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## The Victim Impact Statements: Skewing Criminal Justice Away from First Principles

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## THE VICTIM IMPACT STATEMENTS: SKEWING CRIMINAL JUSTICE AWAY FROM FIRST PRINCIPLES

MICHAEL VITIELLO\*

Participation in this symposium to recognize Professor Stephen Schulhofer's impact on the criminal law is an especial honor for me. I was his law student at the University of Pennsylvania Law School during his second year as a professor there. His class on Criminal Law, his scholarship, and his friendship have had a profound and positive influence on my career.

Professor Schulhofer and members of our generation of criminal justice scholars came of age during a remarkable period of optimism for liberal reformers.<sup>1</sup> The American Law Institute had only recently completed the Model Penal Code, which attempted to bring coherence to the criminal law and to advance principles of proportionality and culpability.<sup>2</sup> The 1970s witnessed widespread legislative reforms based on the Code.<sup>3</sup> Professor Schulhofer graduated from Harvard towards the end of the Warren Court criminal procedure revolution and, as a law clerk to Justice Hugo Black, saw that process from inside the sausage factory.<sup>4</sup> Many Warren Court

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1. *Stephen J. Schulhofer*, NYU LAW, <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20270> [https://perma.cc/KS3K-Y99P].

2. See MODEL PENAL CODE (AM. LAW INST. , Official Draft 1962). "The Model Penal Code took 300 years of American criminal law and distilled a coherent and philosophically justifiable statement of the bounds and details of the criminal sanction." Robina Inst. of Criminal Law & Criminal Justice, *Model Penal Code*, U. MINN. (2019) (quoting *Model Penal Code: Sentencing*, AM. LAW INST.), <https://robinainstitute.umn.edu/areas-expertise/model-penal-code> [https://perma.cc/24CQ-EZ55].

3. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320 (2007).

4. *Schulhofer*, *supra* note 1.

decisions held promise for a more just system.<sup>5</sup> But by the time he entered the legal academy, there were already signs of challenges to progressive reforms.

The Warren Court's revolution produced powerful resistance from the right, leading in part to Richard Nixon's presidential victory in the 1968 election.<sup>6</sup> Nixon's four Supreme Court selections within the first two-plus years of his presidency started a process of retrenchment that has lasted for years.<sup>7</sup> In part as a reaction to the Warren Court, victims' rights advocates began organizing and attempting to unravel Warren Court reforms.<sup>8</sup>

Due to concern about crime rates, politicians from across a broad political spectrum began efforts to "rationalize" criminal sentences, a process that would eventually lead to increased punishment, including reduced good time credits,<sup>9</sup> long minimum sentences,<sup>10</sup> and prison as the default option for convicted offenders.<sup>11</sup> The threat of long prison sentences led to increased bargaining power on the part of prosecutors who could compel even innocent offenders to accept plea deals in lieu of trials.<sup>12</sup> That process has led to a system that now has eliminated trials in well over 90% of all criminal cases.<sup>13</sup>

Several developments made in recent years offer hope for liberal criminal justice reformers. Several states have enacted sentencing reforms that have reduced criminal sentences and adopted programs designed to rehabilitate offenders and to reduce recidivism.<sup>14</sup> Some states have reduced their prison populations without

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5. See generally *U.S. v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

6. Michael Vitiello, *Reflections on an Extraordinary Career: Thoughts about Gerald Caplan's Retirement*, 46 McGEORGE L. REV. 459, 471 (2014).

7. *Id.* at 474.

8. Raphael Ginsberg, *Victims Deserve the Best: Victims' Rights and the Decline of the Liberal Consensus* 1, 60 (Aug. 2013) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the Carolina Digital Repository).

9. See Nicolette Parisi & Joseph A. Zillo, *Good Time: The Forgotten Issue*, 29 CRIME AND DELINQUENCY 228, 232–33 (1983).

10. MICHAEL H. TONRY, SENTENCING REFORM IMPACTS 29 (1987).

11. Bernard J. McCarthy, *Responding to the Prison Crowding Crisis: The Restructuring of a Prison System*, 2 CRIM. JUST. POL'Y REV. 3, 8–9 (1987).

12. See Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1358–60 (2016).

13. See William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 445 (2004).

14. See Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, FED. SENT'G REP. 1, 7 (2004).

endangering public safety.<sup>15</sup> Even California, which incarcerated too many offenders for too long,<sup>16</sup> has cobbled together sentencing reform, largely compelled by the Supreme Court.<sup>17</sup> Reformers are winning the fight to abandon mandatory minimum sentences.<sup>18</sup> Some states are experimenting with bail reform.<sup>19</sup> Recent passage of the First Step Act is another example of the consensus across the political spectrum, leading to reform.<sup>20</sup> Recent years have shown a sharp decline in newly imposed death penalties and few executions.<sup>21</sup> After years of presenting themselves as tough on crime, a number of reform-minded prosecutors have run on progressive platforms and won elections, opposing police abuse and mass incarceration.<sup>22</sup>

Despite some progress towards meaningful reform, sustained reform efforts face significant challenges. No one would confuse the current Supreme Court with the reform-minded Warren Court. The American criminal justice system remains addicted to plea-bar-

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15. See Dennis Schrantz, Stephen DeBor, and Marc Mauer, *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENTENCING PROJECT (Sept. 5, 2009), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/#:~:text=this%20report%20examines%20the%20experience%20of%20five%20states,prison%20with%20no%20adverse%20effects%20on%20public%20safety> [https://perma.cc/2934-E7SW].

16. See Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 BRIT. J. CRIMINOLOGY 83, 83 (1994).

17. See *Brown v. Plata*, 563 U.S. 493, 543–45 (2011).

18. *Mandatory Minimums and Sentencing Reform*, CRIM. JUSTICE POLICY FOUNDATION, <https://www.cjpf.org/mandatory-minimums/> [https://perma.cc/7T5L-U25L].

19. Lauren Sudeall Lucas, Darcy Meals, & Jobena Hill, *Misdemeanor Bail Reform and Litigation: An Overview*, GA. STATE UNIV. COLL. OF LAW CTR. FOR ACCESS TO JUSTICE 2–9 (2017), <https://university.pretial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=D935d1e1-80a9-3314-bf2a-bbefde49285f&forceDialog=0> [https://perma.cc/MQ73-5FN4]; Kyle Harrison, *SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform*, 49 U. PAC. L. REV. 533, 542 (2018).

20. H.R. 5682, 115th Cong. (2018).

21. Brandon Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417, 421 (2017).

22. See Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [https://perma.cc/WMA8-VTR7]; Victoria Law, *When Former Prosecutors Rebrand Themselves as Progressives to Win Elections*, IN THESE TIMES (Mar. 14, 2019), <http://inthesetimes.com/article/21794/prosecutor-kamala-harris-lori-lightfoot-sally-yates-police-elections> [https://perma.cc/UXA7-M2T8].

gaining.<sup>23</sup> Many states have inadequately funded public defender offices or other programs to provide indigent defendants with meaningful access to counsel.<sup>24</sup> In addition to these examples, other challenges remain.

My focus, however, is on one particular challenge: the victims' rights movement. As I develop in this paper, even in places like California where liberal reforms seem possible, the victims' rights movement remains potent.<sup>25</sup> Such groups have been able to oppose reforms aimed at providing protection for criminal defendants. In every state, victims' rights advocates have succeeded in passing victim's rights legislation, with some even placing victims' rights protections into state constitutions.<sup>26</sup> Nationwide, the movement hopes to add a victims' rights amendment to the United States Constitution.<sup>27</sup>

One might ask what, if anything, is wrong with such a movement. Indeed, much of what the movement has accomplished is more than laudable: for example, attention to the shameful treatment of rape victims has led to important reforms in many police departments and prosecutors' offices.<sup>28</sup> But as developed below, victim impact statements, a major policy success of the movement, skew the way in which the public thinks about the purpose of punishment by conflating the harm to the state with the harm to the victim.<sup>29</sup> Indeed, as suggested by the title of this article, the efforts

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23. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASSN. OF CRIMINAL DEF. LAWYERS 5 (2018) <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/3MU3-7HDG>] ("[T]rial by jury has declined at an ever-increasing rate to the point that this institution now occurs in less than 3% of state and federal criminal cases.").

24. See Irene O. Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391 (2016) (discussing the issue of under-resourced public defenders who are forced to prioritize certain clients); Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html?action=click&module=top%20Stories&pgtype=Homepage> [<https://perma.cc/Q8QA-BFPA>].

25. See *infra* Part I.

26. See ACLU FACT SHEET ON THE PROPOSED VICTIMS' RIGHTS AMENDMENT, <https://www.aclu.org/other/aclu-fact-sheet-proposed-victims-rights-amendment> [<https://perma.cc/6SXU-VGSZ>] (last visited Mar. 15, 2020).

27. See *id.*

28. See *infra* Part III.

29. See *infra* Part IV.

to expand the victims' rights agenda have skewed some critical first principles of our criminal justice system.<sup>30</sup>

This paper focuses on the threat to criminal justice reform presented by victim impact statements. Initially, it provides a short history of the ascendancy of the victims' rights movement and then a look at some of the reasons why liberal reformers have hope for the future.<sup>31</sup> It then discusses the theoretical problem created by victim impact statements, which conflate harm to society and harm to victims.<sup>32</sup> Specifically, they shift the focus of criminal sentencing from basic principles of the criminal law to a focus akin to that of the tort system.<sup>33</sup> The victim impact statements focus on repairing victims, not on principles of liberty and just deserts of the offender.<sup>34</sup> Thereafter, it turns to some anecdotes to demonstrate the power of such stories and the ability of such stories to overwhelm a more nuanced discussion about the criminal law.<sup>35</sup> This is because victims' stories are immediately accessible; the ability to explain the workings of our criminal justice system pales by comparison.<sup>36</sup>

## I.

### THE SELF-INFLICTED WOUND

While many of us supported the Warren Court criminal procedure revolution, the revolution may have come too quickly.<sup>37</sup> As journalist Fred Graham characterized the process, the Court imposed a "self-inflicted wound," planting seeds of its own unraveling.<sup>38</sup>

Graham and others have written about the public backlash against, for example, *Miranda v. Arizona*.<sup>39</sup> Indeed, some argue that *Miranda*, more than any other case, resulted in Richard Nixon's 1968 presidential victory.<sup>40</sup> Nixon cleverly used law and order as a

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30. *See id.*

31. *See infra* Part I.

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See id.*

35. *See infra* Part V–VI.

36. *See id.*

37. *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1362 (2004).

38. *See* FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 9 (1970).

39. *See id.* at 153.

40. *See* Paul G. Ulrich, *What Happened to Miranda: A Decision and Its Consequences*, 72 J. MO. B. 204, 204 (2016).

key campaign issue and targeted the Court as his foil.<sup>41</sup> As such, he was able to outmaneuver George Wallace, running as an avowed racist.<sup>42</sup> Candidate Hubert Humphrey made no effort to defend the Court from attacks from the right.<sup>43</sup>

Two years before the campaign, members of the right were organizing against the Court.<sup>44</sup> Frank Carrington, author of the 1975 book *The Victims*, founded the Americans for Effective Law Enforcement in 1966.<sup>45</sup> Carrington and other organizers wanted to create a counterbalance to the American Civil Liberties Union and other liberal organizations by supporting police and “law-abiding” citizens instead.<sup>46</sup> The Reagan administration supported his efforts, as Attorney General William French appointed Carrington to a Task Force on Violent Crime.<sup>47</sup> They were joined by many on the right, including members of the Heritage Foundation, in calling for “restoring the balance” in the criminal justice system, which, from their perspective, had tilted too far towards protecting criminals.<sup>48</sup> By restoring balance between victims and criminal defendants, they meant that the system needed to restore the rights of victims and the public.<sup>49</sup>

The move to the right on criminal justice matters was hardly the province of only the Republican Party.<sup>50</sup> Prominent Democrats also joined in. Senator Teddy Kennedy helped pass the law creating

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41. JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 600, 647 (6th ed. 2017).

42. *Id.*

43. *Id.*

44. See Raphael Ginsberg, *Mighty Crime Victims: Victims' Rights and Neoliberalism in the American Conjuncture*, 28 *CULTURAL STUD.* 911, 918–19 (2014) (discussing victims' rights in the era of President Nixon).

45. FRANK CARRINGTON, *THE VICTIMS* (1975); *Frank Carrington, 55 Victims' Rights Lawyer*, N.Y. TIMES (Jan. 3, 1992), <https://www.nytimes.com/1992/01/03/obituaries/frank-carrington-55-victims-rights-lawyer.html?mtrref=WWW.google.com&gwh=A05B8DC84E897092181DEC2B9D7895B0&gwt=pay> [https://perma.cc/8K6A-7F9K].

46. *Americans For Effective Law Enforcement (AELE)*, LAW CROSSING <https://www.lawcrossing.com/article/900045166/Americans-for-Effective-Law-Enforcement-AELE/> [https://perma.cc/62EY-DUMB] (last visited Mar. 15, 2020).

47. See Ginsberg, *supra* note 8, at 8.

48. WILLIAM T., HERITAGE FOUND., *RESTORE THE BALANCE: FREEDOM OF INFORMATION AND NATIONAL SECURITY* (1982), <https://www.heritage.org/homeland-security/report/restore-the-balance-freedom-information-and-national-security> [https://perma.cc/XB2B-K2LH].

49. See Ginsberg, *supra* note 44, at 919.

50. See Willard Gaylin & David J. Rothman, *Introduction to ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION*, at xxxvii (1976) (discussing how liberals have

the Federal Sentencing Commission and federal sentencing guidelines, viewed by many as a failed system leading to unnecessarily long sentences.<sup>51</sup> As evidenced by his stance on the death penalty and other criminal justice matters, President Bill Clinton courted law enforcement groups through his support of the 1994 Violent Crime Control and Law Enforcement Act<sup>52</sup> and the 1996 Antiterrorism and Effective Death Penalty Act.<sup>53</sup> Indeed, in 2016, Presidential Candidate Hillary Clinton lost support from some members of the African-American community because of her husband's support for a number of law and order measures.<sup>54</sup> As commentators have observed in other contexts, significant criminal justice reform often results only when consensus forms across the political spectrum.<sup>55</sup> Supporters of gun rights and of an invigorated Second Amendment also joined the victims' rights movement.<sup>56</sup>

Not only did law and order advocates support victims' rights, but so too did supporters of women and many on the left.<sup>57</sup> Liberal reformers found fault with police response to rape victims.<sup>58</sup> Beyond pushing for better treatment for victims, liberal reformers began pushing for a more modern approach to rape and sexual assault laws.<sup>59</sup>

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moved towards joining the argument for abandonment of the rehabilitation model).

51. Edward M. Kennedy, *Introduction: Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1, 1 (1978).

52. Jessica Lussenhop, *Clinton Crime Bill: Why Is It So Controversial?*, BBC NEWS MAG. (Apr. 18, 2016), <https://www.bbc.com/news/world-us-canada-36020717> [<https://perma.cc/ABQ5-W7GG>].

53. Press Release, William J. Clinton, Statement by the President (Apr. 24, 1996) (on file with Clinton White House Archive), <https://clintonwhitehouse6.archives.gov/1996/04/1996-04-24-president-statement-on-antiterrorism-bill-signing.html> [<https://perma.cc/87Q3-4AE2>]; see also Liliana Segura, *Gutting Habeas Corpus*, THE INTERCEPT (May 4, 2016), <https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/> [<https://perma.cc/CZ7K-3FZ2>].

54. Keeanga-Yamahatta Taylor, *Why Should We Trust You? Clinton's Big Problem with Young Black Americans*, THE GUARDIAN (Oct. 21, 2016), <https://www.theguardian.com/us-news/2016/oct/21/hillary-clinton-black-millennial-voters> [<https://perma.cc/GPT8-W4KL>].

55. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU N. CAL. (Nov. 16, 2017), <https://www.aclunc.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/Q5VW-LCF6>].

56. Libertarian National Committee, *Gun Ownership*, LIBERTARIAN, <https://www.lp.org/issues/gun-ownership/> [<https://perma.cc/P6S5-2K7Q>] (last visited Mar. 15, 2020).

57. See Ginsberg, *supra* note 44, at 922–25.

58. See *id.*

59. See *id.*



The victims' rights movement and other law and order groups had remarkable success with these efforts in a short period of time. California made a series of changes to its laws, including victims' rights provisions added to its constitution.<sup>60</sup> In 1982, California approved Proposition 8, which amended its constitution to include the "Victims' Bill of Rights."<sup>61</sup> The provision did a number of things, with an overarching goal to give "crime victims a stronger voice within the criminal justice system."<sup>62</sup> It created a "Truth-in-Evidence" provision to expand the evidence admissible against defendants and to limit exclusionary rules.<sup>63</sup> It also created a victim's right to restitution from perpetrators or from public funds.<sup>64</sup>

The movement's momentum continued into the 1990s with the passage of Proposition 115. Proposition 115, the Crime Victims Justice Reform Act,<sup>65</sup> was aimed at limiting the ability of liberal judges to give an expansive reading of the state constitution to favor criminal defendants.<sup>66</sup>

A decade ago, California expanded victims' rights when it adopted Marsy's Law, also known as the Victims' Bill of Rights Act of 2008.<sup>67</sup> According to supporters, it provides victims with due process not available absent special legislation.<sup>68</sup> The 2008 initiative amended the state constitution.<sup>69</sup> Some of the rights now provided

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60. See CAL. CONST. art. I, §§ 14.1, 24 (incorporating portions of another initiative called "The Crime Victims Justice Reform Act," or Proposition 115, in California); David Aram Kaiser & David A. Carillo, *California Constitutional Law: Reanimating Criminal Procedural Rights After the Other Proposition 8*, 56 SANTA CLARA L. REV. 33, 49 (2016) (discussing the addition of California's first victims' rights Constitutional amendment, commonly known as Proposition 8); *Victims' Bill of Rights Act of 2008: Marsy's Law*, STATE OF CAL. DEP'T OF JUST., [https://oag.ca.gov/victim-services/marsys\\_law](https://oag.ca.gov/victim-services/marsys_law) [<https://perma.cc/A3TR-FW57>] (noting that Marsy's Law in California is the most current California victims' rights law).

61. See CAL. CONST. art. I, §28. The California Victim's Bill of Rights was added by Proposition 8 in 1982.

62. Diana Friedland, *27 Years of "Truth-in-Evidence": The Expectations and Consequences of Proposition 8's Most Controversial Provision*, 14 BERKELEY J. CRIM. L. 1, 1 (2009).

63. See *id.*

64. CAL. CONST. art. I, § 28(a)(13).

65. Deborah Glynn, *Proposition 115: The Crime Victims Justice Reform Act*, 22 PAC. L.J. 1010, 1012 (1991).

66. *Id.* at 1011.

67. *Victims' Bill of Rights Act of 2008: Marsy's Law*, *supra* note 60.

68. Office of Victim and Survivor Rights & Services, *Marcy's Law*, CAL. DEP'T OF CORRECTIONS & REHABILITATION, <https://www.cdcr.ca.gov/victim-services/marsys-law/> [<https://perma.cc/7SK9-FQVL>].

69. *Id.*; Marsy's Law was named after Marsy Nicholas, a UC Santa Barbara student who was stalked and killed by her ex-boyfriend in 1983. Just one week later,

to victims in that document include a victim's right to refuse an interview, deposition, or discovery request by the defense; the right to be informed of details regarding the defendant's sentence, including release date; and the right to have the safety of the victim and their family considered before any parole or post-judgment release decision is made.<sup>70</sup> It also lengthened the period between parole hearings for prisoners serving life sentences.<sup>71</sup>

Prison construction was another effect of many of the reforms that took place in California.<sup>72</sup> Even then, with massive prison construction, those reforms led to massive overcrowding in California's prisons.<sup>73</sup> Not coincidentally, the California Correctional Peace Officers Association (CCPOA), the union that represents prison guards, gained extraordinary political clout.<sup>74</sup> Often, the CCPOA worked hand-in-glove with victims' rights groups to advance their overlapping agenda.<sup>75</sup>

Several other states have adopted laws similar to Marsy's Law.<sup>76</sup> Much of the funding for the passage of such laws comes from Marsy

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while Marsy's brother and mother were grocery shopping, they saw the accused murderer in the store, having had no idea that the man had been released on bail. Marsy's brother, Dr. Henry Nicholas, was the key proponent of Marsy's Law. California was the first to pass the law and in doing so put California at the forefront of the United States' victims' rights movement. *About Marsy's Law*, MARSY'S LAW (2020), <https://marsyslaw.us/about-marsys-law/> [<https://perma.cc/3PWS-48ES>].

70. CAL. CONST. art. I, § 28(b).

71. *Id.*

72. See Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 350 (2014) (discussing funding from AB 900 resulting in the construction of jails).

73. See Andrew Cohen, *The Supreme Court Declares California's Prisons Overcrowded*, THE ATLANTIC (May 23, 2011), <https://www.theatlantic.com/national/archive/2011/05/the-supreme-court-declares-californias-prisons-overcrowded/239313/> [<https://perma.cc/U3SK-RF57>] (discussing the *Brown v. Plata* ruling, which declared California's prisons overcrowded).

74. See *The California Sentencing Commission: Laying the Groundwork*, STAN. LAW SCH. CRIM. JUST. CTR. 3 (2007) [https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/266901/doc/slspublic/Stanford\\_Exec\\_Sessions\\_Report\\_Recommendations.pdf](https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/266901/doc/slspublic/Stanford_Exec_Sessions_Report_Recommendations.pdf) [<https://perma.cc/DQ9L-QV4C>] (listing the CCPOA's Executive VP as a member of Stanford Law School's Executive Sessions on Sentencing and Corrections).

75. JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 84 (2011).

76. Carter Coudriet, *Billionaire-Backed 'Marsy's Law' Ballot Measures Pass In Six States, Thanks To \$72 Million Push*, FORBES (Nov. 7, 2018, 7:54 AM), <https://www.forbes.com/sites/cartercoudriet/2018/11/07/billionaire-sponsored-marsys-law-for-victims-rights-passes-in-six-states-thanks-to-72-million-push/#5d715f945b7c> [<https://perma.cc/VYD7-YFQX>].

Nicholas' billionaire brother Henry Nicholas.<sup>77</sup> He injected \$72 million into recent elections, which contributed to the creation of similar laws in Florida, Georgia, Kentucky, Nevada, North Carolina, and Oklahoma.<sup>78</sup>

More broadly, thirty-two states have added victims' rights amendments to their state's constitution and all fifty states have passed some sort of victims' rights legislation.<sup>79</sup>

Victims' rights advocates' long-term goal is an amendment to the United States Constitution.<sup>80</sup> A proposed victims' rights amendment is currently before Congress.<sup>81</sup> It enumerates various rights for crime victims.<sup>82</sup> These would include the right for a victim to be notified of all legal proceedings, guaranteed admission of victims to these proceedings, and the right to speak during them.<sup>83</sup> The amendment would also guarantee that courts consider the interests of victims in their attempt to ensure that trials occur without "unreasonable delays" and looking at a victims' safety when determining whether to grant a defendant a conditional release.<sup>84</sup>

Victims' rights groups have gained political clout, often appealing to a broad political spectrum. But some of the groups' policies have troubled liberal justice reformers. Two of those developments are particularly noteworthy.

The first development occurred early, as the victims' rights movement gained credibility in reaction to the Warren Court criminal procedure revolution.<sup>85</sup> Candidate Nixon's not-so-subtle racist appeal to voters, including many traditional white working class voters fearful of increased crime rates and expanding civil rights for

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77. *Marsy's Law Crime Victim Rights*, BALLOTPEDIA, [https://ballotpedia.org/Marsy%27s\\_Law\\_crime\\_victim\\_rights](https://ballotpedia.org/Marsy%27s_Law_crime_victim_rights) [https://perma.cc/A24X-MCYR] (last updated Apr. 2020).

78. Coudriet, *supra* note 76.

79. ACLU FACT SHEET, *supra* note 26. As of 2000, 32 states had amended their constitutions: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. S. REP. NO. 106-254, at n.1 (2000).

80. See ACLU FACT SHEET, *supra* note 26.

81. H.R.J. Res. 93, 115th Cong. (2017).

82. See ACLU FACT SHEET, *supra* note 26.

83. *Id.*

84. *Id.* The latest action on this resolution is that the House referred it to the Subcommittee on the Constitution and Civil Justice on April 12, 2017.

85. Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 528 (1985).

minorities, paid off.<sup>86</sup> In remarkably short order, Nixon got to reshape the Court with four appointments in two-plus years.<sup>87</sup> While the counter-revolution did not come as quickly and dramatically as some on the right might have hoped, it came nonetheless.<sup>88</sup> Over time, the Court frequently refused to expand or erode Warren Court precedent in matters of victims' rights.<sup>89</sup> The Burger and Rehnquist Courts cabined many Warren Court decisions. *Miranda* was the most notable example of that process. By the time the Court squarely addressed overruling *Miranda*, Chief Justice Rehnquist, appointed to the Court in part to overrule cases like *Miranda*, wrote the 2000 decision upholding *Miranda* from a frontal attack on its constitutional legitimacy.<sup>90</sup>

The second development that liberal criminal justice reformers and scholars have focused on is the expanded use of prison as the punishment of choice for offenders. Beginning with his first go-round as California's Governor, Jerry Brown endorsed the abandonment of indeterminate sentencing, in favor of fixed prison terms.<sup>91</sup> Initially, such reforms had broad political support.<sup>92</sup> Liberal reformers saw the back-end decisions made by parole boards as racially biased.<sup>93</sup> Many critics of indeterminate sentencing saw the system as arbitrary: judges viewing the same case file varied their proposed sentences wildly.<sup>94</sup> But by the time states and the federal government abandoned indeterminate sentencing, the nation had

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86. Hugh Davis Graham, *Richard Nixon and Civil Rights: Explaining an Enigma*, 26 PRESIDENTIAL STUD. Q. 93, 93–94 (1996).

87. Yale Kamisar, *The Miranda Case Fifty Years Later*, 97 B.U. L. REV. 1293, 1295 (2017).

88. Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375, 376–78 (2011).

89. Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court* in FRANCIS G. LEE, *NEITHER CONSERVATIVE NOR LIBERAL: THE BURGER COURT IN CIVIL RIGHTS AND LIBERTIES* 84–85 (F. G. Lee ed., 1983).

90. *Dickerson v. United States*, 530 U.S. 428, 444 (2000); see Kamisar, *supra* note 87, at 1294–95.

91. See Marisa Lagos, *Brown Sees Proposition 57 as Key to Ending Court's Oversight of Prisons*, NPR (Nov. 8, 2016), <https://www.kvpr.org/post/brown-sees-proposition-57-key-ending-courts-oversight-prisons> [<https://perma.cc/PX36-4LVX>].

92. See Jennifer Warren, *Jerry Brown Calls Sentence Law a Failure*, L.A. TIMES (Feb. 28, 2003, 12:00 AM), <http://articles.latimes.com/2003/feb/28/local/me-prisoners28> [<https://perma.cc/S3HQ-EFFV>].

93. JEREMY TRAVIS, *BUT THEY ALL COME BACK* 17–18 (2005) (“Reliance on the exercise of discretion by judges, corrections administrators, parole boards, and parole officers was criticized as arbitrary, racially discriminatory, and fundamentally unfair.”).

94. See *id.*

taken a hard turn to the right.<sup>95</sup> Retribution was back in vogue.<sup>96</sup> The trend would become part of a march towards increased incarceration, including a move towards mandatory minimum sentences.<sup>97</sup> Longer sentences,<sup>98</sup> court decisions legitimizing plea-bargaining,<sup>99</sup> longer criminal dockets,<sup>100</sup> the war on drugs,<sup>101</sup> and shrinking resources for public defenders (often leaving defense lawyers with little alternative other than pleading their clients)<sup>102</sup> were only some of the causes leading to mass incarceration. The critique of mass incarceration is now so widely disseminated that I need not dwell on its social costs at so many levels.<sup>103</sup>

Liberal criminal justice scholars and reformers like Professor Schulhofer have had plenty to rail against. For most of us who came of age in the late 1960s and early 1970s, the arc of history has not provided many opportunities for celebrating expansion of protections for criminal defendants. But that is changing. Or is it? That is the subject of the next section of this article.

## II. AN ERA OF REFORM

Clearly, no one expects the current Supreme Court to emulate the Warren Court by protecting criminal defendants. Indeed, Brett Kavanaugh, Justice Kennedy's replacement, may help undo a few of the hopeful Supreme Court cases in which Justice Kennedy pro-

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95. See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991).

96. See WAYNE R. LAFAVE, CRIMINAL LAW 26 (2d. ed. 1986).

97. Dripps, *supra* note 12, at 1352.

98. See Marc Mauer, *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, 21 ROGER WILLIAMS U. L. REV. 447, 452 (2016).

99. See *Bryan v. United States*, 492 F.2d 775, 780 (5th Cir. 1974) ("Plea bargains have accompanied the whole history of this nation's criminal jurisprudence."); *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

100. See Mauer, *supra* note 98, at 448–49 (discussing how the criminal justice system has expanded overall at a fast rate since the 1970s).

101. See *id.* at 450.

102. See Faye Taxman et al., *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences for Deterrence*, 16 J. HEALTH CARE POOR & UNDERSERVED 57, 70 (2005) (discussing indigent defense systems operating outside of national standards).

103. See generally JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017); MICHELLE ALEXANDER, THE NEW JIM CROW (2010); IMPRISONING AMERICA (Mary Pattillo et al. eds., 2004).

vided a fifth vote.<sup>104</sup> But in recent years, this adversity aside, liberal criminal justice reformers have had cause for optimism.

Notably, many states have reformed their criminal sentencing systems to reduce prison populations.<sup>105</sup> That has occurred in both conservative and liberal leaning states.<sup>106</sup> Surprisingly to some, California was slow to reform its overcrowded prison system.<sup>107</sup> But with a healthy incentive from a three-judge panel of federal judges, whose decision to force prison reductions was affirmed by the Supreme Court,<sup>108</sup> California has followed suit.<sup>109</sup> Indeed, even in some jurisdictions, attorneys have campaigned to serve as district attorneys on platforms that oppose mass incarceration.<sup>110</sup> Some, including in Philadelphia, have won and seem poised to take on resis-

104. Justice Kennedy wrote a number of opinions for a closely divided Court in such cases. See *Graham v. Florida*, 560 U.S. 48 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). He joined the more liberal wing of the Court in other instances. See *Miller v. Alabama*, 567 U.S. 460 (2012).

105. See Sean T. McAllister & Kenneth M. Plotz, *Criminal Sentencing Reform in Colorado*, 36 COLO. LAW. 23, 23 (2007) (discussing “ongoing efforts to evaluate incarceration policy in Colorado that seek to ease the fiscal burden of increased incarceration while maintaining public safety”); James B. Jacobs, *Sentencing By Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 224 (1982) (discussing states that have reformed their prisoner good time credits to reduce prison populations); Tim Arango, *In California, Criminal Justice Reform Offers a Lesson for the Nation*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/us/california-incarceration-reduction-penalties.html> [<https://perma.cc/7NGR-7A5C>]; *Data Trends: South Carolina Criminal Justice Reform*, PEW CHARITABLE TR. (Sept. 2017), <https://www.pewtrusts.org/~media/data-visualizations/infographics/2017/data-trends-south-carolina-criminal-justice-reform.pdf> [<https://perma.cc/DP4V-X4TB>].

106. See McAllister & Plotz, *supra* note 105 (discussing criminal sentencing reform in Colorado); Justin Wingerter, *How Tough-On-Crime Texas Lowered Its Prison Population and What Oklahoma Can Learn from It*, THE OKLAHOMAN (Aug. 12, 2018, 5:00 AM), <https://oklahoman.com/article/5604318/how-tough-on-crime-texas-lowered-its-prison-population-and-what-oklahoma-can-learn-from-it> [<https://perma.cc/2FUD-2G55>]; *State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TR. (Mar. 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth> [<https://perma.cc/ML2W-K6FS>].

107. *Dealing with California’s Overcrowded Prisons* (NPR radio broadcast May 26, 2011).

108. See *Brown v. Plata*, 563 U.S. 493, 543–45 (2011).

109. *Safe Neighborhoods and Schools Act*, CAL. PROPOSITION 47 (2014) (codified as CAL. GOV’T §§ 7599–7599.2; CAL. PENAL CODE § 1170.1); Assemb. B. 109, 2011–12 Leg., Reg. Sess., (Cal. 2011).

110. See Taylor Pendergrass, *In District Attorney Races Across the Nation, Reform Is Still on the Agenda*, ACLU: SMART JUSTICE (Oct. 29, 2018), <https://www.aclu.org/blog/smart-justice/mass-incarceration/district-attorney-races-across-nation-reform-still-agenda> [<https://perma.cc/M5XJ-FP3L>].

tance from police and resistance within their own offices among assistant district attorneys.<sup>111</sup>

In the recent past, a coalition formed across a broad political spectrum, resulting in criminal justice reform in Congress.<sup>112</sup> Congress passed the First Step Act, which was signed into law by then-President Trump on December 21, 2018.<sup>113</sup> The First Step Act reduces prison sentences for many federal drug offenders.<sup>114</sup> It builds upon the experience in many states, which have reintroduced rehabilitative programs and achieved measurable success in reducing recidivism.<sup>115</sup> The Act adds provisions that allow inmates to amass good time credits to secure earlier release.<sup>116</sup>

Another example of recent reform is that the death penalty is on the decline. The Supreme Court has narrowed cases in which the death penalty satisfies the Eighth Amendment's proportionality principle.<sup>117</sup> Several states have abandoned the death penalty without increases in crime rates.<sup>118</sup> Juries are less and less likely to impose the death penalty.<sup>119</sup> In fact, district attorneys are less likely than in the past to seek the death penalty, outside of a few coun-

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111. Gonnerman, *supra* note 22.

112. Patrick Gleason, *First Step Act Was This Past Year's Second Example of Federalism At Its Finest*, FORBES (Dec. 31, 2018, 8:57 PM), <https://www.forbes.com/sites/patrickgleason/2018/12/31/enactment-of-the-first-step-act-was-the-past-years-second-example-of-federalism-at-its-finest/#3993fa3d184e> [https://perma.cc/ULY3-GX3D].

113. John Malcolm & John-Michael Seibler, *Trump and Congress Earn a Conservative Victory with First Step Act*, HERITAGE FOUND. (Dec. 21, 2018), <https://www.heritage.org/crime-and-justice/commentary/trump-and-congress-earn-conservative-victory-first-step-act> [https://perma.cc/BM25-5TJB].

114. Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME (Dec. 20, 2018), <http://time.com/5483066/congress-passes-bipartisan-criminal-justice-reform-effort/> [https://perma.cc/Y4W8-PG5H].

115. Gleason, *supra* note 112.

116. Martinez, *supra* note 114.

117. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 899 (2011).

118. Beth Kassap, *Does Murder Rate Go Up Without the Death Penalty?*, ORLANDO SENTINEL (Mar. 23, 2017, 2:10 PM), <https://www.orlandosentinel.com/news/os-does-death-penalty-deter-crime-20170321-story.html> [https://perma.cc/3XJR-CTA9].

119. See BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 8–9 (2017).

ties.<sup>120</sup> Only a handful of counties account for almost all of the few death penalties still imposed in the United States.<sup>121</sup>

Cases like the shooting of Michael Brown by a Ferguson, Missouri police officer have brought attention to an additional group of issues that result from the imposition of numerous fines for misdemeanors by the United States criminal justice system.<sup>122</sup> The Obama Justice Department brought attention to the vicious cycle whereby poor people end up in a never-ending trap.<sup>123</sup> Unable to pay their fines, they end up paying amounts that are many times more in costs and fees than their original fines.<sup>124</sup> Often, this cycle leads to incarceration or loss of employment and employability.<sup>125</sup> In response to this harmful cycle, some states have begun studying alternatives to such a disabling application of the law.<sup>126</sup>

Bail is another area of reform, and some states have reformed their bail systems.<sup>127</sup> Reformers have long argued that the cash bail

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120. *See id.* at 4; Radley Balko, *In America's Leading Death-penalty County, Judges Routinely Outsource Their Written Opinions to Prosecutors*, WASH. POST (June 26, 2018, 4:21 PM), [https://www.washingtonpost.com/news/the-watch/wp/2018/06/26/in-americas-leading-death-penalty-county-judges-routinely-outsource-their-written-opinions-to-prosecutors/?utm\\_term=.328f4c5496d0](https://www.washingtonpost.com/news/the-watch/wp/2018/06/26/in-americas-leading-death-penalty-county-judges-routinely-outsource-their-written-opinions-to-prosecutors/?utm_term=.328f4c5496d0) [https://perma.cc/A8ER-L6KF]; *The Death Penalty in 2017: Year End Report*, DEATH PENALTY INFO. CTR. 2 (2017), <https://files.deathpenaltyinfo.org/reports/year-end/2017YrEnd.f1560295940.pdf> [https://perma.cc/R6RJ-NEM4].

121. *See* Richard Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. (2013), <https://files.deathpenaltyinfo.org/legacy/documents/TwoPercentReport.pdf> [https://perma.cc/4WNU-WCZS].

122. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 27–28 (2018); U.S. DEP'T OF JUST., REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf) [https://perma.cc/RA3W-HY94].

123. *See* Vanita Gupta, Head of the Civil Rights Division, Dep't of Justice, Remarks at Southern Center for Human Rights Symposium on the Criminalization of Race and Poverty (Sept. 20, 2016) (transcript available at <https://www.justice.gov/opa/speech/head-civil-rights-division-vanita-gupta-delivers-remarks-southern-center-human-rights> [https://perma.cc/CR4Q-CSBP]).

124. *See id.*

125. *See id.*

126. Alexandra Bastien, *Ending the Debt Trap: Strategies to Stop the Abuse of Court-Imposed Fines and Fees*, POLICYLINK 8–9 (Mar. 2017), <https://www.policylink.org/sites/default/files/ending-the-debt-trap-03-28-17.pdf> [https://perma.cc/4HND-57GD] (discussing various state reforms in Colorado, Michigan, Ohio, Washington, Iowa, California, Georgia, and Missouri).

127. *See id.* at 10 (“In 2017, the New Orleans City Council voted unanimously to allow indigent defendants charged with minor offenses to be released without bail in its municipal court system.”).



system is a failure.<sup>128</sup> It disadvantages poor defendants who, when unable to make bail, are more likely to be convicted or to plead guilty.<sup>129</sup> Indeed, numerous stories of innocent defendants pleading guilty to get out of jail have made headlines.<sup>130</sup> Not only is cash bail discriminatory against less affluent defendants, it also is not necessary in many cases to assure a defendant's appearance at trial.<sup>131</sup> Leading the efforts for this type of reform, in 2018 California became the first state to abolish—at least for many cases—cash bail.<sup>132</sup>

Reforms like these demonstrate new attitudes about the criminal justice system, again expanding protection for criminal defendants. Some commentators point to additional areas where the criminal justice system needs significant reform, including additional reductions in the use of prisons, greater efforts towards equality in criminal sentencing and renewed commitment to provide adequate resources for public defenders. But the arc of history seems to have turned back towards a more just criminal justice system, where the rights of criminal defendants matter again. Or has it? In the next section, I address one of the most meaningful challenges to criminal justice reform.

### III.

#### A CLOSER LOOK AT THE VICTIM IMPACT STATEMENTS

One would have to be callous to suggest that all of the reforms advanced by victims' rights groups were inappropriate. Victims' rights advocates have brought important issues into the national dialogue. For example, Professor Susan Estrich highlighted the way in which police treated rape victims, initially in her *Yale Law Journal*

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128. See Steven Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 *FORDHAM L. REV.* 40, 40 (1980) (discussing the Bail Reform Act of 1966, recognizing that pretrial incarceration was unnecessary and frequently unjust and discriminatory).

129. See Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU: SMART JUSTICE (Dec. 11, 2017), <https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail> [https://perma.cc/4T85-JZQD].

130. See John Rapling, *Plead Guilty, Go Home. Plead Not Guilty, Stay in Jail*, L.A. TIMES (May 17, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html> [https://perma.cc/A7X7-547T].

131. See Duke, *supra* note 128.

132. See Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> [https://perma.cc/3Z3L-YYAS].

article *Rape*,<sup>133</sup> and then in her book *Real Rape*.<sup>134</sup> She was hardly the only feminist or women's rights supporter who brought such practices to light.<sup>135</sup>

Some other agenda items advanced by the victims' rights movement remain controversial. Victim impact statements have been the most controversial.<sup>136</sup> Notably, in death penalty cases, families of victims have been able to speak extensively about their trauma caused by the defendant.<sup>137</sup> Similar powerful evidence is admissible in many non-death penalty cases as well. During convicted sex offender Larry Nassar's sentencing, for example, over 150 women and girls presented horrifying stories about the harm that Nassar caused through his sexual abuse.<sup>138</sup>

The Supreme Court ruled twice that victim impact statements were unconstitutional in death penalty cases.<sup>139</sup> Their reasoning was that such statements created an unacceptable risk that jurors would focus on information unrelated to the offender's intent to kill.<sup>140</sup> It did so first in 1987<sup>141</sup> and again in 1989.<sup>142</sup> Two years later, after Justice Souter replaced Justice Brennan,<sup>143</sup> the Court reversed

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133. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

134. See SUSAN ESTRICH, *REAL RAPE* (1988).

135. See Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMTY. PSYCHOL. 263, 263 (2006).

136. See generally Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL., PUB. POL'Y, & L. 492 (2004) (discussing the danger of prejudice with victim impact statements); see also Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 467 (2005) (discussing the recent movement in the law seeking gender equality in sexual relations and its success in enacting rape shield laws).

137. See *Payne v. Tennessee*, 501 U.S. 808, 825–27 (1991) (holding that if the prosecution decides to introduce victim impact statements, the Eighth Amendment poses no per se bar prohibiting them). See generally Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129 (2011) (discussing widespread usage of victim impact statements since *Payne* and results of an experiment that support the idea that VIS would arouse the emotions of jurors and bias them in favor of death).

138. See Benedict Carey, *More Than 150 Women Described Sexual Abuse by Lawrence Nassar. Will Their Testimony Help Them Heal?*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/health/nassar-victims-testimony.html> [https://perma.cc/6DSD-8QBY].

139. See *South Carolina v. Gathers*, 490 U.S. 805, 811 (1989); *Booth v. Maryland*, 482 U.S. 496, 509 (1987).

140. Myers & Greene, *supra* note 136.

141. See *Booth*, 482 U.S. at 509.

142. See *Gathers*, 490 U.S. at 811.

143. PAUL FINKELMAN, *THE SUPREME COURT: CONTROVERSIES, CASES, AND CHARACTERS FROM JOHN JAY TO JOHN ROBERTS* 1148 (2014).

those decisions, typically an unusual event for that Court.<sup>144</sup> Seldom has the Supreme Court acted so quickly to overrule precedent, lest it appear that the overruling was simply a result of a change in Court personnel.<sup>145</sup>

The public supports the use of such statements.<sup>146</sup> In the minds of many members of the public, such statements give victims closure.<sup>147</sup> As prominent victims' rights advocate Professor Paul Cassell has explained: (1) they provide information to the judge and jury about the harm caused by the crime, which may be helpful in determining an appropriate sentence; (2) they help crime victims gain closure; (3) they educate the defendant about what their crime has done, which may aid their rehabilitation; and (4) they ensure fairness at sentencing because the State, the defendant, and the victim are all heard from.<sup>148</sup>

Listen to the language of the victims' rights movement to understand how their rhetoric conflates individual harm and broader social harm. For example, take a look at the debate surrounding Brock Turner, the Stanford student convicted of sexual assault.<sup>149</sup> Judge Aaron Persky sentenced Turner to six months in jail, largely consistent with the probation department's report, but far shorter than the prosecutor's recommended sentence.<sup>150</sup> Many of Persky's critics (and supporters of his recall) focused on the personal harm that Turner caused the victim, not on social harm generally.<sup>151</sup> Michele Dauber, the Stanford Law Professor who led the campaign

144. Mark Stevens, *Victim Impact Statements Considered in Sentencing: Constitutional Concerns*, 2 CAL. CRIM. L. REV. 3 ¶40 (2000).

145. James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1094 (2001).

146. Paul Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2008).

147. Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 2 (2009) (critiquing the closure rationale for victim impact statements).

148. Cassell, *supra* note 146.

149. See generally Michael Vitiello, *Brock Turner: Sorting through the Noise*, 49 U. PAC. L. REV. 631 (2018).

150. Bridgette Dunlap, *How California's New Rape Law Could Be a Step Backward*, ROLLING STONE (Sept. 1, 2016), <http://www.rollingstone.com/culture/news/how-californias-new-rape-law-could-be-a-stepbackward-w437373> [https://perma.cc/4MEX-YURU]; Matt Hamilton, *Brock Turner To Be Released From Jail After Serving Half of Six-Month Sentence in Stanford Sexual Assault Case*, L.A. TIMES (Aug. 30, 2016, 12:05 AM), <http://www.latimes.com/local/lanow/la-me-ln-brock-turner-release-jail-20160829-snap-story.html> [https://perma.cc/2V4J-46TU].

151. See Julia Ioffe, *When the Punishment Feels Like a Crime*, HUFFINGTON POST: HIGHLINE (June 1, 2018), <https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber/> [https://perma.cc/ETF2-SFXXR].

for Persky's recall, stated that Persky "[s]ees himself almost like a social worker . . . like his job is to rehabilitate these people' and 'Rehabilitation is an important goal of punishment, but I don't think that what he's doing is the right way. Because without accountability and consequences, I think your chances for rehabilitation, particularly for sex offenses, is lower. I think there has to be both.'"<sup>152</sup> Similarly, Dauber argued that the victim in the Turner case was the "perfect victim" who did "everything right" and because she "didn't get justice," she felt "[t]he message this case is sending is 'Don't bother calling the police, you won't get justice.'"<sup>153</sup>

Personal harm to victims is not the same as social harm. A person may experience a great loss, for example, if a loved one dies in an auto accident. Society may experience a loss as well; for example, the deceased may have otherwise contributed to the good of society. But society may also be harmed by punishing the other person in the auto accident. That person may not be blameworthy; incarcerating that person may not be necessary to protect society in the future; that person's incarceration may remove that person from engagement in the workforce and from the person's loved ones. The equation of personal and social harm is simply incorrect. It confuses goals of the tort system with those of the criminal justice system.

In any number of stories about Turner, commentators focused largely on the harm to the victim.<sup>154</sup> That is often the case in situations when the public focuses on headline criminal cases.<sup>155</sup> Harm to the victim should produce empathy for the victim from all of us.

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152. *Id.*

153. AFP, *Stanford assault puts the spotlight back on rape culture*, WION (June 11, 2016), <https://www.wionews.com/world/stanford-assault-puts-the-spotlight-back-on-rape-culture-354> [<https://perma.cc/9TLN-L9G3>]

154. Katie Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17PM) (discussing the victim's disappointment with the "gentle" sentence and publishing her statement in full); Melissa Klein, *Stanford Assault Victim's Family Speaks: 'My heart's been broken'*, N.Y. POST, (June 12, 2016, 3:45 AM) (discussing the victim's family's feelings after the assault); Marina Koren, *Telling the Story of the Stanford Rape Case*, THE ATLANTIC, (June 6, 2016) (comparing the victim's experience to Brock Turner's father's).

155. See *Believed: Larry Nassar's Survivors Speak, And Finally The World Listens—And Believes*, MICHIGAN RADIO (Dec. 10, 2018), <https://www.npr.org/2018/12/07/674525176/larry-nassars-survivors-speak-and-finally-the-world-listens-and-believes> [<https://perma.cc/XTJ2-SHC6>]; Janine Rubenstein, *'It Was a Horrible Life': 8 Women Who Accuse R. Kelly of Painful Abuse Share Their Stories*, PEOPLE (Jan. 5, 2019), <https://people.com/music/surviving-r-kelly-8-women-abuse-share-stories/> [<https://perma.cc/P8Z6-YXH7>].

One cannot debate that point. My concern focuses on the balance between culpability of an offender, personal harm to the victim, and the goals of punishment. The victims' rights movement has changed the focus of the theoretic framework of criminal law from the offender to the victim.<sup>156</sup> That is a shift away from basic principles towards a tort concept of the criminal law. As developed below, this shift has often led to unnecessarily long sentences and can lead to unequal treatment of criminal defendants.

#### IV. BACK TO FIRST PRINCIPLES

Almost halfway into the semester of one of my recent Criminal Law classes, we turned to sexual assault. Class discussion focused on a provision of the Pennsylvania criminal code. Section 3124.1 provides that ". . . a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant without the complainant's consent."<sup>157</sup> The discussion was far ranging, including a discussion of the relevant sentence for a felony of the second degree under Pennsylvania law (up to ten years in prison).<sup>158</sup> It then focused on the absence of a mens rea term in the statute and whether it should be read as a strict liability offense.<sup>159</sup> A student raised her hand and asked, "What would be wrong with making the offense strict liability?"

I suspect that many have the same question. After all, harm to a victim remains the same whether the defendant acted without a culpable frame of mind. This confusion has been propounded by the victims' rights movement. Focus on harm to a victim conflates tort concepts with first principles of the criminal law, as developed below.

Pick up any Criminal Law casebook, including Kadish, Schulhofer, et al.,<sup>160</sup> and look at the first few chapters.<sup>161</sup> They lay out the first principles of the criminal law. Among those essential

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156. *Infra* Part IV.

157. 18 PA. CONS. STAT. § 3124.1 (2019).

158. *See id.* at §106(b)(2).

159. For example, what if a person did not signal the lack of consent in any manner and an act of intercourse took place? The harm occurred: the act of non-consensual sex. But the offender had no reason to know that consent was not present.

160. SANFORD KADISH ET. AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, (10th ed. 2017).

161. *Id.* at 1-349 (containing chapters on the institutions and processes of criminal law, the justification of punishment, and the elements of just punishment).

aspects of the criminal law are principles that focus on an offender's culpability,<sup>162</sup> on proportional punishment,<sup>163</sup> and on the reasons for standards like guilt beyond a reasonable doubt.<sup>164</sup> Some casebooks include a chapter on lenity,<sup>165</sup> which focuses on rules that favor defendants and their liberty when the meaning of a statute is unclear.<sup>166</sup> Casebooks raise questions about alternatives to criminal law, like tort law or other civil sanctions, to avoid imposing the weight of criminal law on some individuals.<sup>167</sup>

These are not transient notions, as the Supreme Court has observed.<sup>168</sup> For example, while analyzing whether a statute includes a mens rea element, courts recognize that an offender's culpability is essential to the criminal law.<sup>169</sup> Punishment is not measured by harm to the victim; instead, the major focus is on the offender's culpability.<sup>170</sup> Indeed, that notion has constitutional status: in assessing whether an offender's sentence is grossly disproportionate, the Court looks to the gravity of an offense, measured in terms of *social* harm and the offender's level of culpability.<sup>171</sup> Indeed, some commentators have questioned whether the law should even criminalize negligent offenders; after all, someone unable to achieve the standard of a reasonable person may be subject to punishment for their stupidity rather than for their individual fault.<sup>172</sup> As a result, the criminal law not only disfavors strict liability, it also shuns ordinary negligence, typically requiring more than the kind of risk that can lead to tort liability.<sup>173</sup>

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162. *See id.* at 258.

163. *See id.* at 202.

164. *See id.* at 38.

165. JOSHUA DRESSLER & STEPHEN GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 93–132 (7th ed. 2015).

166. *Id.* at 113.

167. *See KADISH ET AL.*, *supra* note 160, at 87.

168. *Staples v. United States*, 511 U.S. 600, 605 (1994); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.”).

169. *Staples*, 511 U.S. at 605 (“[W]e must construe the statute in light of the background rules of the common law . . . in which the requirement of some mens rea for a crime is firmly embedded.”).

170. *See id.* at 616.

171. *See Harmelin v. Michigan*, 501 U.S. 957, 959–60 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 292 (1983).

172. *See Michael Vitiello, Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, *LEWIS & CLARK L. REV.*, 1435, 1439–42 (2010).

173. *See id.*

The tort and criminal justice systems parted long ago. The two systems did so because they have different goals.<sup>174</sup> A tort system focuses on individual—not social—harm, allocates loss, and often looks to who is in a better position to guard against harm or spread risk among users of a product.<sup>175</sup> Hence, strict liability may be acceptable in tort because a manufacturer can spread the cost of its product's harm across a large number of consumers.<sup>176</sup> A driver may be liable to tort damages based on momentary inattention while driving. The tort law system can tolerate such a result because the driver is in a better position to insure herself against such a risk than an innocent person injured by the driver's activity.<sup>177</sup> By contrast, the criminal law system is about individual culpability and deserving punishment.<sup>178</sup>

Early in common law legal history, the law did not distinguish clearly between tort and criminal law actions.<sup>179</sup> Indeed, early on, in cases involving a breach of the King's peace, victims could choose among different actions, including a writ of trespass, an indictment of a felony, or an indictment of trespass.<sup>180</sup> The victim received compensation if she chose to pursue a writ of trespass; the other options led to criminal punishment.<sup>181</sup> But the conflation of criminal law and tort law ended hundreds of years ago.<sup>182</sup> As a result, the tort law system is about individual harm. The criminal law system is about social harm and offender culpability.

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174. Compare DAN B. DOBBS ET AL., *TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* 5–6 (7th ed. 2013) (defining goals of tort law as including corrective justice, distributive justice, compensation, and risk distribution), with DRESSLER & GARVEY, *supra* note 165, at 157 (stating that doctrines regarding necessary criminal intent and a defendant's guilty mind are “deeply rooted in our legal tradition as one of our first principles of [criminal] law”).

175. See DOBBS ET AL., *supra* note 174, at 6.

176. See *id.*

177. See Richard Lewis, *Insurance and the Tort System*, 25 *LEGAL STUD.* 85, 93 (2005) (“[I]nsurance in this context is fundamental to the general operation of the tort system.”).

178. DRESSLER & GARVEY, *supra* note 165, at 157–58.

179. See Kenneth Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 *WIDENER L.J.* 719, 719 (2008); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 *B.U. L. REV.* 59, 59 (1996).

180. See Seipp, *supra* note 179.

181. See *id.* at 59–60.

182. See Simons, *supra* note 179. Trying a criminal and civil case together can be problematic. See Danielle Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, *MCGEORGE L. REV.* 347, 355–67 (2013) (outlining the major criticisms of the Amanda Knox case).

Unlike tort law, criminal law is also concerned with liberty.<sup>183</sup> Hence, in acknowledging that the Constitution includes the requirement of a presumption of innocence and of guilt beyond a reasonable doubt, the Court recognizes the preference for liberty.<sup>184</sup> Thus, our criminal justice system has long recognized, if not literally then metaphorically, that we would rather acquit ten guilty offenders than convict one innocent offender.<sup>185</sup>

Liberty matters. Not only is the preference for liberty part of constitutional protections, it also explains the principle of lenity.<sup>186</sup> Thus, although a legislature is free to abandon the principle of lenity, the principle requires courts to interpret ambiguous statutes in favor of the defendant.<sup>187</sup> If the choice is between favoring the powerful state or the individual, the court should side with liberty; if necessary, the state can rewrite its laws.<sup>188</sup> In the interim, close calls go to accused individuals.<sup>189</sup>

The tort system focuses on allocation of risk between the parties.<sup>190</sup> A tort remedy focuses on compensating the victim.<sup>191</sup> Except in cases of punitive damages, a defendant's culpability is irrelevant to the amount of damages.<sup>192</sup>

Social harm still counts in criminal law. But the movement towards modern criminal law was the shift in focus from social harm to the offender's culpability.<sup>193</sup> *Regina v. Cunningham*, a classic case used by Professor Schulhofer in his casebook, captures this change in the criminal law.<sup>194</sup> There, the defendant stole a gas meter to extract the coins.<sup>195</sup> In doing so, he broke the gas line, leading to the asphyxiation of a resident of the other home in a duplex. He

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183. See Lenth, *supra* note 182, at 9; *In re Winship*, 397 U.S. 358, 363–64 (1970).

184. See *Winship*, 397 U.S. at 363–64.

185. See *id.* at 372.

186. DRESSLER & GARVEY, *supra* note 165, at 113–14.

187. *Id.*

188. *Id.*

189. *Id.*

190. See DOBBS, *supra* note 174, at 6.

191. See *id.*

192. See *id.*

193. See MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly.”); Vitiello, *supra* note 172, at 1439 (discussing the Model Penal Code’s reform of the criminal law to premise “criminal liability on an offender’s culpable mental state”).

194. *Regina v. Cunningham* [1957] 2 QB 396 (Eng.).

195. See *id.*



was charged with maliciously administering a noxious thing to another person, thereby endangering that person.<sup>196</sup> The trial court instructed the jury that it should find the defendant guilty as long as he did a wicked thing.<sup>197</sup> Of course, he did so by committing the theft. The appellate court construed the statutory term “maliciously” as the equivalent to recklessness.<sup>198</sup> It then parsed the statute to determine whether the mens rea term attached to the social harm.<sup>199</sup> In a compact way, the court signaled the change in modern criminal law: the social harm remains whether or not the offender was aware of the risk that he created. But an offender who was aware of the risk is more culpable than one who failed to recognize the risk.<sup>200</sup>

The Supreme Court has increasingly recognized the same principle through interpretation of modern criminal statutes. For example, in *United States v. Staples*, the Court inferred that Congress must have intended a malum prohibitum statute to include a mens rea term in light of the possible long prison term.<sup>201</sup> The majority ignored early precedent that was willing to find liability even absent a mens rea term for such public welfare statutes.<sup>202</sup> Similar examples abound.<sup>203</sup> Thus, in its death penalty case law, even in cases where the defendant has killed another person, the Court has required some significant level of culpable mens rea.<sup>204</sup>

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196. *See id.*

197. *See id.*

198. *Id.*

199. *See id.*

200. MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985) (providing that the Code’s recklessness standard, awareness of risk, is a higher culpability standard than that of negligence). Of course, disconnecting the culpability of the offender from the social harm is why almost all commentators rejected the felony murder rule. *See Note, Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427, 432–33 (1957) (stating that the felony murder rule renders the existence of differing degrees of murder meaningless); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 680 (1994) (arguing the felony murder doctrine “does not serve the crime preventive purposes of the criminal law, and is not redeemed by any defensible normative principle”).

201. *See Staples v. U.S.*, 511 U.S. 600, 617 (1994).

202. *See id.* at 619.

203. *See, e.g.,* *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2009 (2015) (“We have repeatedly held that ‘mere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it.’”).

204. *See Tison v. Arizona*, 481 U.S. 137, 157–58 (1987) (holding that reckless disregard for human life is the lowest mental state required before imposition of the death penalty).

The Model Penal Code offers even more examples of the modern trend. For instance, strict liability offenses are disfavored<sup>205</sup> and prison time is not suitable in such cases.<sup>206</sup> Absent a stated mens rea, under the Code's default provision, the court must read into the statute a minimum of recklessness.<sup>207</sup> While retaining negligence as a possible mens rea term, the Code's drafters rejected that level of culpability as generally acceptable.<sup>208</sup> Indeed, the drafters debated whether a negligent actor, one who lacks subjective awareness, is ever a suitable subject for punishment.<sup>209</sup>

Contrary to modern criminal law theory, victim impact evidence skews the criminal process away from an offender's culpability toward increased attention to the individual harm, not necessarily to societal harm. When the Court first addressed victim impact evidence in two cases in the 1980s, the Court rejected the evidence absent some showing that the offender acted with some awareness that family members would experience grave harm.<sup>210</sup> In *Payne v. Tennessee*, the Court granted broad authority for admission of victim impact evidence.<sup>211</sup> In doing so, not only did it overrule recent precedent (more rapidly than in almost any other instance), the Court introduced an arbitrariness into the criminal justice system with a special focus on harm to the victim's family.<sup>212</sup>

To demonstrate, imagine two homicide victims of a single crime: in one instance, that victim's family is vengeful; in the other, the victim's family believes in forgiveness.<sup>213</sup> The offender's conduct towards the two victims is otherwise identical. In one instance, the jury may impose the death penalty and not in the other based on factors relating only to social harm.<sup>214</sup> A host of other factors,

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205. See MODEL PENAL CODE at § 2.05.

206. See *id.*

207. See MODEL PENAL CODE at § 2.02(3).

208. See *id.*; *id.* at § 2.02(2)(d) (requiring a gross deviation from the standard of care that a reasonable person would observe in the actor's situation); Vitiello, *supra* note 172, at 1439–42 (2010).

209. Vitiello, *supra* note 172, at 1439–41.

210. See *Booth v. Maryland*, 482 U.S. 496, 507–09 (1987) (concluding that victim impact statements at the sentencing phase of a defendant's trial violate the 8th Amendment); *South Carolina v. Gathers*, 490 U.S. 805, 811–12 (1989) (holding that the information contained in the victim impact statement was inadmissible because it did not relate directly to the circumstances of the crime and was unknown to the defendant).

211. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

212. See *id.*; Michael Vitiello, *Payne v. Tennessee: A "Stunning IPSE Dixit,"* NOTRE DAME J.L. ETHICS & PUB. POL'Y, 165, 195, 211 (1991).

213. Vitiello, *supra* note 212, at 225 n.394.

214. See *id.* at 225.

unrelated to the offender's culpability might factor into the jury's decision as well, factors that reverse the modern emphasis on culpability.<sup>215</sup> For example, a family's religion and that religion's view of forgiveness may determine whether the family testifies in favor of the death penalty.<sup>216</sup> Whether family members are articulate, perhaps a result of educational advantages and wealth, can influence the jury's decision to impose the death penalty.<sup>217</sup> Indeed, while I pose this example as a hypothetical, one can find real life instances where a family's wishes have resulted in prosecutors seeking the death penalty.<sup>218</sup>

As mentioned above, the victims' rights movement focuses on individual harm, not the harm to society generally. This means that a victim's or her family's desire for a long prison term for an offender may make no sense from a societal point of view.<sup>219</sup> An offender may represent a very low risk to the public if he is released after a short prison term.<sup>220</sup> Private vengeance demanded by the victim may result in excessive punishment.<sup>221</sup> As a result, the center-

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215. See *Booth*, 482 U.S. at 505 ("Allowing the jury to rely on a VIS could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."); Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1498 (1974) (explaining that factors such as "[t]he precise location of a knife or gunshot wound, [or] the speed of intervention by neighbors or the police" may determine a case's result, even though the defendant had no knowledge or control of those factors).

216. See, e.g., Lucy Pasha-Robinson, *Investigator Jailed After Refusing to Testify in Death Penalty Case for Religious Reasons*, THE INDEPENDENT (Feb. 28, 2018, 6:08 PM), <https://www.independent.co.uk/news/world/americas/mennonite-investigator-jailed-death-penalty-colorado-not-testify-refuse-religious-capital-punishment-a8233336.html> [<https://perma.cc/KG3A-BD2R>].

217. See *Booth*, 482 U.S. at 506 (finding the family members' statements in that case "articulate and persuasive in expressing their grief," yet recognizing that, in other cases, "the family members may be less articulate in describing their feelings even though their sense of loss is equally severe"—thus the "fact that the imposition of the death sentence may turn on such distinctions illustrates the danger of allowing juries to consider this information").

218. See *Death the Only Just Sentence in Taft's Murder, State Says*, WRAL.COM (June 7, 2012), <https://www.wral.com/death-the-only-just-sentence-in-taft-s-murder-state-says/11177003/> (noting that the Wake County District Attorney's office sought the death penalty because the "sentence [would] help her family—and more importantly the community—put this heinous act behind [them]").

219. See Vitiello, *supra* note 149, at 658 (arguing long prison terms are costlier than potential alternatives, such as drug treatment or close parole supervision, and because criminality correlates with age, criminals in their thirties and older are "more likely to phase out of criminality").

220. See *id.* at 641.

221. *Id.*

piece of the victims' rights movement—the victim impact statement—is at odds with fundamental principles of our criminal law system.

V.  
WHAT ABOUT ON CONSEQUENTIALIST  
GROUNDS?

One might respond to the concerns raised above by arguing that victims' participation in the criminal justice system is justified on consequentialist grounds. Thus, one might argue that, on balance, victim participation is justified because it benefits victims more than it harms offenders. That argument seems implicit in some of the language used by victims' advocates.<sup>222</sup> Proponents commonly state that a victim of a crime or her family experiences closure by participating in the process.<sup>223</sup> Thus, one might argue that even if an offender receives a longer sentence than the judge might otherwise impose absent powerful impact statements, the net benefit to society justifies the increased punishment. Here, the benefit would be helping the innocent victim recover more quickly than they otherwise might have, had they not participated in the process.

Victims' rights supporters can point to anecdotal evidence to support such claims. For example, after hearing one victim's statement, a judge reassured her that she was not to blame for the incident, thereby acknowledging her suffering.<sup>224</sup> The victim said, "Because of what the judge said, it was so easy just to walk out of that court and start my life".<sup>225</sup> One report noted that when judges make statements to the defendant in front of the victim, like "I can't believe how much damage you have caused here," it can help victims as well.<sup>226</sup>

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222. See Bandes, *supra* note 147, at 11 n.62 (describing the argument in favor of victim impact statements as one which emphasizes the giving back of something to victims' families and friends that was previously taken by the defendant).

223. See *id.* at 2 (stating that victim impact statements "assist with healing and closure because they permit victims and survivors to give voice to their pain and sense of loss in a public setting").

224. Susan A. Bandes, *Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal Justice*, in *THE EXPRESSION OF EMOTION: PHILOSOPHICAL, PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 274 (Catherine Abell & Joel Smith, eds., 2016).

225. *Id.*

226. MARY LAY SCHUSTER & AMY D. PROPER, *VICTIM ADVOCACY IN THE COURTROOM: PERSUASIVE PRACTICES IN DOMESTIC VIOLENCE AND CHILD PROTECTION CASES* 86 (2011).

Elsewhere, one victim of the Boston Marathon attack wrote to the defendant that it aided her to deliver her statement even if he failed to make eye contact with her when she spoke.<sup>227</sup> As she stated, “Today I looked at you right in the face and realized I wasn’t afraid anymore. And today I realized that sitting across from you was somehow the crazy kind of step forward that I needed all along.”<sup>228</sup> This suggests that victims’ impact statements may benefit victims by allowing them to confront defendants for the pain and suffering that the defendants have caused.<sup>229</sup>

The problem with that position is that consequentialist arguments rest on empirical claims. The support for the idea that victims benefit by participating in the process is thin. Marilyn Armour, director of the Institute for Restorative Justice and Restorative Dialogue has spent twenty years researching co-victims and writes that “[t]hey’ll tell you over and over and over again that there’s no such thing as closure.”<sup>230</sup>

Further, psychological studies have found that executions do little to heal the victims’ families.<sup>231</sup> A Marquette University study compared the effects of executions on victims’ families in Minnesota and Texas. Minnesota has no death penalty; Texas leads the nation in executions. The study found that families of victims in Minnesota had higher levels of physical, psychological, and behavioral health and more satisfaction with the criminal justice system than families of victims in Texas.<sup>232</sup>

Victims’ families have, in fact, formed a group, *Murder Victims Families for Reconciliation*, whose mission statement is to mobilize

227. Lindsey Bever, *Dear Dzhokhar Tsarnaev: A Survivor’s Letter to Accused Boston Bomber*, WASH. POST (Mar. 5, 2015, 4:50 PM), [https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/dear-dzhokhar-tsarnaev-a-boston-marathon-survivors-letter-to-the-man-who-maimed-her/?hpid=hp\\_hp-top-table-main-boston-marathon-survivor%3Aletter-to-the-man-who-maimed-her%3Ahomepage%2Fstory&utm\\_term=.F057f374ebfa](https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/dear-dzhokhar-tsarnaev-a-boston-marathon-survivors-letter-to-the-man-who-maimed-her/?hpid=hp_hp-top-table-main-boston-marathon-survivor%3Aletter-to-the-man-who-maimed-her%3Ahomepage%2Fstory&utm_term=.F057f374ebfa) [<https://perma.cc/EH5K-XSQ4>].

228. *Id.*

229. Bandes, *supra* note 147.

230. Laura Santhanam, *Does the Death Penalty Bring Closure to a Victim’s Family*, PBS NEWSHOUR, (Apr. 25, 2017, 3:02 PM), <https://www.pbs.org/newshour/nation/death-penalty-bring-closure-victims-family> [<https://perma.cc/GYY6-6RFT>].

231. Traci Pedersen, *Study Finds Executions Do Little to Heal Victims’ Families*, PSYCHCENTRAL, <https://psychcentral.com/news/2014/01/26/study-finds-executions-do-little-to-heal-victims-families/64973.html> [<https://perma.cc/TYB5-DQWJ>].

232. See Marilyn P. Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1, 91–95 (2012); see also Scott Vollum & Dennis R. Longmire, *Covictims of Capital Murder: Statements of Victims’ Family Members and Friends Made at the Time of Execution*, 22 VIOLENCE AND VICTIMS 601–19 (2007).

“victim families and help them tell their stories in ways that disrupt and dismantle the death penalty and create pathways for wholeness, reconciliation and restoration.”<sup>233</sup> This all tends to suggest that executions do not in fact provide the alleged closure that many death penalty advocates have clung to for so long as justification for the practice.<sup>234</sup>

Absent compelling evidence to the contrary, one should be suspicious that expressing one’s loss to the defendant on one instance in open court can provide closure, if by closure proponents mean psychological healing. Victims of violent crime often suffer major trauma, often post-traumatic stress disorder (PTSD).<sup>235</sup> The idea that venting one’s emotions in court on a single occasion does much to heal victims is out of line with the reality that PTSD, while treatable, is a serious condition. It requires far more treatment than can be provided by a day in court.<sup>236</sup>

Absent empirical evidence to support the idea that a victim’s participation provides meaningful psychological benefits, one is left to find some other justification to abandon traditional criminal law principles. Our system long ago abandoned private vengeance.<sup>237</sup> Yet, as some of the examples above indicate, the current use of victim impact statements may lead to a difference in an offender’s sentence only because the family of the victim or the victim herself

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233. Lisa Murtha, *These Families Lost Loved Ones to Violence. Now They Are Fighting the Death Penalty*, AM. JESUIT REV. (Dec. 28, 2017), <https://www.americamagazine.org/faith/2017/12/28/these-families-lost-loved-ones-violence-now-they-are-fighting-death-penalty> [<https://perma.cc/4GNU-5MFQ>].

234. Pedersen, *supra* note 231.

235. Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. TRAUMATIC STRESS 119, 125–26 (2003) (stating “[v]ictims of violence experience a variety of emotional problems [and] PTSD is among these,” and finding 32% of rape victims had lifetime PTSD and 38.5% of physical assault victims had lifetime PTSD).

236. See James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 Hous. L. REV. 1205, 1273–75 (2004) (suggesting continuing symptoms of PTSD may be a result of inadequate coping strategies and “[a] criminal prosecution may provide a juristic ending to the victim’s violation. But depending on the vagaries of the criminal justice system to provide psychological balm is to risk relying on other actors for the resolution of one’s own trauma.”); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 998–99 (1985) (arguing the victim recovery process is more complicated than can be accomplished simply by participation in the defendant’s sentencing, and “to say to a victim that after sentencing he or she can now put the experience to rest denies that any remaining questions of meaning, fears of death, or feelings of helplessness exist”).

237. See Henderson, *supra* note 236, at 1000–01; *In re Estrada*, 408 P.2d 948, 951 (Cal. 1965) (stating a desire for vengeance is not permitted under modern theories of penology).

advocates for a longer or shorter sentence.<sup>238</sup> The added sentence may be entirely unnecessary to assure public safety and may not at all relate to the offender's culpability.<sup>239</sup>

## VI. WHAT ABOUT DEMOCRACY?

Anyone who listens to victims articulate the suffering caused by being criminal victims must feel their pain and outrage, as long as the listener has a modicum of empathy. Headline cases can be flash points for popular outrage.<sup>240</sup> That outrage moves members of the public to action, as it did when California enacted its draconian Three Strikes law in reaction to news about Richard Allen Davis' kidnap and murder of twelve-year-old Polly Klaas.<sup>241</sup>

Another example of the power of the victims' rights movement is the reaction in California after Brock Turner's criminal sentence.<sup>242</sup> Even at a time when the state had started to advance liberal sentencing reforms, California changed its law to mandate a minimum prison sentence for an offender convicted of sexual assault of an unconscious woman in reaction to the sentence imposed on Turner.<sup>243</sup> Turner's case also led to the sentencing judge's recall, despite the fact that Judge Aaron Persky, a well-regarded judge, followed the probation report's recommendation when he imposed Turner's sentence.<sup>244</sup>

Both the passage of Three Strikes and the recall of Judge Persky garnered broad public support. For example, Three Strikes

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238. WRAL.COM, *supra* note 218.

239. See *Booth v. Maryland*, 482 U.S. 496, 509 (1987); Schulhofer, *supra* note 215.

240. See Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395, 411–12 (1997); Michael Vitiello, *"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1601 (1997).

241. Vitiello, *"Three Strikes" and the Romero Case: The Supreme Court Restores Democracy*, *supra* note 240, at 1602–03.

242. See Vitiello, *supra* note 149, at 634–38.

243. See *id.* at 639; *Sexual Assault Law—Judicial Recall—California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369 (2019).

244. See Vitiello, *supra* note 149, at 637; Report of Probation Officer, *People v. Brock Allen Turner*, No. B1577162 (Cal. Super. Ct., June 2, 2016); Dunlap, *supra* note 150; Paul Elias, *Judge in Stanford Rape Case Often Follows Sentencing Reports*, ASSOCIATED PRESS (June 17, 2016), <https://apnews.com/a01788e9c0374cf19a942625fde93174> [<https://perma.cc/XC3Q-RS9Z>] (stating Judge Persky followed the sentencing recommendation of the Santa Clara County Probation Department).

passed with support of 72% of the voters.<sup>245</sup> Almost 60% of the voters in Santa Clara County voted to oust Judge Persky.<sup>246</sup>

One might ask: what is wrong with democracy or, more particularly, what is wrong with voters determining sentencing policy? The answer is a great deal, in the area of criminal sentencing. Long ago, Jeremy Bentham argued that a criminal justice system should center on a government's properly developed penal code, not on public morals or outrage.<sup>247</sup> Scholars have demonstrated that Bentham was right and that public involvement in criminal sentences results in prison terms longer than needed for protecting public safety.<sup>248</sup>

The authors of *Punishment and Democracy* demonstrated the excesses of California's Three Strikes law.<sup>249</sup> The authors found at best a minor deterrent effect for future criminal activity.<sup>250</sup> Further, three strike offenders tended to be older and, in many instances, guilty of mid-level offenses.<sup>251</sup> The offenders who Three Strikes proponents claimed would be subject to the law (murderers, rapist, and child molesters)<sup>252</sup> were already subject to very long terms of imprisonment or even the death penalty.<sup>253</sup> The offenders tended to be older because they had already served prison sentences for their qualifying strikes.<sup>254</sup> Hence, the most common offenders given very long sentences under the law were mid-level offenders who were no longer in their prime criminal years age-wise: for most

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245. BILL JONES, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOV. 8, 1994 GEN. ELEC. XXV (1994).

246. Richard Gonzales & Camila Domonoske, *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, NPR (June 5, 2018, 1:58 PM), <https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur> [https://perma.cc/N56A-GNF5].

247. Guyora Binder, *Punishment Theory: Moral or Political*, 5 BUFF. CRIM. L. REV. 321, 338–48 (2002); see also Kent Greenwalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1282, 1286–87 (Joshua Dressler ed., 2d ed. 2002).

248. See generally FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (discussing the California legislature's enactment of the Three Strikes law and its implications for criminal sentencing).

249. *Id.*

250. *Id.* at 94–105.

251. See *id.* at 56.

252. See *id.* at 4–7.

253. *Id.* at 44.

254. See ZIMRING ET AL., *supra* note 248, at 56; see also, e.g., FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES 1993–2001 (Nov. 2003), [https://ucr.fbi.gov/additional-ucr-publications/age\\_race\\_arrest93-01.pdf](https://ucr.fbi.gov/additional-ucr-publications/age_race_arrest93-01.pdf), [https://perma.cc/8YG9-ERSP].



men, between nineteen and twenty-nine years old.<sup>255</sup> A 25-year-to-life sentence imposed on a 35-year-old mid-level offender results in many years of expensive incarceration that cannot be justified based on any resulting social protection.<sup>256</sup>

Similarly, many commentators who opposed Judge Persky's recall did so, in part, out of concern about judicial independence, especially relating to length of prison sentences.<sup>257</sup> Imagine, for a moment, another judge sentencing a defendant in a case like Brock Turner's case after witnessing the successful recall effort. Consciously or unconsciously, the judge would have to consider the risk to his or her career if the sentence seemed to the public to be inadequate.<sup>258</sup> While recall supporters downplayed the impact on judicial independence, empirical data supports the concern about judges imposing unnecessarily long sentences.<sup>259</sup>

In December 2015, the Brennan Center for Justice at New York University Law School published a study on state court judicial sentencing practices.<sup>260</sup> The report measured the effect of an upcoming re-election on a judge's sentencing practices and discussed the increased cost of judicial elections.<sup>261</sup> Much of the funding for election campaigns is from outside groups that typically fund negative ads.<sup>262</sup> Largely, those ads attack opposition candidates as soft on crime or tout candidates as tough on crime.<sup>263</sup> Relevant to this dis-

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255. *See id.*

256. *Id.* at 60 ("The offense charged at the current arrest is less likely to be a crime of violence for a third-strike defendant than for a defendant with no strikes at all.").

257. *See* Tracey Kaplan, *Recall Aftermath: Will the Removal of Judge Aaron Persky Prompt a New Legal Battle?*, MERCURY NEWS (June 6, 2018), <https://www.mercurynews.com/2018/06/06/judge-persky/> [https://perma.cc/6QTX-DD8M].

258. *Id.* ("Opponents [to the recall] said . . . independence from popular opinion is what has allowed judges to rule on civil rights, integrated schools, free speech, access to birth control and marriage equality."); *see* Vitiello, *supra* note 149, at 652–59.

259. *See* Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAVIOR 483, 505 (2003) (concluding that members of the public are "sensitive to the principle of proportionality and recognize the threat to this principle created by laws that mandate the same sentence for all offenders regardless of their levels of culpability").

260. Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST. (2015), [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf) [https://perma.cc/REA9-GGPD].

261. *See id.* at 1

262. *See id.* at 8.

263. *See id.* at 3.

cussion, judges up for retention gave longer sentences as those judges got closer to reelection.<sup>264</sup> Keep in mind that in many states, victims' rights groups provide much of the money for judicial election ads.<sup>265</sup> In California, the prison guards' union, working closely with victims' rights groups, often provides funding to back tough-on-crime judges.<sup>266</sup> Not surprisingly, therefore, the political process ends up adding unnecessary years of confinement in many cases.<sup>267</sup>

While in recent years the public seems exhausted with mass incarceration,<sup>268</sup> the democratic process will almost inevitably result in sentences that are longer than necessary to protect public safety.<sup>269</sup>

Often lost in the reaction to Judge Persky's sentencing decision was his reliance on a detailed probation report.<sup>270</sup> That report, in turn, focused on the California legislature's criteria for determining the length of a criminal sentence.<sup>271</sup> Those criteria include a

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264. *See id.* at 9.

265. Alicia Bannon et al., *Who Pays for Judicial Races? The Politics of Judicial Elections 2015-2016*, BRENNAN CTR. FOR JUST. 29, 36 (2017).

266. Sagar Jethani, *Union of the Snake: How California's Prison Guards Subvert Democracy*, MIC (Feb. 5, 2019), <https://mic.com/articles/41531/union-of-the-snake-how-california-s-prison-guards-subvert-democracy#.P004fsUjN> (stating that the California Correctional Peace Officers Association "has been one of the leading backers of tough sentencing laws," spending \$100,000 in support of the Three Strikes law and \$1 million on beating Proposition 66).

267. Berry, *supra* note 260, at 7.

268. *See, e.g.*, Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016) <https://time.com/4596081/incarceration-report/> [<https://perma.cc/UGM6-HDQC>]; ACLU N. CAL., *supra* note 55; *see also* Peter K. Ennis, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857 (2014) (examining punitive tendencies of the U.S. public since 1953 and revealing a significant decrease in public support for "tough on crime" policies since the mid 1990's).

269. *See generally* Berry, *supra* note 260; *see* Lauren-Brooke Eisen et al., *How Many Americans Are Unnecessarily Incarcerated*, BRENNAN CTR. FOR JUST. 42 (2016), <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated> [<https://perma.cc/U27L-2XEZ>] (suggesting that mass incarceration will continue to rise unless bold solutions are provided, including reducing minimum and maximum required sentencing, and eliminating prison terms for lower level crimes).

270. Elias, note 244; *see also* *Brock Turner Sentencing Packet*, N.Y. TIMES (Jun. 12, 2016), <https://www.nytimes.com/interactive/2016/06/12/us/document-SentencingPacket.html> [<https://perma.cc/4QVK-6AAZ>].

271. *See Brock Turner Sentencing Packet*, *supra* note 270; *see also* CAL. PENAL CODE § 1170 (West 2020). *Cf.* Nicole Knight, *Brock Turner Sentencing Prompts California Legislators to Expand Rape Definition*, REWIRE (Sept. 2, 2016, 1:40 PM), <https://rewirenewsgroup.com/article/2016/09/02/brock-turner-sentencing-prompts-california-legislators-expand-rape-definition/> [<https://perma.cc/E626-BGFC>]; Matt Ford, *How Brock Turner Changed California's Rape Laws*, THE ATLANTIC (Oct. 1,

risk assessment instrument, which provides a reasonably accurate prediction of whether an offender will recidivate.<sup>272</sup> In light of his age and lack of prior criminal record, Turner's score indicated a low likelihood of reoffending.<sup>273</sup> The sentence imposed was not only lawful, but also based on that substantial probation report.<sup>274</sup>

Like many, I read the headlines about the light jail sentence and assumed that the sentence demonstrated the worst kind of bias, a light sentence imposed on a well-to-do athlete.<sup>275</sup> After reading the probation report, I was less certain about the sentence. In addition, I was not in the courtroom and did not see the defendant when he testified. As a result, like most people who have heard about the case, I have no idea whether he was credible. Apparently, the judge found the defendant's testimony about some of the events to be credible, including the defendant's belief that the victim was consenting.<sup>276</sup> Over time, I became increasingly agnostic about whether Turner's sentence was too lenient.

My experience with the Turner case is illustrative: even someone who has written about excessive punishment and urged greater attention to limiting prison sentences and focusing on rehabilitation was initially moved by news headlines.<sup>277</sup> Most voters are not criminal law scholars and have little time to read probation reports or to reflect on first principles of the criminal law. Many people learned about the case from headlines, often ones that misrepresented the facts of the case.<sup>278</sup>

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2016), <https://www.theatlantic.com/news/archive/2016/10/california-law-brock-turner/502562/> [https://perma.cc/2P45-YGDL]; Mollie Reilly, *California Closes Loophole That Allowed Brock Turner's Light Sentence*, HUFFPOST (Sept. 30, 2016, 3:26 PM ET), [https://www.huffpost.com/entry/california-rape-sentencing-brock-turner\\_n\\_57c6f0a9e4b078581f10631c](https://www.huffpost.com/entry/california-rape-sentencing-brock-turner_n_57c6f0a9e4b078581f10631c) [https://perma.cc/B4FW-FA7Z].

272. See *Brock Turner Sentencing Packet*, *supra* note 270, at 8–9; See CAL. PENAL CODE § 290.04 (West).

273. See *Brock Turner Sentencing Packet*, *supra* note 270, at 9.

274. Elias, *supra* note 244.

275. Vitiello, *supra* note 149.

276. Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, THE ATLANTIC (June 17, 2016), <https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/> (noting that Persky stated, "I mean, I take him at his word that, subjectively, that's his version of events.").

277. See generally Vitiello, *supra* note 95; Vitiello, *supra* note 172; Vitiello, *supra* note 212; Vitiello, *supra* note 240.

278. Vitiello, *supra* note 149, at 637–38; Kendall Fisher, *No Time Like the Present, Except the Past Fifty Years: Why California Should Finally Adopt the Model Penal Code Sentencing Provisions*, 49 U. PAC. L. REV. 661, 662–64 (2018); Wiemond Wu, *Crocodiles in the Judge's Bathtub? Why California Should End "Unregulated" Judicial Recall*, 49 U. PAC. L. REV. 699, 719–21 (2018); Justine McGrath, *Stanford Rapist Brock Turner Lost His Sexual Assault Conviction Appeal*, TEEN VOGUE (Aug. 9, 2018), <https://>

Even worse were reports on social media that distorted the facts of the case. So many false accusations were made on largely unregulated social media sites that a law professor set up a webpage to rebut misstatements or outright lies made about the case.<sup>279</sup>

The democratic process does not work in right-sizing criminal punishment. Anyone with empathy feels for victims. We may see ourselves or our loved ones as victims. Guilty defendants have done something wrong.<sup>280</sup> Getting past those realities to a position where one can assess appropriate punishment dispassionately is difficult. Explaining first principles of criminal law to members of the public takes one into a theoretical realm, which is harder to understand than the immediate pain of victims.

## VII. CONCLUDING THOUGHTS

For the first time in many years, liberal criminal justice advocates may have something to cheer about.<sup>281</sup> Americans have rejected many of the policies that led to mass incarceration.<sup>282</sup> Their politicians are enacting reform legislation in many states. Many

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www.teenvogue.com/story/stanford-rapist-brock-turner-lost-his-sexual-assault-conviction-appeal [https://perma.cc/5BU8-YP2Y] (labeling defendant a “rapist” in the headline); Will Garbe, *Attorney Tells Judges Brock Turner Practiced ‘Sexual Outercourse,’* THE ATLANTA J.-CONSTITUTION (July 25, 2018), https://www.ajc.com/news/national/brock-turner-stanford-student-convicted-rape-practiced-sexual-outercourse-attorney-says-appeal/b9bm0xCSSrHmrIzDmI5Vy/ [https://perma.cc/Y93G-G3GW] (changing the headline of the article and concluding in an editor’s note that the article headline previously misstated the facts and alleged Turner was convicted of rape).

279. See Elspeth Farmer & Ellen Kreitzberg, *Guest Opinion: We Need Reform, Not a Recall*, PALO ALTO ONLINE (May 11, 2018, 6:28 AM), https://www.paloaltoonline.com/news/2018/05/11/guest-opinion-we-need-reform-not-a-recall [https://perma.cc/9L4X-JCJD] (listing the website norecall2018.org/get-the-facts/ that claims to “debunk the distortions and false narrative of the recall campaign”).

280. JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?” THE MAKING OF A CRIMINAL LAWYER (1983).

281. See Garrett, *supra* note 21; Law, *supra* note 22; Jacobs, *supra* note 105; McAllister & Plotz, *supra* note 105; Arango, *supra* note 105.

282. See Law, *supra* note 22 (voting for politicians who brand themselves as “progressives”); Udi Ofer, *ACLU Poll Finds Americans Reject Trump’s Tough-on-Crime Approach*, ACLU (Nov. 16, 2017, 1:45 PM), https://www.aclu.org/blog/smart-justice/aclu-poll-finds-americans-reject-trumps-tough-crime-approach [https://perma.cc/EF9W-4PCY] (“Seventy-one percent of respondents agreed that ‘sending someone to prison for a long sentence increases the chances that he or she will commit another crime when they get out because prison doesn’t do a good job of rehabilitating problems like drug addiction and mental illness.’”).

states are reinstituting rehabilitation programs.<sup>283</sup> They are recalibrating their views of mandatory minimum sentences and of the war on drugs.<sup>284</sup>

At the same time, the victims' rights movement remains a powerful force in the criminal justice system, even in an era of sentencing reform.<sup>285</sup> The movement towards amending the Constitution to add a victims' rights provision remains strong.<sup>286</sup> Victims routinely testify at sentencing hearings and judges often give great deference to their views.<sup>287</sup>

As argued above, the main premises of the victims' rights movement are contrary to first principles of the criminal law.<sup>288</sup> The theoretical basis for the movement is about compensating the victims.<sup>289</sup> But that is the goal of the tort system in the United States.<sup>290</sup> Criminal justice is about offender culpability and is grounded in principles supportive of an offender's liberty.<sup>291</sup> This shift in focus is meaningful and often leads to punishment unjustified to guarantee public safety.<sup>292</sup>

Even in a more reform-minded era, the victims' rights movement can win the battle for hearts and minds. When I gave a work in progress to develop my thesis, I started out with the following observation: "I am going to convince very few of you that my central thesis is correct. But that is my point: the victims' rights narrative is far easier to understand than are the core values of the criminal law." Think about the optics of the debate: an injured sympathetic victim and an offender who has committed a crime. Why should we favor a wrongdoer over an innocent victim? One cannot explain those reasons in ways that are quickly digested by one's listeners. Ideas like "closure," balancing the system to put victims on an even playing field with criminal defendants, and restoring fairness to our system, are emotionally compelling. Arguing the nuances of crimi-

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283. See Wool & Stemen, *supra* note 14.

284. See *id.*

285. See *supra* Part I; see also Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement> [<https://perma.cc/LXJ2-DD76>].

286. See ACLU FACT SHEET, *supra* note 26.

287. See Carey, *supra* note 138; Paternoster & Deise, *supra* note 137; Vitiello, *supra* note 149, at 646 (stating judges are required to consider victims' statements as relevant to sentencing).

288. See *supra* Part IV.

289. See *id.*

290. See *id.*

291. See *id.*

292. See *id.*

nal law theory will lose out to the victims' rights narrative. In the end, though, through this skewed focus of the victims' rights movement we risk more unnecessary criminal sentences unjustified by the need for public safety and sacrifice important principles.

