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# Disrupting Victim Exploitation

by David A. Singleton\*

## INTRODUCTION

Violent-crime survivors have powerful stories to tell.<sup>1</sup> Prosecutors use these stories to convict the accused and advocate for harsh sentences.<sup>2</sup> Legislators use these narratives to pass punitive sentencing measures locking away the convicted for increasing periods of time.<sup>3</sup>

Though prosecutors and legislators serve the entire community,<sup>4</sup> many present themselves as speaking for victims, particularly those who call

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1. See Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1256–77 (2012); Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003 (2014); Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17 (2000); Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377 (2004).

2. Scott Sexton, *Sexton: Child's Words Cut Deeper than Sentence in Corbett Murder Trial*, WINSTON-SALEM J. (Aug. 9, 2017), [http://www.journalnow.com/news/columnists/scott\\_sexton/sexton-child-s-words-cut-deeper-than-sentence-in-corbett/article\\_910c6027-123a-52aa-bfe4-e933cf7dee67.html](http://www.journalnow.com/news/columnists/scott_sexton/sexton-child-s-words-cut-deeper-than-sentence-in-corbett/article_910c6027-123a-52aa-bfe4-e933cf7dee67.html) (noting the effectiveness of "the words of a [victim's] child, read into the official record by a prosecutor" in describing prosecutor's advocacy for long prison sentence).

3. See, e.g., Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

4. As to prosecutors, see AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, STANDARD 3-3.2 cmt. (3d ed. 1993) ("[T]he prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction."); Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 579 (2005).

themselves “tough on crime.”<sup>5</sup> But do the interests of those who advocate for punitive, retributive justice<sup>6</sup> always align with those of crime victims? And when their respective interests diverge, is it exploitative for prosecutors and legislators to suggest that they represent the interests of all victims?<sup>7</sup>

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As to legislators, *see, e.g.*, THE FEDERALIST Nos. 10, 14, 39 (James Madison); *Duncan v. McCall*, 139 U.S. 449, 461 (1891):

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.

5. *See, e.g.*, Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 698 (2007); Danielle Levine, Comment, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 NW. U. L. REV. 335, 341 (2010) (“In response to the increased protections the accused received [under Warren Court jurisprudence], conservatives championed victims’ rights in order to promote their ‘tough on crime’ agenda and strengthen the hand of the prosecutor and police.”).

6. *Retributive justice* is focused on retribution and “supposes that crime inherently merits punishment . . . that punishment is directed at imposing merited harm upon the criminal for his wrong, and not at the achievement of social benefits.” Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–16 (2000). In the 1980s, tough-on-crime rhetoric led to a shift away from the rehabilitative goals of the criminal justice system towards a focus on retribution. *See* Michael Tonry, *Sentencing in America, 1975–2025*, in 42 CRIME AND JUSTICE IN AMERICA, 1975–2025, at 141, 159–60 (Michael Tonry ed., 2013); Albert W. Aschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts on the Next*, 70 U. CHI. L. REV. 1, 9–11 (2003). As one scholar notes, after rehabilitation faded as a goal of the criminal justice system, “[t]he retribution model became an attractive replacement for politicians, mainly because it provided an opportunity to replace the ‘soft on crime’ model with the ‘get tough on crime’ model.” Lisa E. Cowart, *Legislative Prerogative v. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 645 (1998). Accordingly, this Article will equate tough-on-crime advocates with those who favor primarily retribution, as opposed to rehabilitation, or restorative justice, which “offers an approach to justice that allows for win-win resolutions by focusing on the harm, the needs of those affected by the harm, and the accountability to repair that harm.” Lauren Abramson, *Restorative Justice: The “Quadruple Bottom Line,”* 32 DEL. L. 24, 24 (2014).

7. *See, e.g.*, Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 197–98 (2015) (“Prosecutors sometimes exploit victims instrumentally to secure convictions in cases that proceed to trial, regarding victims as nuisances hindering the efficient disposition of cases through plea bargains or dismissals.”); Michael Lawrence Goodwin, *An Eyeful for an Eye—An Argument Against Allowing the Families of Murder Victims to View Executions*, 36 BRANDEIS J. FAM. L. 585, 593–94 (1997):

Politicians exploit victims’ families by using both the public and publicized executions for political grandstanding. Politicians know that support for the death penalty wins votes. Their vocal support of executions exploits the families of both the victims and the condemned by using their suffering for political gain,

This Article explores the exploitation of crime survivors and how progressive criminal justice reformers can partner with them to reclaim their voices. Part I defines *exploitation* as used in this Article and provides examples of the concept. Part II uses narrative storytelling to discuss the difficulty in identifying true instances of victim exploitation. I contrast the experience of one crime survivor after she recanted her testimony against my client with what I believe to be a clearer instance of victim exploitation: the passage of New Jersey's Megan's Law just one month after Megan Kanka's brutal murder, and specifically, the role played by New Jersey's Speaker of the House as he prepared to run for the United States Senate. Part III concludes by providing two recent examples of crime survivors' joining with criminal justice reformers to achieve progressive change.

### I. THE MEANING OF EXPLOITATION

Throughout two decades of work in the criminal justice system, I have frequently observed prosecutors, victim advocates, and politicians using victims' stories to advocate for long sentences in individual cases, new laws to impose even lengthier sentences, and burdensome collateral consequences. I sometimes found the use of these victim narratives appropriate, while other times it seemed inappropriate and perhaps exploitative. Identifying what separates the appropriate from the inappropriate requires understanding *exploitation*.

One scholar has noted that "[t]he ambiguous and ill-defined concept of exploitation has been widely applied, taking on an open-textured and almost all-encompassing meaning."<sup>8</sup> I use the term in this Article to mean "unfairly taking advantage of someone."<sup>9</sup> This sense of exploitation has been used to describe how southern plantation owners built their

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and creates pressure on families to accept and endorse their offerings of retribution and compensation.

8. John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 631–32 (1994).

9. The Oxford Dictionary defines *exploitation* as "[t]he action or fact of treating someone unfairly in order to benefit from their work." *Exploitation*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/exploitation> (last visited Jan. 6, 2018). Similarly, the Cambridge Dictionary defines the term as "[t]he act of using someone unfairly for your own advantage." *Exploitation*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/exploitation> (last visited Jan. 6, 2018). *Exploitation* also means "[t]he action of making use of and benefiting from resources." *Exploitation*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/exploitation> (last visited Jan. 6, 2018). This last definition of *exploitation* does not necessarily involve unfairness, which is central to the type of exploitation this Article addresses.

fortunes on the backs of slaves;<sup>10</sup> the use of child labor to enrich industry owners;<sup>11</sup> the use of adhesion contracts by merchants who have asymmetrical bargaining power over their customers;<sup>12</sup> the taking advantage of vulnerable people by unscrupulous caregivers;<sup>13</sup> and the treatment of trafficked individuals by pimps.<sup>14</sup>

*Exploitation* also refers to the misappropriation of a marginalized group's culture.<sup>15</sup> Examples include: *The Education of Little Tree*, an alleged autobiographical account of an orphaned white boy raised by Cherokee "grandparents," written by a white supremacist who was neither orphaned nor raised by Cherokees;<sup>16</sup> the use of Native American themes in Outkast's Grammy performance;<sup>17</sup> and the use of black cultural elements by white fashion designers<sup>18</sup> and performers.<sup>19</sup> In discussing the line between cultural borrowing and cultural misappropriation, one legal scholar notes that "borrowing may become appropriation when it reinforces historically exploitative relationships or

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10. See, e.g., Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 113–14 (2005).

11. See, e.g., Rupneet Sidhu, *Child Laborers: The World's Potential Future Labor Resource Exploited and Depleted*, 15 HASTINGS WOMEN'S L.J. 111, 113 (2004) (discussing the "exploitative terms of child labor" internationally); Peter J. McGovern, *Children's Rights and Child Labor: Advocacy on Behalf of the Child Worker*, 28 S.D. L. REV. 293, 294–95 (1983) (discussing the "exploitation" of child labor in the United States during the 1800s and early twentieth century).

12. Ronald J. Gibson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as a Contract Design*, 100 CORNELL L. REV. 23, 76 (2014) (recognizing "the problem of exploitation in adhesion contracts").

13. See Ashley Jaconetti, *Vindicating Vulnerable Victims: Illinois's Effort to Prevent Elder Financial Exploitation*, 17 PUB. INT. L. REP. 130 (2012); Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911 (2001).

14. See Taina Bien-Aimé, *A Right Not to Be Trafficked*, 89 N.Y. ST. B.J. 22 (May 2017).

15. Kelly Mauceri, *Of Fakes and Frauds: An Analysis of Native American Intangible Cultural Property Protection*, 5 GEO. J.L. & PUB. POL'Y 263, 272 (2007) (discussing how "[p]op culture is rife with examples of the misappropriation of indigenous culture for commercial exploitation and entertainment purposes").

16. *Id.* at 264.

17. *Id.* at 272.

18. See Madeline Roth, *Nicki Minaj Calls Out Fashion Designers for Exploiting Black Culture*, MTV NEWS (Sept. 12, 2017), <http://www.mtv.com/news/3035721/nicki-minaj-calls-out-designers-exploiting-black-culture/>.

19. See Preston Mitchum, *Dear Miley Cyrus: Hip-Hop Culture Never Needed You and It Won't Miss You*, THE ROOT (May 8, 2017), <http://www.theroot.com/dear-miley-cyrus-hip-hop-culture-never-needed-you-and-1795030923>; Dr. Lisa Tomlinson, *The Ongoing Economic Exploitation of Black Music*, HUFFINGTON POST (Jan. 8, 2016), [http://www.huffingtonpost.ca/dr-lisa-tomlinson/black-music-exploitation\\_b\\_8934870.html](http://www.huffingtonpost.ca/dr-lisa-tomlinson/black-music-exploitation_b_8934870.html).

deprives [cultures] of opportunities to control or benefit from their cultural material.”<sup>20</sup>

The concept of cultural misappropriation is particularly helpful in shaping the contours of “victim exploitation” as used in this Article. As will be discussed later, tough-on-crime proponents often co-opt victim narratives to serve political agendas many crime survivors do not support. For example, when politicians, particularly those who are not crime survivors themselves, purport to speak for all victims, they engage in behavior akin to white musicians culturally misappropriating black music. Thus, the concept of victim exploitation this Article proposes borrows from the idea of cultural misappropriation.

For this Article’s purposes, *victim exploitation* exists where (1) a criminal justice system actor (such as a prosecutor, victim advocate, judge, or legislator) (2) unfairly appropriates victim narratives to (3) advance the actor’s, rather than the victim’s, interests. As illustrated in the two case studies below, whether exploitation exists often turns on whether the criminal justice system has used the victim’s narrative unfairly.

## II. VICTIM EXPLOITATION OR NON-EXPLOITATIVE ADVOCACY: TWO CASE STUDIES

### A. *One Crime Survivor’s Experience*

I recently handled a clemency petition based on actual innocence for my client, Tyra Patterson.<sup>21</sup> Tyra and her four co-defendants were accused of robbing five young women at gunpoint, and in the process, murdering fifteen-year-old Michelle Lai.<sup>22</sup> At trial, the four survivors identified Tyra as one of the robbers.<sup>23</sup> The jury convicted Tyra, and the judge sentenced her to forty-three years to life.<sup>24</sup>

The Ohio Parole Board held a hearing on our petition in January 2015, but none of the evidence supporting Tyra’s innocence<sup>25</sup> appeared to move the board members. Then, the prosecutor began by displaying Michelle’s

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20. Olufunmilayo Arewa, *Cultural Appropriation: When ‘Borrowing’ Becomes Exploitation*, THE CONVERSATION (June 20, 2016), <https://theconversation.com/cultural-appropriation-when-borrowing-becomes-exploitation-57411>.

21. See David A. Singleton, *Unmaking a “Murderer”: Lessons from a Struggle to Restore One Woman’s Humanity*, 47 SETON HALL L. REV. 487, 493–526 (2017); see also David A. Singleton, *To Love or Not to Love: The Possibility, Promise and Peril of Mutually Transformative Attorney-Client Friendships*, 46 SETON HALL L. REV. 743, 747–55 (2016).

22. Singleton, *Unmaking a “Murderer,”* *supra* note 21, at 496.

23. *Id.* at 508.

24. *Id.* at 493.

25. *Id.* at 498–514.

nude autopsy photograph as he argued that she and her friends were the victims in the case, not Tyra.<sup>26</sup> He also chastised those who urged the Board to recommend clemency, arguing that they ought to be supporting the victims, not Tyra. Without hesitation, he presented himself as the voice of Michelle Lai and the other survivors of that awful night.

But it later became clear the prosecutor did not speak for all of the victims. In March 2016, I met with Michelle's sister and co-victim Holly Lai Holbrook.<sup>27</sup> Clutching her only picture of Michelle, she told me how much she missed her sister and cried as she told me about the toll Michelle's murder had taken on her. But the conversation soon turned to Tyra, when Holly told me that Tyra was innocent and that she wanted to do whatever she could to free her. Holly told me that she did not want to speak to the prosecutor because she did not trust him. She also worried that, if she wrote to the governor and it became public, her family would disown her.

Nevertheless, Holly decided to write Governor John Kasich.<sup>28</sup> In addition to recanting her trial testimony, Holly acknowledged the fear and anxiety she felt because of her family. She stated, however, that "what's more important is that I tell the truth about how I feel."<sup>29</sup> Holly also explained that writing the letter "has helped to free me from the pain I have held in all these years. Writing this letter also has helped me see that I actually have a voice that deserves to be heard."<sup>30</sup> Holly closed her letter by urging Governor Kasich to "release Tyra now because the sooner you do so, the quicker I can begin to fully heal."<sup>31</sup>

Regarding her need to heal, Holly asked if she could meet with Tyra in person. I told her she would need to get special permission from the prison, and I put her in touch with a victim advocate. After speaking with the victim advocate, Holly told me the advocate advised her not to talk with me and suggested that Holly call the prosecutor to get "the other

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26. Unfortunately, there is no transcript of the hearing to cite. The Ohio Parole Board does not allow hearings to be recorded for purposes of transcription.

27. Singleton, *Unmaking a "Murderer," supra* note 21, at 539.

28. Letter from Holly Lai Holbrook to John R. Kasich, Ohio Governor (Apr. 26, 2016).

29. *Id.*

30. *Id.*

31. *Id.*

side.”<sup>32</sup> After Holly responded that she did not feel comfortable talking with the prosecutor,<sup>33</sup> the victim advocate pushed her to reconsider.<sup>34</sup>

Holly also asked the victim advocate if I could be present during the meeting with Tyra, but the advocate responded with a firm “no.”<sup>35</sup> When Holly asked if she could tell me about their conversation, the victim advocate warned her that doing so could jeopardize the office’s willingness to arrange a meeting with Tyra.<sup>36</sup> Finally, Holly expressed interest in writing to Tyra periodically in an effort to befriend her.<sup>37</sup> “Absolutely not,” the victim advocate answered.<sup>38</sup> Holly told me that the victim advocate made her feel bad for wanting to speak to Tyra.

Holly knew that the prosecutor would eventually learn of her support for clemency when she agreed to sit for an interview with *The Guardian*, which in 2015 had published a three-part series on Tyra’s case.<sup>39</sup> Holly explained to me that she wanted to do the interview despite concerns about her family and the prosecutor because she wanted to be as helpful to Tyra as possible. In December 2016, *The Guardian* published its story on Holly’s coming forward to urge Tyra’s release.<sup>40</sup> The *Dayton Daily News* published a follow-up story, in which the prosecutor responded,

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32. Email from Author to Steven Drizin, Jim and Nancy Petro, and Peggy Lehner (May 13, 2016, 8:58 PM) (on file with Author).

33. Holly was not comfortable speaking with the prosecutor because she did not trust him and felt that he would try to pressure her into retracting her letter to the Governor.

34. Email from Author to Steven Drizin, Jim and Nancy Petro, and Peggy Lehner, *supra* note 32.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Ed Pilkington & Laurence Mathieu, *The Injustice System: A tale of two Tyras*, THE GUARDIAN (Jan. 14, 2016), <https://www.theguardian.com/us-news/ng-interactive/2016/jan/14/the-injustice-system-us-prisons-tyra-patterson-michelle-lai-dayton-ohio-montgomery-county>; Ed Pilkington & Laurence Mathieu, *The Injustice System: This Could Have Cleared Her*, THE GUARDIAN (Jan. 15, 2016), <https://www.theguardian.com/us-news/ng-interactive/2016/jan/15/the-injustice-system-part-two-tyra-patterson-trial-michelle-lai-dayton-ohio-us-prisons>; Ed Pilkington & Laurence Mathieu, *The Injustice System: Time to Come Home*, THE GUARDIAN (Jan. 16, 2016), <https://www.theguardian.com/us-news/ng-interactive/2016/jan/16/the-injustice-system-part-three-tyra-patterson-michelle-lai-dayton-ohio>.

40. Ed Pilkington & Laurence Mathieu, *Tyra Patterson is in Prison for Murder—Now Victim’s Sister says she is Innocent*, THE GUARDIAN (Dec. 2, 2016), <https://www.theguardian.com/us-news/2016/dec/02/tyra-patterson-murder-case-ohio-prison-release-letter-john-kasich>.



“While [Holly’s letter to the Governor] is emotional, it is in direct contradiction to her own testimony . . . given under oath.”<sup>41</sup>

I was quick to deride the prosecutor and victim advocate for dismissing Holly’s interests once it became clear she wanted Tyra released, and to accuse them of exploiting Holly to keep Tyra behind bars. In hindsight, however, I recognize that the line between appropriate advocacy and exploitation is a difficult one to draw.

With respect to the prosecutor, I realize that he is entitled to dispute Tyra’s innocence claim. After all, there is no evidence, such as DNA, to exonerate Tyra with 100% scientific certainty. Likewise, I recognize that courts are generally skeptical of recantations like Holly’s because witnesses can disavow their testimony for reasons having nothing to do with the truth.<sup>42</sup> Moreover, Holly was the only victim to recant her testimony. What troubled me the most about the prosecutor was his suggestion that the trial evidence was the only thing that mattered in determining Tyra’s innocence, and that any new information was irrelevant.<sup>43</sup> If the prosecutor’s goal was only to preserve the conviction, then perhaps his willingness to use Holly’s victimhood to argue against clemency, while simultaneously dismissing Holly’s call for clemency, is exploitative. But the prosecutor insisted at numerous times that he believed justice was done at Tyra’s trial. While I may disagree with the prosecutor on that point, I cannot question his intentions any more than he can question mine. I simply cannot conclude that the prosecutor treated Holly unfairly, and therefore, exploited her.

As to the victim advocate, her admonition to Holly to cease communicating with me suggests that she was ignoring Holly’s stated interests. According to Jennifer Thompson, a rape survivor, author,<sup>44</sup> and founder of Healing Justice,<sup>45</sup> Holly’s experience is not unique because

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41. Josh Sweigart, *Clemency Support Builds for Dayton Woman*, DAYTON DAILY NEWS (Dec. 7, 2015), <https://www.daytondailynews.com/news/crime-law/clemency-support-builds-for-dayton-woman/2Hf1jGLso6O6U3B7E2hKpL/>.

42. See Robert D. Covey, *Recantations and the Perjury Sword*, 79 ALB. L. REV. 861, 861 (2015) (noting that courts “are notoriously skeptical of recantation evidence, in part because of finality concerns, but also in part because judges tend to treat such statements as less reliable than the original, in-court testimony that was previously given”).

43. See, e.g., Letter from Leon Daidone, Chief Criminal Division Prosecutor, to John R. Kasich, Ohio Governor 2 (July 3, 2014) (“Patterson simply ignores the testimony and evidence admitted during her trial and which was subject to the Rules of Evidence.”) (on file with Author).

44. JENNIFER THOMPSON-CANNINO & RONALD COTTON WITH ERIN TORNEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009).

45. An organization “focused on recovery and healing for those harmed by wrongful convictions.” HEALING JUST., <http://www.healingjusticeproject.org> (last visited Jan. 6, 2018).

victim advocates frequently “see themselves as aligned with, and agents of, prosecutors.”<sup>46</sup> On the other hand, was it unreasonable or unfair for the advocate to have advised Holly to be wary of dealing with me? Indeed, the advocate’s advice may have simply reflected her desire to protect Holly from a lawyer who could be manipulating her to free his client. Although I know that Holly willingly volunteered to help Tyra, those who were not present during our conversations must take me at my word. Accordingly, I want to extend to the prosecutor and victim advocate the same benefit of the doubt I would want for myself.

I am less forgiving, however, of others I have encountered in my career, particularly tough-on-crime legislators who use victims for political gain. As the next section discusses, these politicians are the quintessential exploiters.

### *B. The Passage of New Jersey’s “Megan’s Law”*

Proponents of harshly retributive criminal justice laws often appropriate victim narratives to push their legislative agenda, even when those laws do not advance public safety. One example is the proliferation of statutes imposing burdens upon convicted sex offenders. Many of these laws are fear-driven<sup>47</sup> and do little, if anything, to protect the public.<sup>48</sup> Some bear the name of a high-profile victim whose suffering,

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46. Email from Jennifer Thompson to Author (Nov. 13, 2017, 2:35 PM) (confirming previous statement to Author).

47. See David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 602–07 (2006) (describing how fear of sex offenders gave rise to residency restrictions); Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 317–18 (2001) (“[S]ome commentators have suggested that Megan’s Law reflects a recurring type of ‘moral panic,’ a widespread, if overblown fear that the nation’s children are at extreme risk.”); Charles J. Dlabik, *Convicted Sex Offenders: Where Do You Live? Are We Entitled to Know? A Year’s Retrospective on Ex Post Facto Challenges to Sex Offender Community Notification Laws*, 22 NOVA L. REV. 585, 591 (1998) (noting that “the New Jersey Legislature passed ‘Megan’s Law’ in response to the public’s fears and reports indicating that sex offenders pose a danger to the community”).

48. See Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 612–13 (2009) (noting that “there is no evidence proving the effectiveness of [sex offender residency restrictions]” and positing that “they arguably worsen the problem by isolating sex offenders from the urban cores, where countervailing forces such as employment opportunities, public transportation, social services, therapeutic personnel, family, and law enforcement are most likely to exist and counteract any recidivist impulses”); Singleton, *Sex Offender Residency Statutes*, *supra* note 47, at 611–13, 615–17 (discussing the ineffectiveness and counterproductivity of residency restrictions); Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 351 n.121 (2014) (citing a federally funded study finding Megan’s Law ineffective at reducing sex offenses); Amanda Y. Agan, *Sex Offender*

and usually death, inspired the law.<sup>49</sup> New Jersey's Megan's Law is one example.

On July 29, 1994, Jesse Timmendequas, a convicted sex offender, raped and murdered seven-year-old Megan Kanka.<sup>50</sup> Megan's murder received national media coverage, and soon nationwide calls for increased regulation of sexual offenders followed.<sup>51</sup> Within one month of Megan's murder, New Jersey legislators enacted Megan's Law, which, among other things, requires all persons who have committed certain sex offenses to register with local law enforcement, and provides for community notification of information about the registrants, including their addresses.<sup>52</sup>

The speed with which New Jersey enacted Megan's Law was breathtaking.<sup>53</sup> Although some legislators expressed concerns about voting on the bill without committee hearings, they still passed the bill

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*Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 208 (2011) (finding Megan's Law ineffective in reducing sex offense rates or recidivism).

49. See, e.g., Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)); The Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Pub. L. No. 103-322, tit. XVII, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (1994 & Supp. IV 1998)).

50. *Missing N.J. Girl's Body Found*, UNITED PRESS INT'L (July 31, 1994), <https://www.upi.com/Archives/1994/07/31/Missing-NJ-girls-body-found/9214775627200/>; Associated Press, *Suspect Confessed in the Murder of a 7 Year-Old Girl, Prosecutors Say*, N.Y. TIMES (Aug. 2, 1994), <http://www.nytimes.com/1994/08/02/nyregion/suspect-confessed-in-the-murder-of-a-7-year-old-prosecutors-say.html>; William Glaberson, *Man at Heart of Megan's Law Convicted of Her Grisly Murder*, N.Y. TIMES (May 31, 1997), <http://www.nytimes.com/1997/05/31/nyregion/man-at-heart-of-megan-s-law-convicted-of-her-grisly-murder.html>.

51. Associated Press, *Whitman Latest to Urge Laws on Notices for Sex Offenders*, N.Y. TIMES (Aug. 6, 1994), <http://www.nytimes.com/1994/08/06/nyregion/whitman-latest-to-urge-laws-on-notices-of-sex-offenders.html> (discussing New Jersey governor's call for community notification legislation); Fred Bayles, *Sexual Offender Registry Laws Gaining Support*, CHARLESTON GAZETTE (Aug. 8, 1994), at P1A (reporting efforts in various states to pass community notification laws); Marjorie Valbrun, *Rep. Zimmer Urges Congress to Support Federal "Megan's Law" He Is Co-Sponsoring Legislation to Inform Communities and Track Sex Offenders for Life*, PHILADELPHIA INQUIRER (Aug. 9, 1994), at S3 (discussing proposed federal legislation).

52. N.J. STAT. ANN. § 2C: 7-1-11 (West 1994); see *E.B. v. Verniero*, 119 F.3d 1077, 1081-87 (3d Cir. 1997) (describing New Jersey's Megan's Law registration and community notification system), *superseded by constitutional amendment*, N.J. CONST. art. IV, § 7, ¶ 12 (authorizing the legislature to publish information about sex offenders).

53. See Editorial, *Rough Start: The Predicted Flaws in New Jersey's Hasty Megan's Law Have Been Very Quick to Surface*, PHILADELPHIA INQUIRER, Jan. 13, 1995, at A22 (describing Megan's Law as "enacted at warp speed").

overwhelmingly.<sup>54</sup> Many of the legislators wore pink bows on their lapels in Megan's memory while mentioning two other child sex abuse victims who had been murdered in New Jersey that year.<sup>55</sup> Supporters of the bills branded the few opponents "as more concerned about pedophiles than about the children of New Jersey."<sup>56</sup> As one legislator put it, "I'd rather err on the side of potential victims and not on the side of criminals . . . . We can lock away these animals and take out of our minds the doubts that our children will be the next victims."<sup>57</sup> Stoking the public's fear, another legislator concluded, "If this bill was in place before, Megan Kanka would be alive today."<sup>58</sup>

Following New Jersey's lead, the remaining forty-nine states enacted their own versions of Megan's Law.<sup>59</sup> However, a 2008 study funded by the National Institute of Justice examined New Jersey's law and concluded that it does not prevent the sexual abuse of children.<sup>60</sup> Specifically, the study found that the law "showed no demonstrable effect in reducing sexual re-offenses" and that it was expensive to operate, growing from \$555,565 in startup costs to \$3.9 million annually for the counties reporting data.<sup>61</sup>

So why the rush to pass these laws? In explaining why New Jersey needed Megan's Law, two of its drafters explained that "sex offenders are likely to be unsusceptible to the 'cures' offered by the prison system."<sup>62</sup> Indeed, the statute itself cites the danger of sex offender recidivism as a justification for its provisions.<sup>63</sup> But social science research available at the time New Jersey enacted Megan's Law questioned whether

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54. See *Verniero*, 119 F.3d at 1081 (describing the emergency process used to bypass the committee hearing process); Kimberly J. McLarin, *Trenton Races to Pass Bills on Sex Abuse*, N.Y. TIMES (Aug. 29, 1994), <http://www.nytimes.com/1994/08/30/nyregion/trenton-races-to-pass-bills-on-sex-abuse.html> ("There is no rational reason for us to be considering any of these bills without public hearings.") (quoting Wayne R. Bryant).

55. Marjorie Valbrun, *Sex-Offender Bills Passed by Assembly; Some Legislators Protested the Haste. The Bills Were Spurred by the Deaths of Megan Kanka and Others*, PHILADELPHIA INQUIRER, Aug. 30, 1994, at A01.

56. McLarin, *supra* note 54.

57. *Id.*

58. *Id.*

59. *About Megan's Law*, NAT'L INST. JUST., OFF. OF JUST. PROGRAMS, <https://www.nij.gov/topics/corrections/community/sex-offenders/pages/about-megans-law.aspx> (last visited Jan. 6, 2018).

60. KRISTEN ZGOBA, PHILIP WITT, MELISSA DALESSANDRO & BONITA VEYSEY, MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY (Dec. 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>.

61. *Id.* at 2.

62. Megan's Law, S. 14, 1999 Leg., Reg. Sess. (N.J. 1999) (statement by sponsors).

63. N.J. STAT. ANN. § 2C:7-1(a) (West 1994).

recidivism rates for sex offenders were high compared to other categories of offenders.<sup>64</sup> Perhaps the legislature never learned this information because the bills were pushed through the New Jersey Assembly with no hearings and through the Senate with only one hearing.<sup>65</sup>

Aside from the outrage that Megan Kanka's murder generated, there is another explanation for the law's quick passage: political ambition. Interestingly, the legislator most responsible for speeding Megan's Law through the Assembly without a hearing was Speaker Chuck Haytaian, who at the time was also running for the United States Senate.<sup>66</sup> Republicans, who controlled both houses in the New Jersey Legislature and the Governor's office, wanted Speaker Haytaian, a Republican, to replace Democrat Frank Lautenberg in the Senate and "saw [Megan's Law] as an opportunity."<sup>67</sup> As one commentator noted, "The only emergency . . . which led to the suspension of the rules, was a statewide election on November 8th, in which the Speaker of the Assembly, Mr. Haytaian, was a candidate for United States Senate."<sup>68</sup>

Haytaian's television ads show how he sought to use Megan's Law to paint himself as tougher on crime than his opponent: "Lautenberg's voted against the death penalty 30 times,' [said] the announcer to the sound of an ominous chord. 'Haytaian supports the death penalty and fast-tracked Megan's Law,' the announcer continue[d] as the music shifts to the cheery sound of a high-pitched bell."<sup>69</sup>

Of course, it is impossible to say definitively what Haytaian's motivations were in circumventing the normal hearing process for Megan's Law and whether political expediency played a role in his decision. Perhaps he was appropriately responsive to his constituents' calls to act quickly to protect children from sexual predators.<sup>70</sup> Under

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64. See Kenneth Crimaldi, "Megan's Law": Election-Year Politics and Constitutional Rights, 27 RUTGERS L.J. 169, 172-73 (1995) (citing various studies).

65. Valbrun, *supra* note 55.

66. John J. Gibbons, *Megan's Law*, 13 N.Y.L. SCH. J. HUM. RTS. 56, 57 (1996).

67. Bob Ingle, *Twenty Years Later, Has Megan's Law Delivered?*, DAILY J. (Aug. 25, 2014), <http://www.thedailyjournal.com/story/opinion/2014/08/25/twenty-years-later-mega-law-delivered/14600617/>.

68. Gibbons, *supra* note 66, at 57; see also Am. Political Network, Inc., *Haytaian Using Tragedy to Boost Campaign*, HOTLINE (Aug. 17, 1994) ("But it seems the 'emergency' driving Haytaian is the need to use this tragedy to make headlines in Trenton while his opponent, Sen. Frank Lautenberg (D), is in Washington, dealing with health care and crime.").

69. Nancy Phillips, *Haytaian's Latest Ad Pumps Up the Volume: The Senate Candidate Hits Away at Lautenberg on Crime and Taxes. The Soundtrack Plays Along*, PHILADELPHIA INQUIRER, Oct. 7, 1994, at S3.

70. James Barron, *Vigil for Slain Girl, 7, Backs a Law on Offenders*, N.Y. TIMES (Aug. 3, 1994), <http://www.nytimes.com/1994/08/03/nyregion/vigil-for-slain-girl-7-backs-a-law-on-offenders.html> (describing 1000-person vigil calling for law to require community

those circumstances, was it unfair and exploitative of the Speaker to bypass the normal legislative process to rush Megan's Law into existence? Did he co-opt crime survivors' voices in doing so, especially when Megan's parents were chief among those demanding quick legislative action?

However, the fact that Megan's parents and constituents clamored for a community notification law does not absolve Haytaian and other legislators from their responsibility for passing Megan's Law without the hearings necessary to carefully vet the bill. Had the legislature done so, it could have learned of the law's problems, such as its enormous administrative expense compared to its ineffectiveness in preventing sex offenses;<sup>71</sup> the possibility of offenders registering false addresses to avoid compliance with the law;<sup>72</sup> the risk of vigilantes targeting sex offenders whose addresses are disclosed publicly;<sup>73</sup> and the law's giving community members a false sense of security.<sup>74</sup> Arguably, the hasty passage of Megan's Law shortchanged crime survivors and future victims who deserved much more from their legislature.<sup>75</sup>

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notification of sex offenders); Jan Hoffman, *New Law is Urged on Freed Sex Offenders*, N.Y. TIMES (Aug. 4, 1994), <http://www.nytimes.com/1994/08/04/nyregion/new-law-is-urged-on-freed-sex-offenders.html> ("The grieving Kanka family and their neighbors have begun urging state legislators to pass what they are calling Megan's Law, a measure that would require authorities to notify communities when a child-sex offender comes to live among them.").

71. Zgoba et al., *supra* note 60.

72. Christine M. Kong, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257, 1293 (1995) (mentioning problem of sex offenders registering false addresses).

73. Doe v. Poritz, 662 A.2d 367, 430–31 (N.J. 1995) (citing examples of vigilante attacks under New Jersey's Megan's Law); Editorial, *Being Vigilant vs. Being a Vigilante*, PHILADELPHIA DAILY NEWS, Jan. 17, 1995, at 24 ("Megan's Law' is turning out to be an invitation to vigilante activity and is probably unconstitutional, just as many critics predicted it would be."); see also Andrew Buncombe, *The Bitter Legacy of Megan's Law: A Vigilantes' Charter?*, INDEPENDENT, June 24, 2006, at 29 (chronicling the series of vigilante attacks in the United States under Megan's Law).

74. James R. Acker & Catherine Cerulli, *When Answers Precede Questions: Megan's Laws' Uncertain Policy Consequences*, 34 CRIM. L. BULL. 23, 246–49 (1998) (discussing the false sense of security Megan's Law causes by, among other things, causing sex offenders not to register their addresses to avoid community notification, which undermines the law's primary purpose, and heightening the risk of recidivism by increasing the offender's sense of isolation and other pressures); Kong, *supra* note 72, at 1293.

75. ROBERT ELIAS, VICTIMS STILL: THE POLITICAL MANIPULATION OF CRIME VICTIMS 6 (1993):

By now it is commonplace to view victims as twice victimized: first by the crime and the criminal and then by the poor treatment they receive in the criminal process. But this ignores a larger victimization: the survival of policies that

In sum, although we will likely never know Haytaian's true motivations, it appears he sought to capitalize on Megan Kanka's murder to benefit his Senate campaign by burnishing his tough-on-crime credentials. If so, his conduct, at least to me, bears the hallmarks of victim exploitation.

### III. COUNTERING VICTIM EXPLOITATION

This Article's premise is that those who advocate draconian punishment routinely exploit victims to further retributive justice aims. These actors have found a powerful way to advance their cause by purporting to represent the interests of victims and survivors.<sup>76</sup> But if data shows that these actors do not truly speak for most victims, what can those victims who support progressive criminal justice reform do about it?

#### *A. Results of the First-Ever National Survey of Victims' Views on Safety and Justice*

Contrary to popular belief, a recent survey found that "the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in prevention and treatment to more spending on prisons and jails."<sup>77</sup> Specifically, the survey found that, by an approximately 3:1 margin, "victims believe that prison is more likely to make people commit crimes than to rehabilitate them" and that victims are "more likely to believe that the U.S. sends too many people to prison (38%) than too few (29%)."<sup>78</sup>

The survey also found by a 2:1 margin that "victims prefer that the criminal justice system focus more on rehabilitating people who commit

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perpetuate rather than curb crime and violence and thus fail to prevent victimization in the first place.

76. See MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 7 (2002) (discussing how "politicians surround themselves with victims of violent crime, or their surviving relatives, when the time has come to re-pledge their commitment to the war on crime"); Kathryn M. Young, *Parole Hearings and Victims' Rights: Implementation, Ambiguity, and Reform*, 49 CONN. L. REV. 431, 440 (2016) ("[I]ntroductions of harsher sentencing laws might be paired with expanded entitlements to individual victims, then promoted jointly, with emphasis on 'victims' rights."); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 750 (2007) ("The victims' rights movement is and always has been a product of conservative tough-on-crime ideology.").

77. ALLIANCE FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE 13 (2016).

78. *Id.* at 14.

crimes than punishing them.”<sup>79</sup> Of the victims surveyed, 61% “prefer shorter prison sentences and more spending on prevention to longer prison sentences.”<sup>80</sup> Furthermore, the survey reports that 89% of the respondents prefer spending more money on schools and education than prisons,<sup>81</sup> and that most victims prefer alternatives to incarceration and non-prison options to hold people who commit crimes accountable.<sup>82</sup> In sum, “the vast majority of crime survivors believe we rely too heavily on incarceration and want policymakers to invest in new safety priorities that better protect victims and help them recover from the crimes committed against them.”<sup>83</sup> Thus, those who favor draconian punishment and who use victimhood narratives to achieve retributive aims do not speak for most crime survivors. As the next section discusses, the voices of crime survivors whose needs are not addressed by our punishment-focused criminal justice system can play a key role in the fight for progressive reforms.

*B. The Growing Role of Crime Survivors in the Movement for Progressive Criminal Justice Reform*

Crime survivors who prefer alternatives to our punitive justice system are increasingly joining, and even leading, the movement for progressive reform. The following two examples illustrate the trend and offer hope for change.

**1. California’s Proposition 47**

In November 2014, California voters approved Proposition 47,<sup>84</sup> a ballot initiative to reduce the state’s prison population.<sup>85</sup> Proposition 47 requires, among other things, misdemeanor, rather than felony, sentencing for certain drug possession offenses;<sup>86</sup> misdemeanor sentencing for petty theft, receiving stolen property, and forging or

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79. *Id.* at 15.

80. *Id.* at 16.

81. *Id.* at 17.

82. *Id.* at 20.

83. *Id.* at 21.

84. CAL. SEC’Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE, NOVEMBER 4, 2014 GENERAL ELECTION 15 (Dec. 12, 2014), <http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf>.

85. CAL. SEC’Y OF STATE DEBRA BOWEN, OFFICIAL VOTER INFORMATION GUIDE, PROPOSITION 47, CRIMINAL SENTENCES. MISDEMEANOR PENALTIES. INITIATIVE STATUTE. OFFICIAL TITLE AND SUMMARY 34–37 (Aug. 13, 2014), <http://vig.cdn.sos.ca.gov/2014/generall/en/pdf/proposition-47-title-summary-analysis.pdf>.

86. *Id.* at 34.



writing bad checks when the amount involved is \$950 or less;<sup>87</sup> and resentencing for people serving felony sentences for offenses that became misdemeanors under the new provisions.<sup>88</sup> Additionally, the statute requires any savings from the resulting reduction of the state's prison population be invested in mental health and drug treatment programs, K–12 schools, and services to support crime victims.<sup>89</sup>

Californians for Safety and Justice, a coalition of individuals “from all walks of life,” including crime survivors,<sup>90</sup> spearheaded Proposition 47.<sup>91</sup> As one reporter noted, “The campaign was boosted by support from reform proponents who couldn’t be painted by opponents as being ‘soft on crime,’” including the widow of a police officer killed by a drug-addicted person.<sup>92</sup> Although Proposition 47 faced opposition from some crime victim advocates,<sup>93</sup> it nonetheless passed with 59.6% of the vote.<sup>94</sup>

Building on this success, the Alliance for Safety and Justice (ASJ) “launched in 2016 to grow state capacity to replace prison waste with new safety priorities.”<sup>95</sup> ASJ is currently working in six states—California, Florida, Michigan, Illinois, Ohio, and Texas<sup>96</sup>—to elevate the voices of

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87. *Id.*

88. *Id.*

89. *Id.*

90. *About Us*, CALIFORNIANS FOR SAFETY & JUST., <http://www.safeandjust.org/About-Us> (last visited Jan. 6, 2018).

91. Sasha Abramsky, *How California Voters Got So Smart on Crime*, THE NATION (Mar. 26, 2015), <https://www.thenation.com/article/how-california-voters-got-so-smart-crime/>; CALIFORNIANS FOR SAFETY AND JUST., SECOND CHANCES AND SYSTEM CHANGE: HOW PROP 47 IS CHANGING CALIFORNIA 9 (Mar. 2017), [https://safeandjust.org/wp-content/uploads/P47\\_Report\\_Final.pdf](https://safeandjust.org/wp-content/uploads/P47_Report_Final.pdf) (describing “the leadership of Californians for Safety and Justice and its Crime Survivors for Safety and Justice network” in building the campaign to pass Proposition 47).

92. Abramsky, *supra* note 91.

93. Cal. Sec’y of State, *Prop 47*, CAL. GEN. ELECTION, <http://vigarchive.sos.ca.gov/2014/general/en/propositions/47/arguments-rebuttals.htm> (last visited Jan. 6, 2018) (listing Christopher W. Boyd, President of California Police Chiefs Association, Harriet Salarno, President of Crime Victims United, and Gilbert G. Otero, President of California District Attorneys Association); *California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_47\\_Reduced\\_Penalties\\_for\\_Some\\_Crimes\\_Initiative\\_\(2014\)#cite\\_note-laws-1](https://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_(2014)#cite_note-laws-1) (specifying additional opponents of Proposition 47) (last visited Jan. 6, 2018).

94. CAL. SEC’Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE, *supra* note 84, at 15.

95. *Who We Are*, ALLIANCE FOR SAFETY & JUST., <https://www.allianceforsafetyandjustice.org/who-we-are/> (last visited Jan. 6, 2018).

96. *State Partners*, ALLIANCE FOR SAFETY & JUST., <https://www.allianceforsafetyandjustice.org/state-partners/> (last visited Jan. 6, 2018).

crime survivors and to push for progressive criminal justice reform.<sup>97</sup> The work of these two organizations shows that it is possible for crime survivors who favor investing more in prevention and treatment than prison to reclaim their voices.

## 2. Opposition to Sex Offender Residence Restrictions by Sexual Assault Survivors

People who commit sex offenses are among the most marginalized and despised people in our communities.<sup>98</sup> They have become a punching bag for politicians seeking to fortify their tough-on-crime credentials.<sup>99</sup> Sex offender residency restrictions are one way legislators have demonstrated their “toughness” in dealing with the people who commit sex offenses.<sup>100</sup> Such laws, which exist in dozens of states and municipalities across the United States,<sup>101</sup> typically prohibit convicted sex offenders from living near places where children are likely to be found, such as schools, daycare facilities, and parks.<sup>102</sup>

Two rationales for residency restrictions are to prevent child abductions and sexual assaults by strangers and to limit opportunities for sex offenders to groom children for sexual assault.<sup>103</sup> Thus, these

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97. *Id.* (describing ASJ’s approach of “partnering with state leaders, advocates, crime survivors, law enforcement, formerly incarcerated people, business leaders, and other diverse stakeholders to replace prison waste with new safety priorities: crime prevention, survivor support, rehabilitation and community health”).

98. Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories in the Press: The Impact of Media Distortions on Sex Offender Law and Policy*,” 3 U. DENV. L. REV. 185, 185 (2013) (describing sex offenders as “arguably the most despised members of our society”); Cassie Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH. L. REV. 1235, 1237 (2009) (describing sex offenders as “social pariahs” who comprise “a reviled and vilified class”).

99. See Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 143 (2017) (characterizing as “tough on crime” certain “punitive responses to rape such as sex offender registration”); Erin Miller, *Let the Burden Fit the Crime: Extending Proportionality Review to Sex Offenders*, 123 YALE L.J. 1607, 1617 (2013) (“Legislators pressured to be tough on crime face few drawbacks but many rewards for restricting released sex offenders.”).

100. Kari White, *Where Will They Go? Sex Offender Residency Restrictions as Modern Day Banishment*, 59 CASE W. RES. L. REV. 161 (2008) (discussing sex offender residency restrictions as a result of the need for legislators to appear tough on crime).

101. See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 103–04 (2007) (discussing the growth of state and municipal sex offender restrictions); Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6–10 (2006).

102. Yung, *supra* note 101, at 103.

103. Singleton, *Sex Offender Residency Statutes and the Culture of Fear*, *supra* note 47, at 610.

restrictions have a laudable goal: protecting vulnerable children from becoming victims of sexual violence.<sup>104</sup>

Contrary to their public safety rationales, these restrictions are not effective in preventing children from being sexually abused. Opponents such as the Jacob Wetterling Resource Center,<sup>105</sup> whose purpose is to protect children from sexual abuse, contend not only that residency restrictions are ineffective, but also that they are counterproductive in many ways, including by increasing sex offenders' risk of recidivism by destabilizing them, and by giving the community a false sense of security.<sup>106</sup>

Along with the Association for the Treatment of Sexual Abusers, the Iowa County Attorneys Association, the Iowa State Sheriffs and Deputies Association, and the Iowa Coalition Against Sexual Assault, the Jacob Wetterling Resource Center joined an amicus brief challenging retroactive application of Ohio's sex offender residency restriction.<sup>107</sup> The unusual coalition of voices opposing Ohio's residency restriction did not go unnoticed by the Ohio Supreme Court.<sup>108</sup> At oral argument, the Chief Justice stated to one of the state's lawyers defending the law: "The amicus brief, as you know, from some law enforcement authorities and others who . . . work with children who have been molested . . . they don't like this law either. They don't think it's helpful."<sup>109</sup> By a six-to-one vote, the court held that Ohio could not apply the state's sex offender residency restriction retroactively,<sup>110</sup> and the voices of crime victims likely helped persuade the court to reach this result.<sup>111</sup>

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104. See Alex Tom, *Abusers' Housing Options Severely Limited*, DES MOINES REG., Aug. 26, 2002, at 1A ("We hear about all the child abductions. We didn't want [sex offenders] living across from schools and child-care centers, looking out the windows at all the kids across the street.") (quoting St. Sen. Jerry Behn).

105. JACOB WETTERLING RES. CTR., <http://www.gundersenhealth.org/ncptc/jacob-wetterling-resource-center/who-we-are/> (last visited Jan. 6, 2018). As the organization's website indicates, the Center was formerly known as the "Jacob Wetterling Foundation." JACOB WETTERLING RES. CTR., <http://www.gundersenhealth.org/ncptc/jacob-wetterling-resource-center/who-we-are/history/> (last visited Jan. 6, 2018).

106. See David A. Singleton, *Kids, Cops, and Sex Offenders: Pushing the Limits of the Interest-Convergence Thesis*, 57 HOWARD L.J. 353, 377 (2014).

107. *Id.* at 377-78.

108. *Id.* at 383.

109. Oral Argument at 28:17, *Hyle v. Porter*, 117 Ohio St. 3d 165 (No. 2006-2187), <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=119831>.

110. *Hyle v. Porter*, 117 Ohio St. 3d 165, 165 (2008).

111. Singleton, *Kids, Cops, and Sex Offenders*, *supra* note 106, at 384.

## IV. CONCLUSION

On October 24, 2017, the Ohio Parole Board voted to release Tyra Patterson.<sup>112</sup> And on Christmas Morning 2017, Tyra walked free after twenty-three years in prison.<sup>113</sup> For those of us who have fought for Tyra, there is no question that Holly Lai Holbrook played the crucial role in convincing the Board to vote to release her. If not for Holly, Tyra would likely face many more years in prison. The lesson from Holly's story is not that the prosecutor and victim advocate exploited her—indeed, I am not sure they did—but that her voice was not heard until we helped her lift it up.

This Article posits that politicians, prosecutors, and other individuals who occupy positions of power within the criminal justice system, at times, use victim narratives for their own gain. When they do so, they engage in a form of unfair exploitation. Speaker Haytaian's role in rushing Megan's Law to a hasty vote illustrates that point, although, as one scholar observed, “[t]he manipulation of victims for political gain,” does not always “result[] from purposeful intrigue[;] such manipulation may have been merely opportune as the movement developed.”<sup>114</sup>

What progressive criminal justice reformers must realize is that prosecutors and legislators who prefer punishment over rehabilitation—tough-on-crime rhetoric, rather than smart-on-crime policies—do not speak for all crime survivors. To the contrary, most crime survivors prefer investment in crime prevention strategies rather than more spending on prisons. Partnering with these ignored voices is key to disrupting victim exploitation when it occurs. More importantly, amplifying the voices of crime survivors who seek restorative, rather than punitive, justice is key to achieving progressive reform.

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112. Ed Pilkington, *Tyra Patterson, Still Protesting Her Innocence, to be Freed After 23 Years*, THE GUARDIAN (Oct. 25, 2017), <https://www.theguardian.com/us-news/2017/oct/25/tyra-patterson-to-be-freed-after-23-years-in-prison-and-claims-of-innocence>.

113. Kara Driscoll, *Woman Convicted of Teen Slaying in Dayton Released on Christmas Day*, DAYTON DAILY NEWS (Dec. 25, 2017), <https://www.google.com/amp/s/www.daytondailynews.com/news/woman-convicted-teen-slaying-dayton-released-christmas-day/xuEzIF8Q NnjgbSMj1mb3SJ/amp.html>.

114. ELIAS, *supra* note 75, at 49.

