LEGACY OF A SCANDAL: HOW JOHN GEOGHAN'S DEATH MAY SERVE AS AN IMPETUS TO BRING ABATEMENT AB INITIO IN LINE WITH THE VICTIMS' RIGHTS MOVEMENT

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> How dare our government try to sweep clean such a dirty slate? Such a dirty slate of a person—that was a child molester. It was a shock to me that he was dead, but he lived a life of a criminal and he died as a criminal at the hands of a criminal. How can they put aside for one second what John Geoghan has done?[1]

INTRODUCTION

On August 23, 2003, defrocked Roman Catholic Priest John Geoghan was murdered in his prison cell by a fellow inmate.[2] Geoghan, the primary figure at the center of America's church sex-abuse scandal, was serving a sentence stemming from a guilty verdict at his January, 2002 trial on child sexual abuse charges. Geoghan's conviction is considered a landmark decision in the Catholic Church child sexual abuse scandal because it was the first successful prosecution of a priest many considered to be protected by an epidemic of cover-ups by the Catholic Church.[3]

While at the time of his death, Geoghan had been convicted of only one count of abuse, there were literally hundreds of other claims against him, brought by

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1. Maryetta Dussourd, a mother whose three sons and four nephews were allegedly molested by John Geoghan, reacting to the application of the abatement doctrine to invalidate Geoghan's 2002 conviction for child molestation because he was murdered prior to having an appeal of his conviction reviewed. Brendan McCarthy, *Victims Challenge Voiding Geoghan Record*, BOSTON GLOBE, Aug. 28, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/082803_victims.htm.

2. Yvonne Abraham, *Geoghan's Death Voids Conviction, Prosecutors Say*, BOSTON GLOBE, Aug. 27, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/082703_conviction.htm.

3. *The* Boston Globe *Spotlight Investigation, Abuse in the Catholic Church—The Geoghan Case*, *at* http://www.boston.com/globe/spotlight/abuse/geoghan/ (last visited Mar. 7, 2005). This website contains a day-by-day breakdown of the Boston scandal. It is comprised of the newspaper articles covering the scandal that have been printed in the *Boston Globe* to date and additional explanatory and historical commentary only available on the website.

former parishioners accusing Geoghan of molesting them as children.[4] In September 2002, the Boston Archdiocese paid $10 million to settle a suit brought by eighty-six plaintiffs who said Geoghan sexually assaulted them.[5] No fewer than eighty-four civil lawsuits remain pending against him, and it is expected that many of these will be pursued against his estate, despite his death at the hands of a fellow prisoner.[6] However, while Geoghan may be the face of the abuse scandal for many, he is not alone among accused priests. Shortly after Geoghan's conviction, Cardinal Bernard Law, the archbishop of the Boston Archdiocese, released the names of dozens of other priests under his supervision who were known to the Archdiocese to be pedophiles.[7] Tragically, this was only the beginning of the scandal. As it escalated, Cardinal Law, once among the most powerful and revered men in the Catholic Church, was forced to resign from the post he had held for nearly twenty years.[8] The scandal continues to haunt the Catholic Church, and more importantly, the victims affected by the cover-up.

Consequently, it came as a shock to many Americans when the state of Massachusetts announced, in the days after Geoghan's death, that the law required that all charges against him be dropped and that he be legally restored to a status equivalent to "presumed innocence."[9] Massachusetts, along with a majority of states and the federal system, follows a common-law doctrine known as abatement ab initio,[10] which dictates that upon the death of a convicted criminal awaiting appellate review, the conviction of the trial court is to be vacated and the indictment dismissed.[11]

The theoretical underpinnings of the abatement ab initio doctrine are both practical and procedural. In its most basic formulation, the appeals process exists to completely and finally resolve any lingering issues as to a defendant's

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4. *Id.*

5. *Id.*; *see also* Walter V. Robinson & Michael Rezendes, *Geoghan Victims Agree to $10 Million Settlement*, BOSTON GLOBE, Sept. 19, 2002, *available at* http://www.boston.com/globe/spotlight/abuse/stories3/091902_geoghan.htm. More recently and in response to general allegations of abuse against other priests in the Boston Archdiocese, the Church in September 2003, agreed to an $85 million settlement to 552 plaintiffs alleging sexual abuse by Boston priests. *See* Kevin Cullen & Stephen Kurkjian, *Church in an $85 Million Accord*, BOSTON GLOBE, Sept. 10, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/091003_settlement.htm.

6. *See* Robinson & Rezendes, *supra* note 5; *see also* Abraham, *supra* note 2.

7. *The* Boston Globe *Spotlight Investigation, Abuse in the Church—Cardinal Law and the Laity*, *at* http://www.boston.com/globe/spotlight/abuse/law_laity/ (last visited Mar. 7, 2005).

8. *Id.*

9. Abraham, *supra* note 2; McCarthy, *supra* note 1.

10. Literally, abatement "to the beginning." Abatement ab initio means that all proceedings in a case dating from its inception are abated. The result of this abatement is that a defendant awaiting an appeal is legally restored to a status of presumed innocence and all charges against him are dismissed.

11. Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 955 (2002).

innocence in a case.[12] Resolution becomes moot, however, when the appellant is no longer living or available to pursue the appeals process.[13] Additionally, there are procedural bases behind the appeals process that are grossly offended if a conviction is left standing where the convicted has not had the opportunity to take advantage of the appeal. When regarded as a right granted to one convicted of a crime, an appeal is a procedural safeguard without which a trial verdict is never properly scrutinized and, thus, cannot be fairly upheld and enforced.[14]

In recent decades, however, a significant majority of states have placed greater weight on the rights of crime victims.[15] This has amplified the debate regarding the appropriateness of abatement ab initio in criminal cases. Interestingly, Massachusetts has been at the center of this controversy before.[16] In 1996, John Salvi III was convicted of terrorist attacks on two abortion clinics

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12. *See id.* at 971-73; *see also* Joseph Sauder, Comment, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement Ab Initio Doctrine*, 71 TEMP. L. REV. 347, 350-53 (1998).

13. *See* Sauder, *supra* note 12, at 350 & n.24.

14. Cavallaro, *supra* note 11, at 945-47.

15. Alice Koskela, Casenote & Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158 (1997). Koskela reviews the background of the Victims' Rights Movement and its expansion over the last few decades at both the state and federal levels. The article also discusses a few "hot topic" issues in the area, including the standing of victims' relatives to invoke victims' rights legislation, due process arguments in favor of the defendant, and the rights of victims under some statutes to refuse to submit to defense discovery interview requests.

16. *See* Barry A. Bostrom et al., *John Salvi III's Revenge From the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y. CITY L. REV. 141 (2002). This article opens from the viewpoint of Richard Seron, a security guard at an abortion clinic attacked by John Salvi III as part of his intended rampage against such establishments. Seron sustained four gunshot wounds in a close-range shootout with Salvi. As a result of the confrontation, Salvi fled, leaving behind a bag that contained seven hundred rounds of ammunition and other gun paraphernalia which he presumably intended to use to commit a far greater number of murderous attacks on abortion providers (the clinic where Seron worked was Salvi's second target of the day). *Id.* at 146.

At the time of Salvi's suicide, Seron was awaiting several rewards that had been offered for information leading to the conviction of anyone committing serious attacks against abortion clinics. He had been notified that the rewards were being held, pending final disposition of the case against Salvi, i.e., until Salvi's appeals had been heard, to ensure that the conviction would be upheld. *Id.* at 149-50. Salvi's "revenge," then, was that his suicide prevented such disposition, having resulted in the abatement of his conviction under Massachusetts law. Seron was forced to file suit to collect his reward money because, according to those offering the rewards, the final disposition of the case under abatement ab initio did not result in Salvi's conviction! Seron settled out of court under undisclosed terms. Seron's plight provides a stark example of the far-reaching effects of the abatement doctrine, and the various kinds of "victims" that can be affected by its harsh results.

in the state for murdering two women and attempting to kill five others.[17] Salvi appealed the conviction, but committed suicide in prison before his appeal was heard, and, consequently, his conviction was abated[18] in the same manner as Geoghan's. The State of Massachusetts failed to successfully take legislative action to dissolve the doctrine, despite a considerable public outcry.[19] Given the notoriety and scope of the Boston Catholic Church scandal, however, a more determined protest may be anticipated in the fallout of Geoghan's abatement.

This Note provides an overview and analysis of the abatement doctrine as it relates to and offends the popular Victims' Rights Movement. Part I surveys the doctrine of abatement ab initio, covering the federal and state majority viewpoint, that the abatement of proceedings is appropriate upon the death of the convicted. Further, Part I discusses the proposition that the right to final adjudication in the appellate system has come by many to be viewed as a pseudo-constitutional right guaranteed to every criminal defendant. Finally, Part I reviews the two minority viewpoints that have developed through case law as the result of judicial recognition that our sense of justice is often offended by the abatement doctrine.

Part II discusses the Victims' Rights Movement and its prominence in recent decades, and covers the basic form in which the movement has taken hold in the courts and legislatures of most states and the federal system. Included in this section is a coverage of the policy arguments that have been well-received by our courts and our citizens, if not always so well-received by some legal scholars.[20] This Part concludes by suggesting that the uniformity and near-unanimity of Victims' Rights Amendments in this country signals a trend toward a view of the criminal justice system consistent with increased recognition of and sensitivity toward the victims of crimes.

Part III, then, takes into account the arguments against the Victims' Rights Movement specifically related to the abatement doctrine and provides an analysis of the friction between these two polar concepts. This Part demonstrates how courts and legislatures are in the position of being forced to balance the interests of victims and defendants in a system that traditionally has given defendants strong rights, but has recently overwhelmingly declared that the rights given to victims have not been strong enough.

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17. *Id.* at 148.

18. *Id.* at 148-49.

19. McCarthy, *supra* note 1. In the fallout of the Salvi case, a 1997 proposal with the support of then-Governor Weld was unanimously approved in the Massachusetts Senate, but failed to come through in the House of Representatives. Former State Senator William Keating, the bill's sponsor, expressed hope that the amendment would be reintroduced to the Massachusetts legislature as a result of the Geoghan case. *See also* Abraham, *supra* note 2 (noting the failed legislation).

20. Ironically, many scholars suggest that the arguments against victims' rights are often better-organized and more logical than those supporting the movement. While it is important to acknowledge this and provide some balance to the arguments with the essentially morality- and fairness-based arguments in favor of victims' rights, it is important to clarify at this stage that this Note does not attempt to sway the reader in favor of or against the concept of victims' rights. Although that is a worthy topic, it is simply not in the scope of this Note, dealing narrowly with the movement's effect on the doctrine of abatement.

Finally, Part IV returns to the review of the judicial positions in the abatement ab initio discussion, analyzing the need for reconciliation of the rights of a victim with those of a defendant, even when a defendant has died before final closure of his case. This Note concludes that the minority position is actually the better tool available to our developing legal system to fully realize the balance of interests being considered.

I. THE DOCTRINE OF ABATEMENT AB INITIO

A. The Majority View: Death of the Convicted Prior to Appellate Review Abates the Conviction

The majority of United States courts continue to hold that the death of a defendant prior to final appellate review of his case results in the abatement of all proceedings against that defendant.[21] In the federal system, this view is almost unanimous: eleven of the twelve federal appellate courts follow the abatement doctrine, and the Supreme Court has indicated its support for the concept as well.[22] The majority view also receives wide support in the state court system, where most courts endorse the abatement doctrine as the appropriate resolution of a case following the death of the defendant prior to appeal.[23]

A brief review in this section of the cases at each level of the judiciary identifies the common policy concerns behind these opinions and demonstrates the reasoning behind the abatement doctrine in most majority courts. Then, this section covers the two prominent minority views on the subject of abatement and the reasoning behind these views, and postulates that as relatively recent developments in the case law, these opinions indicate a shift in the goals and priorities of the criminal justice system in the United States—a shift subtly but strongly influenced by the Victims' Rights Movement.

1. The United States Supreme Court.—Due to the nature of the appeals process, there is some difficulty in determining the position of the Supreme Court on the abatement doctrine. The doctrine typically is at issue in courts handling a defendant's appeals of right.[24] The Supreme Court, under the certiorari system, grants discretionary appeals.[25] To this point, no crime victim has successfully taken a case against the State to the Supreme Court on the issue of an appeal of right where a defendant's conviction has been abated ab initio.

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21. *See* discussion *infra* notes 26-49 (covering majority opinions in federal and state courts).

22. *See* discussion *infra* notes 35 and 40.

23. *See* discussion *infra* note 44.

24. *See* Bostrom et al., *supra* note 16, at 163 (noting the importance of the distinction between appeals of right and discretionary appeals when applying the abatement doctrine); *see also* Cavallaro, *supra* note 11, at 951-53. For case law clarifying the issue with reference to the Supreme Court's decisions in *Dove* and *Durham*, see *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977).

25. *Moehlenkamp*, 557 F.2d at 128.

However, two cases in the 1970s strongly point to the Court's support of the abatement doctrine. In *Durham v. United States*, the Court took the unexpected step of abating all proceedings in a case where a defendant died after petitioning the Court for certiorari, even though his conviction had been upheld at the appellate level.[26] Before *Durham*, it was the usual practice of the Court to dismiss the petition for certiorari and leave it to the lower courts to decide the scope of abatement.[27] The Court in *Durham* noted that the practice of federal courts when dealing with cases on direct appeal was to apply the abatement doctrine and dismiss all prior proceedings against the defendant.[28] Adopting this approach for discretionary certiorari appeals, the Court vacated the judgment of the lower court and remanded with instructions to dismiss the indictment altogether.[29]

However, the Court overruled its surprising decision in *Durham* just five years later in *Dove v. United States*.[30] In a very brief per curiam opinion,[31] the Court simply announced that the death of a defendant results in the dismissal of his petition for certiorari, of course leaving the last appellate decision unchanged. In other words, abatement ab initio does not extend to the discretionary appeals available beyond direct appellate review.[32] The Court acknowledged its decision in *Durham*, stating simply, "[t]o the extent that *Durham v. United States* . . . may be inconsistent with this ruling, *Durham* is overruled."[33]

Given the opaque nature of the *Dove* opinion itself, the legal community is left to divine what it can of the Supreme Court's stand on abatement ab initio from the reasoning behind *Durham*.[34] From *Durham*, it seems that the Supreme

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26. 401 U.S. 481 (1971) (per curiam).

27. *Id.* at 482.

28. *Id.* at 482-83.

29. *Id.* at 483.

30. 423 U.S. 325 (1976) (per curiam).

31. The entire text of *Dove* reads:

> The Court is advised that the petitioner died at New Bern, N.C., on November 14, 1975.
>
> The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States* . . . may be inconsistent with this ruling, Durham is overruled.
>
> It is so ordered.
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> Petition dismissed. Mr. Justice White dissents.

Id. (citation omitted).

32. See Cavallaro, *supra* note 11, for a discussion of the reading of *Dove* by courts confronted with the abatement issue since that decision. With the exception of the Third Circuit, all of the federal appellate courts have determined that the *Dove* decision controls only in cases considering discretionary petitions for certiorari to the Supreme Court, not to those concerning appeals of right. Each circuit court has declined to apply *Dove* to abolish abatement ab initio, instead differentiating between appeals of right and discretionary appeals and holding that an appellant's death prior to the exercise of his right to appeal results in abatement of the conviction ab initio. *See infra* note 40.

33. *Dove*, 423 U.S. at 325.

34. *See* United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977).

Court agreed with the basic tenets of the abatement remedy.[35] The Court acknowledged the effect of the rule, stating that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception."[36] Referring to the use of the doctrine at the appellate level, the Court states, "[t]he unanimity of the lower federal courts which have worked with this problem is . . . impressive. We believe they have adopted the correct rule."[37] When deciding *Dove*, the Court limited the extent to which *Durham* was overruled to the common factors in the two cases: to the application of the doctrine to petitions for certiorari.[38] This limitation suggests that the general language in *Durham* supporting the use of the doctrine at the appellate court level continues to have the support of the Court. Though the Court has not addressed the issue since, the reading of the cases by the appellate courts seems likely to be an accurate one.[39]

2. *Federal Courts of Appeal.*—As the Supreme Court noted in *Durham*, the federal appellate courts demonstrate considerable unity in their approaches to the abatement doctrine. With the exception of the Third Circuit, all of these courts continue to abate all proceedings in a criminal case where the defendant dies pending an appeal of right.[40]

The adherence to abatement ab initio in federal appellate courts is well demonstrated by *United States v. Pogue*.[41] Here, the D.C. Circuit employed the abatement remedy following the defendant's death even though the defendant had pled guilty to the charge he was appealing and there was evidence that the victim

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35. *Id.* at 128.

36. Durham v. United States, 401 U.S. 481, 483 (1971) (per curiam).

37. *Id.*

38. *See Dove*, 423 U.S. at 325.

39. *Durham* does lend some support to the "appeals of right" view now espoused by the majority of courts. In his dissent (on other grounds), Justice Blackmun points out that an appeal of right is procedurally different from an appeal of certiorari. He supported dismissing the petition for certiorari and leaving the conviction to stand. 401 U.S. at 484-85. Some authors suggest that the *Dove* decision can be characterized as the Court's adoption of Justice Blackmun's dissent in *Durham*. Bostrom et al., *supra* note 16, at 163.

40. For federal opinions following the majority view, see, e.g., *United States v. Pogue*, 19 F.3d 663 (D.C. Cir. 1994); *United States v. Mollica*, 849 F.2d 723 (2d Cir. 1988); *United States v. Oberlin*, 718 F.2d 894 (9th Cir. 1983); *United States v. Pauline*, 625 F.2d 684 (5th Cir. 1980); *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977); *Crooker v. United States*, 325 F.2d 318 (8th Cir. 1963). For the single federal opinion breaking with the majority analysis, compare *United States v. Dwyer*, 855 F.2d 144 (3rd Cir. 1988), where the court dismissed an appeal not on the basis of abatement ab initio, but instead cited a lack of standing by the attorney seeking abatement. (Interestingly, it is John Geoghan's attorney who is responsible for petitioning the court to abate Geoghan's conviction. *See* McCarthy, *supra* note 1. In the Third Circuit, then, Geoghan's conviction would stand.) As discussed later, some state courts have followed a minority view that allows for substitution of a party following a defendant's death, thereby overcoming the problem cited in *Dwyer*. *See* discussion *infra* notes 68-78 and accompanying text.

41. *Pogue*, 19 F.3d at 663.

intended only to challenge his sentence, or that he planned to voluntarily dismiss his appeal altogether. The court stated the common assertion in support of abatement: that the "principle underlying the abatement rule is that 'the interests of justice ordinarily require that [a defendant] not stand convicted without resolution of the merits' of an appeal."[42] This basic policy argument will be addressed in more detail in a later section of this Note.[43]

3. State Courts.—Most state courts reviewing abatement cases have also adopted the majority opinion followed in the federal system.[44] While the language used in the many state cases varies more than in the federal courts, most of these state decisions follow the same basic principles set forth at the federal level.[45]

In holding for abatement ab initio in the case of a deceased man who had appealed his criminal conviction, the Supreme Court of Iowa is representative of many states' adherence to the majority view in abatement cases. In *State v. Kriechbaum*,[46] that court declared:

> In such a case there is no unsuccessful party; nor a successful one. Defendant's right of appeal inhered in the prosecution from the beginning. His right of appeal was as inviolable as any right of defense. Also his right of suspension of the judgment of the trial court until after the appeal has been heard. The judgment below could not become a verity until the appellant [sic] court made it so by an affirmance. . . . The question of the defendant's guilt was therefore necessarily undetermined at the time of his death. If death abated the action, the question never could be determined. . . . We hold therefore that the death of the defendant abated the action as well as the mere appeal. . . . The criminal action must therefore be deemed as abated in toto or not at all.[47]

Another state case following the majority rationale for the abatement doctrine

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42. *Id.* at 665 (citing United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)).

43. *See* discussion *infra* notes 50-59 and accompanying text.

44. *See* Hartwell v. State, 423 P.2d 282 (Alaska 1967); State v. Griffin, 592 P.2d 372 (Ariz. 1979); Dixon v. Superior Court, 240 Cal. Rptr. 897 (Ct. App. 1987); People v. Lipira, 621 P.2d 1389 (Colo. Ct. App. 1980); Howell v. United States, 455 A.2d 1371 (D.C. 1983); State v. Stotter, 175 P.2d 402 (Idaho 1946); People v. Robinson, 719 N.E.2d 662 (Ill. 1999) (Robinson II); State v. Kriechbaum, 258 N.W. 110 (Iowa 1934); State v. Thom, 438 So. 2d 208 (La. 1983); State v. Carter, 299 A.2d 891 (Me. 1973); State v. West, 630 S.W.2d 271 (Mo. Ct. App. 1982); State v. Campbell, 193 N.W.2d 571 (Neb. 1972); State v. Poulos, 88 A.2d 860 (N.H. 1952); People. v. Craig, 585 N.E.2d 783 (N.Y. 1991); State v. Boyette, 211 S.E.2d 547 (N.C. Ct. App. 1975); State v. Dalman, 520 N.W.2d 860 (N.D. 1994); Johnson v. State, 392 P.2d 767 (Okla. Crim. App. 1964); State v. Marzilli, 303 A.2d 367 (R.I. 1973); State v. Hoxsie, 570 N.W.2d 379 (S.D. 1997); Carver v. State, 398 S.W.2d 719 (Tenn. 1966); Perry v. State, 821 P.2d 1284 (Wyo. 1992).

45. *See* Bostrom et al., *supra* note 16, at 162.

46. *Kriechbaum*, 258 N.W. at 110.

47. *Id.* at 113.

is *State v. Carter*.[48] In this case, dealing with an appeal from a finding of felonious homicide, Maine's highest court expressed the common concern that a defendant who dies awaiting an appeal could consequently be found guilty of his crime unfairly. The court stated that a "conviction, in fact left under a cloud as to its validity or correctness when . . . death causes a pending appeal to be dismissed, should not be permitted to become a final and definitive judgment of record—thereby to operate as an effective adjudication that defendant was guilty as charged."[49]

B. Abatement Ab Initio: The Underlying Policy of the Right to Appeal

In both state and federal courts, opinions are easily found suggesting that abatement is an appropriate remedy when a defendant dies because the defendant is no longer available to receive his punishment. Professor Cavallaro points out that courts state this in a variety of ways; that "crimes . . . are buried with the offender;"[50] that "the removal of appellant by death has prevented the execution of any sentence;"[51] that "[d]eath withdrew the defendant from the jurisdiction of [the] court;"[52] and that "[there has been a] loss of an indispensable party to the proceeding."[53] Although this is sound reasoning in a certain "common-sense" way, it often does not hold up well to a legal analysis when weighed against the manner in which abatement can offend the victims of an appellant's crimes or the integrity of a judicial decision at the trial stage. If abatement ab initio remains the law, surely a more pressing reason for its use must be articulated.

Professor Cavallaro suggests the most persuasive reasoning behind the majority position. She proposes that the real drive behind the abatement remedy is the right to appeal.[54] She points out that a workable criminal justice system must follow a process that ensures accuracy in determining the culpability of a criminal.[55] Appellate review, she notes, is designed to essentially guarantee such

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48. *Carter*, 299 A.2d at 891.

49. *Id.* at 894.

50. Cavallaro, *supra* note 11, at 954 (quoting United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909)).

51. *Id.* at 956 n.40 (quoting Hartwell v. State, 423 P.2d 282, 284 (Alaska 1967)).

52. *Id.* (quoting *Kriechbaum*, 258 N.W. at 113).

53. *Id.* (quoting *Carter*, 299 A.2d at 894).

54. *Id.* at 945, 954-55. Cavallaro argues in favor of the appeal rationale, and also discusses the simpler proposition that the case simply dies with the defendant. She expertly points out that the appeal rationale is behind even these simpler decisions, though courts often fail to state the connection succinctly. *See also* Sauder, *supra* note 12, at 350-53.

55. Cavallaro states:

> Appeal is, fundamentally, about error correction. Thus, our legal attitude toward the importance of error correction should determine the status of the right of appeal. Because innocence is a bar to punishment under any theory of punishment, appeal is a necessary and effective process of error correction that guarantees that the innocent will not be punished. These propositions should inform the nature of the right of appeal.

accuracy.[56] This Note focuses on this discussion of the right to appeal.

The importance of the right to appeal in the context of abatement cannot be overlooked. If one accepts the basic premise that the purpose of the appeals process is to provide a final and more certain outcome to a case, it is indeed easier to understand the use of abatement where that outcome can no longer be achieved. Where an appeal is used to review and correct errors made at the trial level, the need to preserve the process to perform such a function is obvious.

At the heart of the appeals process is a fundamental concern for the wrongly convicted. When viewed in such a context as the conviction of an innocent man at trial, the appeal serves two functions so important that it is very difficult to justify their neglect: the appeal is the innocent man's opportunity to bring to light the error that led to his conviction and to have that conviction finally nullified, and the appeal serves to redirect our attention to pursuing the real perpetrator of the crime so that the criminal system can bring him to justice.[57] Abatement upon death serves, at least, to preserve the former of these two functions by clearing the name of the defendant who has not yet been confirmed in guilt through the appeals process.

The societal interest in ensuring that a convicted man is actually guilty of his crime has led considerable strength to the right to appeal. One of the more pressing proposals set forth by Cavallaro is that the statutory right to appeal,[58] while not technically a constitutional right guaranteed to criminal defendants, has essentially reached that status within our current legal system.[59] Indeed, it would

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Cavallaro, *supra* note 11, at 971-72.

56. *Id.* at 971-82. Cavallaro discusses the function of appellate review as a guarantor of accuracy in the criminal justice system by analyzing the importance of review under each of the four theories of punishment: retribution, rehabilitation, deterrence, and restitution. She soundly concludes that under any or all of the four theories, the function of appellate review as error correction is indispensable.

57. This latter function, while imperative within our system of justice, does not bear on the subject matter of this Note. It is worthy to point out, however, that even if this function is left to be served following the death of a wrongly convicted defendant awaiting appeal, abatement ignores this function by wiping clean the slate of the defendant without seriously calling his guilt into doubt. In such a case, the true perpetrator of a crime is virtually assured that he will never be discovered.

58. See 28 U.S.C. §§ 1291-1293 (2000) for the federal codification of the appeals process. Additionally, every state provides either constitutionally or statutorily guaranteed appellate review for, at minimum, felony convictions. Cavallaro, *supra* note 11, at 945-46 & n.9.

59. *Id.* at 946-49, 982-86. Cavallaro points specifically to capital cases as a starting block for this contention, noting that the availability of appellate review as a procedural safeguard under a state's death penalty process can be determinative as to the constitutionality of that process. *Id.* at 967 & n.77 (citing Pulley v. Harris, 465 U.S. 37, 55 (1984) (Stevens, J., concurring) ("'some form of meaningful appellate review is required' in capital cases")).

Cavallaro also argues that the right to appeal has become so embedded in our society that it is fundamentally a constitutional due process right. *Id.* She points to the societal expectation of appellate review as being so ingrained that it elevates the procedure to a constitutional status. She

seem that the majority view of abatement, reluctant to give finality to the conviction of even the most clearly guilty man (such as Geoghan), would support such a position. In addressing the minority views on abatement ab initio, then, it is imperative that we keep the gravity of Cavallaro's analysis in mind.

C. The Minority Views

Despite almost unanimous acceptance of abatement ab initio in the federal courts and a strong following in state courts, critics of the doctrine find its results to be unreasonably far-reaching, particularly in that its application restores a convicted defendant to a status of presumed innocence. In addressing the doctrine's shortcomings, two minority opinions have evolved in the state court system.

1. Abolition of Abatement Ab Initio.—Of the two popular minority opinions espoused in state courts, the predominant view simply declines to follow the abatement doctrine, dismisses only the appeal, and allows the conviction to stand as last decided.[60] State courts offer varying rationales for this position. Some point to the historical significance of the conviction, noting that the fact that it has not been fully appealed does not change the fact that an adjudication resulting in a verdict has taken place.[61] Often, courts refer to this rationale as a need to promote confidence in the decisions of our courts.[62] Other states follow the

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cites *Dickerson v. United States*, 530 U.S. 428 (2000), where the Supreme Court acknowledged the evolution of the *Miranda* rule as constitutionally compelled because of the degree to which it is embedded in our culture as an expected part of police practice. *Id.* at 985. The *Dickerson* Court expressly recognized the validity of including social expectation when evaluating the constitutional status of a practice. *Id.* (citing *Dickerson*, 530 U.S. at 438). Noting that all fifty states and the federal courts employ a mode of appellate review, and further that several states provide for such review in their constitutions, Cavallaro draws an appropriate parallel between the societal status of the *Miranda* rule and the status of the right to appeal, suggesting that "[i]t would surprise many Americans to learn that there is, in fact, no right to such review as there is a right to trial by jury and a right not to incriminate oneself." *Id.* at 985-86.

60. *See* Ulmer v. State, 104 So.2d 766 (Ala. 1958); State v. Trantolo, 549 A.2d 1074 (Conn. 1988); State v. Dodelin, 319 S.E.2d 911 (Ga. Ct. App. 1984); Whitehouse v. State, 364 N.E.2d 1015 (Ind. 1977); Royce v. Commonwealth, 577 S.W.2d 615 (Ky. 1979); People v. Peters, 537 N.W.2d 160 (Mich. 1995); *In re* Carlton, 171 N.W.2d 727 (Minn. 1969); State v. Clark-Kotarski, 486 P.2d 876 (Mont. 1971); State v. Kaiser, 683 P.2d 1004 (Or. 1984); Mojica v. State, 653 S.W.2d 121 (Tex. Ct. App. 1983); State v. Christensen, 866 P.2d 533 (Utah 1993).

61. *E.g.*, *Royce*, 577 S.W.2d at 616.

62. Ironically, actual error rates may serve the opposite function, at least with regard to the decisions of lower courts. Cavallaro points to recent studies suggesting rates of error in capital cases approaching fifty percent, with error in non-capital cases estimated around five percent. Cavallaro, *supra* note 11, at 977-78 (citing studies conducted by James S. Liebman and others, reported in James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052-56 (2000)); *see also* Sauder, *supra* note 12, at 363-64 & n.104 (citing overall error rates as high as fourteen percent in some states).

reasoning of the Third Circuit in Dwyer and dismiss the appeal by citing a lack of standing in anyone but the criminal defendant himself.[63]

The prevailing rationale for rejecting the abatement doctrine, however, seems to be simply that it is outdated and fails to acknowledge that a convicted defendant, even in death, can no longer enjoy the status of a man presumed innocent. A case thoroughly covering this rationale is *People v. Peters*.[64] In a decision overruling Michigan's prior adherence to abatement ab initio, the reasoning of the Supreme Court of Michigan was largely based on its offense at the distorted return to a presumption of innocence afforded by the doctrine.[65] The court cited the rationale set forth by the Indiana Supreme Court:

> The presumption of innocence falls with a guilty verdict. At that point in time, although preserving all of the rights of the defendant to an appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown. To wipe out such a judgment, for any reason other than a showing of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results in the area of survivor's rights in more instances that [sic] it would avert an injustice.[66]

Addressing the issue of an appeal of right as opposed to a discretionary appeal, the *Peters* court further stated that "[t]he conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right. We therefore find that it is inappropriate to abate a criminal conviction."[67] Procedurally, courts following this point of view simply dismiss the appeal, leaving the ruling of the lower court to stand without further adjudication.

2. The Moderation Approach: Substitution of a Party for a Final Decision.— A second minority view has also gained a foothold in the state court system. It provides an approach of moderation between the two extreme positions outlined above: the majority view of abatement ab initio, and the primary minority view doing away with the doctrine altogether, leaving the defendant's last court decision to stand unchallenged. This approach declines to automatically apply

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63. *E.g.*, *Kaiser*, 683 P.2d at 1006. Although this rationale has the support of the Third Circuit as well, it does not seem to satisfy many civil court decisions attempting to reconcile this issue in favor of overthrowing abatement. *See supra* note 40. Perhaps this is because courts allow standing to be transferred to third parties following the death of a party. As in those cases, it is difficult to argue that the deceased, having wished to pursue the action when living, does not benefit from the inclusion of the third party in the proceeding following his death.

64. *Peters*, 537 N.W.2d at 160.

65. The court also relied heavily on the then-recent enactment of its Victims' Rights Act to justify abolishing the abatement doctrine. *See* discussion *infra* note 84 and accompanying text. However, a reading of the case suggests the "presumed innocence" argument alone was considered sufficient by this court to justify abolishing the doctrine, as the case does not directly address Michigan's VRA until after the court announces its overruling of abatement.

66. 537 N.W.2d at 164 (citing Whitehouse v. State, 364 N.E.2d 1015, 1016 (Ind. 1977)).

67. *Id.* at 163.

abatement ab initio to a conviction, but acknowledges the rights of a criminal defendant by allowing another party to pursue that defendant's right to appellate review.[68]

The rationale behind this solution purports to preserve the status quo of the criminal justice system by allowing a case already adjudicated at the trial level to follow a natural progression through the appellate process even without the defendant's presence.[69] The Supreme Court of Hawaii, in *State v. Makaila*,[70] provided a comprehensive analysis of this approach in comparison to the positions discussed above. *Makaila* overruled the court's long-standing majority-position precedent, *State v. Gomes*,[71] stating that "it seems unreasonable automatically to follow the abatement ab initio rule and pretend that the defendant was never indicted, tried, and found guilty."[72] The court balanced this concern, however, in acknowledging the defendant's interest in having an appeal heard: "Similarly, outright dismissal of the appeal—without the possibility of a review of the merits—seems equally unacceptable."[73]

In adopting the moderation approach, the *Makaila* court seemed keenly aware of the difficulty posed by a convicted defendant's return to the presumption of innocence as a matter of public policy. Citing the Ohio Supreme Court when it adopted the moderation approach, the court noted:

> To accept [the majority position] would require us to ignore the fact that the defendant has been convicted and, therefore, no longer stands cloaked with the presumption of innocence during the appellate process. Such a holding would not be fair to the people of this state who have an interest in and a right to have a conviction, once entered, preserved absent substantial error.[74]

Remaining mindful, as well, of the defendant's interest in the right to appeal,[75] the *Makaila* court found the moderation approach to be "a fair compromise between the competing interests" at issue.[76] The court held that upon the death of a

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68. *See* State v. Clements, 668 So. 2d 980 (Fla. 1996); State v. Makaila, 897 P.2d 967 (Haw. 1995); State v. Jones, 551 P.2d 801 (Kan. 1976); Gollott v. State, 646 So.2d 1297 (Miss. 1994); New Jersey State Parole Bd. v. Boulden, 384 A.2d 167 (N.J. Super. Ct. App. Div. 1978); State v. Salazar, 945 P.2d 996 (N.M. 1997); State v. McGettrick, 509 N.E.2d 378 (Ohio 1987); State v. McDonald, 424 N.W.2d 411 (Wis. 1988).

69. *See, e.g.*, *McGettrick*, 509 N.E.2d at 382-83.

70. *Makaila*, 897 P.2d at 967.

71. 554 P.2d 235 (Haw. 1976).

72. *Makaila*, 897 P.2d at 972.

73. *Id.*

74. *Id.* at 970 (citing *McGettrick*, 509 N.E.2d at 380).

75. *See* discussion *supra* notes 54-56 and accompanying text.

76. *Makaila*, 897 P.2d at 972. In support of the suggestion that, despite the heightened importance of the right to appeal cited by Cavallaro and others, loss of presumed innocence upon conviction is an equally well-established principal in the law, see *People v. Peters*, 537 N.W.2d 160, 162 (Mich. 1995).

defendant, that defendant's personal representative or the State may file a motion for substitution, and that absent such a motion, the appellate court "may, in its discretion, either (1) dismiss the appeal as moot, vacate the original judgment of conviction, and dismiss all related criminal proceedings, or, in the alternative, (2) enter such other order as the appellate court deems appropriate."[77] Procedurally, this is the manner in which most courts apply substitution.[78]

II. THE VICTIMS' RIGHTS MOVEMENT

A common criticism of the traditional American legal system is that it guarantees criminal defendants many constitutionally conferred rights[79] at the expense of the relatively-ignored victims of their crimes.[80] Although this

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77. 897 P.2d at 972. Following this ruling, which is consistent with other courts permitting substitution, clearly allows for the application of abatement ab initio if no party requests substitution. Query: Though an appellate determination is of primary importance to a living defendant trying to escape, justly or unjustly, punishment under his conviction, in many cases (i.e., those without a corresponding civil component that are more dependent upon a successful appeal), might those parties eligible to have standing in the place of the defendant be just as happy with the results of abatement? Why apply for substitution when doing nothing results in restoration of the defendant to presumed innocence without further time or expense on the part of any third party?

78. *See supra* note 68.

79. Jennie L. Caissie, Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 647 (1998). Caissie lists the constitutional rights guaranteed to criminal defendants:

> the right to counsel [Amend. IV], the right to due process of law [Amends. V, XIV], the right to a speedy trial [Amend. VI], the right to be free from double jeopardy [Amend. V], prohibition against self-incrimination [Amend. V], prohibition against unreasonable searches and seizures [Amend. IV], the right to have warrants issued only upon probable cause [Amend. IV], the right to a jury of peers [Amend. VI], the right to be informed of accusations [Amend. VI], the right to confront witnesses [Amend. VI], the right to subpoena witnesses [Amend. VI], prohibition against excessive bail [Amend. VIII], the right to a grand jury indictment [Amend. V], prohibition against excessive fines [Amend. VIII], and the prohibition against cruel and unusual punishment [Amend. VIII].

Id. at 654 (citations omitted).

80. *See* Gessner H. Harrison, *The Good, The Bad, and The Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 ARIZ. ST. L. J. 531, 533-34 (2002) ("[T]hey were 'pushed aside, forgotten, ignored, [and] diminished by a [criminal justice] system too skewed in favor of the accused.'") (alterations in original) (quoting Editorial, *It Isn't All Bad*, PHOENIX GAZETTE, Nov. 13, 1990, at A12, *available at* 1990 WL 3736023); Koskela, *supra* note 15, at 158 ("There is little question that crime victims have deserved better than they have received from our system; even critics of the victim's [sic] rights movement acknowledge that victims often have been disregarded or treated as depersonalized 'evidence' by police, prosecutors, and judges."); Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R. 5TH 343 § 2(a) (2001) ("[T]here is a widespread perception that the

defendant-centered approach is logical because the courts deal most directly with defendants, it has still become generally acknowledged that the system should not ignore crime victims.[81] Over the last thirty years, thirty-three states have adopted constitutional amendments incorporating victims' rights.[82] A proposed victims' rights amendment to our Federal Constitution has been before Congress five times, most recently in the 108th Congress.[83] Additionally, every state in the

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criminal justice system is out of balance since it coddles defendants . . . while [victims] are at best left out in the cold, or . . . are repeatedly insulted and hurt by the same system.").

81. *See* Caissie, *supra* note 79, at 684-85; Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43 (1999). *But cf.* Ahmed A. White, *Victim's Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357 (1999) (arguing that the idea of victims' rights actually serves to decay our justice system by claiming to balance scales—between defendants and victims—that cannot be balanced while maintaining meaningful safeguards so crucial for the just treatment of defendants).

82. National Victims' Rights Constitutional Amendment Network (NVCAN), http://www.nvcan.org//canmap.html [hereinafter NVCAN] (last visited Mar. 9, 2005) (The NVCAN is a formal organization led by members of various U.S. victims' advocate groups. While the organization works diligently at the state level to promote the enactment of VR legislation and state constitutional amendments, its ultimate goal is the adoption of a federal constitutional VR amendment.); *see also* Koskela, *supra* note 15, at 158 (discussing the history of the Victims' Rights Movement and its spread across the nation since the 1970s).

In reference to Geoghan's case specifically, Massachusetts does not yet have a constitutional victims' rights amendment. Notably, in 1988 (prior to either the Salvi or Geoghan cases) the state did adopt a statutory provision, the Rights of Crime Victims and Witnesses Act, providing many of the rights NVCAN supports. *See* MASS. GEN. LAWS ch. 258B §§ 1-13 (2003); NVCAN, *supra*.

83. *See* S.J. Res. 1, 108th Cong. (2003). A Victims' Rights Amendment has been proposed in each of the last five sessions of Congress. The text of the version before the 2003 Senate, proposed on January 7, 2003, reads:

> SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.
>
> SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.
>
> SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused

union provides some form of statutory guarantee of rights to crime victims, as does the federal government (though the quantity and quality of these rights varies by jurisdiction).[84] To understand the impact of abatement ab initio on victims of crime, it is helpful to become familiar with the policy underpinnings of the Victims' Rights Movement and the status of those policies in our legal system.

A. The Nature of the Rights Encompassed Under the Victims' Rights Rubric

The National Victims' Rights Constitutional Amendment Network (NVCAN) has identified ten "core rights" afforded to crime victims in a survey of state victims' rights amendments, statutes, and case law.[85] These rights include:

1. Protection and safety;
2. Information about services available to assist victims in several ways;
3. Information about crime victim compensation programs;
4. Notification of rights and the dates and times of proceedings;
5. To be present during criminal proceedings;
6. To be heard in criminal proceedings;
7. Prompt disposition of the case;
8. Information about the status and location of the offender;
9. Restitution;
10. Standing and enforcement, in order to make their complaints heard.[86]

Additionally, LaFave has categorized victims' rights amendment provisions as generally seeking any number of six objectives:

1. Making the victim whole economically;
2. Developing administrative sensitivity to the plight of the victim;

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of the crime may obtain any form of relief hereunder.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

SECTION 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

Similar resolutions were proposed before the 108th Session in the House of Representatives. *See* H.J. Res. 10, 108th Cong. (2003) (proposed on January 7, 2003); H.J. Res. 48, 108th Cong. (2003) (proposed April 10, 2003).

84. *See* The National Center for Victims of Crime, Legislative Summary, *at* http://www.ncvc.org/ncv/main.aspx?dbName=DocumentViewer&DocumentID=38725 (last visited Mar. 7, 2005).

85. NVCAN, Victims' Rights Educational Project: Ten Core Rights, *at* http://www.nvcan.org/canm3s4.html (last visited Mar. 7, 2005).

86. *Id.*

3. Respecting the victim's privacy;
4. Providing protection against intimidation;
5. Reducing the burdens on victims willing to assist in prosecution;
6. Giving victims a participatory role beyond that of witness.[87]

Of course, any one of these six objectives may be achieved through one or more specific provisions in a given state's victims' rights legislation, and a given state (or the federal government) could ratify an amendment that includes provisions aimed at any number of these objectives.

Numerous rationalizations for the idea of victims' rights are espoused by its supporters. Among these are the societal responsibility to demonstrate support, compassion, and understanding for the victim who has suffered at the hands of a criminal; the benefit of including a victim in the prosecution of a defendant;[88] the need to sensitize criminal justice personnel (e.g., police officers, prosecutors, judges) to the problems faced by a victim;[89] and the need to address a victim's role in a crime, as opposed to simply using them to gather evidence and testimony related to the defendant's role.[90] While there are those who suggest that the Victims' Rights Movement is detrimental to the legal system,[91] the reality is that most states have passed victims' rights legislation supported by strong legislative and electoral majorities.[92]

B. The Status of the Victims' Rights Movement: Is It Strong Enough to Change the Way We Look at the Function of the Law?

The federal warming to victims' rights is indicative of the movement's standing as a political influence. Beyond the push for a federal constitutional amendment,[93] there have been other indications of support for victims' rights in the federal system. Victims' rights were first directly addressed by Congress under the Victims' Rights and Restitution Act of 1990 and the Crime Control Act

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87. WAYNE R. LAFAVE & JEROLD H. ISRAEL, 1 CRIMINAL PROCEDURE § 1.4(k) (2d. ed. 1992).

88. It stands to reason that a victim is the most interested party in seeing a defendant successfully and fairly prosecuted. Of course, this rationale can backfire sometimes—for example, a particularly zealous or vindictive victim may be unable to see the benefit in allowing a defendant to accept a plea bargain, instead hoping to see the defendant fully "get what he deserves." Also, certain classes of victims, particularly victims of violent crimes, may be either hesitant to participate in a prosecution or, conversely, may feel that their defendant deserves a more severe punishment than has actually been determined to be fair by our justice system.

89. "Victims' rights enactments may also sensitize criminal justice personnel . . . to the plight of the victim, give the victim some measure of dignity, and convey to the victim a message of administrative concern." Zitter, *supra* note 80, § 2(a).

90. *Id.*

91. *See* discussion *supra* note 20.

92. *See* Stearman, *supra* note 81, at app. A (table listing state-by-state electoral support for Victims' Rights Amendments passed through 1998).

93. *See* discussion *supra* note 83 and accompanying text.

of 1990.[94] A fairly comprehensive victims' rights statute, 42 U.S.C. § 10606 provided victims with the right to be treated with fairness and respect for their dignity and privacy; the right to reasonable protection from the accused; the right to be notified of court proceedings; the discretionary right to be present at court proceedings; the right to confer with the Government attorney in the case; the right to restitution; and the right to information about the conviction, sentencing, imprisonment, and release of the defendant.[95]

In its last session, Congress repealed the Victims' Bill of Rights with the enactment of an even stronger victims' rights statute as part of the Justice for All Act of 2004.[96] The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (Crime Victims' Rights Act) guarantees each of the rights previously guaranteed to victims under § 10606.[97] It goes further than § 10606, however, by providing significant enforcement mechanisms aimed at protecting those rights, along with substantial funding available to the many sectors of the legal system that may deal with victims either directly or indirectly. The Act specifically addresses the duties of government officials with respect to victims' rights, calling for individuals and agencies to put forth their "best efforts" in according those rights that fall within their ability to protect.[98] The Act also sets forth a specific process for a victim, a victim's representative, or even a prosecuting attorney to follow in moving for relief and a writ of mandamus where a victim's rights are violated,[99] and requires the promulgation of regulations within one year of the Act's enactment aimed at enforcing victims' rights.[100]

Victims' rights advocates are also excited about the Act's provision of funding for various initiatives designed to make victims aware of their rights and to ensure the implementation and enforcement of the law.[101] Funding is available for victim/witness protection programs, technological enhancement of the methods employed for victim notification, the development, staffing and maintenance of free legal clinics for victims, and for training programs seeking to assist state-level jurisdictions in the implementation of and compliance with the statute.[102]

A comparison of the federal statutes to the core concepts of victims' rights

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94. 42 U.S.C. § 10606 (2000), *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, § 102(c), 118 Stat. 2260, 2264.

95. *Id.* § 10606(b).

96. Pub. L. No. 108-405, 118 Stat. 2260.

97. *Id.* § 102(a).

98. *Id.* § 102(b)-(c).

99. *Id.* § 102(c)(3).

100. *Id.* § 102(f).

101. *Id.* § 103; Press Release, National Victims' Constitutional Amendment Passage, Crime Victim Advocates Applaud Enactment of "Ground-Breaking" Federal Victim Rights Law (Nov. 1, 2004), *available at* http://www.nvcap.org/S2329/ Press%20Release.doc.

102. Crime Victims' Rights Act § 103. The total funding allocated by the Act for fiscal years 2005 through 2009 exceeds $150 million. *Id.*

amendments and legislation covered by NVCAN[103] and LaFave[104] indicates that legislators agree with the common principles driving the Victims' Rights Movement, even if they have not shown their full support of a constitutional amendment. Moreover, the United States Supreme Court has indicated an increased compassion for crime victims in its historic decision in *Payne v. Tennessee*.[105] In that case, the Court ruled that victim impact evidence, previously considered inadmissible under the Eighth Amendment's cruel and unusual punishment clause, was admissible at the sentencing phase of a criminal prosecution.[106] *Payne* acknowledges a policy in favor of making a sentencing authority aware of the harm a defendant's behavior has caused.[107] The *Payne* Court also addressed the interests inherent in providing a process by which a jury could balance the evidence presented in favor of the defendant (i.e., character evidence) with evidence relevant to blameworthiness and general considerations of culpability.[108] Victims' rights advocates argue that there is no better way to achieve this balance than by allowing a victim to assert the rights available under victims' rights legislation, particularly in regards to a victim's participation in trial and sentencing proceedings.

Although *Payne* focused on a victim's right to be heard in impact evidence, this case can be read in conjunction with the federal victims' rights statute to demonstrate a favorable view of the policies underlying the Victims' Rights Movement by the federal branch.[109] *Payne*'s narrow approach indicates an acceptance of the policy that a victim should be heard and that the victim's voice can provide valuable insight to the judge or jury attempting to determine the most appropriate sentence for a defendant. This acknowledges the policy that a victim is among those in the best position to provide a fair prosecution for a defendant. It further supports the proposition that criminal justice personnel should respect a victim's situation and the role that a victim can play, beyond an evidentiary one, in assisting the justice system. Additionally, the statutory Victims' Bill of Rights, taking a more holistic approach to overall victims' rights (as opposed to the narrow approach of *Payne*), expressly acknowledged the need for compassion and respect for a victim, and the replacement Justice for All Act of 2004 continues the holistic approach.[110]

Given the broad appeal and acceptance of the Victims' Rights Movement, it is valid to suggest that its policies have emerged as a considerable force in many areas of the law. The doctrine of abatement ab initio, then, seems ripe for an attack under these policies, as the doctrine directly conflicts with the rights these policies protect.

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103. *See* discussion *supra* notes 85-86.
104. *See* discussion *supra* note 87.
105. 501 U.S. 808 (1991).
106. *Id.* at 827; *see also* Zitter, *supra* note 80, § 2(a).
107. *Payne*, 501 U.S. at 827.
108. *Id.* at 825.
109. *See* discussion *supra* notes 88-92 and accompanying text.
110. *See* 42 U.S.C. § 10606(b)(1) (2000).

III. The Friction Between Abatement and Victims' Rights

Though some courts have reasoned that the enactment of victims' rights amendments are irrelevant to the disposition of a case by application of the abatement doctrine,[111] it is fair to submit that the clearly harsh impact of abatement on a crime victim, coupled with the fact that a victim's only statutory recourse in such a case usually is found in victims' rights legislation, demands otherwise. This is supported by the decisions finding against the traditional application of abatement ab initio,[112] as well as by *Payne v. Tennessee*.[113] A contrast of the rights involved for defendants and victims within this conflict serves to clarify the point further.

Recall in Part I of this Note that advocates of the abatement doctrine cite various reasons for its application.[114] Many courts fail to state a specific policy justification for the rule, reasoning basically that a defendant, once dead, can no longer serve a sentence. A few courts provide a more developed analysis of the problem, such as, "all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."[115]

However, as Part I made clear, more sophisticated, indeed, probably more accurate arguments for abatement center on the defendant's right to appellate review before a final disposition of his case,[116] and the importance of review as a mechanism for securing the accuracy of trial decisions.[117] Certainly, commentators and courts alike have come to suggest that this right borders upon implied constitutional protection.[118] Abatement ab initio, then, serves to preserve

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111. People v. Robinson, 699 N.E.2d 1086 (Ill. Ct. App. 1998) (Robinson I), *vacated by* 719 N.E.2d 662 (Ill. 1999) ("Robinson II"). In *Robinson I*, the Illinois appellate court disagreed with the circuit court's decision that the Illinois Victims' Rights Amendment (Ill. Const. art. I, § 8.1(a)) was irrelevant. The appellate court dismissed the appeals and upheld the convictions of three men convicted of violent crimes, reasoning that the violent nature of the crimes afforded specific consideration to the rights of victims under the statute and precluded abatement of the convictions. *Robinson I*, 699 N.E.2d at 1089-91. The court also noted that allowing abatement of a violent crime "would have a senselessly harsh impact upon the psychological well being of [the victim's] surviving family [and it] would further have the effect of eroding confidence in the criminal justice system [among victims]." *Id.* at 1090. In *Robinson II*, the Illinois Supreme Court vacated the judgments, following the rationale of the district court and declaring that the VRA was irrelevant to the abatement debate. *Robinson II*, 719 N.E.2d at 663.

112. *See* discussion *supra* notes 60 and 68.

113. *See* discussion *supra* note 105 and accompanying text.

114. *See* discussion *supra* notes 50-56 and accompanying text.

115. Cavallaro, *supra* note 11, at 954 (quoting United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909)).

116. *See* discussion *supra* notes 54 and 59 and accompanying text; *see also* Zitter, *supra* note 80, § 13(a).

117. *See* discussion *supra* notes 55-56.

118. *See* discussion *supra* note 59 (citing Professor Cavallaro's general opinion and the statement of Justice Stevens in *Pulley v. Harris* specifically regarding appellate review in capital

the appellate process where a defendant, through death, is no longer available to do so by employing the process for his own purposes.

Alternatively, as Part II of this Note examined, the idea of victims' rights serves a seemingly contrary function to that served by abatement ab initio: the protection of the victims of a crime. Whereas the criminal defendant is protected by various constitutional[119] and (arguably) impliedly-constitutional[120] rights, legislation under the Victims' Rights Movement seeks to protect the victims of a defendant's crime by guaranteeing them various rights as well.[121] In response to the often-recognized criticism that criminal defendants are protected to the detriment and complete disregard of victims, victims' rights legislation seeks to support victims by acknowledging their abuse at the hands of criminals, their role in the crimes committed against them and their interest and value in the prosecution of criminals.[122] This not only serves the individual interests of crime victims, but also societal policy interests promoting the prosecution of crime and favorable views of the criminal justice system.

It is not difficult, then, to identify the potential for conflict between these two sets of rights. Proponents of the abatement doctrine, at least as applied under the traditional majority rubric, advocate an absolute supremacy of defendants' rights over victims' rights, regardless of the contemptibility of the defendant's crime or the brutality of the result on the dignity and well-being of the victim. This reasoning applies even for defendants like John Geoghan and John Salvi III, for whom guilt is certain and uncontested, and whose victims are most certainly violated by the application of abatement ab initio and its ensuing restoration of each defendant's presumed innocence. Victims' rights advocates, on the other hand, argue that public policy and current political trends indicate that victims' rights have, for some time, been of increasing import in our judicial environment. To most victims, their rights merit as much or more consideration than those of the criminals who have violated them, particularly once the criminals are dead.[123] This reasoning carries greater weight when the guilt of a defendant is certain.

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cases); *see also* Sauder, *supra* note 12, at 359-62 (tracing the history of the right to appeal and its strength as a mainstay right of defendants).

119. *See* discussion *supra* note 79.

120. *See* discussion *supra* notes 59, 118.

121. *See* discussion *supra* notes 85-87 and accompanying text.

122. *See* discussion *supra* notes 88-90 and accompanying text.

123. This comment evokes Sauder's thesis that abatement ab initio should be applied following the death of a defendant, provided that the defendant did not commit suicide. Sauder, *supra* note 12, at 367. Sauder discusses the application of the doctrine following the suicide of John Salvi III, arguing that a criminal can exact a measure of revenge (whether intentionally or not) on his victims and the criminal justice system in general via suicide. *Id.* at 373-74. This Note does not advocate this position, finding it to be patently offensive in its disregard for the illness suffered by a vast majority of suicidal individuals; however, aside from his analysis of suicide, Sauder lends support to the notion that most defendants, once expired, would be hard-pressed to argue that their rights should subjugate those of their victims.

What defendants' rights advocates fail to recognize, however, is that the interests of defendants and victims are not necessarily mutually exclusive in the appellate context; a victim is equally as well-served by a final determination of guilt at the appellate level as is a defendant. Application of the abatement doctrine, unfortunately, disregards this logic and throws the two sets of rights out of balance. This serves no party well: neither defendants, nor victims, nor society. In analyzing abatement issues, it is important for any court to keep in mind the defendant's and public's interests in having a case conclusively adjudicated. It is equally important, however, to balance those interests with the victim's and public's interests in disposing of cases in a manner consistent with the rights of victims under victims' rights legislation. What the criminal justice system needs, then, is a tool that can restore the proper balance of these two interests, preserving the rights guaranteed to all involved parties. Our system already has such a tool: the moderation approach to the abatement quandary.

IV. Balancing the Rights of Defendants and Victims—Choosing the Moderation Approach

The moderation approach discussed in Part I allows for the continuation of appellate proceedings even after the death of a defendant by providing for the substitution of a party in standing for the defendant. This Part explores the usefulness of this approach as a mechanism that successfully balances the interests of defendants and victims and their corresponding public policy interests. First, however, it is useful to demonstrate why the other two approaches to abatement ab initio are ineffective in achieving this desirable balance.

A. The Failure of Justice Under the Polar Approaches to the Abatement Doctrine: Appellate All or Nothing is Unfair to Everyone

The majority approach[124] is unsuccessful because it altogether fails to address the interests of the victim. It cannot reasonably be said that the victims of a crime, particularly of violent or heinous crimes such as those in the Geoghan case, do not suffer harm or offense to their psychological well-being when their perpetrator is cleared of all charges upon his death. Further, it is an insufficient outcome in our legal system when it is considered that most of these appeals would be decided against the defendant if they actually were to be fully adjudicated.[125] The majority opinion, then, essentially trades a likely finalized conviction and the well-being of crime victims for a very unlikely result that is offensive both to crime victims and the public at-large, all in the name of protecting the interests of a person no longer able to enjoy such protection, who

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124. *See* discussion *supra* notes 21-49 and accompanying text.

125. *See* discussion *supra* note 62. Although this discussion points out that the appellate process, in overturning a significant percentage of trial court decisions, may serve to erode the public's confidence in the court system, it is nonetheless clear that a significant majority of appeals result in final judgments upholding the decisions of lower courts.

would never likely have received such a favorable outcome in the first place.

The primary minority approach,[126] dismissal of the appeal upon the death of a defendant, is in many ways equally offensive. Obviously, it fails to protect any remaining interests the defendant or his survivors may have in appellate review by confirming finally the defendant's guilt without his ever having had access to the process by which our legal system attempts to ensure that such a verdict is indeed just. This approach is equally unfair to the victim of a crime and to society, stripping all of the various measures of security that final adjudication brings: proof that the system is effective; that the right defendant has been prosecuted and vindication has been achieved (inasmuch as the legal system can provide); that the case, along with the legal plight of the victim, is finally and fully closed.

B. The Balance Inherent in the Moderation Approach

Whereas both of these approaches are historically inadequate and demonstrably unfair in the current legal environment in support of victims' rights, the moderation approach[127] is able to remedy the shortcomings of both positions. Defendant substitution is the only approach to this issue that truly attempts to reconcile the seemingly at-odds rights of defendants and victims under the abatement doctrine while keeping in mind the ultimate societal interests in the debate.[128]

By allowing a substitute defendant, the rights of the defendant and his survivors are protected by encouraging full and final adjudication of a case. A defendant's family or his personal representative is provided with the opportunity to receive all the protections our courts afford via the appellate system. At the same time, a victim's rights are as fully acknowledged and protected as they are in an ordinary case with a living defendant. Victims retain the assurance that the convicted person is subject to all levels of the review process. Abatement will not serve to destroy their faith in the credibility of the legal system, or to promote a sense that the legal system is entirely defendant-centered without regard for the well-being of victims. Perhaps most importantly, in a general sense, the public interests involved are satisfied by the fact that the case is presumably resolved in the same manner and reached the same final result as would have been the case had the defendant lived to exercise his right to appeal.

Regarding any procedural concerns, the approach will be no more difficult

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126. *See* discussion *supra* notes 60-67 and accompanying text.

127. *See* discussion *supra* notes 68-78 and accompanying text.

128. *See* State v. Makaila, 897 P.2d 967, 972 (Haw. 1995):

> [W]e recognize the importance of the interests advanced by both parties in the matter before us .... [Defendant's] family seeks "vindication" of the deceased. The State has an interest in preserving the presumptively valid judgment of the trial court. A resolution of the matter of going forward with the appeal ... involves a policy decision that rests solely within the discretion of this court .... [Allowing for substitution of the defendant] fashions a fair compromise between the competing interests.

for courts to enforce than the ordinary appellate process.[129] The only procedural differences in applying the approach involve the uncomplicated process of requesting and granting substitution of a party in standing for the defendant, and the determination by the State to dismiss the proceedings if no party requests substitution. Additionally, since the moderation approach protects the rights of all parties and the public interest fully to the same extent as the appellate process, legislatures would no longer need to be concerned with analyzing the abatement doctrine and its attendant policy concerns, as has been the case in Massachusetts for several years.[130]

CONCLUSION

Returning to a discussion of the John Geoghan case, the above analysis can apply to the three positions on abatement ab initio as a means of illustrating the strength of the moderation approach. The Geoghan case is a well-suited mechanism for such illustration because of the high profile of the Boston Church scandal and the compassion and understanding evoked by the child victims. Any tolerance for the idea of victims' rights is certainly enhanced by the facts of this tragic case.

Under the majority position (the position, unfortunately, followed in the state of Massachusetts), abatement ab initio has served to restore John Geoghan to a status of presumed innocence. It does not matter that he was clearly guilty of hundreds, perhaps thousands, of instances of sexual predation of children. It does not matter that he is regarded by many as the most vilified character connected to a scandal that calls into question the motives and actions of many priests in the Catholic Church.[131] It does not matter that the dignity and peace of mind offered to his victims by his conviction has been violated. John Geoghan's conviction does not stand. It is difficult to accept an argument that this does not offend the rationale behind the appellate review process.[132] More fittingly, this result

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129. *See* discussion *supra* note 77 and accompanying text (covering the procedural employment of the moderation approach used by most courts following the position).

130. *See* Bostrom et al., *supra* note 16, at 172 n.106 (discussing the difficulties in addressing this issue before the Massachusetts State Legislature); *see also* discussion *supra* note 19 (discussing failed Massachusetts legislation).

131. *See* THE JOHN JAY COLLEGE OF CRIMINAL JUSTICE OF THE CITY UNIVERSITY OF NEW YORK, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES (Apr. 16, 2004), *available at* http://www.usccb.org/nrb/johnjaystudy/. This study, covering eighty percent of the Catholic priests in the United States, found that approximately four percent of priests (numbering over 4000) had been accused of at least one instance of sexual abuse of a minor child between 1950 and 2002. *Id.* at 5-6. As to the scope of abuse, the study found that "the problem was indeed widespread and affected more than 95% of dioceses and approximately 60% of religious communities." *Id.* at 39, *available at* http://www.usccb.org/nrb/johnjaystudy/prev2.pdf.

132. For Professor Cavallaro's view of abatement and the right to appeal in the Geoghan case (consistent with her view as cited throughout this note), see Rosanna Cavallaro, Opinion, *Why,*

offends the very rationale of justice underlying the process of criminal adjudication itself.

The primary minority approach, abolition of the abatement doctrine, is equally inadequate, as demonstrated by the Geoghan case. While Geoghan's guilt was clear and well documented by the Boston Catholic Church itself,[133] the fact that Geoghan was a participant in the appellate process indicates that he recognized the possible advantages of exercising his right to appeal. John Geoghan had the same right as every other defendant to have his appeal heard and to have the proceedings of the trial court reviewed for error that might have changed the outcome of his case. At the time of his death, John Geoghan was the subject of at least eighty-four civil lawsuits.[134] A favorable ruling for Geoghan at the appellate level could have had significant positive implications for John Geoghan, even if he had remained imprisoned. The importance of the right to appeal cannot be denied in this case.

The moderation approach, however, is available to courts facing the dilemma proposed by these other two positions. Under the moderation approach, John Geoghan's death would not result in disregard for the rights of Geoghan or his victims. Rather, society would see the strong policy interests underlying the right to appeal protected from the arbitrary decision of fate. A representative for Geoghan—a family member, his lawyer, perhaps even the Catholic Church in a display of good faith—would be permitted to stand in for John Geoghan and to see his case through the appellate process. Geoghan would not be present; he would not realize the final determination of his case. However, the case would move forward to the same fruition as could otherwise be realized only if Geoghan had lived. There would be no call for legislative action to protect the rights of Geoghan's victims or the integrity of a sound trial court conviction. There would be no violation of the closure those victims had within their grasp until the moment Geoghan was murdered. Indeed, the right to appeal would be protected and employed with precisely the effect intended. The moderation approach would address all of these concerns, while reinforcing and re-dignifying our criminal court system and allowing the system to serve justice upon a child molester.

The doctrine of abatement ab initio provides a perfect illustration of the conflict between defendants' and victims' rights in the American legal system. This Note discussed various constitutional, pseudo-constitutional, statutory and common law developments that compete in our courts every day in an attempt to balance these rights and secure a fair adjudication for defendants and a just resolution for victims. The policies underlying each of these two interests, standing in stark contrast when abatement is permitted, can be reconciled only

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Legally, Geoghan Is Now "Innocent," BOSTON GLOBE, Aug. 29, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/082903_cavallaro.htm.

133. *See* Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, *available at* http://www.boston.com/globe/spotlight/abuse/stories/010602_geoghan.htm.

134. *See* discussion *supra* notes 5-6 and accompanying text.

when justice is allowed to carry a case forward without regard to the death of one of the parties. Where abatement, or alternatively, the approach abolishing abatement altogether fails, the moderation approach succeeds. Moderation protects the rights of defendants inherently contained in the appeals process, but also protects the rights of crime victims recognized by every state and so resoundingly last year by our federal government. Because the moderation approach is able to bring a sense of equilibrium to the conflict created by abatement ab initio, it is the approach best adopted by jurisdictions left to manage the case of a deceased defendant.