 Victim Law Bulletin (n 47).
102 Debra J Wilson, The Complete Book of Victims' Rights, Prose Associates 1995, 76.
103 Ibid. 81.

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beneficial or the case may simply receive a lower priority with the passage of time".[104] More substantively, such delays can also prevent the victim from achieving closure to his or her victimisation, prolong mental suffering and preclude timely receipt of restitution.

The CVRA sought to remedy the inequities between the defendants and victims with regard to the reasonable period of time in which to resolve a criminal case. In so doing, it adopted the above language, fashioning for victims the "right to proceedings free from unreasonable delay".[105] While this is an improvement for victims over their previous status as having no rights regarding prompt resolution, it is noticeably different than the defendant's right to a speedy trial. Victims should also possess the right to a speedy resolution.

As the legislative history of the CVRA notes, this provision targets the situation that arises all "too often" in which "delays in criminal proceedings occur for the mere convenience of the parties.…It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties and the court".[106] While it is not an absolute right to a delay-free experience, the provision does at least require that "any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay".[107]

8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

This right rests at the core of what the victim–criminal justice interface has lacked for many years: a recognition of the inherent dignity of the crime victims and the need for that fairness, dignity and privacy to be respected. In many ways, all other victim rights, whether within the CVRA, state constitutions or state statutes, are encompassed within this language.

104 Doyle (n 18), 37 (quoting Paul Cassell, Balancing the Scales of Justice: the Case for and Understanding the Effects of Utah's Victims' Rights Amendments, Utah L. Review 1994, 1373, 1402).
105 18 USC § 3771(a)(7) (2014).
106 150 Congressional Record S4268–269, 9 October 2004.
107 150 Congressional Record S10910, 9 October 2004.

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"This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches to treat victims of crime with the respect they deserve and to afford them due process".[108] Unlike the other rights, this one suggests no limitation to it being applied throughout the process. Rather, this seems to encompass all stages of the process.[109]

While dignity, fairness, and privacy may seem ambiguous concepts, they are central to victim rights. The State of Utah even defined these rights within its crime victim rights laws. It defines "dignity" as "treating the crime victim with worthiness, honor, and esteem"; "fairness" as "treating the crime victim reasonably, even-handedly, and impartially"; and "respect" as "treating the crime victim with regard and value".[110]

Much of the litigation in this area focuses upon the right of the victim to his or her privacy and involves the media and the court—a situation not at issue in the canonical process.[111] Privacy, however, is a complex concept here in that some might try to use "privacy" to preclude access to proceedings. In the American system, the offender does not have a right to privacy in that sense. On the contrary, he/she has a right to a public trial. Victim-survivors are the stakeholders with more significant privacy interests. Those interests, however, do not preclude the public trial and they should not be used to shield the details of the harm caused from the public. Rather, they should be used as a basis for more surgical privacy, such as withholding the victim-survivor's true name from the media, the victim-survivor's identifiable information from the offender, or potential illegal images from the public. All Americans enjoy a Constitutional right to privacy, and globally many other nations provide a much more robust privacy right.[112] Furthermore, many jurisdictions protect privacy in a myriad of ways, including limited disclosure of identifying information, rape shield laws and redactions of personal information in discovery and court documents.

108 150 Congressional Record S10911, 9 October 2004.
109 US Department of Justice (ed.), The availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, Opinions of the Office of Legal Counsel 34 (2010) 239–262, 8.
110 Utah Code Annotated § 77–38–2 (West 1953).
111 Victim Law Bulletin (n 47).
112 Right to Erasure, Art 17 GDPR: "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay...".

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Some district courts have ruled this right to fairness could even include the right to be heard at a hearing to dismiss an indictment or the right to be referred to as "the victim".[113] Through this provision, "Congress, in effect, has determined that failure to treat a victim with fairness and with respect to privacy works a clearly defined and serious injury to the victim".[114] While the language may seem aspirational, this is clearly an enforceable right. Department of Justice staff are directed to protect victims' privacy information from disclosure utilising protection orders, redaction or other tools.[115] Conversely, however, sealing a record which prevents the victim accessing the record violates this right. "A trial court sealing of the record…is inconsistent with victims' right to fair treatment and respect for his dignity" because he or she cannot determine if his or her rights have been violated.[116] Therefore, this concept of privacy cannot be manipulated for further protection of the defendant or the system that supports him/her. The canonical process must also appreciate the point made in Patkar. Not only is the failure to treat a victim-survivor with fairness wrong, but it is also *revictimisation* of him/her, which causes its own injury. The Holy See should avoid further harming child victims by not providing them with the most minimal of standards: the fairness, respect, dignity and privacy that individual victims require.

9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

In 2015 this right was added to the list of federal statutory crime victim rights.[117] Congress did so despite the Department of Justice's position that the aforementioned right to be heard at any proceeding applied only after an offender had been formally charged.[118] With the vast majority of cases resolved by plea agreement, for many of them the plea bargaining process has already been completed prior to charging in many cases. Therefore, the Department of Justice's position made little sense in actuality as it would

113 Cassell (n 23) 314–15; United States v Spensley, No 09-CV-20082, 2011 WL 165835 (CD Ill January 19, 2011) 1–2.
114 United States v Patkar, No 06–00250, 2008 WL 233062 (D Haw January 28, 2008) *5.
115 Guidelines (n 89), 3; Federal Rules of Criminal Procedure 49.1.
116 Doyle (n18), 40.
117 18 USC § 3771(a)(9) (2016).
118 The Availability of Crime Victims' Rights (n 109), 1.

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have foreclosed many victim-survivors' opportunity to consult. Congress designed this provision to correct that Department of Justice interpretation and ensure that victims have the right to this plea information even if charges have not yet been filed.

This issue came to a head in the case of the wealthy financier Jeffrey Epstein. Although a procedurally complicated case, it highlights the problem with enforcing rights. Epstein created a sex-trafficking ring of minor girls in several different states. After sufficient evidence to proceed was secured, no state charges emerged, and the FBI responded to a request to investigate. This work occurred and the FBI prepared a 53 page draft indictment.[119] However, prior to criminal charges being filed, Epstein's attorneys reached a non-prosecution agreement with the then United States Attorney's Office allowing Epstein to plead guilty to minor state prostitution-related charges in exchange for him avoiding federal or state trafficking charges and for immunity for Epstein and all others involved in the offence. The United States Attorney's Office never told the over two dozen victims about this sealed agreement, actively misled them and actively hid it from the victim-survivors.[120] Upon learning that the prosecutors had not only failed to confer with them but had actively misled them, the victim-survivors were outraged, and one victim-survivor sued, alleging the violation of her rights under the CVRA. The 11th Circuit agreed with the plaintiff that the prosecutors' actions were unconscionable but found that the victim did not have a right to sue civilly under the Act until charges were filed, which they were not.[121] Subsequently, Congress enacted this right to prevent such a situation and ensure such victims are informed of such disclosures.

The Holy See should learn from this correction and avoid making similar missteps. Victim-survivors must have the right to be informed of agreements, thus affording them the ability to actualise their other rights. More importantly, such a practice confers to them the respect and dignity these rights convey.

119 In re Wild, 994 F.3d 1244, 1248 (11th Cir 2021).
120 Ibid. 1247.
121 Ibid.; Doyle (n18), 41.

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10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (*42 U.S.C. 10607(c)*) [1] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

Although it seemed implicit in the original list of rights that victim-survivors should be provided notice of such rights, the history of neglect of these rights led to the addition of this right. Through the inclusion this provision, what was implicit in the language requiring Department of Justice employees to make their best efforts to notify victim-survivors of their rights becomes explicit. Section 3771(a) (10) now enhances that command making it an unambiguous right.

4. Enforcement

Effective enforcement requires at least two basic elements. First, a mechanism for victim-survivors to obtain relief when their rights are not recognised must exist. Second, there must be sanctions for officials whose duty it is to carry out these rights when they fail to do so. Without an enforcement mechanism, these rights are not rights at all but simply function in contravention to the stated rights as they offer a victim hope of fairness and justice where there is none.

The CVRA provides that the right may be enforced by the victim-survivor, the government or his/her lawful representative in the court where the defendant is being prosecuted or, if there is not yet a prosecution, the district where the crime occurred.[122] The CVRA then places a burden on the court that it "shall ensure that the crime victim is afforded the rights described…".[123] As discussed, government employees must also make their best efforts to see that victims are accorded their rights.[124] Congress ordered the government to train employees who interact with crime victims regarding the rights afforded under this Act. Similarly, it created a sanction system for those who fail to do so. The Department of Justice established the Office

122 18 USC § 3771(d)(1), (3) (2014); Federal Rules Criminal Procedure 60(a)(2); e.g., US v Does, 749 F.3d 999 (11th Cir 2014).
123 18 USC § 3771(b)(1) (2014).
124 18 USC § 3771(c)(1) (2014).

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of Victims' Rights Ombudsman as the office where victim-survivors can file complaints regarding a department employee failing to provide them their rights.[125] A victim-survivor can file an administrative complaint seeking the relief that a Department of Justice representative comply with the CVRA.[126] After the filing of such a complaint, the Department of Justice is required to investigate the allegation. "[I]f it is later determined that the Department of Justice willfully disregarded the rights of the victim, the Department is required to sanction that employee".[127]

Although these provisions do not provide a cause of action against the government, trial courts are required to address these rights when asserted, and if the victim disagrees with the outcome, she can petition for a writ of mandamus for relief, which must be decided upon within 72 hours. If the appellate court denies the relief, it must state the reasons in writing on the record.[128]

While these provisions have some minimum measure of the two elements of enforcement, more could be done. The procedural mechanism does exist. Whether the public nature of requiring a written response to allegations is sufficient to ensure compliance is debatable. However, it is certainly preferable to the retraumatisation of victims by a system without an avenue to assert one's rights.

5. Additional Models

The above represents a basic framework of minimal laws. Many courts, both state and federal, have built additional rights and protective measures upon this scaffolding for victim-survivors of sexual offences. This paper would be remiss if it did not address some of these mechanisms, which demonstrate the rights and the theories behind them in action.

These include measures taken outside the courtroom to assist victim-survivors in navigating the system. Such measures include the creation of the ombudsman position and the requirement that his contact information be readily available to victim-survivors. Some courts can appoint *Guardians Ad Litum* to represent child witnesses' best interests. Key figures in assist-

125 28 CFR § 45.10 (2005).
126 Virginia Kendall / Markus Funk, Child Exploitation and Trafficking, Rowman and Littlefield 2012, 244.
127 Ibid.
128 18 USC § 3771(d)(3), (6).

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ing victim-survivors are the victim witness advocates (VWA). Due to the incredible size of many prosecuting attorneys' workloads, the attorneys themselves cannot engage in the many tasks that entail complying with victims' rights. VWA's are designed to fulfil those duties by being the point of contact for victim-survivors and their cases. VWA's also accompany the victim-survivor to court, keep them notified of case status, and articulate their questions and concerns to the prosecuting attorneys.

Within the courtroom, other mechanisms are in place to put a victim-survivor at ease so that his/her testimony can be the most accurate. Measures such as these can include allowing the victim witness to have a comfort item while testifying, to have a VWA accompany them to the courtroom while testifying, protection from aggressive cross examination or the ability to prioritise cases consistent with speedy trial rights.

An example of a comprehensive reform effort worthy of considering comes from another institution which found itself plagued by revelations of widespread sexual assaults: the United States military. Like the Church hierarchy, this institutional crisis also represented an insular, hierarchical community with its own generally closed military justice system. Among the many reforms[129] implemented in response to this revelation of vast sexual assault, each branch of the military created a Special Victims Counsel (SVC).[130] SVCs are attorneys appointed to each victim of sexual assault whose duty is "to independently represent the victim of an alleged sexual assault… [and who is] separate and independent from the prosecutorial 'trial counsel'…".[131] The SVC is provided without charge to the victim, and is "tasked with both advising the victim of the legal process and protecting the victim's privacy interest".[132] While much more needs to be done to protect victims in the military from sexual assault and harassment, this access to a dedicated attorney in the justice process can shine a light on the process for an already traumatised victim-survivor and help protect him or her from further harm. Given the complex and similarly obscure canonical process, such a programme could prove highly beneficial to victim-survivors of clergy abuse.

129 10 USC § 806(b) (2016).
130 Ibid.
131 Erin Gardner Schenk / David L. Shakes, Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?, *University of Denver Criminal L. Review* 6 (2016) 5.
132 Ibid.

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6. Conclusion

The Holy See stands in the same position as the United States Government did 50 years ago. Its members have been victimised in unimaginable ways by its officials. The Church hierarchy is just beginning to comprehend the gravity and life-altering consequences of abuse for the victim-survivors and their families. The institution has publicly stated it seeks reconciliation and to correct the wrongs of its past. A necessary component of that recognition and reconciliation is the awareness that there is a vital and essential role for victim-survivors in the canonical process that will benefit both the process as well as the victim-survivor himself/herself. The basic rights afforded in the American federal criminal justice system to all victims of crime provide a minimal framework for that important first step. The framework, however, is meaningless without executing it properly in all cases, and sanctions when those responsible for doing so fail in that duty. These concepts are not luxuries of a justice system. They represent essential components of justice, and any system of adjudication lacks legitimacy without an active role for victim-survivors.

Biography

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References

Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Public L. No 115–299, 132 Stat.4384.

Attorney General Guidelines for Victim and Witness Assistance, 2011 ed. (2012).

Blackstone, William (1884): Bl Comm, 3rd ed., Callaghan & Company.

Cassell, Paul (2012): The Victims' Rights Amendment: A Sympathetic Clause by Clause Analysis, *Phoenix L Review* 5.

Corbet, Sylvie (2021): French Report: 330,000 Children Victims of Church Sex Abuse (AP News, 5 October 2021), https://apnews.com/article/europe-france-child-abuse-sexual-abuse-by-clergy-religion-ab5da1ff10f905b1c338a6f3427a1c66.

Doyle, Charles (2008): Crime Victims Right Act, Nova Science Pub Inc.

Doyle, Charles (2021): Crime Victims' Right Act: A Summary and Legal Analysis of 18 U.S.C. § 3771, Congressional Research Service, RL 3367921.

https://doi.org/10.5771/9783748936169-119, am 31.05.2024, 19:42:14
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

EH v Slayton 468 P.3d 1209 (Ariz 2020) (Allowing victim's attorneys to sit before the bar).

Francis (2018): Letter of His Holiness Pope Francis to the People of God, 20 August 2018, https://www.vatican.va/content/francesco/en/letters/2018/documents/papa-francesco_20180820_lettera-popolo-didio.html.

Gardner Schenk, Erin / Shakes, David L. (2016): Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?, University of Denver Criminal L. Review 6.

Globe Newspaper Co v Superior Court, 457 U.S. 596 (1982).

Goodstein, Laurie / Otterman, Sharon (2018): Catholic Priests Abused 1000 Children in Pennsylvania, Report Says, NY Times, 14 August 2018, https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html.

Henderson, Lynne N. (1985): The Wrongs of Victim's Rights, *Stanford L. Review* 37.

Herrington, Lois H. (1982): Final Report of the President's Task Force on Victims of Crime, U.S. Department of Justice (ed.).

Human Trafficking Task Force e-Guide' (OVCTTAC).

Kendall, Virginia / Funk, Markus (2012): Child Exploitation and Trafficking, Rowman and Littlefield.

Kenna v United States District Court, 435 F.3d 1011, 1016–17 (9th Cir 2006).

Morgan, Rachel E. / Thompson, Alexandra (2020): Criminal Victimization, 2020, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20.pdf.

Morgan, Rachel E. / Thompson, Alexandra (2021): Criminal Victimization, 2021, https://bjs.ojp.gov/content/pub/pdf/cv21.pdf.

National Crime Victim Law Institute (ed.), Fundamentals of Victims' Rights: A Summary of 12 Common Rights, *Victim Law Bulletin* November 2011, available on https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12.

National Victims' Constitutional Amendment Passage (NVCAP): State Victim Rights Amendments, http://www.nvcap.org/states/stvras.html.

Paroline v United States, 134 S. Ct. 1710, 1726 (2014).

Payne v Tennessee, 501 U.S. 808 (1991).

Tobolowsky, Peggy M. et al. (2010): Crime Victim Rights And Remedies, Carolina Academic Press.

United States v Thetford, 935 F.Supp.2d 1280, 1282 (ND Ala 2013).

United States v Patkar, No 06–00250, 2008 WL 233062 (D Haw January 28, 2008)

United States v Spensley, No 09-CV-20082, 2011 WL 165835 (CD Ill January 19, 2011).

U.S. Department of Justice (2014): National Crime Victims' Week Resource Guide, Section 5. Landmarks in Crime Victims' Rights and Services, https://www.ncjrs.gov/ovc_archives/ncvrw/2014/index.html.

U.S. Department of Justice (2020): Resource Guide, Landmarks in Victims' Rights and Services, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2020/info_flyers/2020-NCVRW-Landmarks-in-Victims-508.pdf.

https://doi.org/10.5771/9783748936169-119, am 31.05.2024, 19:42:14
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb

U.S. Department of Justice (2010): The availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, *Opinions of the Office of Legal Counsel* 34 (2010) 239–262, https://www.justice.gov/olc/file/op-olc-v034/download.

US v CS, 968 F.3d 237, 242 (3d Cir 2020).

US v Jim, No. CR 10–2653, 2012 WL 119599 (D New Mexico 2012).

US v Maldonado – Passage, 4 F 4th 1097, 1103 (10th Cir 2021).

US v Minard, 856 F.3d 555 (8th Cir. 2017).

US v Olivares, No. 3:13-cr-00335, 2014 WL 2531559 (W.D.N.C. 2014).

US v Robertson, 493 F.3d 1322, 1334 (11th Cir. 2007).

US v Skilling, No. 11–04–025-SS, 2009 WL 8066757, at 1–2 (SD Tex. Mar 6, 2009).

US v Stevens, 239 F Supp 3d 417, 421–422 (D Conn 2017).

US v Stevens, 239 F Supp 3d 417, 422.

US v Sultsmon, No. 07 – CR-641 (NGG), 2007 WL 423985, alx, (EDNY Nov. 27, 2007).

US v. Yamashiro, 788 F 3d 1231, 1234 (9th Cir 2015).

Wilson, Debra J (1995): The Complete Book of Victims' Rights, Prose Associates

Young, Marlene / Stein, John (2004): The History of the Crime Victims' Movement in the United States, in U.S. Department of Justice (ed.), National Criminal Justice Reference Service.

https://doi.org/10.5771/9783748936169-119, am 31.05.2024, 19:42:14
Open Access – (cc) BY-NC-ND – https://www.nomos-elibrary.de/agb