On the Importance of Listening to Crime Victims . . . Merciful and Otherwise

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Introduction

What role should mercy play in the criminal justice system? While several of this symposium's articles argue for expanding mercy's role, I write to raise a cautionary note. Expanding mercy could potentially conflict with another important feature of contemporary criminal justice: the expanding role of crime victims. Because considerations of mercy focus exclusively on the offender, greater attention to mercy necessarily means less attention to victims. This change in focus would be at odds with a broadly advancing crime victims' movement in this country and, indeed, in many countries around the world.

This cautionary point does not assume that all crime victims want a more punitive criminal justice system. To the contrary, many crime victims may argue for mercy. But allowing victims' voices to carry weight only when they advance merciful arguments is inconsistent with the underlying rationale for victim involvement: that victims should have agency to advance their own claims in criminal justice processes.

This Essay proceeds in three parts. First, I set out an undeniable but often-overlooked feature of modern criminal justice: that crime victims increasingly possess the right to be heard in criminal justice proceedings, notably by providing victim impact statements (VISs) at sentencings and other similar hearings relating to sentence length.

Second, mercy's myopic focus on criminal defendants is in tension with the crime victims' rights movement's success in injecting the victims' voices into criminal justice processes. Because mercy essentially departs from conventional criminal justice considerations by exclusively focusing on defendants, injecting mercy into criminal justice processes may essentially drown out victims' voices. This marginalization of victims is contrary to the public's general conceptions of a fair criminal justice system.

Some commentators have tried to finesse the problem of excluding victims' voices by arguing for giving weight to the victims' views—but only where those views track merciful outcomes. This approach, too, is

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inconsistent with common conceptions of justice. If the victim's right to be heard is going to be meaningful, it must be allowed to operate in various directions—both merciful and otherwise. Any other approach would deny crime victims the agency that victims' rights are designed to protect.

Third and finally, it is important to understand that hearing victims' voices is not a result-driven position. Contrary to some predictions, crime victims' voices will not always argue for harsher punishments but may often defend more nuanced, and even merciful, criminal justice outcomes. The conventional wisdom that victims always seek the maximum penalty runs into empirical headwinds, as the developing evidence paints a more textured picture about crime victims' views. Thus, giving victims a voice in criminal justice processes will not necessarily exclude merciful outcomes but instead will support those outcomes when a case-specific reason supports it.

I. Contemporary Criminal Justice Processes Recognize an Expanding Role for Crime Victims' Voices

Over the last several decades, crime victims' rights have expanded significantly in the American criminal justice system (and elsewhere). This expansion may be one of the most underappreciated changes in the architecture of our contemporary criminal justice system.

While a complete history of the American crime victims' rights movement remains to be written, for purposes of this Essay, the contours can be quickly sketched.[1] At the time of the Founding, crime victims often played a prominent role in criminal prosecutions under a system of private prosecution. But over time with a transition to public prosecutor's offices, crime victims gradually became the forgotten person in criminal proceedings.[2]

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1. For an illustration of this sketch, see Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing*¸ 107 MARQUETTE L. REV. (forthcoming 2024) (manuscript at 6) (on file with author); Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 102–05 (2018); Paul G. Cassell, *Introduction: The Maturing Victims' Rights Movement*, 13 OHIO ST. J. CRIM. L. 1, 2–3 (2015); Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 29192 (1999); Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521–32 (1985).

2. *See, e.g.*, Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 175–77 (2022) (outlining the transformation of crime and punishment in the U.S. from a private harm to be rectified primarily by the victim to a public harm to be remedied by the state); William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 650 (1976) (explaining how redressing a victim's harm is no longer central to the criminal justice process).

A watershed moment for crime victims occurred in 1982, when the President's Task Force of Victims of Crime called for significantly expanding the role of crime victims.[3] The Task Force concluded that the criminal justice system had "lost the balance that has been the cornerstone of its wisdom."[4] The Task Force recommended numerous reforms to improve the treatment of crime victims—even including an amendment to the United States Constitution that would have protected crime victims' rights "to be present and to be heard at all critical stages of judicial proceedings."[5]

Recognizing the difficulty in amending the United States Constitution, crime victims' rights advocates turned their efforts toward enacting state victims' rights amendments.[6] In the decades since, victims' rights advocates had considerable success with this "states first" strategy.[7] The enactment of these state constitutional amendments began with California in 1982,[8] followed by Rhode Island in 1986.[9] Ultimately about thirty-five states have adopted crime victims' rights amendments in their state constitutions.[10] In addition, all states have enacted significant statutory protections for crime victims' rights.[11] The federal criminal justice system, too, has carved out an important role for crime victims, with Congress enacting the comprehensive Crime Victims' Rights Act in 2004.[12]

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3. *See generally* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982) (calling on lawmakers to expand the role of crime victims in the administration of justice); *see* Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV., no. 1, 1984, at 7–8 (noting that the President's Task Force announced at least 60 recommendations to empower crime victims).

4. PRESIDENT'S TASK FORCE, *supra* note 3, at 16.

5. *Id.* at 114. For a review of more recent formulations of the amendment, see Paul G. Cassell, *The Victims' Rights Amendment: A Sympathetic, Clause-by-Clause Analysis*, 5 PHX. L. REV. 301 (2012).

6. Cassell & Garvin, *supra* note 1, at 104.

7. *See* S. REP. NO. 108-191 at 3 (2003) (noting 33 states passed victims' rights amendments to their state constitution).

8. CAL. CONST. art. I, § 28.

9. R.I. CONST. art. I, § 23; Cassell & Garvin, *supra* note 1, at 104.

10. Cassell & Garvin, *supra* note 1, at 105; *see generally* 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 (1994) (discussing Utah's amendment).

11. *See generally* PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES (3d ed. 2016) (discussing state legislation regarding crime victim rights and remedies).

12. 18 U.S.C. § 3771; *see* Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005) (discussing the history and impact of the CVRA); *see also* Paul G. Cassell & Michael Ray Morris, Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, AM. J. CRIM. L. (forthcoming 2024) (manuscript at 15–16) (on file with authors) (discussing federal victims' rights enactments).

While the details of these crime victims' rights enactments vary from jurisdiction to jurisdiction, common themes emerge. Many of the enactments give crime victims the right to be heard at various proceedings, often including bail hearings, plea bargain hearings, and—of particular importance when considering mercy—sentencing.[13] The President's Task Force of Victims of Crime urged that "[v]ictims, no less than defendants, are entitled to have their views considered" during sentencing.[14] The Task Force recommended using victim impact statements that would contain information "concerning all financial, social, psychological, and medical effects [of the crime] on the crime victim."[15] Since then, VISs have become a fixture in America's criminal justice system. Today, virtually all fifty states and the federal system allow victims to provide a VIS at sentencing.[16] And the U.S. Supreme Court has upheld the constitutionality of such statements, even in capital sentencing proceedings.[17]

Just as the victims' role has expanded in sentencing proceedings, it has expanded in related proceedings after sentencing. In particular, victims' rights have played an important role in parole proceedings. Parole proceedings end up effectively determining a prison sentence's length because parole effectively ends the sentence. Historically parole proceedings were often conducted in ways that excluded victims. Before the President's Task Force's recommendations, only six states had "open" parole hearings.[18] In its recommendations, the Task Force proposed that parole be abolished, noting that "[v]ictims consistently express anger and frustration with the sentencing and parole systems."[19] The Task Force proposed a system of

13. *E.g.*, 18 U.S.C. § 3771(a)(4); CAL. CONST. art. I, § 28(b)(8); FLA. CONST. art. I, § 16(b)(6)(b). *See generally* DOUGLAS E. BELOOF, PAUL G. CASSELL, MEG GARVIN & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE 599–600 (4th ed. 2018) (describing a victim impact statement and giving examples of legislation that permit such statements); Cassell & Garvin, *supra* note 1, at 114–16 ("Many states now recognize that crime victims deserve the right to be heard at numerous points in the criminal justice process, thus allowing victims to participate directly in the administration of criminal justice.").

14. PRESIDENT'S TASK FORCE, *supra* note 3, at 76.

15. *Id.* at 33.

16. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 615 (2009) (discussing the advocacy efforts for federal constitutional protection of victim's rights); TOBOLOWSKY ET AL., *supra* note 11, at 102. *See, e.g.*, CAL. CONST., art. I, § 28(b)(8) (stating victims have the right "[t]o be heard upon request, at any proceeding . . . involving a . . . sentencing"); FLA. CONST., art. I, § 16(b)(6)(b) (stating victims have the right "to be heard in any public proceeding involving . . . sentencing"); WIS. CONST. art. I, § 9m(2)(i) (stating victims have the right "to be heard in any proceeding during which a right of the victim is implicated, including . . . sentencing").

17. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

18. TOBOLOWSKY ET AL., *supra* note 11, at 129.

19. PRESIDENT'S TASK FORCE, *supra* note 3, at 29.

"truth in sentencing," where the sentence imposed on an offender would essentially be the sentence the offender served.[20] Congress heeded that recommendation and, two years later in 1984, effectively abolished parole in the federal system.[21] In the states, most parole systems have been reformed to give crime victims an expanded voice. According to one tabulation, "virtually every state now grants eligible crime victims a right to be heard regarding parole decision-making—in writing, orally, or both."[22]

A final phase of the criminal justice process connected to sentencing is executive clemency—such as a Presidential pardon or commutation of a federal sentence. As others have noted in this symposium and elsewhere, clemency is relatively infrequently granted.[23] And the procedures associated with clemency vary from state to state.[24] As a result, the crime victims' role in clemency proceedings is somewhat less defined.[25] But even so, it appears that the crime victim's formal role in clemency proceedings is expanding.

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20. *Id.* at 30.

21. 18 U.S.C. §§ 3583, 3624 (2018).

22. TOBOLOWSKY ET AL., *supra* note 11, at 131. *See, e.g.*, CAL. CONST., art. I, § 28(b)(8) (providing victims have the right "[t]o be heard upon request, at any proceeding . . . involving a . . . post-conviction release decision"); FLA. CONST., art. I, § 16(b)(6)(b) (providing victims have the right to be heard "in any public proceeding involving . . . parole"); WIS. CONST., art. I, § 9m(2)(i) (providing victims have the right "to be heard in any proceeding during which a right of victim is implicated, including . . . parole").

23. *See, e.g.*, Adam M. Gershowitz, *Mercy for the Masses: A Default Rule for Automatically Triggered Commutations*, 102 TEXAS L. REV. 1431, 1431 (2024) ("Clemency is rare in the United States."); *see* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT. RPTR. 153, 153 (2009) ("Executive clemency is no longer a robust feature of American government."). For the purposes of this article, I focus on non-capital cases, which are the vast majority of criminal cases. *See* Cassell & Erez, *supra* note 1, at 42 n.172 (explaining the relatively low number of capital cases compared to other cases in the criminal justice system); *cf.* Carol S. Steiker & Jordan M. Steiker, *Capital Clemency in the Age of Constitutional Regulation: Reversing the Unwarranted Decline*, 102 TEXAS L. REV. 1449, 1450 (2024) (discussing the importance of clemency in capital cases). Because of this focus on non-capital proceedings, no need exists to discuss the anomalous fact that, under current jurisprudence, crime victims' families are forbidden to give their opinions about the appropriate sentence in capital cases but are generally free to do so in non-capital cases. *See* Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (finding that, at capital sentencing, admitting a victim's family members' characterizations and opinions about the appropriate sentence violates the Eighth Amendment); *cf.* Commonwealth v. McGonagle, 88 N.E.3d 1128, 1131 (Mass. 2018) (providing that *Bosse*'s limitation on offering an opinion about sentencing applies only to capital cases). *But cf.* Elijah Lawrence, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J.L. & FAM. STUD. 511, 512 (2010) (criticizing exclusion of victim family opinion evidence in capital cases).

24. *See* Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 MICH. J.L. REF. 817, 826–27 (2016) (comparing the use of executive clemency power between U.S. states).

25. *See* Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89, 137 (2015) (comparing the use of executive clemency power between U.S. states).

Professors Daniel Pascoe and Marie Manikis report that the clear trend is toward an expanded victim role in clemency proceedings; the federal system and at least sixteen states have afforded crime victims a voice in the clemency process via either constitutional provisions or legislation.[26]

It is important to note that the expansion of crime victims' rights is not American exceptionalism.[27] Crime victims' rights have expanded significantly in other countries as well.[28] Today, many criminal justice systems allow crime victims to be heard as part of criminal processes, and particularly sentencing processes.[29] In clemency procedures, too, the victims' role in other countries is expanding.[30] Clearly victims' rights resonate with conceptions of justice that exist not only in this country but in many other

26. Daniel Pascoe & Marie Manikis, *Making Sense of the Victim's Role in Clemency Decision Making*, 26 INT'L REV. OF VICTIMOLOGY 3, 4 (2020); *see, e.g.*, 28 C.F.R. § 1.6 (requiring victim notification during clemency process); Novak, *supra* note 24; *see also* Helen Ginger Berrigan, *Executive Clemency, First-Offender Pardons: Automatic Restoration of Rights*, 62 LA. L. REV. 49, 55 (2001) (discussing Louisiana requirement that the Board of Pardons must give notice to the district attorney and the sheriff in the parish where the applicant was convicted and to the injured victim or next-of-kin); *cf.* Deborah A. Devaney, *A Voice for Victims: What Prosecutors Can Add to the Clemency Process*, 13 FED. SENT'G RPTR. 163 (2001) (arguing that prosecutors should receive notice of federal clemency petitions so that they can provide input from victims and their families).

27. *See* Cassell & Erez, *supra* note 1, manuscript at 74 (noting that "VISs are not some kind of American exceptionalism").

28. *See, e.g.*, VERÒNICA MICHEL, PROSECUTORIAL ACCOUNTABILITY AND VICTIMS' RIGHTS IN LATIN AMERICA (2018) (discussing crime victims' rights in Latin America); Tatsuya Ota, *The Development of Victim Support and Victim Rights in Asia*, *in* SUPPORT FOR VICTIMS OF CRIME IN ASIA 113, 113 (Wing-Cheong Chan ed. 2007) (discussing crime victims' rights in Asia); S. van der Aa et al., *Project Victims in Europe: Implementation of the EU Framework Decision on the Standing of Victims in Criminal Proceedings in the Member States of the European Union* (2009) (discussing crime victims' rights in European Union member states). *See generally* TYRONE KIRCHENGAST, VICTIMOLOGY AND VICTIM RIGHTS: INTERNATIONAL COMPARATIVE PERSPECTIVES (2017) (discussing the expansion of crime victims' rights around the world).

29. *See* Cassell & Erez, *supra* note 1, manuscript at 74 (collecting jurisdictions that give crime victims the functional equivalent of the right to deliver a victim impact statement); Maarten Kunst et al., *The Impact of Victim Impact Statements on Legal Decisions in Criminal Proceedings: A Systematic Review of the Literature Across Jurisdictions and Decision Types*, 56 AGGRESSION & VIOLENT BEHAV., https://doi.org/10.1016/j.avb.2020.101512 [https://perma.cc/A7SZ-RYLY] (2021) (collecting examples of victim impact statements across jurisdictions).

30. *See* Pascoe & Manikis, *supra* note 26, at 4 (noting that "more nation states and sub-national jurisdictions are considering the views of victims in executive clemency decision making").

parts of the world.[31] And it seems likely that victims' involvement in criminal justice processes will only continue to expand in the future.[32]

II. Expanding Attention to Mercy Minimizes Crime Victims' Voices

A. *Understanding "Mercy"*

Against this backdrop of an expanding role for crime victims in criminal processes, how should we understand mercy's role? In answering that question, it will be helpful to begin by considering the term "mercy." Of course, "mercy" is a term that can be applied broadly to almost any aspect of the criminal justice system.[33] For purposes of this Essay, focusing on crime victims' rights, the salient understanding is criminal justice processes following the filing of formal criminal charges.[34] And I will also focus on criminal sentencing hearings (and similar follow-on proceedings, such as parole hearings or clemency decisions). Sentencing hearings present most

31. *See* JONATHAN DOAK, VICTIMS' RIGHTS, HUMAN RIGHTS, AND CRIMINAL JUSTICE: RECONCEIVING THE ROLE OF THIRD PARTIES 243 (2008) (explaining that interest in victims' rights arises from a "[g]enuine and deeply rooted realisation that victims have a legitimate interest in the way that criminal justice is administrated, in terms of substance, processes and outcomes"). *See also* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES ix (Edna Erez et al. eds. 2011) ("What began as an American exercise [regarding therapeutic jurisprudence] soon crossed international boundaries, especially in English-speaking countries—such as Canada, Australia, and New Zealand—and then beyond."); ROBYN HOLDER, JUST INTERESTS: VICTIMS, CITIZENS AND THE POTENTIAL FOR JUSTICE 3 (2018) (discussing how multiple conceptions of justice are converging on the importance of victims' rights).

32. *See* David Gray, *Mercy in Context*, 102 TEXAS L. REV. 1615, 1631 (2024) ("[W]e may expect to see a more prominent role for victims in decisions about whether to prosecute and what charges to bring . . . .").

33. *See* Avlana K. Eisenberg, *The Case for Mercy in Policing and Corrections*, 102 TEXAS L. REV. 1409, 1411–12 (2024) (discussing mercy in policing and corrections); Rachael E. Barkow, *When Mercy Discriminates*, 102 TEXAS L. REV. 1365, 1367–69 (2024) (discussing mercy in the context of law enforcement, prosecution, and jury decision-making); Gray, *supra* note 32, at 1618 (2024) (defining "mercy" broadly); *see also* Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334 n.6 (2008) (acknowledging that there are "other actors who have the power to deliver mercy in the criminal justice system").

34. The extent to which crime victims' rights enactments apply before the formal filing of criminal charges remains disputed. *See, e.g.*, Paul G. Cassell et al., *Circumventing the Crime Victims' Rights Act: A Critical Analysis of the Eleventh Circuit's Decision Upholding Jeffrey Epstein's Secret Non-Prosecution Agreement*, 2021 MICH. ST. L. REV. 211, 211–12 (arguing that the Eleventh Circuit en banc "should recognize that the [Crime Victims' Rights Act] extends rights to crime victims before charges are filed"); Paul G. Cassell et al., *Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 60 (2014) (arguing that "crime victims have rights during criminal investigations").

starkly the potential conflicts between hearing from crime victims and giving sway to mercy in decision-making involving criminal punishment.[35]

In the context of sentencing-type determinations, as I understand the term, a "merciful" sentence is not necessarily a short sentence, but rather a *shorter* sentence than is normally rendered on such facts. Thus, "mercy" is conventionally defined as extending "[c]ompassionate treatment, as of criminal offenders . . . ." (as defined by *Black's Law Dictionary*[36]) or suggesting "a high degree of pitying forbearance that enables one to abstain from judging harshly, from exacting punishment, or from seeking vengeance (as defined by *Garner's Dictionary of Legal Usage*[37]). It is impossible to determine what is "compassionate" treatment without having some sense of conventional treatment; similarly, there can be no "forbearance" unless there is something expected that is being withheld. So even a lengthy prison sentence can be a merciful sentence if the alternative is a death sentence.[38]

Mercy thus "involves a departure from some existing and likely burdensome course of events."[39] This means mercy tends to operate in individual cases to produce a shorter-than-expected or shorter-than-normal sentence.[40] And, as generally understood, mercy's concern is the human who

35. Other scholars have also identified sentencing as the key application of mercy. *See, e.g.*, Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 L. & PHIL. 109, 117 (noting that "mercy is . . . for the convicted"); Nathan Brett, *Mercy and Criminal Justice: A Plea for Mercy*, 5 CANADIAN J. L. & JURIS. 81, 91–92 (1992) (noting that "mercy is . . . parasitic upon a judgment of culpability"). *But cf.* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 247 (1995) (arguing for reallocating victims' power in criminal cases from sentencing to plea bargaining).

36. *Mercy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

37. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 164 (3d ed. 2011).

38. *See Mercy*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "mercy" as "[c]ompassionate treatment," especially "imprisonment, rather than death, imposed as punishment for capital murder").

39. Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 94 (1998).

40. I also distinguish "mercy" from "mitigation." Criminal cases may often involve situations where the defendant has an argument for less-than-expected punishment, for reasons involving conventional retributive or utilitarian sentencing considerations. Professors Carissa Byrne Hessick and Douglas A. Berman have done an admirable job in setting out the kinds of factors that might justify mitigating punishment, such as (1) whether the defendant had an imperfect defense, (2) the role played by others in the defendant's crime, (3) the victim's compensation, (4) the seriousness of the defendant's criminal conduct, (5) the defendant's culpability, (6) the defendant's likelihood of recidivism, (7) the defendant's acceptance of responsibility or sincere remorse, and (8) whether the punishment will result in hardship to a defendant or her family. *See* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 BOS. U.L. REV. 161, 188–202 (2016) (discussing the eight factors listed above).

will receive punishment.[41] Mercy is, therefore, akin to equity. It is a deviation from the strict application of the law, resulting in a consideration of a defendant's individual circumstances "when the law, as it stands, is unable to take those circumstances into account."[42]

B. A Focus on Mercy Often Excludes Crime Victims

Mercy's role immediately stands in tension with the expanding conception of crime victims' rights that is part of the American (and other) criminal justice systems. This is not because crime victims always want harsh outcomes. To the contrary, as explained below,[43] crime victims have varying views on cases and their outcomes—and are not necessarily opposed to (for example) shorter sentences. Instead, this tension exists because mercy typically places the focus exclusively on a defendant in criminal justice processes, to the exclusion of considering other interests—including crime victims' interests.

The difficulty with giving mercy great sway over criminal justice outcomes is that it necessarily operates in one direction—e.g., shorter prison sentences and the like. Put simply, mercy is "organized around granting leniency despite an offender's culpability."[44] It is precisely because crime victims have multifaceted views on criminal case outcomes that expanding mercy's role decreases victims' role. In other words, mercy will necessarily tend to minimize other considerations in the process, including victims' voices.

A good illustration of how victims' voices could be crowded out by expanding mercy in clemency proceedings comes from a thoughtful contribution to this symposium, by Professor Adam Gershowitz.[45] Gershowitz points out that for "ordinary" criminal cases, the prospects for a grant of clemency are close to zero.[46] He then identifies the reason for the low rate of clemency grants as individualized decision-making. He explains:

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41. *See* Kiel Brennan-Marquez & Stephen E. Henderson, *Role-Reversibility, AI, and Equitable Justice—Or: Why Mercy Cannot Be Automated*, 114 J. CRIM. L. & CRIMINOLOGY 1, 19 (2023) (explaining that "society metes out punishments best suited to each individual").

42. Brien, *supra* note 39, at 90.

43. *See infra* notes 118–145 and accompanying text (positing that victim input in sentencing proceedings improves the quality of justice by providing criminal justice decisionmakers with more information).

44. Gray, *supra* note 32, at 1618.

45. *See* Gershowitz, *supra* note 23, at 1431–35 (proposing variations of a "default rule" for automatically commuting the sentences of "ordinary" felony offenders, who are rarely the recipients of clemency).

46. *Id.* at 1434–35.

"Casefile reviews, paperwork, *consultations with victims*, not to mention objections from the prosecutors who handled the cases all stand in the way of clemency being awarded under an individualized assessment regime."[47] Having identified the problem as individualized decision-making, Gershowitz then argues for a "default rule" in which clemency (of perhaps 10% of a sentence length) would automatically be granted, unless some unusual circumstance existed.[48]

Of course, Professor Gershowitz's proposal has the advantage of administrative efficiency. Replacing a system where victims are involved with one where they are excluded will, no doubt, produce more expeditious results. But the price to be paid is diminished public confidence that the system is ultimately producing the right result. As noted above, the public has expansively endorsed victim input into criminal justice decisions, including clemency decisions. Creating a system that presumes that victims will not be heard runs afoul of that sense of justice.

Professor Gershowitz might respond that his proposal contains an "escape hatch," under which prosecutors are able to come forward and defeat clemency by presenting "persuasive evidence" that an individual should not receive clemency. But this escape hatch fails to directly address the victims' rights objection. Prosecutors' interests are not necessarily the same as victims'.[49] Unless victims are guaranteed an opportunity to directly present their own views on clemency to a decisionmaker, victim agency is unprotected.

It is also important to distinguish the debate regarding mercy from a broader debate regarding overall sentence severity. A robust debate exists in this country over whether prison sentences (for example) are too long, producing over-incarceration and other problems—and, if so, what to do about it.[50] I do not propose to enter that debate here. Indeed, it may well be

47. *Id.* at 1433 (emphasis added).

48. *Id.* at 1432, 1443.

49. *See* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005) (noting that "a prosecutor cannot align herself exclusively with the victim" due to their allegiance to independent constituencies like the general public and the accused); Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions?*, 87 BROOK. L. REV. 1127, 1135 (2022) (noting that "[t]here is no professional consensus on how prosecutors should take account of victims' views" and that "prosecutors do not invariably honor victims' preferences").

50. *Compare, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 5 (2020) (arguing that racial bias in the system leads to mass incarceration); Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC L. REV. 113, 113, 131 (arguing that American sentencing policy is excessive and

the case that, at least in some areas, criminal sentences are too long or inflexible—as I have suggested elsewhere.[51] And, at the same time, it is possible that, in general, the public thinks that many criminal sentences are about the right length (or perhaps too short)—as I have suggested elsewhere in connection with the federal sentencing guidelines.[52]

But, by definition, mercy does not operate systemically to reduce sentencing severity. As just explained, by definition, mercy can only swing into action once an existing sentencing structure is in place. And given that America's existing sentencing structures have an important place for crime victims and their views, any reduction in these structures' importance concomitantly reduces the victim's role.

It is important to understand that those existing structures do not give crime victims final control over sentencing decisions. Victims have consistently sought a "voice, not a veto" over criminal justice decisions.[53] Thus, it is possible for even the strongest victims' rights advocates to agree with those (such as Professor McLeod in this symposium) who contend that "victims should not have the power to veto a grant of mercy by a judge or a jury speaking for the community, nor should they have the power to compel such mercy."[54]

But, that said, victims' voices are now widely recognized as an appropriate part of criminal processes and those voices should be heard.[55]

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irrational); *with* BARRY LATZER, THE MYTH OF OVERPUNISHMENT: A DEFENSE OF THE AMERICAN JUSTICE SYSTEM AND A PROPOSAL TO REDUCE INCARCERATION WHILE PROTECTING THE PUBLIC xi, xiii (2022) (arguing the sentences are not generally too long); RAFAEL A. MANGUAL, CRIMINAL (IN)JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS MOST 5 (2022) (cautioning against discarding traditional crime control measures); *see also* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 460 (2017) (discussing state postconviction review as a means of mitigating excessive state sentences).

51. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1 (2010) (criticizing mandatory minimums for depriving judges of flexibility and carrying the potential for unduly harsh sentences).

52. *See* Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (And a Critique of the Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1023–25 (2004) (discussing popular sentiment regarding appropriate prison sentences).

53. *See, e.g.*, CANADIAN HOUSE OF COMMONS, REPORT OF THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS, VICTIMS RIGHTS—A VOICE, NOT A VETO 2 (1998) (" . . . [V]ictims ask for a voice in, not a veto over, what happens at each stage of the criminal justice process.").

54. Marah Stith McLeod, *Showing Mercy Through a Presumption of Retribution*, 102 TEXAS L. REV. 1473, 1491 (2024).

55. Citing various other authors, Professor McLeod also contends that courts should be cautious in giving weight to victims' arguments because "victims 'have a natural tendency to make hasty judgments of responsibility, magnify the wrong done to them, and thus seek retribution out of all

Indeed, even if the victim's statement does not change the sentencing outcome, the process of delivering the statement—having the victim tell her story—improves the perceived fairness of the process.[56]

This point becomes clearer if two different functions of victim statements are separated. As Professor Edna Erez and I have stated in previous work:

> Perhaps most conventionally, criminal justice observers identify a VIS as serving instrumental and expressive purposes. Understood as an instrumental device, a VIS provides information to the sentencer (a judge or jury) about a crime's harm and thus may ultimately influence the sentence imposed. The VIS can also influence sentencing in other ways, such as by providing information about a victim's losses, which can assist the sentencer in awarding appropriate restitution.
>
> A VIS can also serve an expressive function, through which the victim communicates a message to the court, the offender, or the public. This act of communication may be empowering for the victim. The theory is that as a victim's voice is heard, that moment may provide some measure of healing. The victim's voice may also explain the crime's harm to defendants, thereby potentially causing them to appreciate what they have done and contributing to their rehabilitation. And a VIS can also provide information to the public about a crime, which may lead to responses or reforms.[57]

An illustration of the importance of the expressive purposes of VISs comes from the highly-publicized sentencing of Larry Nassar for sexually abusing multiple young female athletes—a sentencing that served what

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just proportion to what is actually appropriate.'" *Id.* at 1491 (quoting Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY 100 (Jeffrie Murphy & Jean Hampton eds. 1988)). By the same token, of course, one could argue that defendants' claims at sentencing should be viewed cautiously in view of their "natural tendency" to argue for leniency. But any claim about what crime victims naturally do at sentencing is an empirical claim. And neither McLeod nor the authors she cites provide empirical evidence for their claims. *Cf.* Cassell & Erez, *supra* note 1, manuscript at 79 (analyzing research finding that crime victims are not necessarily seeking longer sentences when delivering a VIS).

56. *Cf.* Mark Osler, *Rule Complexity, Story Complexity, Mercy & Hope*, 102 TEXAS L. REV. 1495, 1509 (2024) (explaining how considering "story complexity" can help produce justice and equity in sentencing processes).

57. Cassell & Erez, *supra* note 1, manuscript at 7–8 (internal citations omitted).

might be broadly described as a public educative function.[58] For example, the victims who spoke at Nassar's sentencing were heard not only by Nassar and the sentencing judge but by a much broader audience. The positive results were many, such as changes in the leadership at Michigan State University and USA Gymnastics and the passage of congressional legislation protecting young athletes from sexual abuse.[59]

For both of these reasons—the instrumental and the expressive—it is important that we listen to victims' voices in the criminal justice process. In listening to victims' voices, we do not automatically endorse everything those victims say. But the victims know they have been heard and the public regards the process as fairer. To the extent that considerations of mercy begin to drown out these important purposes, the process will become impoverished.

At this point, the proponents of mercy may suggest that my argument is question-begging: it assumes the importance of listening to crime victims. But as the history recounted in the previous section makes clear, crime victims' rights have drawn increasingly broad support from the public and legislatures over the last several decades—in this country and elsewhere. At the same time, it is hard to see any similar broad groundswell of support for merciful procedures being added to the system in individual cases. Focusing on the U.S., for example, while a 2020 Gallup Poll found that there was a slight increase in the number of Americans who say that the criminal justice system is too tough, only 21% of the public believed this to be the case, with 76% believing that the system is not tough enough or about right.[60] Similarly, a 2021 Pew Research Center survey reported that overall, 28% of U.S. adults say people convicted of crimes spend too much time in prison, while 32%

58. *See id.* manuscript at 69 (observing that Nassar sentencing drew public attention to the crime of sexual assault and the individuals and systemic issues that enabled Nassar's crimes); *see also* Susan Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1271 (2022) (acknowledging that VISs might serve to "call[] attention to crimes that are poorly understood and underenforced" and citing Nassar sentencing); AMOS N. GUIORA, ARMIES OF ENABLERS: SURVIVOR STORIES OF COMPLICITY AND BETRAYAL IN SEXUAL ASSAULTS, at xxi (2020) (discussing how Nassar VISs called out others who enabled Nassar's abuse).

59. *See* Cassell & Erez, *supra* note 1, manuscript at 69–71 (collecting examples of positive responses to the Nassar victims' VISs).

60. *See* Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice System*, GALLUP (Nov. 16, 2020), https://news.gallup.com/poll/324164/fewer-americans-call-tougher-criminal-justice-system.aspx [https://perma.cc/N4VA-NVX4] (showing that 41% of Americans considered the criminal justice system "not tough enough," that 35% considered the system to be "about right," and that 21% considered the system "too tough," up from 14% in 2016).

say they spend too little time and 37% say they spend about the right amount of time.[61]

It is also possible to find stark illustrations of how focusing on mercy effectively excludes crime victims. Professor Barkow mentions the example of Mississippi Governor Haley Barbour, who on his way out of office in 2012 gave full pardons or clemency to 208 inmates, including a number of convicted murderers.[62] The victims' families' were surprised by the announcement, which did not appear to involve consultation with the families.[63] The pardons apparently included prisoners whose parole requests had recently been turned down.[64] The basis for the pardons for at least some of the prisoners was that they had worked around the Governor's mansion and, according to the Governor, had each "proved to be a diligent and dedicated workman."[65] The pardons terrified at least some of the victims' families, who were left to worry about what the released prisoners might do once they were on unsupervised release.[66]

Other dubious examples of such exercises of executive clemency—without involving victims—are easy to find. For example, in 1999, Missouri Governor Mel Carnahan granted clemency to a triple murderer due to be executed in a month. The basis for clemency was that Pope John Paul II was visiting and had requested a commutation of the death sentence.[67] The victims' families learned about the Governor's decision from a broadcast on

61. *See* John Gramlich, *U.S. Public Divided Over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), https://www.pewresearch.org/short-reads/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison/ [https://perma.cc/5YHJ-WDCP] (noting that these differences reflect political, racial, and ethnic divides).

62. Barkow, *supra* note 33, at 1368–69; *see also Outgoing Mississippi Governor Haley Barbour Under Fire After Pardoning Four Killers*, NBC NEWS (Jan. 10, 2012, 3:24 AM), https://www.nbcnews.com/id/wbna45938284 [https://perma.cc/FVN6-9P9K] (describing prisoners pardoned by Governor Barbour); Giannini, *supra* note 25, at 89–91 (arguing that Barbour's pardons suggest that "in practice, a victim's ability to be heard in the context of a pardon decision, much less assert any rights he or she may possess in that context, is very much limited by the grace and mercy of the government").

63. *Outgoing Mississippi Governor Haley Barbour Under Fire After Pardoning Four Killers*, *supra* note 62.

64. *Id.*

65. *Id.*

66. *Id.*

67. Gustav Niebuhr, *Governor Grants Pope's Plea for Life of a Missouri Inmate*, N.Y. TIMES (Jan. 29, 1999), https://www.nytimes.com/1999/01/29/us/governor-grants-pope-s-plea-for-life-of-a-missouri-inmate.html [https://perma.cc/3RZ9-6B7E].

the local news station—including photographs from the scene of the murder that the families had never seen before.[68]

More recently, in Oregon, in 2020 and 2021, Governor Kate Brown granted clemency to approximately 1,026 convicted felons, comprising three groups: (1) individuals "vulnerable to the effects of COVID-19"; (2) individuals who had fought "the historic wildfires that ravaged the state around Labor Day 2020"; and (3) 73 individuals sentenced as juveniles before the passage of legislation which made substantial changes to the sentencing of juveniles.[69] Family members of crime victims (and district attorneys) challenged the commutations in court, arguing (among other things) that the families were entitled to some participation before the commutations were issued.[70] But the Oregon Court of Appeals disagreed. The court noted that the Oregon legislature had adopted provisions that anticipated that the sentence commutation process was to be handled on an individual basis and was to be based on an application, followed by orderly notifications, gathering of information, and a thoughtful deliberation period.[71] But that deliberative process was triggered only when a commutation application was made to the Governor. When the Governor herself decided to trigger a commutation (for one prisoner or many), those procedural requirements were simply inapplicable.[72] Reviewing historical precedents, the court explained that the Governor's power to generate her own commutations and pardon was "plenary" and not subject to constraint.[73]

A final example of how victims are excluded from leniency proceedings comes from a case being recently handled by a "progressive prosecutor," Philadelphia District Attorney Larry Krasner. This capital case arose in January 1984, when Robert Wharton and his accomplice brutally murdered Bradley and Ferne Hart in their home and left their then-seven-month-old baby daughter, Lisa, to die.[74] A jury found Wharton guilty of two counts of

68. *See Protecting the Rights of Crime Victims*: *Hearing Before the Subcomm. on the Const., Federalism, and Prop. Rts. of the S. Comm. on the Judiciary*, 106th Cong. 8-9 (1999) (statement of Anita Lawrence) (offering the testimony of a murder victim's mother on seeing this footage).

69. Marteeny v. Brown, 321 Or. App. 250, 253 (Or. App. 2022).

70. *See id.* at 278 (arguing the Governor is obligated to seek crime victims input prior to a grant of clemency).

71. *Id.* at 283–84.

72. *Id*. at 284–85.

73. *Id.* at 292.

74. All of the facts that follow are based on the record in the case, as summarized in Brief of Lisa Newman, Patrice Carr, and Dr. David "Tony" Antony Hart as Amici Curiae Supporting Affirmance at 1, Wharton v. Superintendent Graterford SCI, No. 22-2839 (3d Cir. Aug. 21, 2023) (No, 22-2839). Disclosure: Along with Allyson Ho and other attorneys at Gibson, Dunn, I represent Lisa Newman and other victim family members in the Third Circuit appeal.

first-degree murder in 1985 and returned two death sentences.[75] After a reviewing court vacated Wharton's sentences on a technicality, a second jury again determined that he should be sentenced to death in 1992.[76] For nearly forty years, Lisa and her family have awaited the conclusion of the case.

Despite "zealously opposing Wharton's efforts to overturn his conviction and death sentence for over three decades," in 2021, Krasner's office, "with no explanation, suddenly announced that it would no longer contest Wharton's sole remaining [challenge]" to his death sentence.[77] Krasner's office then "led the district court to believe that the Hart family *supported* this about-face—representing to the court that the DA's office decided to concede Wharton's claim only '[f]ollowing . . . communication with the victims' family.'"[78] That statement was "deeply misleading." As the district court later found after an extended evidentiary hearing, Krasner's office's "only communication was to inform a single family member that the office was *considering* conceding."[79] No family members "supported the decision to concede, and several expressed shock and indignation that the office had suggested otherwise."[80]

In response to that "misrepresentation—which impeded the district court's ability to comply with its own statutory obligation to ensure (among other things) that crime victims [were] afforded their rights"—the district court ordered Krasner's office to apologize to the family in writing and to present "a full, balanced explanation of facts in future habeas proceedings."[81] Krasner's office has appealed the district court's order and the Third Circuit recently affirmed the district court.[82]

These four cases (from Mississippi, Missouri, Oregon, and Philadelphia) make both a procedural point and a broader substantive point. The procedural point is that mercy (as delivered through, for example, clemency procedures) often seems to entirely exclude victims. Perhaps it can be argued that excluding victims is the proper way to handle clemency issues.

75. *Id.* at 2.

76. *Id.*

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 3–4.

80. *Id.*

81. *Id.* at 4–5.

82. Wharton v. Superintendent Graterford SCI, 95 F.4th 140, 144 (3d Cir. 2024) ("[T]he District Court . . . ordered District Attorney Larry Krasner to apologize. Because those mild sanctions were well within the court's sound discretion, we will affirm.").

But the controversy surrounding each of these examples suggests otherwise.[83]

It can also be argued that procedural concerns about crime victim exclusion from clemency procedures could be fixed by ensuring victim participation. As noted earlier, the federal system and many states provide for some form of victim engagement in the clemency process.[84] And various thoughtful proposals have been advanced for more inclusionary procedures surrounding clemency and other proceedings involving mercy.[85]

But even if the procedural issue could be resolved, a substantive problem looms large. Even if victims are guaranteed a voice in clemency proceedings, it is unclear how that voice will be heard. If, for example, the Mississippi Governor wants to extend mercy to someone who was a "dedicated workman" around the Governor's Mansion, how is that idea to be weighed compared to crime victims' concerns. The procedures surrounding clemency decisions often are ill-defined.[86] And even if the procedures were well defined, weighing the apple of crime victim concerns against the orange of a defendant's claim to mercy will be difficult.

C. Victims' Voices Must Be Heard Regardless of Whether They Are Merciful or Not

In an effort to finesse these problems and give some effect to victims' voices in criminal justice processes, a few commentators have advocated the curious and one-sided approach of giving weight to victims when they argue

83. *See, e.g.*, Giannini, *supra* note 25, at 89–90 (noting that the "public outcry" to Governor Barbour's pardons was "quick and immediate").

84. *See supra* note 26 and accompanying text (discussing the scholarly and legislative move towards including victims in the sentencing process).

85. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 5 (2015) (arguing that "review of clemency petitions should be entrusted to a commission that has a diverse, standing membership that includes key conservative representatives who are particularly sensitive to victim interests and public-safety concerns"); Giannini, *supra* note 25, at 125 ("[A] system [for pardons] in which all relevant voices are heard, ven if the ultimate decision is discretionary, would imbue the process with an increased sense of legitimacy."); *see also* McLeod, *supra* note 54, at 1483 (2024) (arguing that any procedures providing mercy to defendants should be handled transparently so as to be understood by the victim); Jeffrey Bellin, *Principles of Prosecutor Lenience*, 102 TEXAS L. REV. 1541, 1546 (2024) (suggesting that prosecutorial guidelines can help promote equality in outcomes).

86. *See* Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENT'G REP. 150, 151 (2001) (concluding that requiring grants of clemency to be supported by detailed reasons could well cause presidents to be more hesitant to use the power in deserving cases); Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. CIV. LIBERTIES & CIV. RTS. 191, 203 (2003) (finding that federal courts have refused to require that clemency decisions be made in accordance with due process standards).

for mercy . . . but not otherwise.[87] The most recent and thorough development of the argument is the article by Professor Bruce A. Green and public defender Brandon P. Ruben, who discuss whether victims' views should influence prosecutors' decisions in misdemeanor cases.[88] Green and Ruben argue that prosecutors should heed victims' views, but only when the victims express "an informed, reasoned, and uncoerced preference to drop a misdemeanor case or to seek a noncarceral alternative, such as restorative justice, restitution, or drug treatment for [] misdemeanor offender[s]."[89] The net effect of Green and Ruben's proposal would be a one-way ratchet where victims' voices could drive misdemeanor sentences downward but not upward.

Green and Ruben begin with the appropriate premise—that victims' voices deserve to be listened to.[90] As they acknowledge, victims' rights laws are "expanding victims' participation in criminal cases by giving them access to information and opportunities to weigh in."[91] Indeed, they concede that "[m]uch attention has been paid, nationally and internationally, to the importance of allowing victims a chance to tell their stories to prosecutors and judges."[92] But Green and Ruben ultimately conclude that the victim's voice should only be followed when it leads in a particular direction: towards mercy. The arguments that they offer for that one-sided approach are unpersuasive.[93]

First, Green and Ruben contend that given the vast volume of potential misdemeanor cases, it is unnecessary to prosecute all of them.[94] This point is

87. *See, e.g.*, Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 338 (2007) (discussing the value of listening to victims to reduce carceral punishments).

88. *See* Green & Ruben, *supra* note 49, at 1129 (concluding that misdemeanor prosecutors are particularly well-suited to listening to victims).

89. *Id.* at 1148.

90. *Id.* at 1129.

91. *Id.* at 1131.

92. *Id.*

93. For compelling arguments similar to mine, see, for example, Ekow N. Yankah, *Should Vulnerable Victims Show Mercy?*, 102 TEXAS L. REV. 1515 (2024) (arguing vulnerable victims should not be compelled to speak mercifully about criminal proceedings). Green and Ruben do not appear to advance a narrower argument that would support their position in some cases. A judge might take the position that if imposing a harsh prison sentence would create additional trauma for a victim, that trauma might be a sound reason for a less severe sentence. *See* Julian V. Roberts, *Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings*, 47 CRIM. L.Q. 365, 383–86 (2003) (discussing case law where judges make such considerations). Perhaps the reason Green and Ruben don't endorse this position is that the flipside is obviously true as well: there may be situations where imposing a harsh sentence might reduce victim trauma by, for example, providing assurance that the defendant will not retaliate against a victim while incarcerated.

94. Green & Ruben, *supra* note 49, at 1149.

true, as far as it goes. But just as victims can help to identify appropriate cases for noncarceral alternatives, then it would seem that they should likewise be helpful in identifying cases deserving rigorous prosecution. Indeed, a standard argument for allowing victims to provide input into criminal processes is that the victim may be the single best person to provide information to the court about the danger posed by a defendant.[95]

Second, Green and Ruben agree that a significant public interest in criminal prosecution is to vindicate the victims' interests. But reasoning from that premise, they argue that, when the victim is uninterested in a prosecution, "the public interest in prosecuting becomes less compelling as compared with interests that point toward a noncarceral resolution."[96] But Green and Ruben fail to explain why the flipside is not also true—that is, where a victim is extremely interested in a prosecution, the public interest would be better served by following that view. Indeed, the idea of listening to "both sides of the story" is particularly significant because crime victims (like criminal defendants) may be viewed as "the other"—outsiders who are viewed as separate and apart from important actors in the system.[97]

Third, Green and Ruben believe that victims may have a special ability to provide relevant information in cases that could lead to a shorter sentence. They explain that, in their view, "[p]rosecutors often make decisions based on folk wisdom, stereotypes, or generalities," while "[v]ictims often can express preferences based on more specific information and experience."[98] Here again, it is hard to understand the claim that victim preferences will be based on "more specific information and experience" only when they tip in the direction of leniency. Indeed, to the contrary, as just noted, it is commonly understood that victims may know the dangers posed by criminal defendants more fully than anyone else.[99]

Fourth, Green and Ruben contend that a significant public interest in cases involving individual victims is avoiding revictimizing victims. They argue that the decision "whether to honor victims' preferences, whatever

95. *See* PRESIDENT'S TASK FORCE, *supra* note 3, at 65 ("The person best able to inform the court of . . . the threat [the defendant] poses is often the person he victimized."); *see also* Cassell & Erez, *supra* note 1, manuscript at 7–8 (collecting evidence that victim impact statements help to provide sentencers with information about the severity of a crime).

96. Green & Ruben, *supra* note 49, at 1150.

97. *See* Josh Bowers, *Mercy in Extremis and the Threat of In-Group Bias*, 102 TEXAS L. REV. 1561, 1562–63 (2024) (discussing bias against the other in criminal justice processes).

98. Green & Ruben, *supra* note 49, at 1150.

99. *See id.* ("[V]ictims will often have expertise in identifying and assessing some of those [public] interests—and possibly greater expertise than the prosecutors.").

those preferences may be, has implications for their wellbeing."[100] They conclude by explaining that "respecting victims' informed wishes, whatever they are, is more likely to be restorative."[101] All these points seem legitimate. But Green and Ruben fail to give any reason for concluding that these points operate in only one direction. Surely respecting victims' "informed wishes" for aggressive prosecution would also be more "restorative" than ignoring those views.[102] Indeed, it is commonly understood that "secondary victimization" may be inflicted on victims if their interests are not considered in criminal justice processes.[103]

Finally, Green and Ruben argue that giving crime victims greater influence may encourage other victims to report crimes. The argument is that some victims may fear to report to prosecutors, knowing that the case will then be out of their hands.[104] Green and Ruben offer the example of "no drop" policies in domestic violence cases, arguing that these policies may have the "unintended consequence of discouraging victims from reporting domestic violence incidents."[105]

But Green and Ruben do not provide any hard evidence that "no drop" policies have actually led to a decline in reporting for domestic violence incidents. And given that such policies have been implemented in a number of important jurisdictions,[106] it would seem that such evidence would be

100. *Id.*

101. *Id.* at 1151.

102. Curiously, Green and Ruben cite an important article by crime victims' rights advocates Margaret Garvin and Douglas Beloof in support of their position. *Id.* (citing Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 70 (2015)). But the whole point of the Garvin and Beloof article—as indicated by the title—is that crime victims need "agency" in the process, that is, a real ability to argue for their position, whatever it may be.

103. *See* Douglas E. Beloof & Paul G. Cassell, *The Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 536 ("Excluding a crime victim perpetuates the subordinate position imposed by the perpetrator . . . .") (2005); *see also* FLETCHER, *supra* note 35, at 250 ("[I]t would be better to allow the third voice [of the victim] at trial rather than freeze out the party for whom the proceedings may carry greater positive meaning than for anyone else.").

104. Green & Ruben, *supra* note 49, at 1151.

105. *Id.* at 1151 n.101 (citing Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Law Policy*, 2004 WIS. L. REV. 1657, 1681 (2004)).

106. At least four states (Florida, Minnesota, Utah, and Wisconsin) have state-wide no-drop domestic violence prosecution enshrined as a legislative mandate. Nancy Simpson, *Benefits and Drawbacks of No-Drop Policies and Evidence-Based Prosecution*, RICH. PUB. INT. L. REV., Apr. 2023, at 141, 145.

available—if the concern of lack of report was significant.[107] In addition, a standard reason given for no-drop policies is to avoid retaliation against victims by their abusers—specifically, retaliation designed to pressure the victim to ask the prosecutor to drop the charges.[108] Green and Ruben seem to recognize this potential issue by predicating their argument on a situation where a victim has an "uncoerced preference" for a noncarceral outcome.[109] But, of course, determining when a victim is acting free of coercion is not always clear, particularly in cases involving domestic abuse where the victims and abuser may be in close personal contact.[110]

In sum, if victims' voices are going to be heard, it is hard to understand why they should only be heard if they make arguments favoring mercy. But at this point, it will be useful to consider an alternative critique—that *any* consideration of victims' voices—merciful or otherwise—is inappropriate because it raises the specter of inequality. Perhaps the most prominent of these objections has come from Professor Dan Markel. He contends that those who seek greater roles for victims at sentencing "must at least recognize the injury they are imposing upon society's commitment to equal liberty under law."[111] He contends that grants of mercy based on, for example, victims' arguments "are as problematic as grants of mercy based on caprice, sovereign grace, corruption, or bias."[112]

But Markel's argument is simply the conventional one against victim involvement in the criminal justice process. And thus, the argument stands athwart more than four decades of advancing victims' rights in all fifty states

107. *Cf.* Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revision in New York Courts' Response to Domestic* Violence, 76 ALB. L. REV. 1417, 1427 (2013) (recounting no-drop policies adopted in New York and concluding "[n]o-drop policies benefit victims by reducing the chance that an offender would intimidate the victim, since it is the prosecutor who controls whether a criminal case progresses, and not the victim").

108. *See* Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 870–71 (1994) (arguing that when victims are women, they face particular and powerful constraints that affect their capacity to initiate and sustain legal action).

109. Green & Ruben, *supra* note 49, at 1148, 1156–57 n.115.

110. *See* Rebecca L. Heron et al., *Why Do Female Domestic Violence Victims Remain in or Leave Abusive Relationships? A Qualitative Study*, 31 J. AGGRESSION, MALTREATMENT & TRAUMA 677, 688–91 (2022), https://doi.org/10.1080/10926771.2021.2019154 [https://perma.cc/ED7Y-8ND3] (summarizing the study's finding on reasons for staying and leaving abusive relationships and complexity of decision-making when victims have a close personal relationship with their abuser).

111. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1478 (2004).

112. *Id.*; *see also* Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999) (taking the extreme position that victims "should and must be ignored if you are claiming to be doing retributive theory").

and the federal system.[113] The public readily agrees that decision-making based on "caprice, sovereign grace, corruption, or bias" is to be avoided.[114] But not so with respect to decision-making based on hearing from crime victims. Indeed, any conclusion that victims' voices must be silenced "conflicts with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[115]

Moreover, taken to its logical conclusion, Markel's argument requires (as he seems to recognize) not only the exclusion of victims' voices but also defendants' voices. After all, listening to defendants can lead to inequalities based on factors that might be thought to be irrelevant to sentencing. And yet the system routinely listens to defendants and their advocates—and properly so. Given that our current system "allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed."[116]

III. Hearing Victims' Voices May Well Lead to Merciful Outcomes

In defending the need to hear crime victims' voices, my position is not that victims want tough sentences and tough sentences are desirable. My argument rests not on substantive outcomes but rather on procedural fairness. Americans generally agree that victims should have a voice in criminal justice processes[117] and, accordingly, reducing that voice is undesirable.

Nonetheless, the crime victims' rights movement does not align automatically with longer criminal sentences. To the contrary, "[e]mpirical evidence suggests that victims are far less vengeful than one might think."[118] For example, a recent national survey of crime victims' views on criminal justice found that, by a substantial (two-to-one) margin, victims prefer that

113. *See* Giannini, *supra* note 25, at 118 ("[A]ppropriately measured information from the victim regarding the extent of harm caused by the defendant helps ensure a retributively sound response to the crime."); *see also* George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 60–63 (1999) (discussing the idea that allowing criminals to go unpunished is complicitly in the original crime and a betrayal of victims, especially when some victims are given justice and others are not).

114. Markel, *supra* note 111, at 1478.

115. Payne v. Tennessee, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

116. Cassell, *supra* note 16, at 640.

117. *See supra* note 16 and accompanying text (nothing that victim statements are allowed in all fifty states and the federal system).

118. Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 336 (2007); *see also* Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 293 (2020) ("[V]ictims are a diverse group with differing needs . . . ."). *See generally* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020) (collecting studies suggesting that the public and victims are less punitive than the law commonly allows).

the criminal justice system focus more on rehabilitating criminals than punishing them.[119] And, the same survey found that, by a three-to-one margin, victims prefer holding people accountable through options other than prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service.[120]

Against this backdrop, listening to victims will not necessarily lead to a more punitive criminal justice system. This point can best be evaluated by considering a standard argument some legal academics have advanced against hearing victims' voices at sentencing—that victim impact statements (VISs) will increase sentencing severity.[121]

Like many arguments about victims' rights, this argument about whether VISs produce longer prison sentences is ultimately an empirical one. And the claim that involving victims makes the system more punitive lacks significant empirical support.[122] In 2021, Maarten Kunst and his colleagues undertook a comprehensive meta-analysis of the empirical evidence regarding VISs' impact on sentence severity, examining thirty-one experimental studies and five criminal case file studies across multiple jurisdictions. They concluded that "it is currently too early to draw any definite conclusions about the systematic impact of VIS delivery on these types of legal decisions and the mediating or moderating role of third factors."[123] Instead, they concluded, more research was needed before firm conclusions could be drawn.[124]

The most recent research in the area finds little support for the proposition that VISs lead to longer sentences. In 2023, Professor Dufour and her colleagues published the most recent empirical study of VIS and sentencing outcomes. Dufour et al. analyzed 1,332 sentencing rulings across

119. *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*, ALL. FOR SAFETY & JUST. 5 (2016), available at http://www.allianceforsafetyandjustice.org/crimesurvivorsspeak/report [https://perma.cc/J647-DS4Q].

120. *Id.*; *see also* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 21 (2019) (finding similar preferences for restorative procedures among victims).

121. *See generally* Cassell & Erez, *supra* note 1 (describing the debate).

122. *See* RHIANNON DAVIES & LORANA BARTELS, THE USE OF VICTIM IMPACT STATEMENTS IN SENTENCING FOR SEXUAL OFFENCES: STORIES OF STRENGTH 34 (2021) ("[A]lthough [victim] impact statements could lead to more severe sentences, the literature suggests that critics' fears that they would lead to this have not been realised.").

123. Maarten Kunst et al., *supra* note 29.

124. *Id*.

Canada from 2016 to 2018.[125] They coded eighty-seven variables, including information about the VIS, the victims and offenders, crime type, and sentencing outcomes.[126] They found, perhaps unsurprisingly, that VISs are more likely to be delivered in cases involving more serious crimes.[127] But once they controlled for the type of crime, the presence of a VIS was not associated with a longer sentence for the defendant.[128]

Against this empirical evidence, what are the arguments of those who believe that hearing victims' voices leads to harsher sentencing? Illustrative of the arguments are those thoughtfully advanced by Professor Michael Vitiello in his recent book regarding the victims' rights movement. Vitiello acknowledges that the "empirical evidence may leave one uncertain about the extent to which victim impact statements increase criminal sentences."[129] But he has an ad hominem argument to deploy, contending that because prosecutors tend to support VIS, that must be because they lengthen criminal sentences.[130]

The issue of whether listening to victims' voices produces a more punitive criminal justice system should be resolved by empirical research, not an inquiry into the (alleged) motivations of those who advocate a public policy reform. Critics such as Vitiello seem to conflate the victims' rights movement with "law and order" promotion. But the movement is far more complicated than Vitiello appreciates. It is hard to imagine, for example, that VIS would have been incorporated into the criminal justice systems in all fifty states and the federal system—and many countries around the world—if it was merely part of a narrow prosecutorial agenda.[131]

As another example of the arguments in this area, Professor Susan Bandes argues that "[t]here is substantial evidence that VIS[s] increase the likelihood of a death sentence," while acknowledging that their effect in

125. Gena K. Dufour et al., *The Relationship Between Victim Impact Statements and Judicial Decision Making: An Archival Analysis of Sentencing Outcomes*, 47 L. & HUMAN BEHAV. 484, 487 (2023).

126. *Id.* at 487–88.

127. *Id*. at 493.

128. *See id.* at 491 ("[O]nce crime type was controlled for in the model, VIS presence did not significantly predict the total sentencing outcome.").

129. MICHAEL VITIELLO, THE VICTIMS' RIGHTS MOVEMENT: WHAT IT GETS RIGHT, WHAT IT GETS WRONG 112 (2023).

130. *Id*.

131. *See* Cassell & Erez, *supra* note 1, manuscript at 80. *Cf.* KENT ROACH, DUE PROCESS AND VICTIMS' RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE 318–19 (1999) (discussing complexities in the movement). *See supra* notes 22, 28–29 and accompanying text.

noncapital sentencings is "less clear."[132] But in spite of that lack of clarity, Professor Bandes believes that the "current way in which VIS evidence is generally utilized" is "as a reflexive argument for a harsher sentence."[133]

Professor Bandes paints with broad brushstrokes. Her argument attempts to shoehorn evidence involving thousands and thousands of victims into a single model. This one-size-fits-all characterization is at odds with what has been aptly described as the heterogeneity of victim impact statements.[134] Indeed, as defense attorney Benji McMurray has explained, victims do not always side with prosecutors because defendants and victims may often have common interests: "It does not have to be the case that defendants view victim testimony only as adverse. To the contrary, by sincerely making their victims' interests an aspect of their own self-interest, defendants will change in lasting ways."[135] Other scholars have also recognized that victims may be interested in more merciful criminal justice outcomes, particularly if those outcomes are fostered through such procedures as victim–offender reconciliation.[136] For example, a careful recent analysis concluded that "while emotional language does populate VIS testimony, sadness is present much more commonly than is anger, which was encountered in less than one half of one percent of all words in the VIS."[137]

A recent article by Professor Edna Erez and me underscores this heterogeneity of victim impact statements. That article provides:

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132. Susan Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253, 1258 n.28 (2022).

133. *Id.* at 1262.

134. *See* Bryan Myers et al., *The Heterogeneity of Victim Impact Statements: A Content Analysis of Capital Trial Sentencing Penalty Phase Transcripts*, 24 PSYCH., PUB. POL'Y, & L. 474, 477 (2018) ("[T]here is substantial heterogeneity in the content and procedural restrictions with regard to VISs and capital sentencing.").

135. Benji McMurray, *The Mitigating Power of a Victim Focus at Sentencing*, 19 FED. SENT'G REP. 125, 128–29 (2006).

136. *See, e.g.*, Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, UCLA L. REV. DISC. 2020, at 302, 309 (describing victim–offender reconciliation as a "foundational restorative justice technique" and arguing such techniques must be integrated as a means of comprehensive sentencing reform).

137. Myers et al., *supra* note 136, at 486; *accord* Mitchell J. Frank, *From Simple Statements to Heartbreaking Photographs and Videos: An Interdisciplinary Examination of Victim Impact Evidence in Criminal Cases*, 45 STETSON L. REV. 203, 225 (2016) (only one judge out of eleven who responded to a survey thought that VIS presented the possibility of the "emotionalism" of the statement possibly affecting sentencing outcomes); *see also* Edna Erez et al., VICTIM IMPACT STATEMENTS IN SOUTH AUSTRALIA: AN EVALUATION, SOUTH AUSTRALIAN ATTORNEY-GENERAL'S DEPARTMENT 40 (1994) (Australian judicial officers reported that VIS "rarely include inflammatory, prejudicial or other objectional statements").

> [A] content analysis of the 168 VISs presented in a Michigan court sentencing of Larry Nassar, who pleaded guilty to decades of sexual abuse of young athletes while he was treating them for various sports injuries. Nassar committed similar crimes against each of his victims, allowing a robust research approach to answer questions about the content, motivations for, and benefits of submitting VISs. Specifically, it is possible to explore the question of whether (roughly) the same crimes produce (roughly) the same VISs.[138]

Closely analyzing the Nassar victims' statements, the harms that the victims suffered varied considerably, which was consistent "with that research on the variability of impacts from crime."[139]

Of particular importance for the issue of sentencing severity, "even in the Nassar case involving a serial sex offender who had committed serious sex offenses against dozens of victims, many victims expressed forgiveness as part of their VIS."[140] Of the victims who discussed forgiveness, 43% were in favor of forgiveness compared to 57% against.[141] Our study was subject to the limitation that Nassar's prison sentence had already been effectively determined before his victims spoke: Nassar was going to spend the rest of his life in prison.[142] But nonetheless, the presence of such a large number of victims willing to forgive Nassar cautions against a reflexive assumption that crime victims only want punitive outcomes.

Finally, in any discussion of mercy and criminal justice outcomes, it is important to avoid assuming that a criminal sentence has a single dimension—the length of a prison term. But criminal sentences can incorporate many other components, notably restitution. A VIS can help provide the sentencer with valuable information about the harm a defendant's crime has caused, leading to a fuller restitution award. Supporting this

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138. Cassell & Erez, *supra* note 1, manuscript at 1; *see also id.* manuscript at 5 n.10 (describing Nassar's prior convictions for possession of child pornography).

139. *Id.* manuscript at 16. *See, e.g.*, RANDY C. DAVIS ET AL., VICTIM OF CRIME xv, xvi (4th ed. 2013) (describing varying ways crimes harm victims).

140. Cassell & Erez, *supra* note 1, manuscript at 81. *See id.* manuscript at 30 (discussing victims' attitudes towards forgiveness and the decision to testify). To be sure, mercy and forgiveness are slightly different concepts, but for present purposes, a suggestion of forgiveness seems somewhat analogous to a suggestion of mercy. *Cf.* MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE 209 (2016) (discussing the relationship between mercy and forgiveness in criminal processes).

141. Cassell & Erez, *supra* note 1, manuscript at 32.

142. *Id.* manuscript at 36.

hypothesis, the (limited) empirical evidence suggests that a VIS increases the chance that a judge will award restitution.[143]

In sum, as this brief discussion of VISs makes clear, victims' voices do not always push sentencing proceedings in one direction. Instead, they reflect the diversity of crime victims, the differing harms that they suffer, and their varying views on criminal sentencing. Listening to those voices can only improve the quality of justice, because victim input provides criminal justice decisionmakers (judges, parole board members, and clemency officials) with more information on which to base their decisions. Indeed, it is precisely this impulse to maximize information that has led to an important provision in the federal sentencing code. Title 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[144] Federal courts rely on this long-standing provision to reject arguments that victim information was improperly considered at sentencing.[145] This same instinct should lead to concern about proposals to listen to defendants' pleas for mercy at the expense of listening to crime victims.

Conclusion

Victims are increasingly playing a role in criminal justice proceedings. Over the last several decades, victims' voices have become an important part of sentencing and follow-on proceedings, such as parole hearings and clemency decisions. The public has come to expect that in any such proceeding, victims should have a voice. Victims deserve a voice in the process not because they are merciful—nor because they are vengeful. Rather, they deserve a voice because criminal proceedings will not be viewed as fair if victims are excluded.

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143. Cassell & Erez, *supra* note 1, manuscript at 81–82; *see* Cassell, *supra* note 16, at 620–21 (explaining that restitution, a component of sentencing, "can be important for victims"); *see, e.g.*, Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 220 (1999) (explaining that in a national survey "most judges and prosecutors thought VIS improved the quality of justice . . . by influencing restitution awards").

144. 18 U.S.C. § 3661.

145. *See, e.g.*, U.S. v. Dominguez, 951 F.2d 412, 417 (1st Cir. 1991), *cert. denied*, 504 U.S. 917 (relying on U.S.C. § 3661 when holding the court can rely on victim impact statements during sentencing); U.S. v. Serhant, 740 F.2d 548, 552 (7th Cir .1984) (relying on the language of U.S.C. § 3661, codified at the time as U.S.C § 3557, when holding the court can rely on victim impact statements during sentencing).

Unfortunately, all too often it appears that procedures for dispensing mercy silence victims' voices, either by design or by effect. Unless victims are made an integral part of such procedures, those procedures will never command broad public support. Advocates who wish to push for mercy should bear this point in mind and create procedures that give victims a full and fair opportunity to advance their legitimate concerns.