

Crime Victim Agency: Independent Lawyers for Sexual Assault Victims

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I. INTRODUCTION

The criminal justice system must incorporate structures that create space for authentic crime victim agency if it is to fulfill its purpose. Fortunately, in recent years the military has provided a powerful illustration of how to build such structures into an effective justice system. This article describes the Special Victim Counsel (SVC), which is now integrated into the military justice system,¹ explaining how the SVC creates the necessary space and opportunity for authentic victim agency. Outcomes have been positive from both victim and system perspectives. This article concludes by urging that a cornerstone of criminal justice reforms in the civilian criminal justice systems of this country should be similar arrangements for lawyers for sexual assault victims.²

The relationship of crime victims to the criminal justice process is evolving within the civilian and military legal systems. This evolution is based upon values of dignity, fairness, and respect for victim privacy that are becoming established in state constitutions and federal and state statutes³ and that are also present in the Military Code of Justice.⁴ These values provide the foundation for victims' due

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³ 10 U.S.C. § 1044e (2012).

⁴ Our focus in this paper is on sexual assault victims because it involves unique cultural complexities and because “[s]hort of homicide, [rape] is the ‘ultimate violation of self,’” Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (White, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (opinion of White, J.)); and because the reform of lawyers for sexual assault victims in the military has been vetted by the Pentagon and Congress.

⁵ See, e.g., The Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(8) (2012) (victims have “[t]he right to be treated with fairness and with respect for the victim's dignity and privacy”); Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 328 (1999) (Appendix A setting out values in victims' rights statutes in state and federal jurisdictions); Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005) (discussing a victim's right to attend the trial as an example of victim-center values being widely accepted).

⁶ See, e.g., 10 U.S.C. § 806(b), art. 6b(a)(8) (2012) (victims have “[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter”); U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, 6-62CODAB, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 36 (2013) (“Incorporating Victim Rights into Military Justice Practice”. The established procedures, including Special Victim Counsel for sexual assault

process rights in both civilian and military criminal processes. These due process rights take the form of notice and opportunities to be heard, as well as other measures that require respect for the victim's dignity and privacy. These values and the rights that flow from them, however, will only be realized when sexual assault victims are provided legal counsel, because only then can authentic victim agency be possible. The military has moved substantially in this direction, and the civilian process should now follow suit.

This article begins by exploring in Part II the concept of crime victim "agency." Crime victim agency is akin to the concept of crime victim autonomy, and at its core is the right and power of individuals to make fundamental decisions about their lives. This is particularly important in a criminal justice setting, where failure to respect crime victim agency can lead to additional harms or secondary victimization.

Next, in Part III, this article reviews the military's Special Victim Counsel. The SVC has begun operating in sexual assault cases within the military and has created significant benefits in the process. Because the existence and success of the SVC is not widely known, it is worth explaining its operation in some detail.

Part IV then compares and contrasts the military process with the civilian criminal justice process for sexual assault victims. This part demonstrates that the civilian process places undue—and almost exclusive—emphasis on victims' reporting to and cooperation with law enforcement. This focus impairs victim agency and is inconsistent with the victim values that are now a central part of the criminal justice process.

Part V discusses the role of lawyers for sexual assault victims in civilian criminal processes. Just as the SVC plays a crucial role in the military system, attorneys for victims are required in the civilian system to assure that victim values are fully respected.

Part VI explains why only independent lawyers can adequately represent victims' interests.

Finally, Part VII elaborates on how the civilian criminal process can be modified to protect these interests. Based on consultation with independent legal counsel, sexual assault victims would be able to make informed choices about whether, and how, to proceed with their choice to initiate a prosecution and, if initiated, to make further informed choices during relevant procedural moments as the case progresses. Such an approach would fully protect crime victim agency and honor the victim values that are now central to the civilian criminal process.

victims, are established in an effort to "ensur[e] that victims of sexual assault are . . . treated with dignity and respect."); U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, PROGRAM PROCEDURES, No. 6495.01 at 5 (2015), <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>; U.S. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE, PROGRAM PROCEDURES, No. 6495.02, at 39 (2014), http://sapr.mil/public/docs/instructions/DoDI_649502_20140212.pdf [hereinafter SAPR 6495.02].

II. CRIME VICTIM AGENCY

A. *What is Agency?*

Discussion of crime victim “agency” requires consideration of another word: “autonomy.” The word “autonomy” traces its root back to early Greek terms meaning “the having or making of one’s own laws, independence . . . Liberty to follow one’s will, personal freedom.”⁵ While originally the term was used to describe the condition of nation-states rather than individuals, it evolved to be used to describe the state of individuals during the eighteenth century.⁶ Ultimately, autonomy came to mean the capacity of an individual for self-governance combined with the actual condition of self-governance in an absolute state of freedom to choose unconstrained by external influence.⁷

Feminist philosophers and legal theorists rightfully began criticizing this classic liberal conception of autonomy for failing to account for the relational reality of humans, the intersectionality of identity, and the significant impact of power on choice.⁸ From these critiques, the term “agency” emerged to capture a liberal autonomy, which accommodates the situatedness of individuals.⁹ It is this meaning of agency that is at issue in this article. As commonly defined, the term “agency” means “a person or thing through which power is exerted or an end is achieved: [an] instrumentality.”¹⁰ But the concept can be viewed as more broadly capturing important concepts, such as self-definition and self-direction.¹¹ Self-

⁵ *Autonomy*, The Compact Oxford English Dictionary (2d ed. 1998).

⁶ See JOHN CHRISTMAN, *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan. 9, 2015), <http://plato.stanford.edu/entries/autonomy-moral/> (discussing the evolution of the value of autonomy, including the writings of Kant and Mills).

⁷ *Id.* See generally GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988). See also Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 22–23 (2009) (discussing evolution of term autonomy).

⁸ See, e.g., Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 826–27 (1999) [hereinafter Abrams, *From Autonomy to Agency*] (exploring the concepts of agency, self-definition, and self-direction and describing the complexity of relational interdependence and social influence); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 346 (1995) (identifying a feminist model of “partial agency,” which juxtaposes women’s “capacity for self-direction and resistance” with “often-internalized patriarchal constraint”); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 7–10 (1989) (“Feminism requires a new conception of autonomy.”); Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 298–300 (2007) (in defining agency, noting the importance of accounting for the impact of social norms and the barriers that impede choices); Goodmark, *supra* note 7 (collecting criticisms and articulating a new conception).

⁹ See Abrams, *From Autonomy to Agency*, *supra* note 8 (discussing emergence of term agency).

¹⁰ *Agency*, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003).

¹¹ See Abrams, *From Autonomy to Agency*, *supra* note 8, at 823–39.

definition is the fundamental determination of how one conceives of oneself both as an individual and as a community member. Self-direction is, relatedly, the charting of one's direction in life. It is this broader sense of the term that is at issue here.

B. *Why Does Agency Matter?*

Agency, broadly construed, is critically important for crime victims. Research reveals that for some victims who interact with the criminal justice system, participation is beneficial. It can allow them to experience improvement in depression and quality of life, provide a sense of safety and protection, and validate the harm done by the offender.¹² For other victims, interaction with the criminal justice system leads to a harm beyond that of the original crime, a harm that is often referred to as “secondary victimization” and which is recognized to have significant negative impacts on victims.¹³ Specifically, re-victimization has been associated with posttraumatic stress disorder; physical, mental, and sexual distress; and negative impacts on self-esteem and trust in the legal system.¹⁴ Judith Herman summarized well the impacts of re-victimization when she noted, “if one

¹² See, e.g., Margaret E. Bell et al., *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcomes and Processes*, 17 VIOLENCE AGAINST WOMEN 71, 72 (2011) (noting studies that found “positive experience in the justice system [civil and criminal] are associated with less physical and psychological distress and better posttraumatic adjustment”); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 160–61 (2003) (discussing potential benefits of participation); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182, 182 (2010) (same).

¹³ For a discussion of secondary victimization and its impact on victims, see Nat'l Crime Victim Law Inst., *Polyvictims: Victims' Rights Enforcement as a Tool to Mitigate “Secondary Victimization” in the Criminal Justice System*, VICTIM L. BULL. Mar. 2013, <http://law.lclark.edu/live/files/13797-ncvlipvvictims-rights-enforcement-as-a-tool-to>. See also Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1389 (discussing trauma caused to victims from lack of notice of proceedings); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 314 (2002) (noting that “secondary victimization” can negatively influence “self-esteem, faith in the future, trust in the legal system, and faith in a just world”); Pamela Tontodonato et al., *Crime, Punishment, and Victim Distress*, 3 INT'L R. OF VICTIMOLOGY 33, 34 (1994) (observing that secondary victimization can cause victims to feel frustrated with and alienated from the criminal justice system); Parsons & Bergin, *supra* note 12, at 183 (observing that some studies indicate that contact with the criminal justice system may “exacerbate the initial trauma,” “leave victims feeling embittered and disappointed,” and cause anxiety).

¹⁴ See, e.g., Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29 PSYCHOL. OF WOMEN Q. 97, 98 (2005) (“Prior research has found that experiencing secondary victimization is associated with increased posttraumatic stress (PTS) symptomatology, physical health distress, and sexual health risk taking behaviors.”).

set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.”¹⁵

These negative impacts on individuals should be enough to concern policy makers about re-victimization; notably, however, the negative impacts of secondary victimization extend beyond the individual to substantially impair the functioning of the justice system.¹⁶ Disempowered victims may lose confidence in and respect for the system, may not report their victimization, or may disengage part way through the process.¹⁷ Disengagement of victims is significant. At the micro level, victims are important sources of information and the lack of their information can impair fair adjudication. On a grander scale, law and its processes are a constitutive rhetorical act, calling into being a common, collective identity and thereby marking the boundaries of community.¹⁸ When a swath of our community—i.e., sexual violence victims who are re-victimized by the process—are excluded and not interpolated into the common identity, the chance for meaningful progress in the fight against sexual violence is negligible.

A significant part of what accounts for the difference in experience is whether victims have the ability to meaningfully choose whether, when, how, and to what extent to meaningfully participate in the system and exercise their rights.¹⁹ In

¹⁵ Herman, *supra* note 12, at 159.

¹⁶ See, e.g., Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 331–42 (2005) (discussing systemic dysfunctions that result from illusory victims' rights); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 953–55 (1996) (analyzing victim participation in the criminal justice system).

¹⁷ See, e.g., Bell et al., *supra* note 12; Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999); Bibas, *supra* note 16, at 912–14; Rebecca Campbell, *Rape Survivors' Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 30, 37 (2006); Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y. & L. 465, 469 (2003).

¹⁸ See Philip N. Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 570 (1994) (“[W]e are what we say—or rather, we are who we say. That is, we speak through many voices and have innumerable stories to tell. Our communities are multivocal. The law, however, speaks univocally, and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech.”); James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684–90 (1985). See also Maurice Charland, *Constitutive Rhetoric: The Case of the Peuple Québécois*, 73 Q.J. SPEECH 133, 133–34 (1987) (noting that constitutive rhetorics are crucial during “founding” moments when advocates try to “interpellate” or “hail” audiences, calling a common, collective identity into existence). The act of creating or calling in to being an identity is the concept of interpellation articulated by Louis Althusser. See Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 127, 164–73 (Ben Brewster trans., 1971). Thus, interpellation is hailing, combined with the recognition of oneself in the hail, which calls a subject into being.

¹⁹ See, e.g., Bennett, *supra* note 17; Bibas, *supra* note 16; Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential*

short, the difference in experience is explained by the existence—or lack of—agency.

III. MILITARY SPECIAL VICTIM COUNSEL CREATES ROOM FOR SEXUAL ASSAULT VICTIMS' AGENCY

Under intense pressure from Congress, the public, the media, and anti-rape advocates, the military has enacted significant reforms to transform its response to sexual assault over the past decade. A critical reform is the establishment of Special Victim Counsel (SVC) for sexual assault victims. The SVC operates alongside another important reform—a two-option military reporting process which provides that “[a]ctive duty Soldiers, and Army National Guard and U.S. Army Reserve Soldiers who are subject to military jurisdiction under the UCMJ, can elect either restricted or unrestricted reporting if they are the victim of a sexual assault.”²⁰

With *restricted* reporting, the victim has significant control over the decisions of whether and when to engage the criminal process. Restricted reporting has no requirement that the victim participate in an investigation or prosecution: “Restricted reporting requires that law enforcement and criminal investigative organizations not be informed of a victim’s identity and not initiate investigative procedures.”²¹ Thus, a sexual assault victim in the military can make a report to certain government (military) service providers without triggering a law enforcement response.

Restricted reporting comes with full access to the same services available to unrestricted reporters. Among these services are that restricted reporters may elect to have an SVC (who is a Judge Advocate General Corps attorney) serve as the victim’s counsel²² and may access Sexual Assault Response Coordinators (SARC), health care providers, and chaplains, all without triggering a law enforcement response.²³ Evidence, typically statements, rape kits and other physical evidence,

Effects on Psychological Functioning, 34 WAYNE L. REV. 7 (1987) (explaining why giving victims input into the criminal justice system proceedings and providing them with information about the justice process helps to increase victims’ perceptions of control, decrease their feelings of helplessness, and reduce psychological distress). See also ALAN N. YOUNG, DEP’T OF JUST. CANADA, THE ROLE OF THE VICTIM IN THE CRIMINAL PROCESS: A LITERATURE REVIEW—1989 TO 1999, at 11 (2001), http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr00_vic20/rr00_vic20.pdf; Meg Garvin, *Harmony or Discord Between Victim Agency and the Criminal Justice System: A Comment on DePrince, Belknap, Labus, Buckingham, and Gover*, 18 VIOLENCE AGAINST WOMEN 889 (2012) (collecting and discussing a variety of studies and arguing for studies of increased agency).

²⁰ 32 C.F.R. § 635.28 (2013).

²¹ *Id.* at § 635.28(b).

²² 10 U.S.C. § 1044e(c) (2012) (“The relationship between a Special Victims’ Counsel and a victim . . . shall be the relationship between an attorney and client.”).

²³ *Id.*; SAPR 6495.02, *supra* note 4, at 5; 32 C.F.R. § 635.28(b) (2013).

can be collected and retained for one year.²⁴ Should the victim decide to shift his or her report from restricted to unrestricted, such evidence is available for use in prosecution.

Unrestricted reporting is conventional reporting, meaning that the case is known to law enforcement authorities for purposes of investigation and may be referred for prosecution. The entire definition of unrestricted reporting is: “[u]nrestricted reporting requires normal law enforcement reporting and investigative procedures.”²⁵ A type of independent source rule, combined with a concept borrowed from evidentiary privilege law, allows law enforcement to proceed if it becomes aware of the sexual assault from a source independent of the confidential providers defined in restricted reporting rules.²⁶ In essence, the independent source breaks the control that a victim has to keep his or her report of the assault confidential.

In both restricted and unrestricted reporting cases, SVCs are of tremendous assistance to sexual assault victims. For the victim in the military who elects *restricted* reporting, the SVC provides information about the criminal process, including the pros and cons of engaging with it. Legal and procedural realities are explained and misinformation is debunked, thus providing the victim with the information needed to make a knowing, intelligent, and truly voluntary choice about whether and how to shift to unrestricted reporting. For the victim whose case involves *unrestricted* reporting, the SVC provides attorney-client privileged representation throughout the process:

Special victims’ counsel are available to victims of sex-related offenses regardless of whether they file a restricted report, file an unrestricted report, or chose not to file a report. The primary duty of an SVC is to zealously represent his or her clients’ rights and interests, including during the criminal investigation, preliminary hearing, pretrial litigation, plea negotiations, court-martial proceedings, and post-trial phase of a court-martial Finally, SVCs educate clients on the military justice system, the roles of sexual assault response personnel, and the variety of medical and other non-legal assistance available to them. SVCs are not part of the Victim and Witness Assistance Program (VWAP), but Air Force guidance, for example, notes that the legal services provided through its program are intended to align with and strengthen the VWAP by representing

²⁴ 32 C.F.R. § 635.28(c).

²⁵ *Id.* § 635.28(a).

²⁶ *Id.* § 635.28(d) (“In the event that information about a sexual assault that was made under restricted reporting is disclosed to the commander from a source independent of the restricted reporting avenues or to law enforcement from other sources, but from a source other than the SARC, HCP, chaplain, or Provost Marshal/Director of Emergency Services, the commander may report the matter to law enforcement and law enforcement remains authorized to initiate its own independent investigation of the matter presented. Additionally, a victim’s disclosure of his/her sexual assault to persons outside the protective sphere of the persons covered by the restricted reporting policy may result in an investigation of the allegations.”).

the interests of a client so that he or she can fully participate in the military criminal justice process.²⁷

Once the criminal process is engaged, SVCs provide significant legal support to the victim. In the first 11 months of the Air Force SVC program, the workload included 7,966 telephone consultations with clients, 1,328 in-person meetings with clients, 10,381 correspondences on behalf of clients, 11,431 correspondences with clients, 7,904 telephone consultations on behalf of clients, 726 in person meetings on behalf of clients, attendance at 215 client interviews with defense counsel, attendance at 146 client interviews with law enforcement, attendance at 550 client interviews with trial counsel (prosecutors), 193 assertions of clients' privacy rights during discovery, 80 representations of clients for collateral misconduct (where victim may have been engaged in improper conduct at the time of assault), advisement of clients regarding immunity on 113 occasions, assistance with expedited transfer on 73 occasions, filing or answering a motion on 107 occasions, arguing 78 motions, and assisting with 29 Freedom of Information Act requests. In all, SVCs spent 18,919 hours on representation of sexual assault victims during this initial period.²⁸

Of related significance are the results of SVC victim satisfaction surveys from the Air Force (the only branch to conduct a survey): 92% were "extremely satisfied" with the advice and support the SVC provided during the Article 32 hearing and court-martial; 98% would recommend that other victims request an SVC; and, finally, 96% indicated their SVC helped them understand the investigation and court-martial processes.²⁹ In hearings conducted by the military,

²⁷ JUD. PROC. PANEL, REPORT OF THE JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS PANEL, at 49–50 (2015), http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf.

²⁸ Email from Richard Harding, Lieutenant General, U.S. Air Force Judge Advocate General's Corps, to Margaret Garvin, Executive Director, National Crime Victim Law Institute, and Douglas Belooof, Professor of Law, Lewis & Clark Law School (Jan. 19, 2014) (on file with authors). While increased victim agency by legal representation, rather than increased reporting, is the central point of this essay, there are also early indications that enhancing victim agency with SVC provided information may improve unrestricted reporting. In the Air Force, the percentage of restricted reporters who ultimately decided to provide unrestricted reporting to law enforcement had been about 15%. This statistic did not waiver for the five years between 2007 and 2012. In the first year after the advent of special victim counsel, restricted reports shifting to unrestricted reporting was 48%. This threefold growth in the number of victims initially filing a restricted report shifting to unrestricted reporting was, according to General Harding, then head of the Air Force JAG Corps, directly attributable to the availability of attorneys for these victims. Interview with Richard Harding, Lieutenant General, U.S. Air Force Judge Advocate General's Corps (Jan. 7, 2014). Early statistical and satisfaction results on the reforms and victim legal representation of victims are encouraging. Should the military reform efforts have an impact on victim services, reporting, prosecution and protection, it will have achieved what civilian rape law reform has not. Moreover, even modestly improved reporting will provide important information on how processes should be modified.

²⁹ U.S. DEP'T OF DEF., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, Annex 98, http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf [hereinafter ADULT SEXUAL ASSAULT CRIMES PANEL].

the Adult Sexual Assault Crimes Panel had the opportunity to hear from military sexual assault victims who were assigned a[n SVC]. Each witness who had been assigned an SVC testified that the SVC was critical to his or her ability to understand the process and participate effectively as witnesses against their accuser. The outcome of an acquittal in some of the cases did not lessen the value the victim placed on the SVC's representation.³⁰

Because SVCs help victims understand the system, these informed victims can exercise genuine agency regarding whether to engage with the system and as they interact with the system.

IV. THE CIVILIAN PROCESS: MISPLACED EMPHASIS ON REPORTING AND COOPERATION WITH LAW ENFORCEMENT IMPAIRS VICTIM AGENCY

It is not hard to understand why the majority of sexual assault survivors reject the existing criminal justice option provided by the State in the civilian process. Reporting one's victimization means entering a criminal process in which the victims' rights and privacy protections that exist on paper can rarely be accessed without a lawyer by a victim standing alone. Sexual assault victims enter a system notorious for inflicting secondary victimization on them. This is true in part because, with rare exceptions,³¹ the civilian process has only one type of reporting: to law enforcement.

In fact, many criminal justice reforms to date (e.g., rape shield rules and reduced criminal mental state), and some victim's rights movement reforms, have had a goal of increased sexual assault reporting to law enforcement. Despite these reforms, ongoing formal state control has failed to improve reporting rates, investigation rates or conviction rates. Moreover, civilian substantive and

³⁰ *Id.* at 105.

³¹ At least three civilian law enforcement agencies have opted to take a victim-empowerment approach to reporting of sexual violence. For example, the You Have Options program of the Ashland, Oregon Police Department affords victims three reporting options:

[1.] An Information Only report includes any report of sexual assault where at the reporting party's request no investigative process beyond a victim interview and/or a complete or partial Inquiry into Serial Sexual Assault (ISSA) is completed.

[2.] A Partial Investigation includes any report of sexual assault where some investigative processes beyond the victim interview and a complete or partial inquiry into serial sexual assault, have been initiated by law enforcement.

[3.] A Complete Investigation includes any report of sexual assault where all investigative procedures necessary to determine if probable cause exists for a criminal offense have been initiated and completed.

YOU HAVE OPTIONS, *Options for Reporting Sexual Assault at a You Have Options Program Law Enforcement Agency*, <http://www.reportingoptions.org/#!reporting-options/c1g3c> (last visited June 20, 2015). The other jurisdictions are Cambria, Pennsylvania, and Brighton, Colorado. For a summary of the three programs, see Kimberly A. Lonsway & Sgt. Joanne Archambault, *Training Bulletin: Alternative Reporting Methods: Community Spotlight*, END VIOLENCE AGAINST WOMEN INTERNATIONAL (Jan. 2015), <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=593>.

procedural rape law reform has had little to no impact on reporting rates, or rates of prosecution and conviction.³² By 2001, it could credibly be said that “no major scholar in the area of rape law and rape reform has argued that these reforms have produced significant results.”³³

Even the carrot of access to social services conditioned on reporting to law enforcement has not improved reporting rates. State funding for social services typically comes from state victim compensation funds, which pay for medical and therapeutic needs of the victim.³⁴ However, Congress put a substantial restriction on the availability of funds: A state must promote “victim cooperation with the reasonable requests of law enforcement authorities.”³⁵ The rationale for the approach is articulated in the handbook of the National Association of Crime Victim Compensation Boards, which states that “[v]ictims who frustrate law enforcement efforts should not be rewarded with public funds.”³⁶ All eligible crime victims are lumped into this requirement, including sexual assault victims. Thus, to receive state compensation for social services, the sexual assault victim must report the crime to law enforcement and cooperate with prosecution.³⁷

³² These reforms, of course, have value for the cooperating victim. Also, there is no longer a persuasive case for discrimination in providing services, evidence preservation, and information between victims based on cooperation. Now, a non-reporting or uncooperative victim is left with services, if available, such as anti-rape coalitions and crisis lines, which are notoriously underfunded and overworked. Thus, a non-reporting victim seeking services may not be served or will likely be under-served. As is true of rape reform legislation, this linking of crime victim compensation to cooperation with law enforcement has failed to improve reporting. At its core, the approach is misguided. Congress and the states should eliminate the requirement in the Victim of Crime Act (VOCA) that victims cooperate with law enforcement before victims can obtain compensation. Compensation may be a key to critical services needed by the victim and may be critical to victim engagement with the system.

³³ Ilene Siedman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 470 & n.20 (2005) (citing Stacy Futter, Jr. & Walter Mebane, *The Effects of Rape Law Reform on Rape Law Case Processing*, 16 BERKELEY J. GENDER J. & JUST. 72, 81 (2001)). This article also nicely sets out the need for lawyers to represent victims in civil law matters, a subject outside the scope of this piece.

³⁴ These funds were established in the Victim of Crime Act (VOCA) of 1984, 42 U.S.C. § 10602(b)(1)(A) (2006). Because we anticipate some concerns over cost, we point out that there already exists a potential funding source for attorneys at a minimum, on an experimental level, Victim of Crime Act Funds are typically in surplus. Beyond this, victim compensation funds also exist, but presently there are no dedicated funds for victim legal services. A combined evaluation of these funding sources could result in lawyers for sexual assault victims in civilian processes.

³⁵ *Id.* at § 10602(b)(2).

³⁶ Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victims Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL’Y 223, 246 (2011).

³⁷ A few states have attempted to lessen this federal requirement in the language of the states’ statutes. For example, California law provides:

[I]n determining whether cooperation has been reasonable, the board shall consider the victim’s . . . age, physical condition, and psychological state, cultural or linguistic barriers, any compelling health and safety concerns, including, but not limited to, a

The emphasis placed on reporting to and cooperation with law enforcement is misplaced. If, instead, the values of dignity, fairness, and respect for victim privacy informed the process such that sexual assault victim agency was valued and the tools of such agency were accessible, the disincentive to engage with state processes might be mitigated, and, as importantly, those victims that did engage with the system would not suffer the same re-victimization endured today.

V. THE ROLE OF LAWYERS FOR SEXUAL ASSAULT VICTIMS IN CIVILIAN CRIMINAL PROCESSES

It is generally accepted that sexual assault victims may be in need of medical care, psychological treatment, and spiritual counseling. Less well understood is the important role lawyers play for sexual assault victims. In fact, in the civilian criminal process, the vast majority of sexual assault victims have never had advice from a private attorney about the process or their rights. As a result, many victims are inadequately or erroneously informed about what the system and what their participation can look like. This lack of victim lawyers prevents victims' meaningful access to privacy, rights, and interests. Yet independent lawyers for victims can open the space for authentic agency by ensuring victims cannot only decide whether and when to engage with the system but also be the architects of how they engage with the system.

A. *Lawyers & Victim Privacy*

Victims of sexual assault are confronted with potential privacy intrusions at nearly every turn following an assault, from subpoenas for their confidential or privileged records held by third parties (e.g., counseling, medical, and education records), to rape shield issues, to motions to examine the victim's body, mind, or dwelling. Victims need lawyers to explain the law and process, as well as the consequences of choices, so that they can meaningfully choose how to respond. When the chosen response requires lawyering, the victim's attorney can engage the process on the victim's behalf.

1. Subpoenas

When confronted with a subpoena sought by the defense or the state for private victim information in the hands of third parties, victims theoretically have a choice before them—to oppose the subpoenas or to share information. Despite reforms, the records are typically sought through *ex parte* subpoenas and often no

reasonable fear of retaliation or harm that would jeopardize the well-being of the victim or the victim's family . . . and giving due consideration to the degree of cooperation of which the victim . . . is capable in light of the presence of these factors.

CAL GOV'T. CODE § 13956(b)(1) (2014). Whatever the wisdom of such language, it may be that such language does not comport with federal law.

judge reviews the issued subpoena before it is served. Moreover, the victim is rarely notified of the subpoena. Adding to the challenge, prosecutors may not defend these privacy interests of the victim.

The problem is illustrated in a motion by the U.S. Government, reprinted in pertinent part in *United States v. McClure*.³⁸

The Government points out that “there appears to be a trend started by defense counsel in child sex trafficking cases to seek, *ex parte*, the early return of Rule 17(c) subpoenas.” These subpoenas typically request records held by juvenile courts and Child Protective Services that pertain to certain government witnesses. The Government contends that these subpoenas often fail to meet the requirements of *Nixon* and, more generally, are unwarranted intrusions into the private and confidential files of minors. Furthermore, because defendants often obtain these subpoenas *ex parte*, the Government has been unable to oppose their issuance in an adversarial setting.”

The *McClure* court went on to observe that the problem has become so acute that the Federal Rules of Criminal Procedure were amended in 2008 to require

[A] subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.³⁹

Facing this landscape, a victim is unlikely to achieve privacy protection absent a victim lawyer.

2. Prior “Sexual Activity” and Rape Shield

In the context of rape shield, victims have a choice to object to disclosure and enter into evidence of behavior characterized as prior sexual activity or to consent to it. Making these choices meaningfully without private counsel is nearly impossible. As the federal Fourth Circuit Court of Appeals has opined:

No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim’s rights. Therefore, the congressional intent embodied in rule 412 will be frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to the rule.⁴⁰

³⁸ *United States v. McClure*, Nos. CR. 08-100 WBS, CR. 08-270 WBS, 2009 WL 937502, at *1 (E.D. Cal. Apr. 7, 2009) (citations omitted).

³⁹ *Id.* at *2 (citing FED. R. CRIM. P. 17(c)(3)). See Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 BYU L. REV. 835, 875–78 (2005) (proposing amendment); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 901–20 (further discussing amendment).

⁴⁰ *Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981). Rule 412 is 28 U.S.C. 412 (2012), the federal rape shield law.

Independent victim lawyers should be available to argue rape shield protections at the trial level, and on interlocutory appeal from an adverse ruling.⁴¹ In federal court, interlocutory appeal of trial court denial of rape shield protections can only be initiated by the sexual assault victim because the United States Attorney has no statutory authority to do so.⁴² Without a victim attorney, an adverse ruling will go unchallenged and victims' private matters will be disclosed without appellate review.

3. Privilege

The United States Supreme Court has provided a federal psychiatrist-patient privilege:

Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.⁴³

The Court further opined, "The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."⁴⁴

Crisis counselor privileges are provided in some state jurisdictions. These privileges have been the subject of litigation over their absolute or qualified nature, with varying results. An example is the Indiana privilege. The Indiana "privilege protects victims, victim advocates, and victim service providers from being 'compelled to give testimony, to produce records, or to disclose any information concerning confidential communications and confidential information to anyone or in any judicial, legislative, or administrative proceeding.'"⁴⁵ In jurisdictions where privileges are absolute, legal advocacy is needed to establish that the communication falls within the privilege; where the privilege is qualified, courts

⁴¹ Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U. L. REV. 291, passim (2005).

⁴² *Id.* at 296.

⁴³ *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

⁴⁴ *Id.* at 13.

⁴⁵ *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 799 (Ind. 2011).

are balancing interests, and legal advocacy is needed to ensure the balance weighs on the side of maintaining the privilege.⁴⁶

Finally, there is no obligation for the court or the parties to inform a victim of their privileges.⁴⁷ Thus, the victim needs a lawyer just to be made aware of the privileges.

B. Independent Lawyers to Defend Legislated Victims' Rights: The Example of the Federal Crime Victims' Rights Act.

The federal Crime Victims' Rights Act⁴⁸ [CVRA] provides rights to victims of federal crimes. It is based on the experiences of victims' rights in the states, and is now considered a model statute. Two thirds of the state constitutions granted victims' rights, and all states had such statutes, prior to the CVRA.⁴⁹ Most of the CVRA rights have been adopted into military criminal procedure through the National Defense Authorization Act [NDAA].⁵⁰ In the military process, SVCs represent victims in exercising and defending their NDAA rights.⁵¹ In the civilian criminal process, modern victims' rights may lawfully be defended by the victim's own attorney. However, most victims will not be able to afford an attorney, and there is a paucity of trained *pro bono* victim lawyers.⁵²

In the civilian process, public prosecutors may lawfully defend victims' rights where such representation is also in the public interest and where there is no conflict. However, the prosecution is under absolutely no obligation to invest its resources in asserting or seeking enforcement of a victim's rights and may be interested in restricting the scope of these rights. Even a cursory review of the

⁴⁶ Compare Advisory Op. to the House of Representatives, 469 A.2d 1161 (R.I. 1983) (opining that state constitution prevented crisis counselor absolute privilege) with *People v. Foggy*, 521 N.E.2d 86 (Ill. 1998) (upholding absolute crisis counselor privilege).

⁴⁷ *State v. Duncan*, 63 A. 225 (Vt. 1906); *State v. Lloyd*, 139 N.W. 514 (Wis. 1913).. See 81 AM. JUR. 2D WITNESSES § 112 (2015) ("There is ordinarily no rule of law that requires a court to apprise a witness of the right not to give self incrimination evidence, and error cannot be found on a failure to do so.").

⁴⁸ Crime Victims' Rights Act, 18 U.S.C. § 3771 (2012).

⁴⁹ Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 328 (1999) (setting out values in victims' rights statutes in states and federal jurisdictions).

⁵⁰ 159 CONG. REC. H3406 (2013).

⁵¹ 10 U.S.C. § 806b, art. 6b(a) (2012).

⁵² The National Crime Victim Law Institute (NCVLI—<http://www.ncvli.org>) receives requests from victims of all crimes all over the country seeking legal support in criminal cases and while it can connect some victims with such support, the majority continue unrepresented. While the information from NCVLI is anecdotal, requests received reveal that a significant portion of legal issues involve intrusions on victim privacy in sexual assault cases.

rights in litigation reveals how victims are best served by having independent counsel defend their rights.⁵³

Under the CVRA, victims have the “reasonable right to confer” with the federal prosecutor. However, victim attorneys and federal prosecutors are at odds over the scope of the right. Federal prosecutors take the position that the right does not attach until after a formal charge is brought.⁵⁴ Victim attorneys urge that the right is in effect before charging and that such attachment is critical to victim agency. This disagreement and its impact on survivors are perhaps best witnessed in *Does v. United States*.⁵⁵ In this case, the Justice Department took the position that it had no obligation to tell the young women and girls who were sexually assaulted by billionaire Jeffrey Epstein that it was reaching a secret “non-prosecution” agreement with Epstein as part of a lenient plea arrangement. The Justice Department remarkably argued that because they had not yet charged Epstein, the victims had no rights under the CVRA to be treated fairly or to be told that the possibility of charges would be bargained away as part of a deal with the sex offender (who pled to state charges) before formally filing charges against him. The federal district court hearing the matter curtly dismissed the Department’s argument, explaining that “the government’s interpretation ignores the additional language throughout the statute that clearly contemplates pre-charge protections”⁵⁶

The right to “reasonable, accurate and timely notice of any public court proceeding” afforded by the CVRA has also been a source of litigation between federal prosecutors and victim lawyers. In a criminal prosecution of British Petroleum for negligent homicide at an oil plant in Texas that killed 15 workers and injured more than 170 others, the Justice Department intentionally concealed a lenient plea agreement from the victims.⁵⁷ The Justice Department, in secrecy from the victims, went to the trial court to obtain an order that released the Department from complying with victims’ rights. In a case brought by victim lawyers, the federal court of appeals ruled that the Justice Department had acted illegally, admonishing that “the government should have fashioned a reasonable

⁵³ See Paul G. Cassell, *The Victims’ Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHOENIX L. REV. 301, 309–12 (2012) (discussing difficulties crime victims have had asserting CVRA rights).

⁵⁴ *In re Dean*, 527 F.3d 391, 394 (5th Cir. 2008) (holding, contrary to the Justice Department’s position, that victims acquire rights under the CVRA even before prosecution).

⁵⁵ See generally Paul G. Cassell et al., *Crime Victims’ Rights During Criminal Investigations? Apply the Crime Victims’ Rights Act Before Criminal Charges are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 67–69 (2014) (providing an overview of the case).

⁵⁶ *Does v. United States*, 817 F.Supp.2d 1337, 1343 (S.D. Fla. 2011). Two federal circuit courts have also rejected the Department’s position, either directly or indirectly. See *In re Dean*, 527 F.3d 391; *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (that rights attach before charging is an implicit prerequisite of the ruling).

⁵⁷ *In re Dean*, 527 F.3d 391.

way to inform the victims of the likelihood of criminal charges and to ascertain the victims' views on the possible details of a plea bargain."⁵⁸

The scope of the right to "be reasonably heard at any public proceeding" that involves "release, plea, sentencing, or any parole proceeding" also reveals the conflict.⁵⁹ For example, in *Kenna v. U.S. District Court for the Central District of California*,⁶⁰ a victim was defrauded out of money by two defendants. The victim exercised his right to give an impact statement at the first sentencing hearing. However, the district court refused to allow the victim to give an impact statement at the sentencing of the second defendant. The victim, through independent counsel, sought review and was successful in obtaining relief.⁶¹ The Justice Department took no position on the matter.⁶²

The right to "full and timely restitution as provided by law" provided in the CVRA is yet another instance that reveals the difference between victims with and without counsel. In just the narrow situation of child abuse imagery (a.k.a. child pornography), the government has failed to seek full restitution for the victims. To provide but one of many examples, in *United States v. Gamble*,⁶³ "Vicky" obtained a million dollar restitution award with the help of career prosecutors in the Eastern District of Tennessee. The award covered the lifetime psychiatric care required to help her overcome the effects of her victimization. On appeal, the Justice Department actually filed a brief with the Sixth Circuit asking that the restitution award be vacated and that Vicky receive far less money. Most remarkably, the Justice Department did not notify Vicky that it was changing its position from supporting her to attacking her. This issue was ultimately argued in a different case before the United States Supreme Court.⁶⁴ In that subsequent case, the Justice Department and the defendant each argued against the victims' full restitution.⁶⁵

Without lawyers for victims, the Justice Department remains free to disregard or degrade victims' rights with impunity.

⁵⁸ *Id.* at 394.

⁵⁹ 18 U.S.C. § 3371(a)(4) (2012). For an overview of issues surrounding a victim's right to be heard, see Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

⁶⁰ 435 F.3d 1011 (9th Cir. 2006).

⁶¹ *Id.* at 1013–16.

⁶² *Id.* at 1012 ("Assistant United States Attorney [name omitted] was present at oral argument on behalf of the United States and answered questions, but did not file a brief or take a position on the merits.").

⁶³ *United States v. Gamble*, 709 F.3d 541, 545 (6th Cir. 2013).

⁶⁴ *Paroline v. United States*, 134 S. Ct. 1710 (2014).

⁶⁵ Brief for the United States at 10–12, *Paroline*, 134 S. Ct. 1710 (2014) (No. 12–8561), 2013 WL 5425148; Brief for Petitioner at 14–16, *Paroline*, 134 S. Ct. 1710 (2014) (No. 12–8561), 2013 WL 4518605.

C. Victim Lawyers and Judicially Created Procedures

Legislated victims' rights, privacy laws, and evidentiary issues are not the only legal arenas in which victims need lawyers in the criminal process. Many procedures were crafted in an era when the courts did not consider victims' interests. In the present era of legislated victims' rights, judges have in some contexts considered the values of victim dignity and victim privacy in formulating criminal procedures. Victim lawyers are needed to represent victims seeking reconsideration of judicially created procedures. Victim lawyers expand existing procedural choices to incorporate the (now legitimate) victims' interests, thus creating opportunity for authentic victim agency.

In *Payne v. Tennessee*, the Supreme Court recognized crime victims as unique, individual human beings whose particularized harm could be the subject of victim impact statements.⁶⁶ 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.'"⁶⁷

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."⁶⁸ The Court's language is an express recognition that the State's interest in timely punishment is not exclusive, but is shared by victims.

Some examples of lower federal and state court judicial consideration of victims' interests include the victims' relationship to dismissal motions, plea procedures, abatement ab initio, and re-affirmation of victim procedures at common law.⁶⁹ In *United States v. Heaton*, a federal district court judge created a procedure that requires the prosecutor to routinely inform the district court of individual victim's information and views on motions to dismiss.⁷⁰

In Utah, victims have the right to address the court at the time of the plea.⁷¹ In *Casey*, the victim came to the plea hearing and wished to speak in opposition to the plea.⁷² The prosecutor was aware of this, yet never informed the trial court of the victim's objection to the plea bargain.⁷³ The trial judge accepted the plea.

⁶⁶ *Payne v. Tennessee*, 501 U.S. 808, 823 (1991) ("[Victim impact evidence] is designed to show instead *each* victim's 'uniqueness as an individual human being'").

⁶⁷ *Id.* at 827 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)).

⁶⁸ *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (O'Connor, J., concurring) (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993))(citation omitted).

⁶⁹ These examples are explored in detail in Douglas E. Beloof, *Weighing Crime Victims' Interest in Judicially Crafted Criminal Procedure*, 56 CATH. L. REV. 1135 (2007).

⁷⁰ *United States v. Heaton*, 458 F. Supp. 2d 1271, 1272–73 (D. Utah 2006).

⁷¹ *State v. Casey*, 44 P.3d 756, 762 (Utah 2002).

⁷² *Id.* at 757–58.

⁷³ *Id.* at 758.

Having acquired counsel, 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."⁷⁴ The court concluded that "[the victim] properly submitted his request to be heard by the court at defendant's change of plea hearing to the prosecutor."⁷⁵ This procedure, of notice to the court through the prosecutor, was crafted to facilitate the exercise of rights, despite the absence of an express constitutional or statutory directive.

Abatement *ab initio* 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 (s)he had never been convicted of a crime.⁷⁶ Thus, abatement *ab initio* denies the importance of victim vindication and removes from victims the opportunity for financial compensation. 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. Modern victims' rights statutes do not expressly address abatement. Nevertheless, courts are increasingly relying on the relevance of victims' rights and interests, that a victim's specific right to restitution outweighed abatement interest, or both to eliminate abatement *ab initio*.⁷⁷

Courts have relied on victims' interests to overrule earlier common law decisions. For example, in 2003, the Illinois Supreme Court overruled a 1971 opinion that upheld a trial court's jurisdiction to order a physical examination of a sexual assault victim. Finding that a compelling justification for overturning precedent had been met, the court opined that physical "examinations can be intolerably harassing and intimidating and can cause further harm to the victim."⁷⁸

These are a few of the examples demonstrating the potential for victims' independent lawyers to establish greater legal options for sexual assault victims beyond the literal language of existing statutory law reforms.⁷⁹ Authentic agency

⁷⁴ *Id.* at 763.

⁷⁵ *Id.* at 765.

⁷⁶ *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)).

⁷⁷ *Belooof*, *supra* note 69 at 1158–64 (noting the trend and collecting abatement *ab initio* cases).

⁷⁸ *People v. Lopez*, 800 N.E.2d 1211, 1220–21 (Ill. 2003).

⁷⁹ In many jurisdictions, it is in the trial court's discretion to order the sexual assault victim to submit to a physical or psychological examination by defense experts or to permit intrusion into the victim's home. *State ex rel Beach v. Norblad*, 781 P.2d 349 (Or. 1989) (victim and her independent counsel successfully brought mandamus reversing trial court order commanding her to allow entry by accused murderer's investigators); *contra Henshaw v. Virginia*, 451 S.E.2d 415 (Va. App. 1994) (holding the opposite on a mere showing of relevance and materiality); *State v. Gabrielson*, 464 N.W.2d 434 (Iowa 1990) (litigation required to establish that a court has no authority to order psychological exam of victim); *contra In re Michael H.*, 602 S.E.2d 729 (S.C. 2004) (concluding that

is not merely choosing amongst options created by others, but also being the architect of options from which to choose. Without independent lawyers, such agency is beyond the reach of sexual assault victims.

VI. ONLY INDEPENDENT LAWYERS CAN CONSISTENTLY OR ADEQUATELY REPRESENT VICTIMS' INTERESTS

A motivating rationale behind the military justice reforms that have increased opportunity for sexual assault victim agency is that the victims are soldiers and, therefore, it is illogical and unacceptable that as soldiers, they could die in service to their country, but as victims, they should be denied services. Denial of services has come to be recognized as both impairing military readiness⁸⁰ and resulting in loss of soldiers through separation caused by dissatisfaction with the military or by post-traumatic stress caused by assaults. In short, the military has recognized the need to take steps to alleviate the harms resulting from the inability of sexual assault survivors to make informed choices about whether, when, and how their cases proceed. The established procedures, including Special Victim Counsel for sexual assault victims have been established in an effort to “ensur[e] that sexual assault victims are treated with . . . dignity and respect.”⁸¹

Civilian processes, dominated by a drive to increase reporting over-valuing dignity, fairness, and respect for privacy, continue to re-victimize sexual assault victims. The result is that sexual assault victims continue to find themselves outside the hail of the system—outside its interpellation. The civilian processes must address this exclusion of survivors if it is to progress.

For this to happen, sexual assault victims must have independent lawyers representing them in exercising and enforcing their legal options. The alternative, leaving protection of victims' rights to the parties, gives only the parties control over the existence and the scope of victims' rights and utterly eviscerates victim agency. The parties will necessarily be putting forward their own interpretation of rights rather than the victims'; they may not be interested in defending victims' rights or may seek to deny the rights their full potential. For example, without victim counsel, if the parties agree that review of the victims' rights violations do not concern them, the violation will stand, regardless of whether appellate courts would concur with the victims' position. There are circumstances in which the State and defendants are both adverse to victims' interests, like a victim's right to

trial judges have discretion to order psychological examinations upon showing of compelling need); *People v. Lopez*, 800 N.E.2d 1211 (Ill. 2003) (holding a trial court cannot order the physical examination of a complaining witness); *contra* *People v. Chard*, 808 P.2d 351 (Colo. 1991) (holding the opposite on showing of compelling need).

⁸⁰ *Mission & History*, U.S. DEP'T. OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFFICE, <http://www.sapr.mil/index.php/about/mission-and-history> (last visited June 20, 2015).

⁸¹ SAPR 6495.02, *supra* note 4, at 29.

speak in opposition to plea agreements. Just as importantly, the prosecution's counsel to victims is never free of the prosecution's primary duty to the State.

Finally, prosecutorial control of victims' rights provides fertile ground for ethical conflicts of interest.⁸² It is a mistake to define the State and victims as non-adversaries simply because both are harmed by the criminal act and both may share an interest in punishment or other disposition. When the public interest and victims' rights coincide, perhaps little conflict exists. However, when there is conflict, the prosecution cannot reasonably be expected to defend victims' rights. When in conflict, the prosecutor cannot serve two masters, and the victim necessarily becomes the odd person out.⁸³ Whether there is conflict or not, the State is under no legal obligation to defend victims' rights in the way the victim desires and can decline to defend the rights simply out of indifference.

It is apparent that independent lawyers for sexual assault victims are needed to ensure victims can knowingly and voluntarily choose whether and when to engage with the criminal justice system and, having engaged, whether to exercise or waive any specific right. Critically, prosecutors cannot substitute for this vital role because they cannot consistently and adequately represent victims' interests, nor can they facilitate agency. As the non-exclusive examples set out above reveal, there is a plethora of legal issues that victims grapple with that require independent counsel.

As the federal Fourth Circuit Court of Appeals opined in *Doe*, granting a rape victim interlocutory appeal from an adverse rape shield ruling, "No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights."⁸⁴ Just so.

VII. MODIFYING THE CRIMINAL PROCESS IN CIVILIAN SEXUAL ASSAULT CASES

Sexual assault victims face a myriad of legal crossroads. At each crossroad, legal services are critically needed. The civilian system should embrace structural reforms similar to those of the military, reforms that recognize victim dignity and privacy and that open space for authentic victim agency. To achieve this requires independent attorneys.

One option for modifying the civilian process is mimicking the military process. This would create a two-option reporting process where law enforcement

⁸² See Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutors Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005); Walder A. Matthews, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998).

⁸³ In some jurisdictions, legislation or court rules reflect the potential for conflict. *E.g.*, 18 U.S.C. § 3771(c)(2) ("The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the [victim's] rights . . ."); ARIZ. R. CRIM. P. 39(c)(3) ("In any event of any conflict of interest . . . the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency. ").

⁸⁴ *Doe v. United States*, 666 F.2d. 43, 46 (4th Cir. 1981).

was excluded from restricted reporting. However, providing a somewhat different process might fit the civilian system better and increase opportunity for authentic victim agency. Victims could choose *not* to prosecute. In other words, a sexual assault victim's choices could include formal authority equal to the state's authority to refuse prosecution.

Eliminating the wall between the two military options of restricted and unrestricted reporting would be much more efficient for the civilian state and more protective of the non-prosecuting victim. Providing the victim formal authority not to prosecute eliminates risk of the random and coercive undermining of victim agency that exists in the military system. This is because should military law enforcement uncover the sexual assault from an independent source, victim control over the non-prosecution would be revealed to be something less than full agency. Such a random potential end may chill victims' willingness to engage with the system, thereby curtailing the actual choice of whether to engage and in fact undermining authentic agency.

There are efficiency benefits to granting the victim formal control over non-prosecution. Law enforcement could continue to take victim statements and gather evidence. Prosecution-based rape responders (e.g. victim advocates in district attorneys' offices) could continue to perform their duties. On the other hand, mimicking the military alternative to provide for two completely separated reporting options would require substantial structural change to the civilian process.

Perhaps there will be resistance to providing sexual assault victims a veto over prosecution. To be sure, over the course of American legal history, the State has retained the exclusive formal authority to end criminal prosecution.⁸⁵ However, in sexual assault cases, perpetuating such state authority places form over substance. Police and prosecutors routinely grant the sexual assault victim *de facto* "power" to informally end prosecution. Faced with non-cooperation, or merely the victim's desire not to proceed, the state routinely ends the matter.⁸⁶

Victim dignity and respect for victim privacy are established values in the federal and state jurisdictions. Formal sexual assault victim control over non-prosecution positively impacts victims' dignity and respects victim privacy—both in and out of the criminal process. The victim, provided an independent lawyer giving independent advice, can make informed choices about whether and how to proceed in the choice to initiate prosecution, and if initiated, make informed choices at relevant procedural moments, including termination moments. That is

⁸⁵ See Annotation, *Power of Attorney General to Settle or Compromise or Dismiss Suit or Proceeding*, 81 A.L.R. 124 § III (1932) (collecting cases). In modern times, courts provide a modest check on this dismissal authority. FED. R. CRIM. P. 48(a); *United States v. Cowan*, 524 F.2d 504 (1975). See generally BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* 399–469 (3d ed. 2010) (discussing victims' rights in pre-trial dispositions).

⁸⁶ While at times this may be in deference to a victim's actual choice and agency, at other times it is a coercive tactic best addressed by a victim's independent lawyer.

authentic agency and is perhaps the best that can be done to ensure survivors are part of the system's hail.

VIII. CONCLUSION

Criminal justice establishes, maintains, and transforms community.⁸⁷ Through its processes and priorities, the current civilian criminal justice system maintains a community and culture, which abides re-victimization of sexual assault victims. It does this by valuing the reporting of one's victimization to law enforcement over victim dignity and privacy, thus prioritizing state power over authentic victim agency. The result is that sexual assault survivors are excluded from the system's interpretive hail. Facing this reality, one cannot fault survivors for not wanting to disclose their victimization, let alone formally report it to those with power.

A key part of transforming our country's response to sexual violence is changing our criminal justice system. Key among these changes must be elevating the values of victim dignity, privacy, and—most important—agency. Critically, for this change to succeed, victim agency must be authentic, meaning it cannot be merely choosing among options created by others. Instead, sexual assault victims must become the architects of the very options from which they choose. Victims must be able to construct a wide array of options, including non-prosecution.

As experience in the military justice system amply demonstrates, independent lawyers for sexual assault victims are integral to this vision. Without legal counsel for victims, the justice system will never be able to respond effectively to victims' powerful concerns. Just as the military has begun providing legal counsel for victims in its justice process, our country's civilian processes must also begin to provide legal counsel to sexual assault victims. Such a fundamental step is the only way to comprehensively address sexual violence.

⁸⁷ See White, *supra* note 18, at 684–90.