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RUNNING HEAD: Transforming victims' rights

## **Transforming crime victims' rights: From myth to reality**

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Paul G. Cassell is the Ronald N. Boyce Presidential Professor of Criminal Law at the S.J. Quinney College of Law at the University of Utah. His research centers on crime victims' rights in the criminal justice process. He is the co-author of *Victims in Criminal Procedure*, a law school casebook describing crime victims' rights throughout the American criminal justice process. He is also an active pro bono litigator for crime

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victims rights and has argued on behalf of crime victims before the U.S. Supreme Court and many other federal and state courts in the U.S.

## **Transforming crime victims' rights: From myth to reality**

### **Abstract**

Rights for crime victims have been decried as myths; entitlements that have little enforceability. At the same time, they have been criticised as undermining the legal rights of the accused person. In this Guest Editors Introduction to the Special Issue, *Making Rights Real*, we suggest that victims' rights are in transition. Rights may be set out in legal instrument but, we argue, it is through the practices of people in their myriad settings that are part of that shift to realising rights in action. We describe a range of ways in which we see victims rights being realised in different parts of the world and develop a human rights framework for the rights of crime victims to further shape the transition.

Keywords: crime victim; victims' rights; enforcement

## **Transforming crime victims' rights: from myth to reality**

### **Introduction**

The idea of rights is a powerful influence on individuals and societies. But rights are endlessly disputed – who has them, who doesn't, when and why. Since the 1985 United Nations (UN) Declaration of Basic Principles of Justice on Victims of Crime and Abuse of Power (the 'Victims Declaration'), rights for crime victims have been among those most disputed. They have been described as illusory (Belooof, 2005). However, led by developments in international criminal justice and some domestic and regional jurisdictions, we believe that a transition towards rights enforcement has been taking place. This Special Issue, *Making Rights Real: Rights Protection for Crime Victims*, provided an opportunity to bring together perspectives that explore this transition.

As guest editors, we had the honour of soliciting, perusing and digesting a breadth of scholarship from authors working across international and domestic criminal justice, in different legal systems and areas of law, focused on victimisations of varying types, and on legal and non-legal responses. All have raised questions about the nature of "rights", their content and capacity for meaningful realisation in the lives of individuals, groups and communities harmed and wronged by crime and violence. All have also grappled with the persisting difficulties experienced by institutions and professionals to adequately meet the expectations of victims for justice (arguably *the* point of rights). Indeed, contributors to this volume have noted that the challenge of realising victims' rights can mean also dealing with institutional and professional resistance to their being legitimate rights and expectations.

Our editorial introduction encourages the field to keep questioning, but we also challenge victims' rights scholars to talk more with each other across disciplines, across types of legal system— indeed, across languages (Kunst, this volume). Victims' rights researchers need to engage more directly with other rights protection scholarship whether in human rights, anti-discrimination or civil rights; or whether in disability rights protection or equality rights for other oppressed groups. Not only does this wider lens remind us that victims are extraordinarily diverse and that rights protection is not theirs alone, it also stresses continued recognition of and engagement with the analytics of race, class, gender, sexuality and dis/ability and their intersection with the experiences of victimisation and differential experiences of institutional and social power relations (Crenshaw, 1991, p. 1245). There is no single or stable relationship that individuals and groups have with authorities and, for many, these relationships embody continual conflict. Expanding the lens around rights for crime victims also enables us to see better why rights are important to all citizens and to humans when in conflict with legal authority, wherever we are and however socially situated. A wide perspective reveals how researchers and activists in different domain grapple with the many myths of rights as well as providing examples of real enforcement.

Our challenge to the field draws on Stuart Scheingold's influential work, *The Politics of Rights* (1974). Scheingold identified “an oversimplified approach” of litigation, legal rights, and remedies to complex social change processes. He connected what he called the “myth of rights” to the symbolism of law and how it appeared to capture what, in social and political worlds, was valued. The “politics” of rights was thus about what was valued and also about the law as a political resource to citizens. Our sense is that rights for citizens who have become victims of crime draw on the myth of rights in two sense of the term “myth.” First, Scheingold captured

precisely how citizens *imagine* the availability to them of individual and collective rights; indeed, that rights are constitutive of their being both human and citizen. This sense of a rights myth is a narrative of values and belonging; that there is “truth” in an assertion that “I (or we) have rights” (Engel, 1993, p. 790). A second sense of myth is it as a “distorted characterization that requires correction by historical or contemporary evidence” (Daly, 2002, p. 56). In this sense, myth is something untrue or only partially true.

In this Special Issue introduction, we thread both notions of myth to contend that crime victims' rights are, on the one hand, an untruth that is all too often a political and legal deception; and, on the other hand, that crime victims' rights are “true” for people as human and citizen. From these depictions – both “true” in their own ways - we then seek to build a bridge of two foundations over a contested and dynamic field. One foundation is a human rights blueprint through which the presently nebulous nature of victims' rights may be made legible. The second sketches the social and political practices of citizens – alone, with advocates or in some collective - that make rights real. More precisely, we argue the *making* of real rights depends on citizen's talking about them, expecting them and demanding them. While the legal mobilization of rights has long been depicted as a North American practice (Sarat, 1984) counterpoised against the social construction of rights from European civil society (Cichowski, 2007), it is through our proposed foundations of victims' *human rights* and victims' *rights practices* that we attempt to combine faith in law's normative power with grounded understanding of peoples engagements with rights in particular contexts. We argue that both are necessary for a coherent normative framework as well as for a comprehensive strategy for the realisation of real rights for crime victims. The underpinning idea to both is that all citizens have rights in relation to legal



authority. Indeed, this unifying idea brings victims and defendants together as rights-bearers before institutions that are duty-holders (Holder, 2018a).

The Special Issue introduction proceeds in four steps. First, we briefly reprise the reasons behind victims' claims. Second, we expand on "rights" as legal, civil and political as well as individual and collective. A wide depiction of where and how rights-talk is activated – and disputed - is important to reformers as well as to researchers. Drawing these two sections together, we next sketch a human rights blueprint for victims' rights that is not dependent on legal system types nor on particular justice mechanisms; and which may accommodate the diversity of victimisation, aspiration, and contexts for individual and collective victims. We sketch a number of ways in which a human rights approach can strengthen protection and promotion of crime victims' rights. Fourth, we offer some examples of how the myth of rights for crime victims is being transformed into enforceable realities. In conclusion we suggest some future directions for victims' rights research.

### **Why *rights* for victims'?**

Some scholars have argued that recognising victims' *needs* is the radical option (Herman, 2005; Walklate, 2017). It is to peoples' needs that *service* responds (Holmberg, Johansen, Asmussen, Birkmose, & Adrian, this volume). Humanist welfarism is argued to be of more practical use to the vast majority of people who do not turn to formal authorities after victimisation (Dunn, 2007; Waller, 1989); and, for those whom mass conflict has destroyed almost everything, it is said that "you can't eat rights" (Stover & Weinstein, 2004; and see Balta, Bax, & Letschert, this volume).

These arguments can be compelling, and services, supports and social reconstruction have followed in many countries and communities (Dunn, 2007; Stover & Weinstein, 2004). Yet, calls for rights for victims undeniably and pervasively persist. Why these calls for rights

continue is, in part, because victimisation gives rise to concerns beyond harmful consequences and human need. At the heart of any rights claim, as Judith Shklar understood over three decades ago, is the identification of injustice, unfairness, or wrong that is not shared equally (1990). For crime victims, unfairness coalesces in two overlapping concerns: status and equality. On the first, many problems experienced by victims - from being ill-informed to being poorly treated by justice professionals - are associated with victim status. The “seemingly simplest rights” such as a notice to court hearings are not provided (Cassell & Garvin, 2020, p. 106); a point repeatedly affirmed in numerous studies (for a review, see Wedlock & Tapley, 2016). Being kept in the dark conveys a simple message that victims are irrelevant to the administration of justice (McBarnet, 1983). While procedural justice scholars have demonstrated that the irrelevance of individuals to institutions can be ameliorated to some degree by the quality of inter-personal treatment from authorities (Wemmers, van der Leeden & Steensman, 1995), early theorists also emphasised group values such as fairness and equality for all citizens. The emphasis of *group* values highlights that criminal court actions (in particular) undertaken in the *public* interest *require* recognition of and regard for those groups directly affected by the procedure; that is victims and defendants. Gerald Leventhal called this “the representativeness rule” (1980, p. 43; and see Lind & Tyler, 1988). Being treated with dignity and respect demonstrates that authorities believe these particular people matter; that they have an *obligation* to treat them with dignity and respect. However, this is a *myth* as, irrespective of the witness or party status of the victim under different legal codes, criminal justice systems instead act as if they are under no such obligation (Dearing & Huxtable, this volume).

On the second concern of in/equality, victims' experiences are multi-faceted. In the first instance, for an individual (an offender) "to hurt, brutalize, or damage the interests of another individual" is to *make* them *unequal* to you (Hampton, 1998, pp. 38-39). Further, the infliction of violence and experience of victimisation separates victims from their social setting. It disrupts the sense of trust and belonging human beings generally (though variably) have in others, a burden found irrespective of income level, area of residence, sex or age (Norris, Kaniasty, & Thompson, 1997; and see Janoff-Bulman, 1992), and can have extensive negative consequences (Macmillan, 2001). Finally, whereas victims experience their irrelevance to justice institutions, they observe the accused person's centrality in and relevance to proceedings through the allocation of rights and representation. Although victims and the accused may share similar social characteristics (Jennings, Piquero, & Reingle, 2012), the observed inequality of treatment of each by authorities does not argue that the accused should *also* be treated poorly. Rather, the observed inequality exemplifies Scheingold's notion of a *myth of shared values*—i.e., justice authorities purportedly commit to protecting "the freedom and equal dignity of all ... citizens" (Hampton, 1998, p. 40) but in fact treat citizens quite unequally. Thus, *rights* matter because precisely because legal authorities recognise and respond only to those who possess them. Rights thus stabilise the state's obligation for equal treatment. Their failure to do so reveals a "political choice" not to (Shklar, 1990, p. 5).

But what rights are relevant for victims and in what circumstances and to what effect? A partial answer to this question is to observe what people actually do when confronted by injustice and victimisation. It is one thing for state authorities to recognise rights and completely another for citizens to assert their rights. As many surveys have demonstrated, many victims do not mobilize the law by reporting to police or other authorities, even after suffering violence

(Baumer & Lauritsen, 2010; Kershaw, Nicholas & Walker, 2008; Mayhew & Reilly, 2008; Skogan, 1984). Claiming legal protection is a form of social and political practice, where *practice* is the action people take (Kymlicka & Norman, 1994). If victimisation derails one's sense of belonging and equality within a community, we begin to understand rights mobilization as practices to reassert equality.

### **What "rights"?**

Rights rhetoric brings injustice claims to the surface of societal concern and higher up the list of political priorities. Rights talk is the currency of activists and "rights consciousness" is crucial to victims' legal mobilisation (Merry, 2003, p. 344). To be sure, as David Kennedy (2002) has written about human rights, rights talk can be overly devotional. Victims' rights literature, whether on domestic or international justice, is also often laden with rhetoric and frequently inadequately describes what is meant (Doak, 2008). Indeed, as we discuss later, ambivalent language and squishy terms make victims' rights compliance and enforcement difficult.

Rights can be grounded in morality or faith. They can associate with social, political or legal authority. They can be "given", "agreed upon", "fought for" or "talked about" (Dembour, 2010, p.1). As Leif Wenar writes,

Rights dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as many now see it. To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done (Wenar, 2010, p.1).

Confirming the ubiquity of rights and their varied applications are the articles in this volume. Authors locate victims' rights in all these domains but generally without specific association as to their nature. They are in international (Balta et al), regional (Dearing & Huxtable), and domestic instruments (Holder & Kirchengast). They are unlegislated (Holmberg et al), assumed (Illiadis, Fitz-Gibbon, & Walklate), socially contextual (Svensson & Gallo), or simply too diffuse to be grasped (Kunst). The foundation document for this diversity, the 1985 United Nations [UN] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter, the UN Victims Declaration) was "visionary" (Groenhuijsen, 2014, p. 33). It set out that victims "should" be provided access to justice and fair treatment, restitution from offenders and compensation from states, and given "necessary material, medical, psychological and social assistance". From this benchmark, it is unsurprising to discover variation in national, regional and international instruments creating the language of "rights", even if the nature of these rights is not precisely identified.

### **A contested history**

Precise identification of their rights has been significantly less an issue for those accused of crime. For the accused, the assumption that rights bear enforceable outcomes is largely true. The adversarial trial has created rights discourse around those rights owed to the accused by the state and the legal process and the popular conception of what it means to "have rights" generally follows that development. This core idea has also come to prominence in civil and hybrid legal systems over the last century (Dearing & Huxtable, this volume). But victim rights differ from those of the accused not only because of the subject to whom they are owed, but because of the inherent variance between rights offered and significantly, the remedies that may be normatively expected by their enforcement. It is a venerable legal principle that "where there is a legal right,

there is also a legal remedy . . . .” *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The history of victims' rights is therefore markedly different from rights owed across other domains, including human rights, citizen rights and defendant's rights, even when this history has been influenced in part by policy transfer between these rights domains.

The advent of human rights, for example, led to attention on individual victim rights, particularly for those persons subject to abuse of state power. The historical neglect of victims of war coloured this development significantly; a situation remedied somewhat by domestic and international courts set up to deal with mass atrocity crimes. As the contribution of Balta and her colleagues point out, the instruments and structures developed for the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) each developed from a concern to remedy the abuse of power with regard to rights provision for victimised individuals and groups. The rights instruments established an institutional presence for victims which then enabled outcome-focused enforcement, even where this led to reparations without individual restitution or redress (Sperfeldt, 2013). However, for domestic criminal courts dealing with “everyday” crimes, the human rights of crime victims have only gained some traction where there is regional jurisdiction such as in the European Court of Human Rights (Doak, 2008) and the Inter-American Court of Human Rights (Cavallaro et al., 2019).

The 1990s saw continued debate but the development of some procedural entitlements giving victims greater access to aspects of criminal proceedings. For example, some jurisdictions provided avenues to submit a victim impact statement (VIS) at the sentencing of a convicted offender (Booth, 2012) but not in others (Holmberg et al., this volume). While in the United States (U.S.), the right to speak at sentencing and to provide a VIS was considered to parallel to the defendant's right to allocate at sentence (Cassell & Erez, 2011). Toward the 2000s, rights

discourses further evolved to focus on the victim of crime as an important stakeholder in criminal justice processes, one to be provided enforceable rights (Beloof, 2005; Manakis, 2015). Victims were increasingly given “standing” to assert their rights in criminal processes (see later discussion) and the presence of legal counsel for victims in international trials has become (relatively) unremarkable (Killean & Moffett, 2017). Criminal justice institutions (including lawyers who practice within them) appear increasingly to have accepted the realisation that victims may furnish detail that is materially relevant to legal proceedings (Elbers et al., 2020).

Victims' rights enforcement has become increasingly interjurisdictional; that is, victim rights now engage multiple jurisdictions and approaches to afford victims a more meaningful rights framework through which to intersect their interests into justice. This interjurisdictional feature provides a key means to locate victim rights enforcement within a normative context. Enforcement, and its compliance twin, occurs across the administrative and executive levels, involving administrative, civil and criminal rights, and crosses substantive, procedural and even service level rights provision (Holder & Kirchengast, this volume). While victim rights were always fragmentary, a modern human rights-informed framework both grounds interjurisdictionality and provides a set of rights and standards that are easily accessible and enforceable by victims, with or without legal representation or assistance.

### **An overarching human rights framework**

The relatively open provisions of the broadly framed UN Victims' Declaration have facilitated a rich, diverse and flourishing array of victim-related structures, services, mechanisms, and activities in many countries (Kirchengast, 2017). Less positively, it has frustrated victims' rights advocates while, at the same time, unsettling those concerned about offenders' rights. Thus, while victims' rights are often decried as “illusory” (Beloof, 2005), they are simultaneously

attacked as a threat to the accused person's fair trial and due process rights (McBarnet, 1983). Responding to the competing concerns, Francesca Klug (2004) suggests that human rights can provide a universal language through which the tensions between rights be assessed, while Jonathan Doak (2008) has argued that human rights represent a normative basis within which victims' rights may be legitimated (and see, Elias, 1985). Focusing on criminal justice, Doak explicated victims' right to protection, right to participation, right to justice, and right to reparation as squarely within an "international consensus on the rights victims ought to have" (p. 25). This position has recently been extended with foundational argument that "criminal law protects a system of human rights" (Dearing, 2017, p. 3).

Encouraged by European contributors to this volume, in this section we develop these calls for a human rights framework to victims' rights. Initially, we draw on the 1966 International Covenant on the Protection of Civil and Political Rights (ICCPR) as the most relevant to criminal proceedings. To this we add its companion, the International Covenant on Economic, Social and Cultural Rights (ESCR) (1966), plus the foundational 1948 Universal Declaration of Human Rights (UDHR).<sup>1</sup> We do not attempt a definitive list of victims' rights. Others have admirably done this elsewhere (Goodey, 2005; Waller, 2010).<sup>2</sup> Rather, in keeping

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<sup>1</sup> There are nine human rights international treaties, and one optional protocol. Our framework starts with the three founding treaties. Others may wish to expand.

<sup>2</sup> The National Crime Victim Law Institute based in the U.S has produced extensive rights resources for litigators and advocates. See, [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/about\\_ncvli/know\\_your\\_rights.php](https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/know_your_rights.php) [retrieved 22 Nov, 2020]



with our aim to create a bridge across debates about needs versus rights or services versus justice, we seek to build a facilitative and overarching structure.

The framework consists of three tiers: one of hard, binding laws; a second of soft or non-binding laws; and a third of implementation. Tier 1 human rights include not only the well-known global treaties—UDHR, ICCPR and ESCR—but also regional ones (e.g., the 2012 European Union [EU] Victims' Rights Directive). Tier 2 rights are the international and national victims' rights instruments. Tier 3 includes a *mélange* of policy documents, guides, protocols, and standards designed to implement the upper two tiers. The three tiers use enforceability as the delineating concept, but we acknowledge extensive debate about what this looks like (for example see, Groenhuijsen, 2014, Keller & Ulfstein, 2012, and Holder & Kirchengast, this volume).

The Tier 1 rights represent global and regional consensus, albeit one beset by “hard questions” (Holder & Reidy, 2013). Accompanying the instruments are international systems of experts who monitor, review and investigate complaints, all of which facilitate implementation at regional and national levels plus regional and national courts established specifically for redress of alleged human rights violations (Keller & Ulfstein, 2012). Tier 2 international instruments include the UN Victims Declaration and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/Res/60/147) (2005), also known as the van Boven/Bassiouni Principles (Balta et al., this volume). Also at Tier 2 at a national level, there are, for example, federal and state statutes in the United States (U.S.) (Cassell & Garvin, 2020, Cassell, 2015) and Australia (Kirchengast 2017), and national statutes in the United Kingdom (UK), Canada, and New Zealand to name a few. We do not examine each in detail but

extract broadly similar provisions. With some exceptions - especially in the U.S where victims' rights litigation is well established and growing in strength (see later examples) - Tier 2 are generally not legally enforceable standards. Similarly, we provide only examples in Tier 3.

INSERT TABLE 1 HERE

Obviously, the tiers of rights are a hierarchy and our distinctions are likely contestable to readers and will read differently in countries varying legal contexts. Clearly the implementation of human rights also overlap and duplicate in ways relevant to the contexts in which victims find themselves. We view this as a feature of the elasticity of human rights rather than a problem. Although we have "fixed" human rights in Tier 1, its meanings, applications and associations are anything but (Goodale & Merry, 2007; Holder & Reidy, 2013). Human rights have their own mythology. Despite these features, we see at least five ways in which the framework is useful for those working to promote and protect victims' rights.

First and reiterating Doak's argument, human rights provide a normative basis for victims' rights. This means they are not peripheral, but their interests are legitimately and fully within the obligations of States to citizens. Thus, while victims' rights are associated with the transitional status of "victim", when comprehended as human rights they are intrinsic and *inalienable* (Donnelly, 2003).

Second, understanding victims' rights as human rights brings the State and its institutions clearly into view as the *duty-bearers* to rights-holders (victims, offenders, witnesses, litigants and so on) (Holder, 2017). The failings of state agencies such as police, prosecution, and courts in their myriad interactions with victims have tended to be characterised as the unfortunate, even unintentional, side-effects of voluminous workloads. The duties that victims' human rights

impose rather suggest these everyday administrative omissions are an oppressive, even intrusive, abuse of power.

A third use of the depiction of citizens as rights-holders and state entities as duty-bearers is that illuminates parallel interests between victims and offenders—i.e., that each have human rights that should be respected. For too long, there has been a view that state entities only had duties to offenders, because the interests of victims were one and the same as interests of police and prosecutors *against* offenders. Understanding victims as independent actors in criminal justice processes underscores the unique victims' rights at stake.

The fourth usefulness of our framework is linked to the last point; reprising Klug, accepting that the rights of individuals and groups can be in tension in different contexts and circumstances (such as in criminal justice) does not mean one or the other can be disregarded. Instead, human rights can provide a robust structure, language and jurisprudence for rigorous examination of the tension to find “reasonably available alternative measures”<sup>3</sup> to reconcile the rights. This approach is central to notions of the progressive development and realisation of rights.

Finally, we accentuate the centrality of human dignity to human rights and victims' rights, a point that is often lost in the efficiency focus of Tier 3 regulatory and implementation activities.

### **Making rights real: practice, compliance and enforcement**

In this section, we return to the myth of victims' rights and their illusory character. We describe

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<sup>3</sup> Dissenting judgement of Abella J in *R v NS* (2012 SCC 72), Canadian Supreme Court.

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do>

instead a future in which the myth is increasingly being transformed into reality. We provide examples of victims claiming and legally enforcing their rights in criminal justice processes, in ways that demonstrate real impact on criminal proceedings.

It is axiomatic that the defining feature of rights is the potential for legal enforcement (Beloof, 2005; Cassell, 2015; Wenar, 2020). But, as contributors to this volume and scholars elsewhere have observed, compliance with rights, rules, standards, norms, and expectations ultimately depends on a wide array of social, political and institutional processes (for a socio-legal engagement, see Morgan & Yeung, 2007). Compliance is “as much about informal practice as formal process” (Holder & Kirchengast, this volume) and is certainly accompanied by social movement activism from, for example, feminist campaigns on violence against women (Illiadis et al, this volume) to internationalised advocacy networks (Balta et al, this volume). Nonetheless, the issue of enforcement (one side of the compliance coin) looms large. We provide five examples of rights enforcement that demonstrate different approaches.

### ***Rights claiming, pathways and access to justice***

Rights “in practice” considers how they work in peoples’ everyday lives; how people talk about rights, imagine them and use them (Destrooper & Merry, 2018). Here the emphasis is less on the status of rights and more on the assumption that they exist and, going about their daily lives, citizens *enact* their rights and organisations operate assuming rights exist (Svensson & Gallo, this volume). At the same time, rights, and their absence and/or availability, become apparent to individuals and communities when there is a need and action on that need. There are many examples. An Australian one is Lynette Daley, an Aboriginal woman who was brutalised, and who’s family spent years demanded the prosecution of the men who let her bleed to death. Denied the dignity of a hearing, Ms Daley’s family claimed it for her (Holder, 2018b). Whole

communities of people victimised by atrocity have done likewise (Balta et al., this volume). Rights “become practical, robust and reliable when they are claimed and recognised in daily life” (Dearing, 2017, p. 375).

### ***Networked and strategic litigation***

Victims' rights enforcement in criminal justice processes is long established in some traditions (Antonsdóttir, 2018) and is increasingly occurring directly within those processes in some common law systems. Crime victims' attorneys, armed with explicitly enforceable legal rights, are increasingly pressing for changes in legal proceedings based on crime victims' rights (Cassell et al., forthcoming 2021). For example, victims' attorneys have argued before the U.S. Supreme Court for a crime victims' right to restitution (Cassell & Marsh, 2015). Robust discussion continues about ways to expand independent legal representation of victims in criminal cases (Elbers et al., 2020; Reeves & Dunn, 2010).

More broadly than pressing rights in individual cases, training and professional support for legal advocates who systemically press for rights is also beginning to develop. Perhaps most prominently, the National Crime Victim Law Institute (NCVLI) in the U.S. conducts regular training for victims' attorneys who seek to enforce victims' rights (Davis et al., 2012). Through its National Alliance of Victims' Rights Attorneys and Advocates (NAVRA), NCVLI provides legal education on various topics of interest to attorneys working with crime victims, including attorneys attempting to assert rights in criminal cases. Similar networks exist for attorneys pressing for compensation for victims in civil cases.

### ***Standing up for victims: introducing a legal third party***

Victims have not only directly asserting rights in criminal proceedings but are increasingly

seeking to be heard as “friends of the court” or amicus curiae. This third party role extends beyond simply having crime victims’ organisations present their opinions about how resolution of a case might affect crime victims in future cases (Farber, 2020). Instead, international criminal tribunals are increasingly accepting or inviting amicus curiae briefs or submissions. The practice has been explicitly included in the rules of procedure and evidence of the ICTY, the ICTR, the Special Court for Sierra Leone and the ICC. The amicus role provides an avenue for representing interests other than those of the legal parties. As developed at length by Williams, Woolaver and Palmer (2020), this role may provide another “an avenue for participation” for victims that also builds on and maintains the legitimacy of formal proceedings.

The third party may emerge from civil society. Groups of people directly affected by crimes such as the Victims of Crime Assistance League (VOCAL) in Australia and Mothers Against Drunk Driving (MADD) in the US organise to press prosecution and other authorities for recognition and inclusion. Third parties may form part of the formal governance infrastructure. In Australia, for example, statutory office-holders have been created by governments expressly to promote and protect victims’ rights (Holder & Kirchengast, this volume). While third parties take a number of forms, they are effectively co-producers of rights protection (Holder, 2018b).

### ***Using established institutional levers***

There are a range of institutional levers designed to hold decision-makers and powerful state agencies to account. These include statutory offices, specific research institutes and commissions. These undertake targeted and systematic assessment of government undertakings on crime victims. A U.S. example is the Government Accountability Office (GAO). It conducted a mandated review of the federal *Crime Victims' Rights Act (CVRA) 2004*. The review found a

gap between the aspirations and actions of justice entities to implement the legislation and knowledge and use of the instrument by victims themselves. In the United Kingdom (U.K.), Her Majesty's Crown Prosecution Service Inspectorate is one of five criminal justice accountability bodies. In 2019 it conducted a thematic review of rape prosecutions and found that prosecutions had fallen 52% since 2016. In the Australian state of Victoria, the Victorian Law Reform Commission produced a ground-breaking report entitled, *The role of victims of crime in the criminal trial process*. The Commission argued that the strict Crown witness role of crime victims in common law proceedings could no longer be supported and recommended a new definition of the crime victim as "participant" (VLRC, 2016, p. xv).

### ***Strengthening normative and political frameworks***

Normative and political frameworks are co-constitutive of legal frameworks. These understand that the simple enactment of legislation is insufficient to protect victims' rights but need to be accompanied by periodic review, monitoring, political oversight and strategic effort. As already mentioned, the European Union (EU) enacted Directive 2012/29/EU of the European Parliament and of the European Council establishing minimum standards on the rights, support and protection of victims of crime (2012). The EU Fundamental Rights Agency (FRA), providing independent, evidence-based advice to EU and national decision makers, conducted a four-part multi-year and multi-country examination of the implementation of the Victims Directive (FRA, 2019). Civil society victim support agencies across Europe also compiled country reports on the implementation. One result was the EU's first ever strategy to ensure victims of crime can fully

rely on their rights wherever they are in Europe.<sup>4</sup>

### **Transforming myth**

Myths are true and not true. Rights exist in statute and form the basis of legal argument and, at the same time, can be difficult to pin down. In this editors' introduction and in the contributions that follow in the Special Issue, *Making Victims' Rights Real*, we have taken up the challenge to extrapolate the content and power in both the concrete and the ideal of rights. We have attempted to build a human rights-based framework to victims' rights in the hope that this generates fresh insight into existing debates and ways forward for research as well as for rights advocates.

It is noticeable that most contributors to this volume are Europe-based. In many ways, the European project is itself a normative one, so it is perhaps not surprising that the civil and legal rights of Europe's citizens remain of central interest. This observation returns us to our starting point: that victims' rights scholars talk more with each other across disciplines, across types of legal system, across languages, and across different areas of rights protection. There is much to learn from human rights, anti-discrimination, and civil rights scholarship. Rights are a shared project amongst us all; as is making them "real".

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<sup>4</sup> The EU Strategy on Victims Rights, 2020-2025 was adopted in June 2020. See,

[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/eu-strategy-victims-rights-2020-2025\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/eu-strategy-victims-rights-2020-2025_en) [retrieved 22 Nov 2020]



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Table 1: A human rights framework for victims' rights

<b>Tier 1 rights – binding (human) rights</b>	<b>Tier 2 rights – non-binding (victims') rights</b>	<b>Tier 3 – non-binding rights regulations</b>
Right to life; right to security of person; right to protection	Right to protection	Law enforcement procedures  Court orders
Right to dignity; right to equality; non-discrimination	Right to dignity, to respect, non-discrimination	Agency statements of respect, non-discrimination and inclusion
Right to privacy; right to reputation; right to family life	Right to privacy; right to protection	Agency procedures to maintain confidentiality of client records
Freedom from torture, cruel, inhuman or degrading treatment	Right to protection, right to dignity, to respect	Law enforcement procedures  Court orders
Right to recognition as a person; right to understand and be understood; right to interpretation & translation	Right to dignity, to respect	Agency statements of respect, non-discrimination and inclusion
Right to effective remedy; right of complaint	Right to effective remedy/redress/reparation	Complaint procedures to Ombudsmen, statutory bodies, internal to agencies

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Right to equality before the law	Right to non-discrimination	Agency statements of respect, non-discrimination and inclusion
Right to equal access to public service; right to information; right & access to support services; right to social security/education/physical & mental health/cultural life	Right to assistance, services & support; right to interpretation & translation	Victim service standards Quality assurance standards
Right to fair trial; right to be heard; right to review; right to legal aid; right to reimbursement of expenses; right to return of property; rights for specific needs	Right to notice/be heard/be present (participate); right to receive case information;	Vulnerable witness provisions/special measures  Prosecution Code of Practice