Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure

Douglas E. Beloof
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INTRODUCTION

Crime victims' interests in both justice and minimizing secondary victimization are increasingly relevant to modern judicially formulated procedures. The increasing relevance of victims' interests has important im-

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1135
plications for crafting judicial procedures that routinely capture these interests, judicial interpretation of historic citizens’ participation rights, striking the proper balance between the formal parties’ and victims’ interests, and revisiting outmoded procedures crafted judicially without regard for victims’ interests.

This Article proceeds in four parts. Part I includes a brief overview of historic citizen participation, including the changeover from private to public prosecution. Victims’ interests were prominent in the era of private prosecution, diminished during the rise of public prosecution, and are increasingly relevant in a time of victims’ rights. Also in this section, three kinds of discretion are identified as relevant. First is the public prosecutorial discretion never ceded to citizen prosecutors; second, the discretion originally ceded to citizen private prosecutors, now exercised by the state; third, the discretion originally ceded to citizens and still retained by them. Part I then focuses upon two United States Supreme Court cases, *Linda R.S. v. Richard D.* and *Leeke v. Timmerman,* decided at the nadir of victim participation, to examine relevant types of prosecutorial discretion. *Linda R.S.* provides an example of the Court’s refusal to extend citizen participation rights into areas of historic government discretion that were not ceded to private prosecutors. *Timmerman* evidences the responsiveness of courts to changes in the legal culture. In particular, in an era of public prosecution, *Timmerman* was influenced by the reality of public prosecution, using it to limit a state citizen’s independent participation right.

Part II is an overview of modern victims’ rights. Rights of participation, privacy, and protection found in victims’ interests mark a significant change in criminal process culture. Broad and specific rights are examined. These rights demonstrate a vigorous trend towards the inclusion of victims’ interests within the criminal process. Victims’ rights themselves are important bases for judicially formulated procedures, but it is also the interests underlying the rights that define the scope of the rights. Moreover, victims’ interests have been relied upon as relevant in formulating judicially crafted procedure, even where the scope of broad or specific rights does not encompass the issue.

Part III is divided into five sections, each analyzing distinct contexts in which victims’ rights and interests have been relevant to judicially crafted procedure. The increasing relevance of victims’ interests in judicial deci-
sions in this era of victims' rights is demonstrated. The recognition of victims' interests in recent Supreme Court opinions is examined in Part III, section A. The Supreme Court on several occasions has identified victims' interests as important considerations in the administration of justice. Section B sets out a judicially crafted procedure designed to routinely capture victims' interests. The example is a judicially created procedure to ensure input to the court about the victims' views concerning government motions to dismiss indictments. In Section C, victims' interests are reviewed as rationales for ending abatement ab initio. Here the clear trend is to end the doctrine of abatement ab initio because of victims' interests; or victims' rights to fairness, dignity and respect; or the victims' right to restitution. Section D investigates a modern Wisconsin case that reviews an historic procedure allowing victims' judicial access to charging. That case upholds the historic procedure against a constitutional challenge and, in the concurring opinions, identifies modern victims' rights and the victims' interests underlying those rights as relevant to the ongoing viability of the historic procedure. Finally, section E analyzes victims' positions on impaneling a foreign jury versus change of venue. In particular, the New Jersey Supreme Court, despite the absence of a victims' right expressly addressing venue, relied upon victims' more general rights and interests to affirm the trial court's alternate decision to impanel a foreign jury. Just as the legislated change towards public prosecution informed judicial decisions that conformed to that evolving legal culture, so too is the legislated rise of victims' interests transforming the legal culture and informing judicially crafted procedure. Courts now weigh victims' interests in both justice and minimizing secondary victimization when making procedural choices in individual cases, even where no specific victims' right applies.

In Section IV, the Article revisits the *Timmerman* opinion, arguing that, in an era of victims' rights and interests, the *Timmerman* opinion's analytical approach does not adequately weigh victims' interests in the balance because victims' interests, as well as victims' rights, are now relevant considerations in judicially crafted procedures.

The Article concludes that, as the legislatively led historic shift to public prosecution was facilitated by courts, so too, the legislatively led modern shift to victims' rights has moved the courts' to acknowledge victims' interests when weighing judicial procedural choices. Finally, the Article urges that procedures should also be formulated to ensure the routine judicial consideration of both victims' interests and the views of the victim.

5. See generally State v. Unnamed Defendant, 441 N.W.2d 696 (Wis. 1989).
I. THE RISE OF PUBLIC PROSECUTION AND JUDICIAL DECISIONS INVOLVING CITIZENS' INTERESTS

A. Citizens' Historically Based Participation Rights and Government's Ceded and Unceded Discretion

Citizens' participation rights initially existed in an era of private prosecution. In early America, private prosecutions were dominant.7 The system of private prosecution had been "preferred because it avoided the tyranny of government prosecutors and the expense of providing for public prosecution."8 A recent overview of the shift from private prosecution to public prosecution reveals that private prosecution survived in the United States well into the 1800s,9 and in petty offenses continues as a viable procedure to this day.10 In private prosecutions, citizens bring charges and hire counsel to prosecute crimes themselves. As Professor McDonald recounts: "Even after identification and arrest, the victim carried the burden of prosecution. He retained an attorney and paid to have the indictment written and the offender prosecuted."11 Other legal historians report that private prosecution was dominant.12 "Professor Nelson's history of a typical Massachusetts county between 1760 and 1810 . . . reports that criminal trials were 'in reality a contest between subjects rather than contests between government and subjects.'"13 Other historians acknowledge the pre- and post-colonial prevalence of private prosecution.14 In sum, discretion in day-to-day litigation was ceded to private prosecutors.

However, some state discretion was never ceded to private prosecutors. Even after cases met probable cause standards, the state's nolle prosequi (dismissal) authority allowed the state to terminate private prosecutions, even over the objection of the private prosecutor.15 Another unceded discretion was the state's authority to bring, or decline to bring, cases independently of private prosecutors.16 Citizens could not compel the

8. Id. at 485.
9. Id. at 484, 486; see also Carolyn B. Ramsey, The Discretionary Power of "Public" Prosecutors in Historical Perspective, 39 AM. CRIM L. REV. 1309, 1391 (2002).
10. See infra note 29 and accompanying text.
14. Id. (citing legal historians).
16. See infra notes 41-43 and accompanying text.
state to take action to prosecute or not prosecute one another.\textsuperscript{17} Instead, citizens sought direct redress in court.\textsuperscript{18}

Public prosecutors gradually took over from private prosecutors.\textsuperscript{19} Public prosecution's rise has been linked to the abandonment of cases brought by private prosecutors.\textsuperscript{20} As public prosecution replaced private prosecution, the state took over day-to-day litigation discretion from private prosecutors. In some contexts, most notably felony trials, citizens' historic participation rights were eliminated.\textsuperscript{21}

The end of the era of private prosecution left a variety of enduring citizen participation rights which vary among jurisdictions. These rights exist in various procedural contexts. In the investigation phase, citizens can conduct a private investigation.\textsuperscript{22} Citizens can request grand jury\textsuperscript{23} and judicial investigations.\textsuperscript{24} In some contexts, citizens can finance public investigations.\textsuperscript{25} Citizens can arrest without a warrant for felonies, breaches of the peace, and in some jurisdictions, misdemeanors committed in the citizen's presence.\textsuperscript{26} Concerning the charging process, citizens can access

\begin{itemize}
\item \textsuperscript{17} See infra notes 39-43 and accompanying text.
\item \textsuperscript{18} Supra notes 7-13 and accompanying text. See generally, Peter Charles Hoffer, Law and People in Colonial America 112-21 (rev. ed. 1998).
\item \textsuperscript{19} See Beloof & Cassell, supra note 7, at 487 (citing authorities).
\item \textsuperscript{20} Id.
\item \textsuperscript{21} The end of felony private prosecution has been thorough enough that two federal circuits have suggested that felony private prosecutions might violate evolving standards of defendants' due process. See East v. Scott, 55 F.3d 996, 1000-01 (5th Cir. 1995); Person v. Miller, 854 F.2d 656, 663-64 (4th Cir. 1988).
\item \textsuperscript{22} See State v. Clause von Bulow, 475 A.2d 995, 1012 (R.I. 1984).
\item \textsuperscript{23} Douglas E. Beloof, Paul G. Cassell & Steven J. Twist, Victims in Criminal Procedure 335-71 (2d ed. 2006) (reviewing cases regarding citizen access to grand jury); see also Peter L. Davis, Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute, 53 Md. L. Rev. 263, 271, 308-52 (1994).
\item \textsuperscript{24} See State v. Unnamed Defendant, 441 N.W.2d 696, 697 (Wis. 1989). The Wisconsin statute provides in pertinent part:

If a person complains to a judge that he or she has reason to believe that a crime has been committed ... the judge shall examine the complainant under oath and any witnesses produced by him or her ... The extent to which the judge may proceed in the examination is within the judge's discretion ... If it appears probable from the testimony given that a crime has been committed ... the complaint may be reduced to writing ... and thereupon a warrant shall issue for the arrest of the accused.

\item \textsuperscript{26} 5 Am. Jur. 2D Arrest § 57 (1995).
\end{itemize}
grand juries and seek judicial charging. In the case of misdemeanors, subject to the public prosecutors’ authority to nolle prosequi, victims can initiate judicial charging and privately prosecute the case. Citizens can obtain assistance of counsel at their own expense to defend their historic rights. Moreover, citizen participation rights are judicially cognizable, as citizens can seek review of, and remedy for, rights violations.

Emerging from the era of private prosecution are three categories of public prosecutorial discretion relevant to citizens’ historic participation rights: first, the public prosecutorial discretion never ceded to citizens, including dismissal authority and discretion of the public prosecutor to bring or not bring a prosecution independently of private prosecutions; second, the discretion originally ceded to citizens as private prosecutors since relocated to the state, such as public prosecution in the felony trial stage; and third, the discretion originally ceded to citizens and still retained by them—the historic and enduring citizen participation rights.

While some historic citizen participation rights endured, the ultimate status of these rights remained uncertain. How would courts treat enduring citizen participation rights now contextualized by the trend toward public prosecutorial exclusivity? The answer is explored in two significant United States Supreme Court cases.

B. Supreme Court Opinions at the Nadir of Citizen Victims’ Rights

Two relevant Supreme Court opinions were issued during the period between the decline of private prosecution and the rise of modern state victims’ rights. In the first opinion, Linda R.S. v. Richard D., the Court effectively held that citizens do not have rights in state criminal processes that did not exist at common law. The Linda R.S. opinion is a fairly

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27. Supra note 23.
30. E.g., State ex. rel. Beach v. Norblad, 781 P.2d 349, 349-50 (Or. 1989) (issuing peremptory writ after challenge by victim’s lawyer to lower court’s jurisdiction to order defense entrance into victim’s home; writ issued); State ex rel. Miller v. Smith, 285 S.E.2d 500, 501 (W. Va. 1981) (issuing the victim’s attorney a writ of prohibition forbidding the prosecutor’s interference with victim’s access to grand jury).
31. See Norblad, 781 P.2d at 350; Smith, 285 S.E.2d at 502.
32. TORCIA, supra note 15, § 61.
33. See supra note 21 and accompanying text.
34. See supra notes 22-30 and accompanying text.
35. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Linda R.S. is best known for introducing the redressability requirement to the federal standing doctrine. See id. at 618. This redressability issue is distinct from the subject of this Article. Here, the opinions
straightforward application of unceded government discretion, albeit in the then novel context of an equal protection claim.

The second Supreme Court opinion examined here is *Leeke v. Timmerman*, in which the Court determined that a South Carolina citizen did not have a right to obtain an arrest warrant independent of the public prosecutor's review. The *Timmerman* gives heavy weight to public prosecution, weight which is only justifiable in the historic context of *Timmerman*, issued during the apex of exclusive public prosecutorial authority.

1. Linda R.S.

*Linda R.S. v. Richard D.* provides an example of public prosecutorial discretion historically never ceded to citizens. In *Linda R.S.*, the mother of an illegitimate child alleged an equal protection violation and sought to compel a Texas county prosecutor to bring charges of criminal non-support after the prosecutor declined to do so because, "in his view," the statute did not extend to children born out of wedlock. Holding that Linda R.S. had no standing to use a mandamus action to compel a prosecutor to charge, the Court stated that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."

Although the *Linda R.S.* opinion is silent on the procedural point, its holding is consistent with traditional state mandamus limitations—that mandamus could not be used to compel a discretionary act of the public prosecutor. Even in the era of private prosecution, public prosecutors had discretion to direct, or not direct, state resources to prosecution.

are examined to explore whether public prosecutorial discretion exists in a given procedural context.


37. See infra text accompanying notes 70-74.

38. See *Linda R.S.*, 410 U.S. at 614-16.

39. *Id.* at 616, 619.

40. *Id.* at 619.

Citizens' common law private prosecution rights did not allow citizens to seek a writ of mandamus requiring a public prosecutor to exercise prosecutorial charging discretion.\textsuperscript{42}

Instead of compelling the public prosecutor to charge, citizens brought charges independently of the public prosecutor. For example, in the Maryland case of \textit{Brack v. Wells}, decided three decades before \textit{Linda R.S.}, the state's high court ruled that mandamus could not be used to compel a public prosecutor to charge:

As a general rule, whether the State's Attorney does or does not institute a particular prosecution is a matter which rests in his discretion. Unless that discretion is grossly abused or such duty compelled by statute or there is a clear showing that such duty exists mandamus will not lie.\textsuperscript{43}

Further, the \textit{Brack} court stated that mandamus would not lie when there was another remedy available.\textsuperscript{44} That other remedy was for the citizen to independently approach the grand jury.\textsuperscript{45}

Unquestionably, Linda R.S., as a Texan, could have directly approached a Texas grand jury in an attempt to secure a charge. Written before \textit{Linda R.S.}, the seminal Texas case of \textit{Hott v. Yarbrough} opined: "Equally clear is the right of any one who may consider himself aggrieved by the actual or supposed commission of a crime to call the matter to the attention of the grand jury for investigation and action."\textsuperscript{46} The Fifth Circuit Court of Appeals, interpreting Texas case law after \textit{Linda R.S.}, confirmed that Texas citizens had a common law right of direct access to the grand jury: "Under Texas law, the grand jury has the authority to conduct their own investigations, to subpoena evidence and witnesses, . . . and to indict on matters as to which the district attorney has presented no evidence and sought no indictment."\textsuperscript{47} The \textit{Linda R.S.} case did not alter Linda R.S.'s personal right to independently approach the Texas grand jury. Nor did it alter the fact that her right to seek grand jury charging was judicially cognizable. Instead, \textit{Linda R.S.} involved a procedurally inappropriate challenge to public prosecutorial discretion because she sought to compel the public prosecutor to bring charges, an approach that failed her as it had failed the Maryland victim in \textit{Brack} and victims in other jurisdictions.\textsuperscript{48} It failed her because citizen actions to compel public

\textsuperscript{42} See supra note 32 and accompanying text.
\textsuperscript{43} Black v. Wells, 46 A.2d 319, 321 (Md. 1944).
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 321-22.
\textsuperscript{46} Hott v. Yarbrough, 245 S.W. 676, 678-79 (Tex. Comm'n App. 1922).
\textsuperscript{47} Smith v. Hightower, 693 F.2d 359, 368 n.21 (5th Cir. 1982).
\textsuperscript{48} Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Unfortunately, the closest the \textit{Linda R.S.} opinion comes to making this clear is to say that "in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecu-
prosecutors invaded the unceded discretion of the government not to initiate charging procedures. 49

The Linda R.S. case is limited to procedural contexts where state public prosecutors already exercise lawful discretion. Put another way, Linda R.S. means "that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" 50 in procedures where public prosecutorial discretion already exists.

The cases cited in Linda R.S. also support the idea that government discretion must already exist before citizens can be said to have "no judicially cognizable interest in the prosecution or nonprosecution of another." 51 The Younger v. Harris Court held that no standing existed for persons to join with the criminal defendant as interveners in a civil injunction to halt prosecution when those persons were neither prosecuted nor threatened with prosecution. 52 In Bailey v. Patterson, the Court held that plaintiffs had no standing to enjoin prosecution where there was no allegation that plaintiffs were being prosecuted or threatened with prosecution. 53 In both Younger and Bailey, the uncharged citizen had no standing to challenge the public prosecutor's exercise of already existing lawful discretion to bring charges. Finally, in Poe v. Ullman, plaintiffs were denied standing to bring a civil declaratory judgment action to invalidate

49. I have changed my view of Linda R.S., which had been that the rise of public prosecution may have "meant the end of judicially cognizable victim interests in charging." Douglas E. Beloof, Constitutional Implications of Crime Victims as Participants, 88 CORNELL L. REV. 282, 284 (2003). Clearly citizens have a judicially cognizable interest where their right to approach the grand jury to seek a charge is denied. Citizens have never had a judicially cognizable interest in compelling the public prosecutor to charge. Thus, it was not the rise of the public prosecutor that denied the citizen's ability to compel the public prosecutor to charge, because such compulsion had not been permitted at common law. However, my thesis in that article, "the modern states' statutory and constitutional inclusion of the victim in the process sets the stage for federal constitutional accommodation of state crime victims as participants in state criminal processes," remains viable; Linda R.S. is simply irrelevant to it. Id. at 297. Before I wrote that article, Professor Goldstein interpreted the Linda R.S. dictum to be an historical error that "confused the [nolle prosequi] power to intervene and dismiss...with the exclusive power to decide whether they should be initiated at all." Abraham S. Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 MISS. L.J. 515, 549-50 (1982). His view is off the mark. Instead, citizens could never compel charging, but rather, had to resort to their own initiatives before the grand jury. Linda R.S. was historically correct.

50. Linda R.S., 410 U.S. at 619.
51. Id.
52. See Younger v. Harris, 401 U.S. 37, 39, 42 (1971).
state criminal statutes because plaintiffs were neither prosecuted nor threatened with prosecution. While *Poe* involved a civil challenge to a criminal statute, rather than a challenge to a prosecution, prosecutorial discretion remains centrally relevant to the decision. In *Poe*, where the prosecution exercised its *already existing* discretion not to seek a charge, plaintiff had no standing to challenge the criminal statute.

The procedural context, internal citations, and the reality of citizens' judicially cognizable interests in grand jury charging in Texas all support the interpretation that the *Linda R.S.* language means that where prosecutors *already exercise* lawful discretion, citizens lack an interest in prosecution or nonprosecution of another that is sufficient to trump that discretion. Thus, *Linda R.S.* did not establish any new area of public prosecutorial discretion, it preserved pre-existing discretion.

Unaddressed by *Linda R.S.* was how citizens' participation rights would fare where prosecutorial discretion did not previously exist. Would the Supreme Court use the rise of public prosecution to limit citizens' participation rights?

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55. See id. at 498, 501.

56. See id. at 501-02.

2. Leeke v. Timmerman

Unlike *Linda R.S.*, the *Timmerman* opinion exemplifies judicial use of the rise of public prosecution to limit citizens' independent access to a state criminal court to seek an arrest warrant. In *Timmerman*, the Supreme Court referenced the *Linda R.S.* dictum in denying a group of South Carolina citizens access to state arrest warrants independent of the public prosecutor.\(^{58}\) Notably, the plain language of the state statute provides no role for public prosecutors in citizens' access to arrest warrants.\(^{59}\)

In *Timmerman*, citizens alleged that they had been beaten by state officials.\(^{60}\) Based on this allegation they sought arrest warrants from a state judge.\(^{61}\) The officials targeted by these citizens contacted the public prosecutor and asked the prosecutor to participate by contacting the judge.\(^{62}\) The public prosecutor contacted the judge, asked him not to issue arrest warrants, and pledged an investigation.\(^{63}\) The judge did not issue the warrants, and no investigation took place.\(^{64}\) The citizens then brought a federal civil rights action against the state officials alleging interference with access to state courts.\(^{65}\)

The Supreme Court in *Timmerman* held that the South Carolina statute had not been violated because the state trial court actually did receive the citizens' documents.\(^{66}\) As to the interference by state prosecutors, the Court held that citizens had no standing to object because, citing the *Linda R.S.* language, the citizens had "[no] judicially cognizable interest in the prosecution or nonprosecution of another."\(^{67}\)

At first blush, it appeared that the Court was saying that state prosecutors' discretion existed because citizens had "[no] judicially cognizable interest in the prosecution or non-prosecution of another." Instead of a lack of judicial cognizance where government discretion already exists, as was meant by *Linda R.S.*, *Timmerman* appeared to make the novel assertion that as a matter of law in all criminal process contexts citizens had no judicially cognizable interests at all. Such an interpretation would turn *Linda R.S.* on its head. However, a close reading of *Timmerman* reveals that the opinion's use of the *Linda R.S.* language was based on the Court's initial determination that the public prosecutor already had the discretion to review the warrant application.

\(^{59}\) See id. at 87 (citing S.C. CODE ANN. § 22-3-710 (1976)).
\(^{60}\) Id. at 84.
\(^{61}\) Id.
\(^{62}\) Id. at 84-85.
\(^{63}\) Id. at 85.
\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id. at 87.
\(^{67}\) Id. at 86 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).
The Court's determination that public prosecutorial discretion to interfere was preexistent is based not on the language of the state statute or historical tradition, but instead on the prevalence of public prosecution. When faced with a federal constitutional cause of action arising from an allegedly unconstitutional state law, federal courts are put in the position of interpreting state law.\textsuperscript{68} In interpreting state law, federal courts look to analogous cases from the state jurisdiction.\textsuperscript{69} The \textit{Timmerman} Court relied upon an 1871 South Carolina Supreme Court opinion, \textit{State v. Addison}, which held that a citizen/complainant could not move for a change of venue, and that only the public prosecutor could so move.\textsuperscript{70} The period of the late 1800s involved the transition from private to public prosecution.\textsuperscript{71} When citizens ceased to be interested parties, courts were faced with questions about what procedures citizens could continue to participate in.\textsuperscript{72} While the \textit{Addison} court noted that "[i]t is difficult to determine in what sense the words 'some party interested' are used in the Act" governing venue, the court ultimately decided that motions for change of venue were permissible only in the discretion of public prosecutors, not citizens.\textsuperscript{73} In \textit{Timmerman}, the Supreme Court mimicked the South Carolina court's reliance on public prosecution to determine that public prosecutorial authority was also dominant in the context of citizens' access to courts to request arrest warrants.\textsuperscript{74}

The applicability of \textit{Addison} to the \textit{Timmerman} issue is dubious. \textit{Addison} involved the meaning of the word "party" and whether the victim was a party who could move for venue change. At a time when public prosecutors were replacing victims as the party prosecutor, the \textit{Addison} court reasonably determined that a victim was not a party.\textsuperscript{75} On the other hand, \textit{Timmerman} took a statute specifically designed for independent citizen access to courts and interpreted public prosecutorial interference into it.

\textsuperscript{68} John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law} §§ 1.5-1.6 (6th ed. 2000).

\textsuperscript{69} E.g., Lenhardt v. Basic Inst. of Tech., 55 F.3d 377, 379-80 (8th Cir. 1995); see also NOWAK & ROTUNDA, supra note 68, §§ 1.5-1.6.

\textsuperscript{70} \textit{Timmerman}, 454 U.S. at 87 n.2 (citing \textit{State v. Addison}, 2 S.C. 356, 364 (1871)).

\textsuperscript{71} See Beloof & Cassell, supra note 7, at 494.

\textsuperscript{72} Id. at 483-503 (discussing the transition of victims from parties to witnesses in the context of victim sequestration).

\textsuperscript{73} \textit{Addison}, 2 S.C. at 363-64.

\textsuperscript{74} \textit{Timmerman}, 454 U.S. at 86-87.

\textsuperscript{75} \textit{Addison}, 2 S.C. at 363-64. For an in depth example of how victims' status has changed over time, see Beloof & Cassell, supra note 7 (examining the historical changes to victim attendance at trial in light of their loss of party status and the reascendance of victims' attendance in light of their modern status as participants).
The *Timmerman* Court cited to ABA standards promulgated by public prosecutors. Unsurprisingly, the public prosecutor standards urged that citizen requests for warrants should not be independent of public prosecutors:

This conclusion comports with the smooth functioning of the criminal justice system. The American Bar Association Standards for Criminal Justice, the Prosecution Function 3-3.4 (2d ed. 1980), propose that where the law permits a private citizen to complain directly to a judicial officer, the complainant 'should be required to present the complaint for prior approval by the prosecutor, and the prosecutor's actions or recommendation thereon should be communicated to the judicial officer . . . ."

Finally, the *Timmerman* Court looked to statutes from other states that, unlike the South Carolina statute at issue, expressly provided for public prosecutorial review of arrest warrants. In making its decision, the Court reasoned that "[m]any jurisdictions contain provisions for private citizens to initiate the criminal process, and some have required or encouraged input of the prosecuting attorney before issuance of an arrest warrant."

The substance of all three authorities relied upon in *Timmerman* is the same—the rise of public prosecution. From the perspective of the times, *Timmerman* was at least an understandable, though analytically flawed, decision because the trend was toward exclusive public prosecutorial authority. Within this trend, the *Timmerman* Court relied upon the dominance of public prosecution (in its various manifestations) as the rationale to restrict citizens' statutory right to independent access to South Carolina criminal courts to obtain arrest warrants.

II. MODERN VICTIMS' RIGHTS EVIDENCE THE RETURN TO VICTIMS' INTERESTS

As background for Part III, this Part overviews state sovereignty over state criminal procedure and modern victims' rights, and identifies that victims' interests arise from criminal harm and are interests in justice and avoiding secondary harm from criminal processes.

Federalism principles recognize state court sovereignty over state criminal processes. Absent powers reserved to the federal government or barriers within the Federal Bill of Rights, state legislatures and state citizens are free to enact laws on modern victims' rights. The United States Supreme Court stated: "It goes without saying that preventing and deal-

76. *Timmerman*, 454 U.S. at 87 n.3.
77. *Id.*
78. *Id.* (citing NEB. REV. STAT § 29-404 (1979); OHIO REV. CODE ANN. § 2935.10 (1975); S.D. CODIFIED LAWS § 23A-2-2 (1979); WIS. STAT. § 968.02(3) (1977)).
ing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. More specifically, the Supreme Court has acknowledged the legitimacy of states’ criminal process accommodations to crime victims. In *Payne v. Tennessee*, the Supreme Court found no federal constitutional violations associated with a victim impact statement given at the sentencing. The *Payne* Court made clear that “the States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs.” Moreover, as Justice William Brennan’s views on federalism confirm, “[s]tate experimentation cannot be excoriated simply because the experiments provide more rather than less protection for civil liberties . . .” In the area of victims’ rights, the states have met felt needs by engaging in experiments providing more, rather than less, protection than found in the Federal Constitution for civil liberties of victims.

Furthermore, modern victims’ rights flourish in an era of public prosecution under an express exception to the *Linda R.S.* language. That exception is the *Linda R.S.* footnote providing that judicially cognizable rights can be legislated. In the footnote, the *Linda R.S.* Court acknowledged that Congress could enact rights that would be judicially cognizable: “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” By analogy, state legislators can also enact victims’ rights accompanied by victim standing.

Since, and to some extent reliant on, the *Linda R.S.* footnote, a wave of victims’ rights laws have swept state and federal criminal processes. While modern victims’ rights laws have not heralded a return to private felony prosecution at the trial stage, they do provide for participation independent of the public prosecutor in a variety of procedural contexts.

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81. *Id.* at 824-25.
84. *Id.*
85. *See Goldstein, supra* note 49, at 550-52 (observing that victims could be given legislated standing to participate in restitution proceedings of sentencing hearings).
86. *Infra* notes 87-99 and accompanying text.
87. For example, the victim’s right to be heard at sentencing is completely independent of the defendant’s constitutional and the state’s statutory rights to be heard. *See generally* Douglas E. Beloof, *supra* note 49 (evaluating state laws allowing victim allocution at
These rights are individual rights, personally held by the victim. Modern victims' rights are both broad and specific. Broad rights "include the victims' rights to fairness, respect, dignity, privacy, freedom from abuse, due process, and reasonable protection." Victims' rights provisions typically include the specific rights "to be notified, present and heard" at critical stages of the criminal process; to speak at pretrial release, plea, sentencing and parole hearings; to confer with the public prosecutor; to a prompt disposition (also known as victims' speedy trial right); and to attend the trial. Rights are typically enforceable on review by the use of writs. Voiding of pleas and sentences can sometimes be a remedy for rights violations.

Victims' interest in justice is a basis of modern victims' rights. In 2004, the Crime Victims' Rights Act (CVRA) was enacted, providing enforceable federal victims' rights laws. The CVRA followed on the heels of thirty-one state constitutional amendments granting victims' rights in the criminal process.

The federal and state victims' rights laws legitimize crime victim harm upon which victims' interests in justice and minimizing secondary victimization are based. The legislative history provided by the main sponsor of the CVRA identifies victim harm as the basis for victims' participation rights, and that victims' interest in justice underlies the rights:

sentencing). As for federal victims' rights, the legislative history to the CVRA right to be heard makes clear that: "It is not necessary for the victim to obtain the permission of either party [to address the court]." 150 CONG. REC. S10,911 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl); see also Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006) (identifying victims' independent right to speak at sentencing).

89. Id. at 262.
90. Id.
91. Id. at 265.
92. Id. at 266; see also Kenna, 435 F.3d at 1016 (upholding victim's federal right to speak at sentencing).
93. Beloof, supra note 88, at 266.
94. Id. at 267.
95. Id.; see also Beloof & Cassell, supra note 7, at 504-20 (examining victims' right to attend trial in detail); Kenna, 435 F.3d at 1015-16 (finding "clear congressional intent to give crime victims the right to [appear personally and] speak at proceedings covered by the CVRA").
96. Beloof, supra note 88, at 325.
97. See id. at 344-45.
Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. . . . [T]his bill allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from criminal proceedings, whether these are pretrial, trial or post-trial proceedings.\footnote{100}{150 CONG. REC. S10,910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl) (emphasis added).}

Another victims’ interest underlying victims’ rights is minimizing secondary harm from the criminal process. Again, the CVRA legislative history is clarifying. With regard to rights of “fairness and respect for the victims dignity and privacy,” the legislative history provides: “too often victims of crime experience a secondary victimization at the hands of the criminal justice system.”\footnote{101}{Id. at S10,911.} The fairness and respect provisions are “intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.”\footnote{102}{Id.} Thirty-three states and the federal government articulate one or more of the values of respect for, fairness to, and acknowledgment of, the dignity of the crime victim in state constitutions or statutes.\footnote{103}{Beloof, supra note 99 app. A (setting forth state victims’ rights laws expressly incorporating the concepts of fairness, respect, and dignity).} According dignity, fairness, and respect to victims by providing them, but not other classes of individuals, with rights, reveals the importance of victim harm. “These [primary and secondary] harms place the concepts of ‘dignity,’ ‘fairness,’ and ‘respect’ in context, and provide the fundamental basis for victim participation in the criminal process.”\footnote{104}{Id. at 294.}

A focus on more particular rights also reveals victims’ interests in minimizing secondary harm. Like victim laws in many states, federal victims’ rights laws provide notice to the victim of escape or release, as well as ‘speedy trial’ rights.\footnote{105}{18 U.S.C. § 3771(a)(2), (7) (Supp. 2004).} Avoiding secondary harm is a basis of these rights. The CVRA legislative history concerning notice provides that “victim safety requires that notice of the release or escape of an accused
Weighing Crime Victims’ Interests
from custody be made in a timely manner to allow the victim to make informed choices about his or her own safety.\textsuperscript{106} \textsuperscript{106} The importance of avoiding secondary harm is also revealed in the CVRA legislative history concerning the right to proceedings free from unreasonable delay: “Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case.”\textsuperscript{107}

In sum, the criminal harm to the victim gives rise to the both victim’s interests in justice and in minimizing the secondary harm inflicted upon victims by criminal processes.

III. CRIME VICTIMS’ INTERESTS WITHIN JUDICIALLY CRAFTED PROCEDURES

This Part is divided into five sections. The modern recognition of victims’ interests in recent Supreme Court opinions is examined in Section A. On several occasions, the Supreme Court has identified victims’ interests as important considerations in the administration of justice. Section B sets out judicially crafted procedures designed to routinely capture victims’ interests. The example selected for explication is a judicially created procedure to obtain victims’ views concerning a government motion to dismiss an indictment. In Section C, victims’ interests as rationales for ending abatement ab initio are analyzed. The trend is to end the doctrine of abatement ab initio because of victims’ interests or the victims’ rights to either restitution or fairness and respect. Section D investigates a modern Wisconsin case that reviews an historic procedure allowing victims’ access to charging. That case upholds the historic procedure against a constitutional challenge. The concurring opinions identify modern victims’ rights and victims’ interests underlying those rights as relevant to the ongoing viability of the historic procedure. Finally, Section E analyzes victims’ position on impaneling a foreign jury versus change of venue. In particular, the New Jersey Supreme Court relied upon victims’ more general rights and interests to affirm the trial court’s alternate decision to empanel a foreign jury absent a victims’ right expressly addressing venue.\textsuperscript{108}

107. Id. at S10,911.
108. Victims’ interests in justice and minimizing secondary victimization are relied upon by courts in at least two contexts. First, is the context of victims as a class. Second, is the context of a particular individual victim. The distinction can be readily seen in case law. On the one hand, the \textit{general} victims’ interest in timely disposition of a criminal case is a rationale to limit the time taken to finalize criminal cases in general. Part III Section A reviews a Supreme Court opinion that, in substantial part, relies on this rationale to support the need for finality. In the other context, an individual victims’ information about, and views for or against, dismissal of an indictment is relevant to a judicial assessment.
A. The Modern Supreme Court's Acknowledgment of Victims' Interests in the Administration of Criminal Procedures

Even before the advent of meaningful federal victims' rights under the CVRA, the modern United States Supreme Court endorsed crime victims' interests. In 1983, in *Morris v. Slappy*, the Court ruled that a continuance to obtain counsel of choice was properly denied. The Court urged that "in the administration of justice, courts may not ignore the concerns of victims." 109 The Sixth Circuit has since cited *Slappy* for the proposition that, in the context of continuances, "concerns of finality, administrative convenience and victims' rights have weighed more heavily in the balance." 110

In *Payne v. Tennessee*, decided in 1991, the Court recognized crime victims as unique individual human beings whose particularized harm could be the subject of victim impact statements. 111 The majority in *Payne* affirmed that, "justice, though due to the accused, is due to the accuser also . . . we are to keep the balance true." 112 Furthermore, three concurring Justices, Scalia, O'Connor, and Kennedy, acknowledged the ascendance of crime victims' interests:

Justice Marshall has also explained that '[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.' [T]hat a crime's unanticipated consequences must be deemed "irrelevant' to the sentence conflicts with a public sense of justice keen enough that it has found voice in a nationwide "victims' rights" movement. 113

Written in 1991, the Justices' concurrence in *Payne* understates the public sense of justice today. A review of electoral passage rates of constitutional amendments guaranteeing state victims' rights reveals that it is whether the dismissal is in the public interest. Explored below, in Section B, are two federal district court opinions and a state court opinion where individual victim's information and views are involved in the courts' evaluation of the government motion to dismiss an indictment.

109. *Morris v. Slappy*, 461 U.S. 1, 14-15 (1983); see also *United States v. Young*, 50 M.J. 717, 722 & note 2 (A. Ct. Crim. App. 1999) (noting that "a continuance may well have been devastating to the [rape] victim" and citing *Morris v. Slappy* for the proposition that a continuance to allow the defendant to retain counsel of their choice was properly denied by the trial judge).


112. *Id.* at 827 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

113. *Id.* at 834 (Scalia, J., concurring) (citations omitted).
not unusual for them to pass by 70-90%.” Similarly, the initial Senate version of the CVRA passed with a 96-1 vote in favor. The Bill became H.R. 5197 passing with a 394-14 vote in the House and unanimous consent in the Senate.

In 1998, the Supreme Court acknowledged the interests of victims in the timely execution of sentence. In Calderon v. Thompson, six years before the CVRA’s passage, the Court observed that to unsettle expectations in the execution of moral judgment “is to inflict a profound injury to the ‘powerful and legitimate interests in punishing the guilty,’ an interest shared by the State and the victims of crime alike.” The Court’s language is an express recognition that the state’s interest in timely punishment is not exclusive, but is shared by victims. The Sixth Circuit interpreted this language in Calderon to mean that, “[t]he Supreme Court has instructed that the ‘State’s interests in finality are compelling’ and that the ‘powerful and legitimate interest in punishing the guilty’ attaches to both the state and the victims of crime alike.” Because the Court did not rely on statute, the Court implicitly sees victims’ interests as relevant and that these interests are “profound[ly] injured” when execution of sentence is significantly delayed. Plainly, minimizing secondary harm to victims is relevant in judicial procedural choices.

The Court’s appreciation of victims’ interests in Calderon is in harmony with federally legislated victims’ “right to proceedings free from unreasonable delay,” as well as the rights to “fairness” and “dignity.” The CVRA legislative history provides: “Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case.” The Court and Congress have arrived at the same conclusion, that crime victims’ interests are relevant to criminal procedure choices.

Seen in historical context, the language of Slappy, Payne, and Calderon reflect conventional court roles. The rise of public prosecution changed the legal culture—prompting, for example, the Court in Timmerman to interpret a statute to include prosecutorial review of a citizen’s arrest warrant application even though the statute itself was silent on the point.

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114. Beloof, supra note 88, at 341 & n.421 (collecting electoral percentages).
115. Id. at 342.
116. Id.
118. Alley v. Little, 181 Fed. App’x 509, 512-13 (6th Cir. 2006) (unpublished opinion); see also Reid v. Johnson, 333 F. Supp. 2d 543, 552 (E.D. Va. 2004) (citing Calderon and noting: “At this point, the state and the victims of crime can expect the moral judgment of the state to be carried out without delay.”).
Analogously, the Court in *Slappy, Payne, and Calderon* opined within a legal culture in which victims' interests have become relevant.

**B. Judicially Crafted Procedures to Ensure Trial Court Consideration of Individual Victims' Interests**

Where individual victims lack standing to bring their individual interests to the attention of the court there is little certainty that their interests will be considered as part of the judicial resolution of the issue. Thus, where victims have standing to enforce a *right*, courts may be alerted directly to victims' interests by the victim. However, where a victim does not have standing, but nevertheless has information and views relevant to, for example, the public interest function of the court, there is a need for judicially crafted procedures to ensure the routine judicial consideration of victim information and views. The alternative to such procedures is random ad hoc judicial reference to victims' information and views in certain, but not other cases.

Absent trial level procedures institutionalizing consideration of victims' interests, it is difficult to say where the rubber of appellate courts' admonishments to respect victims' interests meets the road of trial court implementation. The admonitions by appellate courts instructing lower courts to consider the general interests of victims, like the U.S. Supreme Court's in *Slappy, Payne, and Calderon*, are more likely to be followed if lower courts utilize them as a basis for crafting trial level procedures that ensure routine consideration of victim's interests. Absent such procedures, ensuring that the relevant interests of victims are consistently brought to the attention of the courts is problematic because there is no reliable advocate of general victims' interests consistently before the court.

121. Of course, where victims have standing to enforce their rights, it serves as the procedural basis for victims' rights violations to be brought to the attention of the court. However, this Article focuses on judicial consideration of victim interests, whether in or out of the scope of a particular right.

122. This Article is concerned with judicial weighing of victim interests. It is not an article about victim standing, a topic I have written about elsewhere. See generally Beloof, supra note 49, at 275-331. Of course, generally when victims' have state constitutional rights, or a statutory interest great enough, victims may have standing to enforce their interests directly. See *Doe v. United States*, 666 F.2d 43, 45 (4th Cir. 1981) (granting interlocutory appeal of pretrial denial of statutory rape shield protection). Courts have victims' interests directly urged upon them. But no effort is made in this article to parse out what interests should result in victim standing. Lack of standing is no barrier to communication when the court seeks victim input.

The interests of victims are in justice and avoiding secondary victimization. These interests provide the basis of judicially created procedures to ensure routine judicial review of victims' interests in specific procedural contexts. For example, in certain procedural stages, courts are responsible for making decisions in the public interest. Victims' interests are legitimately part of the public interest. In United States v. Biddings, the district court denied the government's request to dismiss a federal indictment for robbery. In moving the case to trial, the court reasons: "The manifest public interest, represented by several unrecanting victims, requires a trial to vindicate them or the defendant..." In Biddings, the trial court considered the individual victims' interests as part and parcel of the public interest. The Biddings court's recognition of the victims' interest in justice as an important part of the public interest function of the court was not based on any statutory victims' right. Thus, Biddings stands for the proposition that victims' interests are an important component of the public interest assessment of the court in its role in ruling on a government motion to dismiss.

However, Biddings did not establish any ongoing procedure to routinely capture victims' interests in future cases where the government moves to dismiss. In United States v. Heaton, the federal district court judge created a procedure that routinely informs the district court of individual victim's information and views. In Heaton, the government brought the charge of "using a means of interstate commerce to entice an individual under the age of 18 to engage in unlawful sexual activity." Later, the government moved to dismiss the case. The motion to dismiss was not a public proceeding, as it was submitted in writing. Under federal law the victim only has the right to attend public proceedings.

The court identified its responsibility in dismissal motions under the federal rules, stating that usually "the court will approve a government motion to dismiss, as 'a court is generally required to grant a prosecutor's Rule 48(a) motion to dismiss unless dismissal is clearly contrary to manifest public interest.'" The court recognized that even though the judicial standard was "deferential" to the government, "the court must make

124. Facilitating, but not essential to, routine judicial consideration of these interests are the broad rights to "fairness," "respect," "due process," and "freedom from abuse," that are expressly due to victims under law either as rights or as enabling language to rights. Douglas E. Beloof, supra note 99 app. A.
126. Id.
127. See id.
129. Id. at 1271.
130. See id. at 1271-73.
131. See id. at 1272.
132. Id. at 1271.
its own independent determination that dismissal is warranted."\textsuperscript{133} The court also acknowledged that the victim had a statutory right under the CVRA to “confer with the attorney for the Government in the case.”\textsuperscript{134}

Like Biddings, the Heaton case includes victims’ interests in the public interest assessment function of the court. Unlike Biddings, Heaton created a judicially crafted procedure to routinely review victims’ interests. The Heaton court viewed as relevant the victims’ statutory right under the CVRA to be treated with “fairness” and “dignity.”\textsuperscript{135} The Heaton court held:

It is hard to begin to understand how a victim would be treated with fairness if the court acted precipitously to approve dismissal of a case without even troubling to consider the victims’ views . . . . Likewise, to grant the motion without knowing what the victim thought would be a plain affront to the victim’s dignity.\textsuperscript{136}

The district court in Heaton crafted a procedure for future government motions to dismiss: “in passing on any government motion under Rule 48(a) in any victim related case, the court will expect to see the prosecutor recount that the victim has been consulted on the dismissal and what the victim’s views were on the matter.”\textsuperscript{137} Through this judicially crafted procedure, the court will be routinely informed about individual victims’ views on government motions to dismiss. As result, the courts’ public interest assessment is more fully informed.

Compare the approach in Biddings and Heaton to the Colorado opinion in Gansz v. People.\textsuperscript{138} The victim had not been notified of the dismissal motion or hearing, but upon learning of the dismissal, the victim wrote a letter to the judge, whereupon the judge vacated the dismissal and ordered a hearing.\textsuperscript{139} The trial court dismissed the case at the hearing.\textsuperscript{140} The Colorado intermediate court denied the victim relief because he lacked standing to formally object to a dismissal of the case.\textsuperscript{141} The court opined that there was no violation of the state constitution because the law did not specifically give victims a right to notice and to be heard at dismissal proceedings.\textsuperscript{142} While technically correct, the Gansz case never addressed whether a victims’ information and views concerning

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. at 1273.
\item \textsuperscript{135} Id. at 1272.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. at 1273.
\item \textsuperscript{138} 888 P.2d 256 (Colo. 1995).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id. at 258-59.
\end{enumerate}
\end{footnotesize}
Weighing Crime Victims' Interests

dismissal is an important component of the judicial assessment of the public interest. This, despite the fact that the Colorado rule governing dismissals is, in pertinent part, similar to the federal rule.\(^{143}\) In contrast, *Biddings* and *Heaton* acknowledged that the public interest function includes victims' interests.\(^{144}\) Even before the CVRA, the *Biddings* court obtained victim information relevant to the court's public interest function. Under the CVRA, *Heaton* interpreted victims' rights to require consideration of victim information and views and formulated a procedure to routinely obtain these views.\(^{145}\)

At least in the context of judicial decisions in the public interest, in an era of victims' rights and interests, victim input is relevant, and, arguably, essential to a comprehensive assessment of what is in the public interest. The judicially crafted procedure in *Heaton* is portable to other proceedings where courts ought to routinely secure input from the individual victim, even in the absence of relevant victims' rights.\(^{146}\)

A second example of such judicially crafted procedure can be found in the Utah Supreme Court case of *State v. Casey*.\(^{147}\) In Utah, victims have the right to address the court at the time of the plea.\(^{148}\) In *Casey*, the victim came to the plea hearing and wished to speak in opposition to the plea.\(^{149}\) The prosecutor was aware of this, yet never informed the trial court of the victim's objection to the plea bargain.\(^{150}\) The judge accepted the plea.\(^{151}\)

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\(^{143}\) Compare COLO. R. CRIM. P. 48(a) ("No criminal case pending in any court shall be dismissed or a nolle prosequi therein entered by any prosecuting attorney or his deputy, unless upon a motion in open court, and with the court's consent and approval. Such a motion shall be supported or accompanied by a written statement concisely stating the reasons for the action. The statement shall be filed with the record of the particular case and be open to public inspection. Such a dismissal may not be filed during the trial without the defendant's consent."). with FED. R. OF CRIM. P. 48 (a) ("The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.").

\(^{144}\) See United States v. Heaton, 458 F. Supp. 2d 1271, 1273 (D. Utah 2006) ("[T]o dismiss charges involving a specific victim, the court must have the victim's views on the motion."); United States v. Biddings, 416 F. Supp. 673, 675 (N.D. Ill. 1976) ("The manifest public interest, represented by several unrecanting victims, requires a trial to vindicate them.").

\(^{145}\) *Heaton*, 458 F. Supp. 2d at 1273.

\(^{146}\) The information may come either through the prosecutor or by routinely soliciting the amicus curiae participation of the victim, in writing or in person. Victim standing is obviously not a prerequisite to communicating with a court when the court itself seeks the victims' input.

\(^{147}\) 44 P.3d 756 (Utah 2003).

\(^{148}\) Id. at 761 n.5.

\(^{149}\) Id. at 757-58, 765.

\(^{150}\) Id. at 758, 765.

\(^{151}\) Id. at 758.
Catholic University Law Review

The victim challenged the plea on review as a misplea, based, in part, on the prosecutor’s failure to advise the court, but “neither the constitution nor the code mandate[d] how [the victim’s] request must be submitted.” Nevertheless, the court in *Casey* opined that “the prosecutor breached his duty as an officer of the court because he failed to bring relevant information to the court’s attention.” The court continued:

> [f]ully aware of [the victim’s] desire to speak at defendant’s change of plea hearing, the prosecutor did not inform the court that [the victim] had invoked his constitutional and statutory right to be heard. We therefore conclude that [the victim] properly submitted his request to be heard at defendant’s change of plea hearing to the prosecutor.

In *Casey*, the Utah Supreme Court crafted a procedure to ensure that a victim who wished to be heard could communicate that to the prosecutor and would have that request forwarded to the judge. This procedure was crafted to facilitate the exercise of rights despite the absence of an express constitutional or statutory directive.

C. Victims’ Interests as the End of Abatement ab Initio

Examined here is the trend in state supreme courts towards elimination of abatement ab initio because of victims’ rights and interests. Abatement occurs when a defendant is convicted at the trial court level, but dies before appeals of the conviction are finalized. Abatement ab initio allows a defendant to stand as if he had never been convicted of a crime. The rationales for abatement ab initio are aptly summarized in an opinion of the South Dakota Supreme Court:

> The reasoning behind the [majority] rule [of abatement ab initio] varies among jurisdictions ascribing to it. Generally, the following rationale are offered in support of a court’s decision to abate the criminal proceedings ab initio upon the death of the defendant pending appeal: 1) an appeal is an integral part of the system for adjudicating guilt or innocence, and defendants who die before appellate review is completed have not obtained final adjudication; 2) appeals of right are granted by statutory and constitutional law and while there is no constitutional right to appeal a

152. *Id.*
153. *Id.* at 763.
154. *Id.* at 765.
155. *Id.*
156. United States v. Schumann, 861 F.2d 1234, 1237 (11th Cir. 1988); see also, People v. Peters, 537 N.W.2d 160, 163 (Mich. 1995) (“In literal application, abatement ab initio erases a criminal conviction from the beginning on the theory that all injuries resulting from the crime ‘are buried with the offender.’” (quoting United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983)).
criminal conviction, once the right is conferred by statute, it may not be indiscriminately denied; and 3) penal system principles of protection of the public and reformation are no longer applicable as the interests of the state and society have been satisfied.  

For crime victims, validation that they were wronged comes from the conviction and sentencing of the criminal defendant. Furthermore, some financial redress for the wrong may come in the form of restitution. Abatement ab initio eliminates both the conviction and the opportunity for restitution. Thus, abatement ab initio denies the importance of victim vindication and removes from victims the opportunity for financial compensation. In the language of victims' interests, with abatement ab initio victims are denied justice and a secondary harm is inflicted upon them.

Modern victims' rights statutes do not expressly address abatement. Nevertheless, in ruling on the continuing viability of abatement ab initio, courts could take one of several approaches. First, a court could decline to alter its rule because victims' rights do not specifically address abatement. Second, a court could recognize the relevance of victims' rights and interests in general as a basis to eliminate abatement ab initio. Third, a court could determine that a victim's specific right to restitution outweighed the previously prevailing policies underlying abatement rights. A fourth option is to rely on both the general relevance of both victims' rights and a specific right to eliminate abatement ab initio. Increasingly, courts are relying on either the second, third or fourth approach to eliminate abatement ab initio.

The Illinois intermediate appellate court ended abatement ab initio. Then, in an opinion unique among recent abatement ab initio cases, the Illinois Supreme Court reversed. The Illinois intermediate court of appeals "held that it would not abate defendants' convictions because abatement would have a 'senselessly harsh impact on the psychological well being' of crime victims and their families by implying that defendants had somehow been exonerated." The intermediate appellate court noted that abatement "emanate[s] from the view that criminal prosecutions should punish the guilty and protect society from any future

157. State v. Hoxsie, 570 N.W.2d 379, 380 (S.D. 1997) (collecting cases). Two minority rules hold that (1) criminal defendant's death abates the appeal but not the conviction, noting that "the presumption of innocence falls with the defendant's conviction and to expunge the judgment of conviction for any reason other than a showing of error would not benefit either the deceased defendant or the State," id. at 381, and (2) where rules allow substitution of parties and no party is substituted for defendant the appeal is abated ab initio, but the conviction stands. Id.

158. It also removes the res judicata function of criminal convictions where the conviction serves to establish liability in tort, thus forcing victims to begin a civil trial against the convict's estate in order to re-establish liability.

criminal misdeeds of the defendant.\textsuperscript{160} The court went on to identify that "this traditional view began to change nationally, however, in the late 1970's and early 1980's with the recognition that crime victims . . . also have important, personal interests at stake in criminal proceedings."\textsuperscript{161} The court recognized that victims have rights "which are distinct from the interests of either the defendant or the State."\textsuperscript{162} This opinion clearly values the victim interest of minimization of secondary harm, manifested in the language that abatement "would have a senselessly harsh impact upon the psychological well being of [the victims]."\textsuperscript{163}

The Illinois Supreme Court vacated, stating:

The Crime Victim's Rights Amendment provides crime victims with a set of 10 distinct rights in criminal prosecutions. The State points specifically to two of these freshly minted constitutional rights of victims: the right to 'be treated with fairness and respect for their dignity and privacy throughout the criminal justice process,' and the right to restitution. Unfortunately for the State's argument, the Crime Victim's Rights Amendment has neither application nor reference to the abatement of criminal prosecutions. That is to say, it is wholly irrelevant to the issue at hand.\textsuperscript{164}

The main difference between these opinions is in their views on the value of victims' interests in judicially crafted procedures. The Illinois Supreme Court focused narrowly in looking for abatement language in specific rights. To the Illinois Supreme Court, neither victims' interests underlying their rights nor the victims' rights to restitution or fairness and respect were relevant absent legislation ending abatement ab initio.\textsuperscript{165}

Perceiving a changing legal culture that increasingly incorporates victims' interests, state courts from other jurisdictions have rejected the Illinois Supreme Court's restrictive approach. In \textit{State v. Korsen}, the Idaho Supreme Court relied upon the crime victim's right to "be ['t]reated with

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\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id. at 1090.}
\item \textsuperscript{164} \textit{Robinson, 719 N.E.2d at 663 (citations omitted).}
\item \textsuperscript{165} \textit{Id. at 664. The Illinois Supreme Court noted that the law of abatement ab initio had been case law for twenty years and it would be changed only by specific legislation to the contrary. \textit{Id. at 663-64}. Nevertheless, a separation of powers basis to deny victims' interests seems forced, particularly when abatement ab initio was a judicially created procedure in the first place. Moreover, the twenty years that abatement had been case law was the same twenty years during which victim interests had been repeatedly acknowledged by the Illinois legislature which enacted a variety of victim's rights. \textit{See, e.g.}, 725 ILL. COMP. STAT. ANN. 120/2 (West 2002) (implementing victim's rights protections); 725 ILL. COMP. STAT. ANN. 172/5-10 (West 2002) (establishing a program to protect victims of gang violence); 735 ILL. COMP. STAT. ANN. 5/2-2001 (West 2003) (allowing for civil recovery by crime victims against defendants).
\end{itemize}
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fairness, respect, dignity and privacy throughout the criminal justice process" as a basis for denying abatement ab initio.\textsuperscript{166} The court observed that "abatement of the conviction would deny the victim of the fairness, respect and dignity guaranteed by these laws by preventing the finality and closure they are designed to provide."\textsuperscript{167} The Idaho court brought the abatement ab initio issue within the ambit of victims' rights, although those rights did not expressly address abatement ab initio.

The Idaho court also considered the victims' interests underlying victims' rights in denying abatement ab initio. Victims do not have a right to restitution in Idaho—it is discretionary—but restitution is ordered unless it would be "inappropriate or undesirable."\textsuperscript{168} Nevertheless, victims' interests underlying the laws providing for restitution for victims were a sufficient basis for the court to opine that such laws established "a strong public policy ground for not abating a criminal conviction."\textsuperscript{169} The Idaho court recognized that finality and closure are important victim interests. The court was protecting victims' interest in justice and avoiding secondary victimization, even though the right to restitution was not mandated. Restitution, a compensation based in victims' harm from the crime, was recognized by the court as a "strong public policy ground" upon which to deny abatement.\textsuperscript{170}

In \textit{People v. Peters}, the Supreme Court of Michigan held that "where the intent behind a fine or order is to compensate the victim, the fine or order may survive the death of the offender."\textsuperscript{171} The court identified that, "[t]he Michigan Crime Victim's Rights Act was enacted . . . in response to growing recognition of the concerns of crime victims. The act codifies the victim's right to restitution . . . ."\textsuperscript{172} The subsequent constitutional amendment providing victims' rights "further enumerate the rights of crime victims" making clear the "compensatory nature of restitution in Michigan."\textsuperscript{173}

Financially injured by the infliction of victims' primary harm, harm from the crime itself, Michigan victims' rights to restitution compensate the victim for this loss. The Michigan court concluded that "[t]he order of restitution was issued under the authority of the Michigan Constitution and the Crime Victim's Rights Act [which] were intended to enable victims to be compensated fairly for their suffering at the hands of convicted

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\item \textsuperscript{166} State v. Korsen, 111 P.3d 130, 134-35 (Idaho 2005).
\item \textsuperscript{167} Id. at 135.
\item \textsuperscript{168} Id. at 134.
\item \textsuperscript{169} Id. at 135.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} People v. Peters, 537 N.W.2d 160, 164 (Mich. 1995).
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. at 164-65.
\end{itemize}
Therefore, the court enforced the order of restitution and denied abatement ab initio.

The Michigan opinion is exclusively based on victims' specific right to restitution. The opinion itself does not rely on the victims' interests underlying victims' rights other than to explain the restitution right. The Michigan Supreme Court interprets the scope of victim's right of restitution to include the abatement issue, ultimately prioritizing the compensation for the victim's primary harm.

The Washington Supreme Court has referenced victims' interests to end abatement ab initio because it inflicts an unacceptable secondary harm on crime victims. In a case where the victim "declined to seek restitution and therefore did not suffer financial harm from the abatement," the Washington court held that avoiding harm to the victim was an appropriate basis for denying abatement ab initio. Citing the victims' broad state constitutional right to "dignity and respect" the Washington court opined, "[I]n this case, [the victim] was shocked and distressed when . . . [the victim] fear[ed] renewed violence and strife if the child custody case [was] reopened. These impacts alone, as described in her declaration make the abatement rule 'harmful' as applied here."

In the absence of express reliance upon either a specific or broad victims' right, the Alabama Supreme Court, in Wheat v. State, denied abatement ab initio because of crime victims' interests. The court did not rely on rights to fairness or dignity because Alabama does not provide these rights. Moreover, restitution was not a factor in the Wheat opinion. To be sure, the Alabama court referenced the general existence of victims' state constitutional and statutory rights in order to highlight the importance of victims' interests. Nevertheless, Wheat is not a scope of rights opinion, rather, it is an opinion based on victims' interests.

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174. Id. at 165.
175. Id. at 161-63.
176. Maryland's highest court has also ended abatement ab initio, in part because of victims' restitution. Surland v. State, 895 A.2d 1034, 1040, 1044-45 (Md. 2006). Curiously, in this otherwise comprehensive opinion, the Maryland Court of Appeals is mute about the Korsen and Wheat recognition that abatement ab initio inflicts an unacceptable secondary victimization on the crime victim. See Wheat v. State, 907 So.2d 461, 464 (Ala. 2003); State v. Korsen, 111 P.3d 130, 134-35 (Idaho 2005). Since the Maryland opinion, Washington state has joined the Wheat and Korsen cases in recognizing the unacceptable nature of secondary harm inflicted by abatement ab initio. State v. Devin, 142 P.3d 599, 605 (Wash. 2006).
177. Devin, 142 P.3d at 605.
178. Id.
179. Id. at 604-05.
180. Wheat, 907 So.2d at 462-64.
181. Beloof, supra note 99 app. A.
182. See Wheat, 907 So.2d. at 463-64.
After reviewing and rejecting the Illinois Supreme Court’s opinion in *People v. Robinson*, the Alabama court quoted approvingly from the overruled intermediate Illinois appellate court opinion. The Alabama court “recognize[d] what the Illinois intermediate court described as ‘the callous impact [vacating a conviction ab initio] necessarily has on the surviving victims of crime,’”\(^{183}\) to determine that abatement ab initio would not be the law in Alabama. The Alabama court recognized that secondary harm, or “callous impact,” to the victim was relevant to the procedural decision. The Alabama court implicitly recognized that the modern legal culture is inclusive of victims’ interests and that it is appropriate for the judiciary to weigh these interests in fashioning criminal procedures.

State court judicial decisions are strongly trending towards including the abatement ab initio issue either within the scope of victims’ rights or, absent a controlling right, relying on crime victims’ interests to evaluate abatement ab initio’s viability. This trend in state supreme courts to end abatement ab initio by valuing victims’ rights and interests may signal a change in federal abatement case law. In *Durham v. United States*, a direct appeal, the United States Supreme Court recognized abatement ab initio, holding that “death [of the convict] pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.”\(^{184}\) Five years later, in *Dove v. United States*, on a petition for certiorari, the court overruled *Durham*.\(^ {185}\) Taken together, these cases have been interpreted by the Fifth Circuit to mean that abatement ab initio is in effect only in cases involving appeal as a matter of right.\(^ {186}\)

In the intervening years since 1971, the Crime Victims’ Rights Act of 2004 (CVRA) has been enacted into federal law.\(^ {187}\) The CVRA contains many provisions similar to the state laws relied upon in state cases that abandoned abatement ab initio.\(^ {188}\) Moreover, as revealed above in Part A, the Supreme Court has acknowledged victims’ interests as legitimate even in the absence of particular victims’ rights legislation. Given recent federal legislation concerning victims’ rights and the Court’s own acknowledgement of victims’ interests, the ongoing viability of federal abatement ab initio is in doubt.

\(^{183}\) *Id.* at 464 (alteration in original).
\(^{186}\) *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980).
D. An Enduring Historical Charging Procedure for Citizens

In a 1989 Wisconsin Supreme Court opinion, the majority upheld the constitutionality of a statute, dating back to 1839, establishing a procedure for judges to investigate and charge. The statute provided that citizens could report crimes to a judge, who, in her discretion, could investigate and charge. In concurring opinions, three justices went beyond the constitutional issue and referred to victims' interests in order to address the policy question of whether citizens' should have independent access to charging courts.

The chief justice wrote in concurrence: "The writer is not unmindful of the predicament of a victim of a crime who is afforded no relief by a recalcitrant prosecutor. It would appear . . . that this situation might better be alleviated by legislative approval of a limited judicial review of a prosecutor's declination to prosecute." The chief justice's view is clearly informed by victims' interest in justice. The chief justice's concern is for some relief (justice) for the victim, over exclusive prosecutorial control over charging. Moreover, the modern focus on the victims' interest is apparent in his proposed alternative. The chief justice's alternative focuses on concerns of the victim of crime, rather than the citizen set out in the historic statute. His focus is on the victim of crime rather than on public or community interests.

In a separate concurring opinion, Justice Day incorporates the significance of modern victims' rights into an assessment of the continuing viability of the historic statutory citizen participation right: "In this period when we see interest in 'victim's rights' coming to the fore, certainly having one's tormentor brought to justice should be near the top of any victim's rights program, second only to the right not to be a victim in the

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189. State v. Unnamed Defendant, 441 N.W.2d 696, 698, 701 (Wis. 1989).
190. WIS. STAT. ANN. § 968.26 (West 2007) ("If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in the examination is within the judge's discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used."); Unnamed Defendant, 441 N.W.2d at 696 n.1.
191. Unnamed Defendant, 441 N.W.2d at 702 (Heffernan, C.J., concurring).
192. Compare id. at 702, with WIS. STAT. ANN. § 968.26 (West 2007).
first place."193 And, later in his opinion, he states "[c]rime victims should have recourse to the judicial branch when the executive branch fails to respond."194 Justice Day relies upon the victim's interest in justice underlying modern victims' rights. For Justice Day, the victim's interest in justice provides support for citizen access to judicial charging that is unfettered by prosecutorial discretion. The victim has an interest in justice and is harmed secondarily by the government's denial of it.

Finally, Justice Steinmetz's separate concurrence identifies the connection between the historic statute and modern victims' rights: "These statutes . . . have withstood the test of time, and . . . these statutes promoted victims' rights before that term became popular . . . ."195 The Wisconsin concurrences used modern victims' rights to uphold rather than eliminate or compromise the historic charging statute. This makes sense because modern victims' rights generally do not diminish citizens' preexisting common law participation rights.196 Generally, reliance on a specific modern victims' right to eliminate or reduce enduring citizens' participation rights is misplaced. Such reliance requires ignoring or minimizing the interests underlying modern victims' rights, interests that are similar to the interests underlying historic citizen rights of participation.

As of 1999, thirty-three state victims' rights schemes (and, since 2004, the federal CVRA) contained at least one of the values of or rights to fairness, respect, dignity, privacy, due process, and freedom from abuse.197 Degrading citizens' preexisting participation rights in the name of "fairness" and "respect" for, and the "dignity" of, crime victims makes little sense. Furthermore, victims' specific rights are individual rights, personal to victims, that give victims the right to participate independently of the public prosecutor.198 Thus, victims' interests underlying modern rights do not readily lend themselves to an argument for eroding enduring historical citizens' participation rights.199

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193. Id. at 703 (Day, J., concurring).
194. Id. at 704.
195. Id. at 704 (Steinmetz, J., concurring).
196. Some rights schemes have been clever enough to foreclose such unforeseen legal land mines. For example, the Arizona Constitution provides that: "The enumeration in the constitution of certain rights for victims shall not . . . deny or disparage others granted by the legislature or retained by victims." ARIZ. CONST. art. 2. § 2.1(E); see also S.C. CONST. art. I, § 24. But where such language is missing in other modern victims' rights schemes, like the Wisconsin scheme, its absence should not lead to the conclusion that historic citizens' participation rights should, therefore, be restricted.
199. An exception is that historical participation interests belonged to citizens, while modern interests are victims' interests. See supra note 192 and accompanying text.
E. Victims' Interests in Foreign Jury Versus Change of Venue

A further illustration of the relevance of victims' interests in judicially crafted procedures is found in State v. Timmendequas. There, the New Jersey Supreme Court upheld the trial court's denial of defendant's motion for change of venue in a homicide case because a change of venue would have added two hours a day to the victim's travel time to trial. Instead the trial court impaneled a foreign jury. The prosecutor's objection to venue change was based upon the victim's right to be treated with "fairness [and] compassion," the right "to be present" at trial, and the right to have inconveniences "minimized."

The Timmendequas case relied on victims' interests underlying modern victims' rights to make judicial procedural decisions even in the absence of a specific legislated provision mentioning "venue." The defendant argued that the explicit rights at issue were not relevant to his motion to change venue. The New Jersey Supreme Court reasoned:

Defendant views the Legislature's commitment to victim's rights too narrowly. Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights." That amendment marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system. The purpose of the Victims' Rights Amendment was to 'enhance and protect the necessary role of crime victims. . . in the criminal justice process."

Relying on this enabling language, the New Jersey Supreme court acknowledged the relevance of victims' interests in a judicial change of venue decision and held that the trial court's refusal to change venue was proper.

IV. TIMMERMAN REVISITED

Timmerman can be viewed in at least two ways, both of which support the modern relevance of victims' interests in judicially crafted procedures. On the one hand, Timmerman can be viewed as an inappropriate federal court judicial re-drafting of a state statute. Stated more broadly, public prosecution alone should not have been a basis for federal judicial deviation from a state citizens' statutory right. Under this interpretation, citizens' interests should have been given greater, and public prosecution interests less, weight. On the other hand, Timmerman could be seen as

201. Id. at 75-76.
202. Timmendequas, 737 A.2d. at 76 (citations omitted).
properly weighing public prosecution in an era when it was increasingly
dominant. By analogy, this view supports the modern judicial weighing
of victims’ interests in crafting criminal procedures.

The Timmerman opinion is subject to re-visitation in light of modern
victims’ interests. Today, Timmerman’s deference to public prosecution
is excessive. First, Timmerman relied on the weight the South Carolina
case of Addison gave to public prosecution in denying the victim party
status.203 Today, South Carolina victims’ rights are, in all material aspects,
similar to New Jersey’s. South Carolina’s constitution, like New Jersey’s,
provides victims with the right to be treated with “fairness.”204 South
Carolina’s constitution goes further to provide victims with the right to be
treated with “respect” and “dignity.”205 While South Carolina does not
have New Jersey’s statutory right that inconveniences be “minimized,”
the South Carolina constitution provides that victims be “free from . . .
abuse throughout the criminal . . . justice process . . .”206 Finally, South
Carolina has an unqualified right of the victim to be present at any crimi-
nal proceedings “which are dispositive of the charges where the defend-
ant has the right to be present.”207

The decisional tipping point for a modern South Carolina court facing
the issue and facts like those in Timmendequas, is not whether the spec-
cific victims’ rights are sufficiently the same as New Jersey’s rights, be-
cause they are. Rather, the pertinent question is whether the South
Carolina court will view victims’ interests and rights as relevant to judicial
procedural choices where the issue at hand, here venue versus foreign
jury, is not specifically mentioned in victims’ rights, but nevertheless may
inflict a secondary harm on the victim. The fundamental issue is similar
to the choice faced by the courts in the abatement ab initio cases: are vic-
tims’ rights and victims’ interests, as well as the victim’s views, relevant to
a judicial procedural choice?

One judicial option is to look narrowly for victims’ rights expressly ad-
dressing “venue.” Under this logic, because South Carolina has no vic-
tims’ right expressly mentioning “venue,” victims’ rights could not sustain
an objection to change of venue, regardless of whether the victim or the
prosecutor made the objection. Such a result would be analogous to the
Illinois Supreme Court’s decision regarding abatement ab initio in which
victims’ foundational interests were not valued enough to alter the pro-
cedure.208

205. Id.
206. Id.
207. Id. at art. I. § 24(A)(3).
208. See supra Part III.C; see also People v. Robinson, 719 N.E.2d 662, 663 (Ill. 1999).
If the South Carolina court follows the New Jersey case to hold that victims' interests are relevant to whether venue is changed or a foreign jury impaneled, then it may also be appropriate for the victim to bring these interests to the court's attention, as the parties may fail to do so. Perhaps victims' rights and interests allow victims either at the trial court's invitation or through standing to provide information in opposition to change of venue. To the extent victims may do so, the *Addison* case, with its refusal to allow a victim to participate in a motion for change of venue, is compromised. This is not to say victims would necessarily have party status. Rather, as victims with important interests at stake, some accommodation might be made for incorporating their views or objections into the venue decision. Thus, a modern South Carolina court might weigh victims' interests in venue, something the *Addison* court did not do. If so, the *Timmerman* Court's reliance on *Addison* is now obsolete.

Second, the *Timmerman* opinion expressly relied on the ABA prosecutor section's negative views of the propriety of allowing citizens' independent access to arrest warrants to deny such access. Given modern victims' interests, as well as the fact that there is now a Victim Subcommittee of the ABA's Criminal Justice Section, it would be odd if the Court today deconstructed a specific modern state victims' right because of an adverse opinion of the prosecutor's section of the ABA. For example, most states grant victims the unfettered right to speak at sentencing. A few states allow it in the court's discretion. Prosecutors as a whole might favor this discretionary law because they could argue to the judge that a victim in a given case should not be heard. Today, it is unlikely that any such assertion by the prosecutor's section of the ABA would cause the Supreme Court to redraft a state's absolute right to speak at sentencing into a discretionary one.

Finally, the *Timmerman* opinion relied on statutes from other states which, unlike the South Carolina statute, expressly allowed interference by the public prosecutor. The use of an interpretive technique to weaken a modern victims' right of one state by referencing distinctly different statutory language in other jurisdictions, as was done by the Supreme Court in *Timmerman*, is inappropriate. For example, victims have the unfettered right to attend trial in many jurisdictions. In Utah, however, the prosecutor can interfere with the victims right to attend, as the state evidence code provides: "This rule does not authorize exclusion of . . . a victim in a criminal . . . proceeding where the prosecutor agrees with

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209. *Timmerman*, 454 U.S. at 87 & n.3.
210. *Id.* at 88 n.3.
211. See generally, Beloof & Cassell, *supra* note 7, at 504-05.
the victim’s presence . . . .” 212 In an era of victims’ rights, it certainly would be inappropriate to graft the Utah provision onto state laws whose plain language gives victims the right to attend without prosecutorial interference. Of course, the right at issue in Timmerman was an historic citizen right of access to the state court to secure a warrant, not a modern victims’ right. 213 However, the historic nature of citizens’ rights statutes is not necessarily a liability to their ongoing viability. Modern victims’ rights also challenge the Timmerman premise that public prosecution is enough to compromise enduring historic citizens’ rights of participation. The concurring opinions in the Wisconsin case that upheld a historic statute granting citizen access to charging acknowledged, at the very least, that we are presently in a era of victims’ rights in which victims’ interests matter.

Revisiting the United States Supreme Court Timmerman opinion in light of emerging victims’ rights and interests, the opinion is problematic in the sense that it fails to give sufficient weight to victims’ interests. First, Timmerman relied on the heavy weight Addison gave to the fact of public prosecution, a weight which should now be balanced by the reality of modern victims’ rights and interests. Second, the Timmerman opinion expressly relied on the ABA prosecutor section’s negative views of the propriety of allowing citizens’ independent access to arrest warrants to deny such access. The weight of prosecutors’ views now are balanced against victims’ interests and views. Third, in weighing victim rights and interests into the balance, mandatory victims’ right should not be undercut because a neighbor state made the right discretionary. Finally, Timmerman’s analytical approach is also weakened by the Supreme Court’s recognition since that opinion of victims’ interests, set out in Part III.A., above. For the modern court, “in the administration of criminal justice, courts may not ignore the concerns of victims.” 214

For all these reasons, Timmerman is undermined. Moreover, the Timmerman case is not the only one rendered questionable by the rise of victims’ rights and interests. For example, the Supreme Court’s abatement ab initio doctrine is also ripe for reconsideration because judicially crafted procedures should now weigh victims’ interests and rights in the balance.

V. CONCLUSION

In this era of victims’ rights expansion, thirty-three state constitutions embody victims’ rights, statutory victims’ rights exist in every state jurisdiction, and there is a vigorous new federal statutory victims’ rights law.

212. UTAH R. EVID. 615(1)(d).
213. Timmerman, 454 U.S. at 85-86.
The CVRA legislative history provides: "A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims . . . ."215 Victims' interests in justice and minimizing secondary harm from government actors and criminal processes are of greater relevance than the sum of victims' individual rights. Increasingly, victims' interests, as well as victims' rights themselves, are important considerations in judicially determined procedural choices.

The increasing relevance of victims' interests has important implications for: the judicial interpretation of historic citizen participation rights; courts' views of prosecutorial authority in relation to victims' interests, for example, victims' participation in change of venue proceedings; and, procedures formulated in an era without any regard for victims' interests, such as abatement ab initio.

The legislatively led historic shift to public prosecution was facilitated by courts. Given the legislatively led historic shift to include victims' rights and interests, courts should continue to weigh victims' interests and rights when crafting criminal procedure.