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Timothy A. Razel

DYING TO GET AWAY WITH IT: HOW THE ABATEMENT DOCTRINE THWARTS JUSTICE—AND WHAT SHOULD BE DONE INSTEAD

*Timothy A. Razel**

INTRODUCTION

In December 2001, Ken Horton left the headquarters of Enron Corporation, personal items in hand, for the final time.[1] Like many of the thousands of newly laid-off employees who left the bankrupt company at that time, he felt "betrayed by . . . [the] company he loved."[2] One of Horton's regrets about his overall positive Enron experience was his investment strategy.[3] "'If I had to do it all over again, I would work at Enron again,' he said. 'I just would have invested a little differently.'"[4] Due to the spectacular collapse of Enron in 2001, Horton incurred a six-figure loss from his retirement account, which was loaded with Enron stock.[5]

Thanks to a scheme concocted by Kenneth L. Lay, Chief Executive Officer of Enron, and other company executives, Enron's stock had been kept artificially high between 1998 and early 2001.[6] Enron executives accomplished this feat by using various accounting tricks to conceal over $7 billion in losses.[7] However, on October 22, 2001, the scheme began to crumble as Enron admitted it was under inquiry by the Securities and Exchange Commission (SEC) for possible conflicts of interest related to

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1. Frank Ahrens, *From the Ex-employees: Revenge, Shock, Sadness*, Wash. Post, May 26, 2006, at D1.
2. *Id.*
3. *See id.*
4. *Id.*
5. *Id.*
6. *See* Superseding Indictment ¶ 21, United States v. Causey, 2004 WL 1553217 (S.D. Tex. 2004) (Cr. No. H-04-25). According to the Superseding Indictment, Lay and others engaged in various tactics including fraudulently overvaluing assets, making "false and misleading statements" about the company's true financial condition, and hiding losses in two subsidiary companies, Enron Broadband Services and Enron Energy Services. *Id.* ¶ 28.
7. *Id.* ¶¶ 24, 28.

two partnerships,[8] which the conspirators used to hide losses.[9] After credit rating agencies downgraded Enron's rating, top Enron officials announced that they had overstated their income for the previous three-and-a-half years by $586 million.[10] Enron finally crashed when a merger agreement with a rival failed and its rating was reduced to "junk status."[11] On December 2, 2001, Enron filed for Chapter 11 bankruptcy and its stock was rendered worthless.[12]

As a result of this scheme, Ken Lay netted approximately $217 million in income from sales of artificially inflated Enron stock, as well as $19 million in salary.[13] Also as a result of this scheme, unwitting former Enron employee Adam Plager lost his 401(k) plan, which, like Horton's retirement account, had been buoyed by seemingly invincible Enron stock.[14] Plager and Horton were merely two of "thousands of employees and millions of stockholders" who had lost big money from this scheme.[15]

The Justice Department brought various fraud-related charges against Lay.[16] He was found guilty on May 25, 2006, of all ten counts of the indictment.[17] When he heard about the guilty verdicts, Horton told the *Washington Post* he was "in such an excellent mood."[18] He was right to be happy. Even though sentencing had not yet occurred (it was scheduled for October 23),[19] it was likely that the sentence would include restitution of "tens of millions of dollars" unlawfully obtained by Lay to victims like Plager and Horton.[20] That would be the justice that Lay's victims believed they deserved.

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8. *Timeline of Enron's Collapse*, Wash. Post, Sept. 30, 2004, http://www.washingtonpost.com/wp-dyn/articles/A25624-2002Jan10.html.

9. Superseding Indictment, *supra* note 6, ¶¶ 28-33.

10. *Id.* ¶ 26.

11. *Id.*

12. *Id.*; *Timeline of Enron's Collapse*, *supra* note 8.

13. Superseding Indictment, *supra* note 6, ¶ 16.

14. Ahrens, *supra* note 1. The stock had reached the height of $90 per share in August 2000. *Id.*

15. United States' Opposition to the Motion of the Estate of Lay to Vacate His Conviction and Dismiss the Indictment at 1, United States v. Skilling, Cr. No. H-04-25 (S.D. Tex. Sept. 6, 2006) [hereinafter Opposition to the Motion to Vacate], *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/government_abatement_motion_response.pdf.

16. *See* United States v. Lay, 456 F. Supp. 2d 869, 870 (S.D. Tex. 2006) (granting motion to abate). The charges included conspiracy to commit securities and wire fraud, wire fraud involving false and misleading statements in employee meetings, securities fraud involving presentations to securities analysts and rating agency representatives, bank fraud, and making false statements to banks. *Id.*

17. Opposition to the Motion to Vacate, *supra* note 15, at 1.

18. Ahrens, *supra* note 1 (internal quotation marks omitted).

19. *See* Tom Fowler, *Lay Case: It's Not Over: Prosecutors Seek a New Law to Keep His Conviction Alive, Despite His Death*, Houston Chron., Sept. 7, 2006, at A1.

20. *See* Opposition to the Motion to Vacate, *supra* note 15, at 1. A victim is entitled to restitution if he or she is harmed by the commission of a federal crime under the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, §§ 201-211, 110 Stat. 1214,

However, that justice was about to be put in grave jeopardy. On July 5, 2006, Ken Lay died of a heart attack.[21] His lawyers then moved to invoke a Fifth Circuit precedent that calls for the vacation of the conviction of any defendant who dies before having an opportunity to pursue an appeal.[22] The doctrine is called abatement ab initio, or simply "abatement."[23] Its effect is to stop all proceedings ab initio (from the beginning) and render the defendant as if he or she had never been charged.[24] Since judgment had not yet been entered, and sentencing had not yet occurred, Lay had no opportunity to appeal.[25] Arguing that "the Lay Estate should not be unjustly enriched with the proceeds of fraud," the government opposed the motion.[26] It acknowledged that victims or the government could file a civil action against the estate to have such proceeds disgorged, but that would require the plaintiffs to prove the entire case all over again (albeit at a lower burden of proof) and spend years in litigation.[27]

The government requested that the court delay ruling on the motion until October 23, the date of sentencing, so it could convince Congress to pass a law which would retroactively preserve Lay's conviction.[28] No one came forward to sponsor the legislation, which was sent to then-Speaker of the House of Representatives Dennis Hastert and Vice President Dick Cheney.[29]

With no action from Congress, on October 17, 2006, Judge Sim Lake rendered an order abating Lay's conviction.[30] Judge Lake acknowledged that the "Fifth Circuit Court of Appeals has adopted the abatement rule," and thus he was compelled to abate the proceedings against Lay.[31]

In its opposition to the abatement order, the government pointed out that many states have begun to question their previous use of the doctrine, with some recently overturning precedent and choosing an alternative doctrine.[32]

1227-41 (codified in scattered sections of 18 U.S.C. (2000)). For further discussion, see *infra* notes 151-58 and accompanying text.

21. Purva Patel & My-Thuan Tran, *No Sponsor for Proposed Lay Bill*, Houston Chron., Sept. 8, 2006, at D1.

22. *See* Fowler, *supra* note 19. For an example of the relevant case law, see United States v. Estate of Parsons, 367 F.3d 409 (5th Cir. 2004) (en banc).

23. *See Estate of Parsons*, 367 F.3d at 413; Opposition to the Motion to Vacate, *supra* note 15, at 3.

24. *See Estate of Parsons*, 367 F.3d at 413.

25. United States v. Lay, 456 F. Supp. 2d 869, 874 (S.D. Tex. 2006). Technically, because judgment had not yet been entered, there was no conviction to appeal. *See id.* However, the rule may be invoked after a guilty verdict regardless of whether judgment had yet been entered. *Id.* (citing United States v. Asset, 990 F.2d 208, 211 (5th Cir. 1993)); *see also* United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983).

26. Opposition to the Motion to Vacate, *supra* note 15, at 2.

27. *Id.* at 4.

28. *Id.* at 2. For details about the legislation, see *id.* at 4-7. For the text, see *id.* attachment A.

29. Patel & Tran, *supra* note 21.

30. *Lay*, 456 F. Supp. 2d at 875.

31. *Id.*

32. Opposition to the Motion to Vacate, *supra* note 15, at 4 (noting several examples).

The purpose of this Note is to examine the transition from the nearly universal use of abatement to the many methods modern courts use to dispose of cases such as Lay's. This Note also advocates for the adoption of the approach that produces the fairest result.

Part I discusses the traditional doctrine of abatement and provides a historical overview that tracks the development of the law regarding abatement. This includes a discussion about the changes in the rationale behind criminal law that accompanied the change in policy. It then articulates the various competing interests that the doctrine of abatement affects.

Part II provides an analysis of each of the five alternative abatement doctrines (as set out by the Maryland Supreme Court in *Surland v. State*[33]). It discusses the arguments for and against each method in light of the various interests at stake.

Part III recommends a new approach, one that properly balances all of the interests involved. This new approach recognizes that not all cases are the same—there are variable interests of differing intensities in each. Part III also includes a discussion of other advantages to the new approach, as well as its disadvantages.

I. THE DOCTRINE OF ABATEMENT

A. *The Traditional Doctrine*

1. What Is Abatement?

Abatement is the dismissal or discontinuance of a legal proceeding "for a reason unrelated to the merits of the claim."[34] It is available in both the civil context[35] and the criminal context.[36] Traditionally, the death of a criminal defendant following conviction, but before an appeal can be made, is a ground for abatement.[37] The effect of abatement is to discontinue all proceedings ab initio—dismiss the appeal as moot, overturn the conviction, and dismiss the indictment.[38] Essentially, the defendant is left as if he or she had never been charged.[39]

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33. 895 A.2d 1034 (Md. 2006).

34. Black's Law Dictionary 1 (2d Pocket ed. 2001).

35. *See* 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 1 (2006) (In the civil context, abatement is a mechanism by which the defendant can stop a suit against him either permanently or temporarily because of some procedural defect).

36. *See supra* notes 22-25 and accompanying text.

37. *See, e.g.*, Commonwealth v. Eisen, 334 N.E.2d 14, 14 (Mass. 1975).

38. United States v. Schuster, 778 F.2d 1132, 1133 (5th Cir. 1985); *see also supra* notes 22-25 and accompanying text.

39. *See* United States v. Schumann, 861 F.2d 1234, 1237 (11th Cir. 1988); Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence and the Evolving Right of Appeal*, 73 U. Colo. L. Rev. 943, 951 (2002).

These effects of abatement have some significant legal consequences. Since the conviction no longer exists, it cannot be used in a civil suit related to the criminal activity.[40] Any uncollected fines generally cannot be collected from the estate.[41] Restitution is a more controversial issue—some courts that use abatement eliminate restitution and others preserve restitution orders.[42] However, any restitution already paid by the defendant may not be recovered.[43]

Abatement is generally not used except in cases where defendants die awaiting direct appeal. If the defendant dies appealing the denial of a petition for habeas corpus,[44] or during other collateral proceedings,[45] the proceedings will usually be dismissed but the conviction will remain intact. The United States Supreme Court will dismiss a petition for certiorari which is pending when the defendant dies.[46] Likewise, it will even dismiss a petition for certiorari that has been granted.[47]

Courts are split on the issue of whether the cause of death is relevant. Some courts view the defendant's death by suicide as a decision to intentionally forego "the appeals procedure which he knew would have been available to him."[48] Thus, they will not invoke abatement and instead let the conviction stand.[49] Other courts maintain that suicide is irrelevant.[50] One cannot "waive" the abatement doctrine by killing oneself.[51] Further, such a distinction unjustifiably forces the courts to conduct "an exhaustive examination of the circumstances of death."[52]

2. Sources of Authority for Abatement Doctrine

Where do courts get the authority to abate convictions? In the federal judicial system it is not mandated by the Constitution or federal statute.[53]

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40. United States v. Pauline, 625 F.2d 684, 684 (5th Cir. 1980).

41. *Id.* However, any fines already paid into the court are not refundable; this is analogous to time served in prison, which similarly cannot be refunded. United States v. Zizzo, 120 F.3d 1338, 1346-47 (7th Cir. 1997).

42. *Compare, e.g.*, United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984) (determining that restitution is preserved), *with* United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (determining that restitution is eliminated).

43. United States v. Asset, 990 F.2d 208, 214 (5th Cir. 1993), *abrogated on other grounds by* United States v. Estate of Parsons, 367 F.3d 409 (5th Cir. 2004).

44. *See, e.g.*, Jackson v. State, 559 So. 2d 320, 321 (Fla. Dist. Ct. App. 1990).

45. *See, e.g.*, Commonwealth v. De La Zerda, 619 N.E.2d 617, 618-19 (Mass. 1993) (reviewing an appeal of denial of motion for new trial); Keeny v. State, 575 S.W.2d 850, 850-51 (Mo. Ct. App. 1978) (en banc) (reviewing an appeal of denial of writ of error coram nobis).

46. *See* Dove v. United States, 423 U.S. 325, 325 (1976) (per curiam).

47. *See, e.g.*, United States v. Green, 507 U.S. 545, 545 (1993) (mem.).

48. United States v. Chin, 633 F. Supp. 624, 627 (E.D. Va. 1986).

49. *See, e.g., id.* at 628.

50. *See, e.g.*, United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983).

51. *Id.*

52. State v. McDonald, 405 N.W.2d 771, 773-74 (Wis. Ct. App. 1987) (Sundby, J., concurring), *aff'd in part, rev'd in part*, State v. McDonald, 424 N.W.2d 411 (Wis. 1988).

53. United States v. Rorie, 58 M.J. 399, 405-06 (C.A.A.F. 2003).

The U.S. Supreme Court has not held that abatement is required in the federal system but rather has "allowed the scope of the abatement to be determined by the lower federal courts."[54] It merely instructs that the lower court dispose of the case "as law and justice require."[55]

Thus, abatement in the federal system is a "matter of policy" for each court.[56] In state courts, similarly, abatement is not constitutionally or statutorily compelled but is rather a matter of common law.[57] Some state legislatures, however, have created legislative policy that has influenced the development of the abatement doctrine in those states.[58]

B. *The Development of the Abatement Doctrine*

1. Origins

The origins of the abatement doctrine are unclear. There is little historical writing about the doctrine before the nineteenth century. Beginning in the late nineteenth century, the earliest American cases dealing with the question generally treated abatement as the obvious course of action when a defendant died. In *List v. Pennsylvania*,[59] the Supreme Court acknowledged that the defendant had died and ordered abatement and dismissal of the writ of error. Its sole rationale was that "it appear[s] . . . that this is a criminal case."[60] In an 1879 case, *March v. State*,[61] the Texas Court of Appeals held that a criminal proceeding was still "pending" while an appeal was being taken.[62] Because the defendant had died before the

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54. Durham v. United States, 401 U.S. 481, 482 (1971) (per curiam), *overruled on other grounds by* Dove v. United States, 423 U.S. 325 (1976) (per curiam); *see also* Crooker v. United States, 325 F.2d 318, 320 (8th Cir. 1963) ("These statements [from various Supreme Court cases on abatement] would seem to intend no implication on what the scope of the abatement was which had occurred, but to leave that matter entirely to the lower courts . . . .").

55. *Durham*, 401 U.S. at 482 (internal quotation marks omitted); *e.g.*, Singer v. United States, 323 U.S. 338, 346 (1945). In state cases, the Court will simply dismiss the proceeding without instruction. *See, e.g.*, Gersewitz v. New York, 326 U.S. 687, 687 (1945) (mem.), *cited in Durham*, 401 U.S. at 482.

56. *Rorie*, 58 M.J. at 405. This policy can of course be changed by statute, which the Justice Department has recently tried to convince Congress to do, with little success. *See supra* notes 28-29 and accompanying text.

57. *See, e.g.*, Wheat v. State, 907 So. 2d 461, 463 (Ala. 2005) (per curiam) (discussing whether the court's ability to reject the abatement doctrine is barred by stare decisis); People v. Robinson, 719 N.E.2d 662, 664 (Ill. 1999) (rejecting an opportunity to discard the doctrine because abatement "has been the law . . . for over twenty years").

58. *See, e.g.*, State v. Salazar, 945 P.2d 996, 1003 (N.M. 1997) (citing a New Mexico statute that allows for substitution of a party to pursue the appeal of a dead defendant); State v. Makaila, 897 P.2d 967, 972 (Haw. 1995) (per curiam) (construing Hawaii Rules of Appellate Procedure, Rule 43(a), to allow for substitution of a party to pursue the appeal).

59. 131 U.S. 396, 396 (1888) (mem.).

60. *Id.*

61. 5 Tex. Ct. App. 450 (1879).

62. *Id.* at 453 ("We are of opinion that . . . the case is pending so long as the question of the guilt or innocence of the accused remains undetermined . . . .").

appeal was decided, the court declared, without citation to authority, that "the prosecution abate[d] *in toto*" because the proceeding was still pending.[63] In *O'Sullivan v. People*,[64] the Illinois Supreme Court took the view that "[a] judgment cannot be enforced when the only subject-matter upon which it can operate has ceased to exist."[65] The court thus refused to punish the dead defendant.[66]

Interestingly, some states have never used abatement. Connecticut is one state that decided against abatement.[67] In 1971, the Connecticut Supreme Court was first presented with the issue, and declined to decide whether to adopt abatement, because arguments for the rule were "neither briefed nor argued before [it]."[68] It decided that the appeal was to be "dismissed as moot."[69] Later cases continued to dismiss appeals as moot, without abating the conviction, citing the 1971 case as authority.[70]

Georgia has also never used abatement. In *Taylor v. State*,[71] decided in 1911, the court noted that "the plaintiff in error has departed this life, prior to the decision of the case."[72] It went on to say, "It is ordered that the writ of error be and the same is hereby dismissed."[73] A later case justified dismissal of the appeal on the grounds that "[a]ny further action against the defendant could not proceed even if the case be reversed on appeal."[74] Therefore, not every court considered abatement the natural course of action, but they all recognized that an appeal could not proceed, and that simply dismissing the case was proper.

The main early issue regarding the doctrine focused on whether the obligation to pay criminal fines abated upon death. In *United States v. Pomeroy*,[75] a 1907 federal case, the circuit court noted that there was "little authority" to guide it on this question. It decided the problem on policy grounds—stating that the point of criminal law is to punish the defendant, and not his heirs and next of kin.[76] Thus, the court declared that the

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63. *Id.* at 456.

64. 32 N.E. 192 (Ill. 1892) (per curiam).

65. *Id.* at 193; Tim E. Staggs, Note, *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*, 38 Ind. L. Rev. 507, 515 (2005).

66. *See O'Sullivan*, 32 N.E. at 194.

67. *See* State v. Raffone, 285 A.2d 323, 325-26 (Conn. 1971).

68. *Id.* at 326.

69. *Id.*

70. *See, e.g.*, State v. Trantolo, 549 A.2d 1074, 1074 (Conn. 1988) (per curiam); State v. Grasso, 374 A.2d 239, 241 (Conn. 1977) (citing *Raffone* as authority for dismissing the appeal as moot). In *Trantolo*, one justice argued for the adoption of the abatement doctrine, complaining that *Grasso* and *Raffone* had been mistakenly adopted as legal authority on the question. *See Trantolo*, 549 A.2d at 1074-75 (Healey, J., dissenting).

71. 72 S.E. 898 (Ga. 1911) (per curiam).

72. *Id.* at 898.

73. *Id.*

74. State v. Dodelin, 319 S.E.2d 911, 911 (Ga. Ct. App. 1984).

75. 152 F. 279, 280 (C.C.S.D.N.Y. 1907), *rev'd sub. nom.*, United States v. N.Y. Cent. & H.R.R. Co., 164 F. 324 (2d Cir. 1908).

76. *Id.* at 282.

defendant's fine had abated along with the judgment, and the estate was not liable for it.[77]

State courts generally agreed with the result in *Pomeroy*.[78] According to the court in *Boyd v. State*,[79] "The personal representative of the deceased is not responsible for the alleged violation of the law," and thus he or she cannot be required to pay on the decedent's behalf.[80] A concurring Illinois court opinion reasoned that, unlike in a civil suit where the plaintiff has a property right in the judgment, there is no property right to uphold in a criminal fine.[81]

2. Criminal Law Rationales in the Nineteenth and Early Twentieth Centuries

Before the mid-nineteenth century in England (as well as in early American colonial times), victims were required to apprehend and prosecute criminals who had wronged them if they wanted the criminals to be punished.[82] Victims would have to initiate proceedings, called "appeals" or "indictments," before a judge provided by the king.[83] The victim could extract compensation from the criminal as well as punishment.[84] Unfortunately, the victim had to bear all the costs of prosecution.[85] Due to this limitation, justice was not consistently enforced—especially in less-affluent communities.[86]

This system of private prosecutions came to be considered "elitist, inefficient, . . . vindictive[,]" and "partisan."[87] As the American colonies

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77. *Id.* at 283; *accord* United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909). The Second Circuit reversed the *Pomeroy* court's decision on the grounds that the motion by the estate was a "civil suit . . . [by the] estate to relieve it from the payment of the judgment." *N.Y. Cent. & H.R.R. Co.*, 164 F. at 325. It reasoned that the matter of the estate's liability was separate from the matter of "guilt or innocence," and thus the court, as essentially presiding over a civil matter, did not have authority to abate the judgment. *Id.*

78. *See* Blackwell v. State, 113 N.E. 723, 723 (Ind. 1916) ("The weight of authority seems to be to the effect that a fine imposed as a punishment for an offense cannot be enforced after the death of the defendant as a claim against his estate."); *see also* Boyd v. State, 108 P. 431, 431 (Okla. Crim. App. 1910); People v. Alexander, 281 P. 697, 697 (Cal. Ct. App. 1929).

79. 108 P. 431.

80. *Id.* at 431.

81. O'Sullivan v. People, 32 N.E. 192, 192-93 (Ill. 1892).

82. Jennie L. Cassie, Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 New Eng. J. on Crim. & Civ. Confinement 647, 649-50 (1998). This system was called the "private prosecutorial system." *Id.* at 650.

83. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 360 (1986). Alternatively, if the victim felt feisty, he could choose to fight the criminal in "battle" and whoever won would be considered the winner of the trial. *Id.* Needless to say, this option was rarely used, but it was legal in England until 1819. *Id.* at 360 n.14.

84. Cassie, *supra* note 82, at 649.

85. *Id.* at 650.

86. *Id.* at 651-52.

87. Cardenas, *supra* note 83, at 369.

expanded, it became harder for victims to rely on neighbors to help catch criminals, and prosecutions, therefore, became more difficult.[88] Crime victims eventually became frustrated with their decreasing ability to deal with crime.[89]

The new system, which used professional public prosecutors, would bring "uniformity" to the method of prosecuting crimes and relieve victims of the duty to prosecute their own cases.[90] One significant by-product of this systemic change was that the private needs and interests of crime victims were relegated to a lower rung on the priority ladder.[91] The only interests involved in this early conception of criminal law were those of the state and the accused.[92]

This change in philosophy was largely the product of the Enlightenment Era, which promulgated the idea that crimes and criminals were "an overall societal concern" rather than a private dispute between a victim and a perpetrator.[93] The Enlightenment thinker Cesare Beccaria was highly influential in this time period, producing one of the most important criminal law texts of that era, *Of Crimes and Punishments*.[94] He argued that individuals formed governments by giving up a little of their natural liberty so they could "enjoy the rest in peace and safety."[95] The state, as "administrator," had the authority to punish violations of the criminal law "to prevent the despotic spirit, which is in every man, from plunging the laws of society into its original chaos."[96] This philosophy was based on the view that some individuals in society were always seeking to encroach on the liberty of others.[97] Conceptions about government such as Beccaria's led adherents to conclude that it was the state's natural province, as protector of individuals' liberty, to handle criminal violations.[98]

The Enlightenment also produced the notion of due process protections for criminal defendants, which was enshrined in the U.S. Constitution.[99] Conversely, crime victims had no constitutional rights.[100] The commitment to the rights of the accused caused the appeals process to grow in

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88. *Id.* at 368.

89. *See id.*

90. *Id.* at 371. Government officials, concerned about the lack of collection of public fines and the potential of victims to abuse their ability to extract compensation, favored the change. *Id.* at 369.

91. *Id.* at 372. The civil proceeding was seen as the vehicle whereby a victim could seek restitution of private wrongs related to the crime. *Id.*

92. *See id.* at 371.

93. Cassie, *supra* note 82, at 652.

94. *See* Cardenas, *supra* note 83, at 369 n.59.

95. Cesare Beccaria, On Crimes and Punishments, 11 (Henry Paolucci trans., 1963). Other thinkers concurred with Beccaria. *See, e.g.*, Jean Jacques Rousseau, The Social Contract and Discourses 18-19 (G.D.H. Cole trans., 1950).

96. Beccaria, *supra* note 95, at 12.

97. *Id.*

98. *See* U.S. Const. amend. V; Cardenas, *supra* note 83, at 369; Cassie, *supra* note 82, at 652.

99. Cassie, *supra* note 82, at 653-54.

100. *Id.* at 655.

importance over time,[101] although there has never been a constitutional right to appeal a criminal conviction.[102] The ability to review a conviction is essential to protecting due process and ensuring that "the innocent will not be punished."[103] Since the time that the Supreme Court declared that there was no right to an appeal, new rights and rules were added to the criminal justice system, making trials "more complex" than they were in the nineteenth century.[104] The more considerations that entered the criminal justice system, the greater the chance of error, and, in turn, the greater the need for appellate review.[105] Thus, "[p]ost-trial review has become an integral part of the adjudicatory mechanism of every American jurisdiction."[106] Without such review, it would be extremely difficult to guarantee all the rights that criminal defendants enjoy and ensure complex procedure is followed.[107]

It was in this environment that the common law abatement doctrine developed. The justification for using the abatement doctrine, or for not using it, was tied with the goals of criminal law that prevailed. Before the late twentieth century, the major rationale for criminal law was to punish the defendant.[108] The interests of victims were marginalized.[109] Combine that with the high importance put on due process and the increased use of the appeals process to safeguard those rights,[110] and the abatement doctrine, as formed, seems very logical. If the defendant is not alive to be punished, and his or her conviction has not been deemed final through review, there is no point to retaining the conviction.

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101. *See* Joseph Sauder, *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, 359-60 (1998).

102. McKane v. Durston, 153 U.S. 684, 687 (1894); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. Rev. 503, 505 (1992). The development of the appeals process in the federal system occurred gradually. Congress gave circuit courts authority to issue writs of error in 1879. *See* Arkin, *supra*, at 522-23. In 1889, Congress gave the Supreme Court the right to review capital convictions. *See* Arkin, *supra*, at 523. Then the Court was granted direct review over all "'capital or otherwise infamous crimes'" in 1891. Arkin, *supra*, at 523 (quoting Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826-27). It was only in 1897 that Congress granted jurisdiction over noncapital appeals to the circuit courts of appeal. *See* Arkin, *supra*, at 523-24. The appeals system as we understand it today, with direct review the sole responsibility of the circuit courts, was not instituted until 1911. *See* Arkin, *supra*, at 524.

103. Cavallaro, *supra* note 39, at 971.

104. Arkin, *supra* note 102, at 574-75. For example, the exclusionary rule was first established in 1914, and the "right of counsel" line of cases did not begin until 1932. *Id.* at 574 & n.286, 575.

105. *Id.* at 575.

106. *Id.* at 576.

107. *See id.* For example, the capital sentencing process is "complex" and potential for error is high. *Id.* at 576 n.294.

108. State v. Korsen, 111 P.3d 130, 134 (Idaho 2005); *cf.* William F. McDonald, *The Role of the Victim in America*, *in* Assessing the Criminal: Restitution, Retribution and the Legal Process 295, 295-97 (Randy E. Barnett & John Hagel III eds., 1977) (describing the defendant-centric view of criminal law that prevailed before the victims' rights movement).

109. *See supra* note 91 and accompanying text.

110. *See supra* notes 101-07 and accompanying text.

3. 1971-1976: The Supreme Court Temporarily Endorses Abatement

In 1971, an important U.S. Supreme Court case, *Durham v. United States*,[111] gave a boost to abatement doctrine advocates.[112] George Washington Durham was convicted in Oregon District Court of "having knowingly possessed a counterfeit $20 bill."[113] After an ultimately unsuccessful appeal to the Ninth Circuit, Durham petitioned for a writ of certiorari, but died before the Court could decide whether to grant it.[114]

The Court noted that the "unanimity of the lower federal courts [with regards to abatement] . . . is impressive," and responded by adopting the rule for itself.[115] It referred to *Crooker v. United States*,[116] in which the U.S. Court of Appeals for the Eighth Circuit reviewed the varying language employed by the different circuits.[117] *Crooker* observed that "there appears to be no difference in the nature or scope of the abatement which [the federal circuits] have thus recognized."[118]

In dissent, Justice Harry Blackmun wrote that "the situation is not one where the decedent possessed . . . a right of appeal to this Court" and concluded *Crooker* was distinguishable on this ground.[119] Blackmun would get his way five years later. In *Dove v. United States*,[120] the Court issued a short summary opinion overruling *Durham* and dismissing the petition for certiorari, over the opinionless objection of Justice Byron White.[121] Because of the lack of guidance in *Dove*, "the legal community [was] left to divine what it [could] of the Supreme Court's stand on abatement."[122]

The Seventh Circuit was the first court to attempt to make sense of the decision.[123] In *United States v. Moehlenkamp*,[124] the court held that the Supreme Court was simply deciding what its own policy would be and did

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111. 401 U.S. 481 (1971) (per curiam), *overruled on other grounds by* Dove v. United States, 423 U.S. 325 (1976) (per curiam).

112. *See* Staggs, *supra* note 65, at 512.

113. *Durham*, 401 U.S. at 481.

114. *Id.*

115. *Id.* at 483.

116. 325 F.2d 318, 319-20 (8th Cir. 1963).

117. *Durham*, 401 U.S. at 482-83.

118. *Crooker*, 325 F.2d at 319.

119. *Durham*, 401 U.S. at 484 (Blackmun, J., dissenting).

120. 423 U.S. 325, 325 (1976) (per curiam).

121. *Dove* has been noted by various commentators for its vagueness and lack of substance. *See, e.g.*, United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (referring to the *Dove* "Court's cryptic statement"); Cavallaro, *supra* note 39, at 952 (referring to it as "an opaque one paragraph per curiam opinion"); Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 Fordham L. Rev. 2711, 2735 (2005) (characterizing *Dove* as "a concise opinion").

122. Staggs, *supra* note 65, at 512.

123. Lynn Johnston Splitek, Note, State v. McDonald*: Death of a Criminal Defendant Pending Appeal in Wisconsin—the Appeal Survives*, 1989 Wis. L. Rev. 811, 814.

124. 557 F.2d 126 (7th Cir. 1977).

not want to instruct the lower courts on what they should do.[125] It reasoned that because review before the Supreme Court was not a right, as opposed to review in the circuit courts of appeal, which was, the circuit courts were still free to use the abatement doctrine.[126] The other circuits came to adopt the reasoning of *Moehlenkamp*, thus retaining almost unanimous use of the doctrine by the federal courts.[127]

4. The Rise of Victims' Rights

While the federal courts continued to use the abatement doctrine, major changes occurred across the United States in regards to victims' rights.[128] These changes took hold in the 1970s and 1980s but had their origins in the 1960s.[129] An important impetus for the promotion of victims' rights was the Civil Rights movement, and its emphasis on protecting individual rights, as well as the women's rights movement, concerned about the treatment of victims of rape and domestic violence.[130] Furthermore, during the 1970s and 1980s the crime rate increased significantly.[131] The increase in crime coincided with a heightened public concern about crime during the same period, fueled by political attention paid to the issue.[132] Over this period, American attitudes toward crime developed a markedly more punitive bent.[133] With this shift came the widespread perception that courts were not harsh enough toward criminals.[134] By 1980, society also realized that victims were being ignored in the process, and groups sprung up to provide and advocate for victim services.[135] President Ronald Reagan was a sympathizer to the plight of victims, and he commissioned a task force to

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125. *Id.* at 128.

126. *Id.* (adopting the reasoning of Justice Harry Blackmun in his *Durham* dissent). The court believed it was justified in continuing to abate convictions it was reviewing because such actions protected rights retained by the defendant. *See id.* By contrast, a defendant whose case is under review by the Supreme Court has already exercised that right and thus would not be deprived of it. *Id.*

127. *See* Surland v. State, 895 A.2d 1034, 1036 (Md. 2006) (describing the methods used by the federal circuits).

128. *See* 1 Wayne R. LaFave et al., Criminal Procedure § 1.4(k) (2d ed. 2000).

129. *Id.*

130. Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, 1 Emerging Issues St. Const. L. 163, 165 (1988).

131. *Cf.* Bureau of Justice Statistics, Homicide Trends in the U.S.: Long Term Trends and Patterns, http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm (last visited Jan. 22, 2007) (showing that between 1960 and 1970, the homicide rate in the United States increased by approximately 50% and increased by the same amount by 1980).

132. Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics 3 (1997).

133. *Id.* at 3 n.2. For example, one poll showed that American support for the death penalty grew to 71% in 1988, up from just 45% in 1965. *Id.*

134. *Id.* A poll showed that 82% of Americans felt this way in 1988, compared with 48% in 1965. *Id.*

135. David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 Pepp. L. Rev. 35, 36 (1989). Examples of such groups include the National Organization for Victims Assistance, and Mothers Against Drunk Driving. *Id.* at 36 n.3.

help improve the treatment of victims by the criminal justice system.[136] This new movement, which began to be known as the "victims' rights movement," was an amalgamation of various interests in society.[137]

The broad effect of the victims' rights movement was to establish the interests of crime victims as a consideration in creating criminal procedural rules.[138] To achieve this effect, the movement engaged in various tactics. There was an attempt to modify the U.S. Constitution to protect the rights of victims.[139] President Reagan's task force recommended in 1982 that the Sixth Amendment be amended to give victims the right to "'be heard'" at all times during a criminal proceeding.[140] But, it was never adopted.[141]

The proponents of victims' rights had better luck getting statutory reforms passed. Congress passed the Victim and Witness Protection Act (VWPA) in 1982.[142] This statute empowered federal judges to order restitution from persons convicted of certain federal crimes to any person victimized by his or her acts.[143] It also required that the judge include a

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136. *Id.* at 36. He also made the week of April 19, 1984, "National Victims' Rights Week." *Id.*

137. *See* 1 LaFave et al., *supra* note 128, § 1.4(k). These included prosecutors and police, who wanted greater cooperation from victims, as well as conservatives who wanted to "shift the focus in sentencing from rehabilitation and deterrence to retribution and incapacitation and saw required consideration of the views of the victim as a natural ally in this quest." *Id.* Also included were more liberal elements in society, who saw treatment of certain victims by the criminal justice system to be offensive. *Id.* Some commentators see the women's movement as the reason for the rise of victims' rights. *See, e.g.*, Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocution in Texas*, 26 St. Mary's L.J. 1103, 1111 (1995). Humanitarians saw crime victims as similar to victims of natural disasters and thus felt they deserved the same social assistance. *See* 1 LaFave et al., *supra* note 128, § 1.4(k).

138. Cardenas, *supra* note 83, at 358.

139. Roland, *supra* note 135, at 37.

140. *Id.* (quoting President's Task Force on Victims of Crime, Final Report 114 (1982)).

141. *Id.* Support for the amendment has continued, with President William Jefferson Clinton calling for its adoption in 1996 (along with his Republican opponent Senator Bob Dole) for the purpose of "guarantee[ing] that victims' rights are weighted equally with defendants' rights." John M. Broder, *Clinton Calls for Victims' Rights in Constitution*, L.A. Times, June 26, 1996, at A1 (quoting President Clinton). President George W. Bush endorsed a similar proposal, submitted to the Senate by Senators Dianne Feinstein, Democrat of California, and John Kyl Republican of Arizona, in 2002. Joe Salkowski, *Bush Backs Victims' Rights Amendment to Constitution*, Ariz. Daily Star, Apr. 17, 2002, at A1. It had been submitted several times since 1996, to no avail. *Id.* Concerns about the propriety of amending the Constitution for this purpose (as opposed to passing a simple statute) have frustrated the amendment's passage. *See id.* Other opponents, including legislative counsel of the ACLU, see existing protections as adequate. *Id.* Also, concerns about the possible infringement on states' rights and the lack of definition of who is a victim have driven opponents of the amendment. *See, e.g.*, Editorial, *Victims' Rights Amendment Is Unwise and Unnecessary*, Tampa Trib., Apr. 19, 2002, at 16.

142. Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (codified in scattered sections of 18 U.S.C. (2000)), *amended by* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.); Heidi M. Grogan, *Characterizing Criminal Restitution Pursuant to the Mandatory Victims Restitution Act: Focus on the Third Circuit*, 78 Temp. L. Rev. 1079, 1079 (2005).

143. 18 U.S.C. § 3579 (1982) (current version at 18 U.S.C. § 3663 (2000)).

"victim impact statement" in the presentence report.[144] The statute takes steps to protect potential witnesses and victims by criminalizing the threatening and intimidating of another with the intent to coerce the victim into withholding cooperation from the authorities.[145]

This act was a response to what Congress found to be mistreatment of victims—including being "ignored by the criminal justice system or simply used to identify offenders."[146] The Senate Report pointed out that criminal defendants have a right to counsel to help explain the process and the accused's rights, but crime victims have no such rights.[147] Congress also recognized the risks borne by victims who cooperate with authorities, including harassment by the defendant or his associates while out on bail.[148]

The VWPA is significant in that it is the first time Congress has provided for restitution for victims of federal crimes.[149] Apart from providing for compensation to a victim for his or her loss, restitution is intended to tell victims that they are not forgotten, and also to tell the criminal that his or her actions have harmed someone and that the criminal is responsible for making amends.[150]

Thirteen years later Congress decided that the VWPA needed some improvements.[151] Restitution was ordered in only about one-fifth of all eligible federal cases under the VWPA regime.[152] Congress thought that this was not a consistent enough application of the statute, so it put a provision in the Antiterrorism and Effective Death Penalty Act[153] to amend the VWPA. This provision is known as the Mandatory Victim Restitution

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144. *Id.* app. (modifying Fed. R. Crim. P. 32(c)(2) (current version at Fed. R. Crim. P. 32(d)(2))). A victim impact statement is a written "statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior . . . [;] information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and . . . any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense." *Id.*

145. *Id.* § 1512 (original version at Pub. L. No. 97-271 § 4(a) (1982)).

146. S. Rep. No. 97-532, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516.

147. *Id.*

148. *Id.*

149. Grogan, *supra* note 142, at 1079. There is a disconnect between the traditional contractual concept of restitution and criminal restitution as discussed here. *Id.* at 1104. In contract law, restitution is an equitable doctrine which is intended to prevent the breaching party from being unjustly enriched by his action. *Id.* Restitution under the VWPA has other purposes which are in dispute among the federal circuits. *See id.* at 1082-87.

150. *Id.* at 1102.

151. *See* S. Rep. No. 104-179, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 926. The amendment seems to be dwarfed in importance by the antiterrorism and death penalty provisions of the bill—the Mandatory Victim Restitution Act was not even mentioned by President Clinton in his signing remarks. *See* Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630 (Apr. 24, 1996), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=52713.

152. S. Rep. No. 104-179, at 926. According to the Sentencing Commission, restitution was ordered in 27.9% of murders, 55.2% of robberies, and 28.2% of all kidnappings. *Id.*

153. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C. (2000)).

Act of 1996 (MVRA).[154] The MVRA removes the discretion granted by the VWPA to judges to order restitution, and requires them to order restitution when there is an "identifiable victim."[155] It also removes consideration of whether a defendant is able to pay restitution—it provides for restitution to be paid on an installment plan in case of indigence.[156]

There were also changes in regards to victims' rights on the state level. The movement to amend the Federal Constitution had failed, so victims' advocates began to organize to push for state-level constitutional amendments.[157] In 1986, a group was formed to push for these state-level amendments—the "Victims Constitutional Amendment Network" (Victims CAN).[158] This organization was composed of members of various victim advocacy groups.[159] They preferred that states pass constitutional amendments in lieu of statutory provisions.[160] The primary reason was that many so-called "victims' bill of rights" statutes were toothless—they did not provide for a mechanism for redress if the right was denied.[161] Also, victims' rights advocates saw constitutional amendments as a statement that the state viewed the rights of the victims as equal to the rights of the defendant in a criminal proceeding.[162]

California became the first state to pass a victims' rights amendment in 1982.[163] The voter-approved provision provided a victim the right to "restitution, safe schools, consideration of public safety when setting bail, and unrestricted admissibility of prior felony convictions . . . [as well as] the absolute right to appear at sentencing and parole proceedings."[164] With the help of Victims CAN, Florida and Michigan jumped on the bandwagon with voter-approved amendments in 1988.[165] By 1990, Washington and

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154. *Id.* §§ 201-211, 110 Stat. at 1227-41 (codified in scattered sections of 18 U.S.C. (2000)).

155. S. Rep. No. 104-179, at 926.

156. Grogan, *supra* note 142, at 1079-80. The VWPA allowed judges to "consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate," in deciding whether or not to award restitution. 18 U.S.C. § 3580 (1982) (current version at 18 U.S.C. § 3664 (2000)).

157. *See* Alice Koskela, Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 Idaho L. Rev. 157, 165 (1997).

158. *Id.* at 164-65.

159. *Id.*

160. *Id.* at 165.

161. Siegelman & Tarver, *supra* note 130, at 168. Thus, these "bills of rights" are really "bills of wishes." *Id.* (internal quotation marks omitted).

162. *See* Koskela, *supra* note 157, at 165.

163. *Id.*

164. Roland, *supra* note 135, at 38-39 (discussing Cal. Const. art. I, § 28).

165. Koskela, *supra* note 157, at 165. However, Arizona and Washington's attempts to pass such amendments failed that same year. *Id.*

Texas had passed similar amendments.[166] By 1996, twenty-three more states had such amendments.[167]

5. The Modern State of Abatement

The increased focus on victims' rights altered the calculus of criminal law from the simple interest of the state versus the interest of the defendant by adding the interest of the victim. This new conception caused courts to reconsider their previous use of the abatement doctrine.[168] In the mid-1990s several states abandoned their previous use of abatement.[169] This trend continued in the mid-2000s, with four states[170] and the U.S. military[171] abandoning the doctrine.

Today, the problem of what to do when a convicted defendant dies before being able to appeal is solved by using five separate approaches, all of which are followed by at least one court.[172] Most courts (including nearly all federal circuits) follow abatement ab initio (option 1).[173] "About twelve state courts" expressly refuse to abate the conviction and let the conviction stand (option 2).[174] Some of the courts (including the Third and Fourth Circuits[175]), which use abatement, abate everything except restitution orders (option 3).[176] Around seven states permit a substitute party to continue the appeal (option 4).[177] Finally, only Alabama makes a notation in the record that the appeal was made, but could not be heard (option 5).[178]

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166. *Id.*

167. *Id.* For a good discussion of the specific legislative changes made to promote victims' interests, see generally Roland, *supra* note 135 (discussing victim restitution, victim compensation for crime-related costs, anti-intimidation laws, and victim participation laws).

168. *See supra* note 32 and accompanying text. A few states changed their stances earlier than the 1990s. *See* State v. Salazar, 945 P.2d 996, 1003 (N.M. 1997) (citing State v. Jones, 551 P.2d 801 (Kan. 1976), and State v. McGettrick, 509 N.E.2d 378 (Ohio 1987)).

169. These states included the following: Michigan in *People v. Peters*, 537 N.W.2d 160 (Mich. 1995), Hawaii in *State v. Makaila*, 897 P.2d 967 (Haw. 1995), Florida in *State v. Clements*, 668 So. 2d 980 (Fla. 1996), and New Mexico in *Salazar*, 945 P.2d 996. These cases are discussed in *United States v. Rorie*, 58 M.J. 399, 402 (C.A.A.F. 2003).

170. These states included the following: Alabama in *Wheat v. State*, 907 So. 2d 461 (Ala. 2005), Idaho in *State v. Korsen*, 111 P.3d 130 (Idaho 2005), Maryland in *Surland v. State*, 895 A.2d 1034 (Md. 2006), and Washington in *State v. Devin*, 142 P.3d 599 (Wash. 2006). For a discussion of these cases, see Opposition to the Motion to Vacate, *supra* note 15, at 4.

171. The abatement doctrine was rejected in *Rorie*, 58 M.J. at 407. *Id.*

172. *See Surland*, 895 A.2d at 1035.

173. *Id.* at 1035-36.

174. *Id.* at 1036.

175. *See* United States v. Dudley, 739 F.2d 175, 178 (4th Cir. 1984). The Third Circuit also does not abate restitution orders, but instead allows a personal representative to pursue an appeal. United States v. Christopher, 273 F.3d 294, 295 (3d Cir. 2001).

176. *Surland*, 895 A.2d at 1035-36.

177. *Id.*

178. *Id.*; Wheat v. State, 907 So. 2d 461, 464 (Ala. 2005).

C. *Interests Affected by the Abatement Doctrine*

When state and federal courts consider whether to apply abatement or an alternative doctrine, they consider a myriad of competing interests.

1. Interests of the Defendant

One interest courts consider is the defendant's interest in appellate review of his or her conviction.[179] This is heavily guarded in our criminal justice system.[180] It is held in such high regard that courts that use abatement presume the success of such appeal.[181] There is a stigma associated with being mistakenly declared guilty of a crime—which of course the defendant wants to avoid.[182]

2. Interests of the Defendant's Family and Estate

Another interest accounted for is the interest of the defendant's heirs and next of kin in avoiding punishment they do not deserve.[183] In the U.S. legal system punishment of the innocent is strictly forbidden.[184] This is one reason why courts are reluctant to collect unpaid fines from the defendant's estate.[185]

Also, the family has an interest in having their loved one's name cleared if he is truly innocent.[186] This interest exists not just for the sake of the defendant's reputation—families also have an interest in avoiding any liability associated with that conviction.[187]

3. Victims' Interests

Victims have interests which have only recently been seriously recognized.[188] They have an interest in receiving compensation for loss due to criminal activity perpetrated against them.[189] It is hardly unfair to

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179. Cavallaro, *supra* note 39, at 945.

180. *See infra* notes 210-13 and accompanying text.

181. *See infra* notes 239-40 and accompanying text.

182. *See* United States v. Estate of Parsons, 367 F.3d 409, 415 (5th Cir. 2004).

183. *See supra* note 76 and accompanying text.

184. *See* 1 LaFave et al., *supra* note 128, § 1.4(e). For example, the U.S. Constitution forbids so-called "bills of attainder." U.S. Const. art. I, §§ 9, 10 (denying this power to Congress and the states, respectively). Bills of attainder were punishments of death pursuant to an act of parliament against a person or group of people, rather than pursuant to the finding of a jury. 16B Am. Jur. 2d *Constitutional Law* § 673 (2006). In our system, punishments for acts that were not illegal when they were committed are considered unjust—thus the legislature was forbidden from meting out such punishment. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388-89 (1798).

185. *See supra* notes 75-81 and accompanying text.

186. Cavallaro, *supra* note 39, at 957 (citing State v. Morris, 328 So. 2d 65, 67 (La. 1976)).

187. Splitek, *supra* note 123, at 829-30. This concern may force families to fund and pursue an appeal, if possible in that state, they may not otherwise have pursued. *Id.*

188. *See supra* Part I.B.4.

189. *See supra* notes 143, 149-51 and accompanying text.

require a criminal to compensate another for a loss he or she caused by committing a crime.

Victims also have an interest in obtaining retribution against the person who wronged them. This can be expressed as a need for "closure" or a need to see "justice done."[190] Recently, the federal government and the states have provided victims themselves some of the tools necessary to facilitate the fulfillment of this interest.[191]

4. Interests of Society

Society itself has several interests at play. Often they are the same interests claimed by others in this context. For instance, society has an interest in providing a justice system that facilitates error correction (a macro version of the defendant's interest in appeal).[192] A free and just society cannot exist if the state is routinely declaring innocent people to be guilty.[193]

Society also shares the victim's interest in retribution.[194] It favors retribution not so much to obtain "closure" but to provide a deterrent effect.[195] In the abatement context, specific deterrence is impossible (the criminal is dead), but general deterrence is still feasible.[196]

5. Interests of the Court System

The court system is interested in having justice administered as quickly and cheaply as possible. Additionally, courts have an interest in recouping the costs of criminal proceedings.[197] To this end, some states require defendants to pay the costs of criminal proceedings against them.[198]

Courts also have an interest in only deciding actual cases or controversies. In other words, they do not want to waste their time holding proceedings and making decisions that have little to no practical effect.[199] In the federal system, the Constitution requires an actual case or controversy in order for a federal court to obtain subject matter jurisdiction.[200]

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190. Staggs, *supra* note 65, at 528; *see also infra* notes 277-86 and accompanying text.
191. *See supra* Part I.B.4.
192. State v. McGettrick, 509 N.E.2d 378, 381 (Ohio 1987).
193. *See* Staggs, *supra* note 65, at 515-16.
194. *See id.* at 527.
195. Gollott v. State, 646 So. 2d 1297, 1300 (Miss. 1994).
196. *See id.* The very fact of capture and conviction of the dead criminal would have the deterrent effect on other potential criminals. The death of the defendant before appeal would be irrelevant since the effect would be had upon conviction.
197. *See* State v. Korsen, 111 P.3d 130, 134 (Idaho 2005).
198. *See, e.g.*, *id*; *infra* notes 297-99 and accompanying text.
199. *See infra* notes 311-13 and accompanying text.
200. U.S. Const. art. III, § 2.

II. ANALYSIS OF ABATEMENT AND ITS ALTERNATIVES

This part provides an analysis of each major option, articulating the advantages and disadvantages of each.

A. *Option 1: Abate the Proceedings Ab Initio*

Why did courts invent this doctrine in the first place? First, as discussed earlier, this doctrine is logical considering the environment in which it was created.[201] The *Pomeroy* court held that the "fundamental principle . . . is that the object of criminal punishment is to punish the criminal."[202] If a defendant has died, it is impossible to punish the defendant, so the conviction must abate.[203] Some courts use formalistic logic—reasoning that when the defendant died, the court lost jurisdiction to enforce the judgment against him.[204]

Second, continuing on the theme of futility, courts that use abatement also do so because hearing an appeal is pointless.[205] If the defendant has died, then there is no reason to waste the time hearing an appeal—if the appeal results in a need for a new trial, for example, the trial could not be had without a defendant.[206] If the appeal upheld the conviction, then the judgment could not be enforced anyway—resulting in essentially a waste of the court's time.[207]

A third rationale, related to the idea that criminal law is meant to punish the defendant, is that criminal law does not work to punish the defendant's family, heirs, or next of kin.[208] In fact the U.S. Constitution supports this concept because it does not allow punishment for treason to "work corruption of blood."[209] This expresses an attitude that only one who commits a crime should be punished, and not someone related to him or her.

A final and more modern rationale for keeping abatement relates to the "right" to appeal. There is no federal constitutional right to a criminal appeal.[210] However, forty-seven of fifty states grant at least one appeal of right, with the others providing a procedure that is essentially an appeal of

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201. *See supra* Part I.B.2.

202. United States v. Pomeroy, 152 F. 279, 282 (C.C.S.D.N.Y. 1907).

203. State v. Griffin, 592 P.2d 372, 373 (Ariz. 1979); Cavallaro, *supra* note 39, at 956.

204. *See, e.g.*, State v. Kreichbaum, 258 N.W. 110, 113 (Iowa 1934), *cited in Griffin*, 592 P.2d at 373; *see also* Cavallaro, *supra* note 39, at 956 n.40 (citing other cases with jurisdictional rationales for abatement).

205. State v. Morris, 328 So. 2d 65, 67 (La. 1976); Staggs, *supra* note 65, at 509.

206. *Morris*, 328 So. 2d at 67.

207. *Id.*

208. United States v. Pomeroy, 152 F. 279, 282 (C.C.S.D.N.Y. 1907); *see also* David Pureza, *Recent Decisions: Mississippi Allows Any Party to File Motion for Substitution Upon Death of Criminal Defendant and Adopts Abatement* Ab Initio *as Default Rule*, 64 Miss. L.J. 819, 833 (1995).

209. U.S. Const. art. III, § 3; *see also* O'Sullivan v. People, 32 N.E. 192, 193 (Ill. 1892).

210. Evitts v. Lucey, 469 U.S. 387, 393 (1985); Cavallaro, *supra* note 39, at 965.

right, but is ostensibly discretionary.[211] The constitutions of fifteen states enshrine the right to appeal.[212] Commentators have said that the right to appeal is so important and so respected that it should be considered a fundamental right.[213]

Because review of a conviction is held in high regard in our legal system, many courts that use abatement hold that depriving a defendant of review of his conviction would be unfair.[214] The criminal justice system relies on appellate review to make society confident that a criminal conviction is valid and correct.[215] If this appeals process is necessary to validate a conviction, then we cannot say that a defendant who has died pending a review of right has truly been convicted.[216]

The major disadvantage of abatement is that it completely ignores the interest of the victim, which, as this Note has pointed out, has only recently become important in criminal law.[217] It deprives the victim of any interest in restitution.[218] It also stymies any collateral civil proceedings against the defendant's estate, by depriving the plaintiff of the benefit of offensive collateral estoppel.[219] Other disadvantages of abatement are discussed below in Part II.B as advantages of the non-abatement option.

B. *Option 2: Dismiss the Appeal as Moot but Preserve the Conviction (Non-abatement)*

As much as the rise of the abatement doctrine was a function of the environment in which it was created, so was the rejection of the abatement doctrine and its replacement with the doctrine of what this Note refers to as "non-abatement." Courts that use non-abatement simply dismiss the appeal of the dead defendant as moot but do not overturn the conviction.[220] The environment in which non-abatement arose was one shaped by the victims' rights movement, which advocated for greater attention to victims in the criminal justice system.[221] Thus, the major advantage to non-abatement is that it takes victims' rights into account.

State v. Devin,[222] a very recent Washington case, adopted non-abatement in dicta after ninety years of using the abatement doctrine.[223] The

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211. Arkin, *supra* note 102, at 513-14.
212. *Id.* at 516.
213. *See generally id.*; Cavallaro, *supra* note 39, at 982-84.
214. Cavallaro, *supra* note 39, at 954; *see, e.g.*, Gollott v. State, 646 So. 2d 1297, 1300 (Miss. 1994) ("[I]t is equally unjust to allow a conviction to stand . . . as if the appeal had been heard and the conviction affirmed.").
215. Cavallaro, *supra* note 39, at 956-57.
216. *See* Staggs, *supra* note 65, at 516-17 (referring to the appeals process as necessary to render a defendant "confirmed in guilt").
217. *See supra* Part I.B.4.
218. *See* Opposition to the Motion to Vacate, *supra* note 15, at 2.
219. *See supra* note 40 and accompanying text.
220. Surland v. State, 895 A.2d 1034, 1035 (Md. 2006); Splitek, *supra* note 123, at 817.
221. *See supra* Part I.B.4.
222. 142 P.3d 599 (Wash. 2006).

defendant, Jules Devin, was convicted of attempting to murder his son's ex-wife while the couple was in a bitter custody dispute over their three-year-old daughter.[224] He was ordered to "pay a $500 victim penalty assessment to King County."[225] Restitution was ultimately not set because of the reluctance of the victim and because of the inability of the state to ascertain her medical costs.[226] Devin died shortly after appealing to the Washington Court of Appeals, which then abated his conviction.[227] The state then petitioned the Washington Supreme Court to overturn the abatement doctrine.[228]

The court questioned whether abatement should continue as the law in Washington in part because of the impact of the doctrine on victims' rights.[229] The court noted that since the original adoption of abatement, the voters amended the state constitution to grant victims the right to a "meaningful role in the criminal justice system" and "due dignity and respect."[230] Also, Washington crime victims have the right to restitution.[231] In light of these considerations, the court rejected as outdated the earlier rationale for abatement, articulated in *State v. Furth*,[232] that the point of criminal justice is purely punishment.[233]

A second rationale for non-abatement was articulated in an Idaho case, *State v. Korsen*.[234] David Korsen was convicted of kidnapping after he hid his two children from their mother, in violation of a custody order.[235] Pursuant to Idaho law, he was ordered to pay $13,773 in costs and fees and $13,685 in restitution.[236] After his case was submitted to the Idaho Supreme Court for review, Korsen "apparently" committed suicide.[237]

The court acknowledged that after a conviction, the presumption of innocence is extinguished.[238] Abatement essentially assumes that an appeal would have succeeded, since abatement has the same effect as a successful appeal.[239] If there is no presumption of innocence after a conviction, however, it is inconsistent to presume an appeal would have succeeded.[240]

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223. *Id.* at 601, 603-04.
224. *Id.* at 600.
225. *Id.*
226. *Id.*
227. *Id.* at 601.
228. *Id.*
229. *Id.* at 604.
230. *Id.* (citing Wash. Const. art. I, § 35).
231. *Id.* (citing Wash. Rev. Code § 7.69.030 (2006)).
232. 144 P. 907 (Wash. 1914).
233. *See Devin*, 142 P.3d at 604.
234. 111 P.3d 130 (Idaho 2005).
235. *Id.* at 130-31.
236. *Id.* at 131.
237. *Id.*
238. *Id.* at 134. The U.S. Supreme Court is in accord with this proposition. *See* Herrera v. Collins, 506 U.S. 390, 399 (1993).
239. *Korsen*, 111 P.3d at 134.
240. *Id.*; Staggs, *supra* note 65, at 518.

Third, non-abatement preserves the interests of society in recouping the costs of criminal prosecutions. The *Korsen* court also acknowledged that the Idaho legislature had changed the nature of criminal law to "require convicted criminal defendants to shoulder the costs of criminal proceedings."[241] Idaho also has several provisions requiring fines to compensate victims of the criminals' activity and contribute to a state victims' compensation fund.[242] Finally, state law requires an order of restitution when the crime causes economic loss, except when it determines such order unjust.[243] The court concluded that the public policy underlying these provisions would be short-circuited by the application of the abatement doctrine and therefore it abandoned the use of the doctrine.[244]

Many of the disadvantages of non-abatement are in fact rationales for using the abatement doctrine. For example, non-abatement deprives the defendant of the right to review his or her conviction.[245] It also burdens his or her estate with restitution or fines, punishing the defendant's heirs and next of kin.[246]

C. *Option 3: Abate the Punitive Measures Only, While Retaining the Compensatory Measures (*Dudley *Compromise)*

The Fourth Circuit is one of the federal circuits that departs significantly from total application of the traditional abatement doctrine.[247] In *United States v. Dudley*,[248] it adopted a compromise position in the abatement debate. William Dudley was convicted of misuse of food stamps, among other offenses.[249] Pursuant to the VWPA[250] Dudley had been ordered to pay restitution of $4,807.50 to the U.S. government as well as a fine of $10,000 for a separate offense.[251] Before the Fourth Circuit could determine the appeal of his case, Dudley died.[252] Arguing that restitution is a "criminal penalt[y]," Dudley's counsel argued that such order should be abated along with fines and imprisonment.[253]

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241. *Korsen*, 111 P.3d at 134; *see, e.g.*, Idaho Code Ann. § 19-854 (2004) (requiring criminal defendants to reimburse the state for public defender services).

242. *Korsen*, 111 P.3d at 134 (citing Idaho Code Ann. §§ 19-5307, 72-1025).

243. *Id.* at 134-35 (citing Idaho Code Ann. § 19-5304).

244. *Id.* at 135.

245. *See supra* notes 210-16 and accompanying text.

246. *See supra* notes 75-81 and accompanying text.

247. *See* Surland v. State, 895 A.2d 1034, 1036 (Md. 2006). The Third Circuit also departs in that abatement may only be invoked after an appeal has been filed, and not before. *Compare* United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001), *with* United States v. Dwyer, 855 F.2d 144, 145 (3d Cir. 1988). It also allows preservation of restitution orders, but gives a substitute party an opportunity to challenge the order in a further appeal. *See Christopher*, 273 F.3d at 295.

248. 739 F.2d 175, 179 (4th Cir. 1984).

249. *Id.* at 175.

250. *See supra* notes 142-50 and accompanying text.

251. *Dudley*, 739 F.2d at 176.

252. *Id.*

253. *Id.*

The Fourth Circuit followed a middle course by holding that the restitution order should not be abated, while the term of imprisonment and fine would be.[254] In doing so it drew on a principle articulated in the earliest abatement cases—when a rule's purpose is frustrated, it cannot apply.[255] Since fines cannot fulfill their purpose to punish a defendant when the defendant is dead, the fines abated.[256] The conclusion that restitution should not be abated followed from the logic of the earlier cases because, according to the Fourth Circuit, restitution is meant to compensate the victim (which still could be done)—in this case, the U.S. government.[257]

The court essentially found Mr. Dudley had stolen $4,807.50 worth of food stamps from the United States through his illegal use thereof.[258] Subsequently, the court determined that nothing in the VWPA "foreclosed [the government] from establishing it had been victimized by the crime and recovering restitution."[259] The Fourth Circuit, by distinguishing between pure punishment and compensation, found a way to temper the harsh effects of abatement without stepping on precedent.

A disadvantage of this approach is that it rests on the controversial principle that restitution is compensatory.[260] Some courts that use strictly applied abatement, and have encountered this question, reason that restitution is primarily penal.[261] One such court is the Eleventh Circuit, which abated the $21 million restitution order of a corporate officer after he committed suicide.[262] He had been convicted of fraudulently misrepresenting the financial condition of his company to the SEC.

In coming to its decision, the court cited to *United States v. Johnson*,[263] where a woman was convicted of passing forged checks to a bank.[264] The defendant in *Johnson* pled guilty and received a one-year and one-day sentence.[265] The sentence would remain suspended as long as she paid restitution to the bank and fulfilled the other conditions of probation for five

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254. *See id.* at 179. The Third Circuit concurs with this rule. *See* Kleinhaus, *supra* note 121, at 2746.

255. *Dudley*, 739 F.2d at 177.

256. *See supra* note 76 and accompanying text.

257. *Dudley*, 739 F.2d at 177; Kleinhaus, *supra* note 121, at 2745-46.

258. *Dudley*, 739 F.2d at 175-76.

259. *Id.* at 178.

260. For a detailed discussion of the controversy in the federal courts, see Kleinhaus, *supra* note 121, at 2744-49.

261. The U.S. Supreme Court has not weighed in on the issue of whether, for purposes of the VWPA and the MVRA, restitution is penal or compensatory. Kleinhaus, *supra* note 121, at 2712. Generally, the Court will interpret whether restitution, in the statute which authorizes it, is intended to be compensatory or penal. *Id.* at 2732 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). For a discussion of MVRA- and VWPA-specific case law in regards to the character of restitution, see Grogan, *supra* note 142, at 1083-90.

262. United States v. Logal, 106 F.3d 1547, 1550, 1552 (11th Cir. 1997).

263. 983 F.2d 216, 217 (11th Cir. 1993).

264. *Id.*

265. *Id.*

years.[266] After the defendant failed to make restitution as required, the court imposed the jail sentence and rescinded the obligations of probation, which included the obligation to pay restitution.[267] The bank moved to intervene pursuant to the VWPA, to challenge the authority of the district court to rescind the restitution order.[268] The court denied the bank's motion to intervene, reasoning (among other things) that restitution is penal in nature and the victim has no right under the VWPA to have a criminal restitution order enforced.[269]

Johnson cited a bankruptcy case decided by the U.S. Supreme Court.[270] Referring to the notion that the criminal justice system is "operated . . . for the benefit of society as a whole," the Court ruled restitution, under the Connecticut statute at issue, was meant to be a part of the defendant's rehabilitation (as opposed to being designed to compensate the victim for his or her loss).[271] The amount of restitution is not based on the victim's injury but the "penal goals of the State and the situation of the defendant."[272]

A third stance is taken by the Fifth Circuit, articulated in *United States v. Estate of Parsons*.[273] The defendant was convicted of arson, mail fraud, and money laundering, and ordered to pay restitution.[274] The court dismissed the controversy over whether restitution is penal or compensatory as irrelevant—instead arguing that the "finality principle," which states a criminal conviction is not "final" until the appeals process has been exhausted, overrides it.[275] If abatement renders the conviction void because there was no opportunity to pursue the appeal, then it makes little sense to preserve any restitution order, no matter what its purpose.[276]

Preservation of restitution orders seems like a sensible compromise. However, it makes the erroneous assumption that restitution is the only problem with abatement. There is also the issue of societal condemnation of a criminal's act.

To illustrate this issue, consider the following cases. In 1994, a man named John Salvi opened fire on two abortion clinics in Massachusetts, killing two women and wounding five others.[277] Upon conviction, Salvi committed suicide.[278] Because Massachusetts uses abatement, he was

266. *Id.*
267. *Id.* at 218.
268. *Id.*
269. *Id.* at 220-21.
270. Kelly v. Robinson, 479 U.S. 36 (1986).
271. *Id.* at 52.
272. *Id.*
273. 367 F.3d 409 (5th Cir. 2004) (en banc); Kleinhaus, *supra* note 121, at 2748.
274. *Estate of Parsons*, 367 F.3d at 411.
275. Kleinhaus, *supra* note 121, at 2748.
276. *See id.* at 2748-49.
277. Cavallaro, *supra* note 39, at 943.
278. *Id.* at 945.

"immutably deemed as guiltless as he had been before the shootings."[279] The mother of one of the victims commented to a Boston television station that "it's as if John Salvi is coming from the grave to bring me some hurt."[280] This mother was not the only one affected. The abatement of the conviction sparked public outrage in Massachusetts and led to the near-adoption of a bill overruling the use of abatement by the legislature.[281]

Massachusetts was also the setting for the case of John Geoghan, a former priest convicted of sexually molesting children.[282] After he was murdered in his cell in 2003,[283] the court, still clinging to abatement, rendered him innocent by operation of law.[284] The reaction to the abatement was less than enthusiastic. One lawyer representing sexual abuse victims commented, "'The guilty verdict is a symbol which allowed many clients to regain some sort of self-esteem, dignity, and freedom from unnecessary guilt,'" and that the victims "'will be extremely disappointed'" by the abatement.[285] Another lawyer described the abatement as a development which will "'revictimize the victims.'"[286]

Neither of these cases involved restitution. But the theme underlying both of them is that a conviction for a heinous crime is in itself justice, and the loss of that conviction is a massive injustice, without regard to whether restitution is abated or not.

D. *Option 4: Allow a Substitute Party to Continue the Appeal (Substitution)*

An alternative so-called "moderation" approach, followed by some courts, allows a substitute party to continue and resolve the appeal.[287] This is an attempt to balance the conflicting interests at play in the abatement doctrine.[288] It protects the rights of the victims to any restitution, while at the same time, insuring that the late defendant retains his right to resolve the appeal.[289]

Hawaii, in adopting this alternative, posited the interests protected by substitution as follows: "[The defendant's] family seeks 'vindication' of the deceased. The State has an interest in preserving the presumptively

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279. *Id.*
280. *Conviction in Killings at Clinics Is Overturned*, N.Y. Times, Feb. 2, 1997, at A14 (internal quotation marks omitted).
281. *See* Cavallaro, *supra* note 39, at 945 n.6.
282. *See* Staggs, *supra* note 65, at 507-08.
283. *Id.* at 507.
284. *Id.* at 508.
285. Yvonne Abraham, *Geoghan's Death Voids Conviction, Prosecutors Say*, Boston Globe, Aug. 27, 2003, at B1 (quoting Mitchell Garabedian).
286. *Id.* (quoting Robert Sherman).
287. *See* Staggs, *supra* note 65, at 529.
288. *See id.*
289. *See id.*

valid judgment of the trial court."[290] Also, the court recognized that it is equally undesirable to assume the conviction would have been overturned as it would be to deprive the dead defendant of his statutory right to appellate review.[291] It relied heavily on a decision of the Ohio Supreme Court, *State v. McGettrick*,[292] which also adopted substitution.[293]

McGettrick involved a criminal court judge convicted of accepting bribes.[294] The judge died before appealing, and the state petitioned the Ohio Supreme Court to overrule the policy of abatement.[295] The court recognized the conflicting interests that the Hawaii court articulated, but, rather than framing substitution as a compromise, it pointed to a public policy that favored rendering a decision on the merits of an appeal.[296] In Ohio, the costs of criminal proceedings are imposed by statute on convicted felons.[297] These costs may be assessed against a decedent's estate, according to case law.[298] It is for this reason, among others, that third parties have an interest in seeing the outcome of the appeal on the merits—for example, the heirs and next of kin who would lose the amount of the costs.[299]

The interest in correction of error is another societal interest relied upon as a justification by the Supreme Court of Mississippi in adopting substitution.[300] "Leaving convictions intact without review . . . potentially leaves errors uncorrected which will ultimately work to the detriment of our justice system."[301] Essentially, unreviewed convictions are "hollow," according to the court, and lack the full adjudication that society requires.[302]

There are also problems with the substitution arrangement. First and foremost, the defendant is not available to make the decision about whether,

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290. State v. Makaila, 897 P.2d 967, 972 (Haw. 1995). Hawaii applies substitution to appeals of right and when the defendant's representative or the state moves for substitution. *Id.* If no such motion is made, the court may either abate the proceedings or make "such other order as the appellate court deems appropriate." *Id.*

291. *Id.*

292. 509 N.E.2d 378 (Ohio 1987).

293. *See Makaila*, 897 P.2d at 970, 972 (citing *McGettrick*).

294. *McGettrick*, 509 N.E.2d at 379 n.1.

295. *Id.* at 380.

296. *Id.* at 382.

297. Ohio Rev. Code Ann. §§ 2949.14, 2949.15 (LexisNexis 2006); Wetzel v. Ohio, 371 U.S. 62, 65 (1962).

298. *Wetzel*, 371 U.S. at 63-64 (citing State v. Keifer, 1913 WL 988, at *3-4 (Ohio Ct. Com. Pl. 1913) (relieving decedent's estate of liability for unpaid fines, but not costs)). The court in *Keifer* reasoned that costs were unrelated to the punishment meted out to the defendant, but functioned as compensation to persons "for their services performed in the prosecution." *Keifer*, 1913 WL 988, at *4. Even a pardon would not relieve the defendant of the duty to pay costs. *Id.*

299. *McGettrick*, 509 N.E.2d at 381 n.4.

300. *See* Gollott v. State, 646 So. 2d 1297, 1304 (Miss. 1994); *see also* Pureza, *supra* note 208, at 831 ("The court reasoned that full review of a conviction was the only way to maintain its presumption of validity.").

301. *Gollott*, 646 So. 2d at 1304.

302. *Id.*

and how far, to pursue the appeal.[303] For example, a case that involves a Fourth Amendment search and seizure issue could potentially entail three levels of appeal from a state trial court—the appeals court, state supreme court, and the U.S. Supreme Court. Unless the defendant has previously made an informed statement about how far he or she would wish the appeal to proceed, the lawyer, or the party standing in his or her place, would simply have to guess what the defendant would have wanted.[304]

On a related note, appeals entail costs.[305] The substitute party does not have the same interests as the defendant did and would not necessarily take the same actions the defendant would have.[306] The defendant is, of course, not available to authorize expenditure of his or her money, which now makes up the estate. The heirs and next of kin of the defendant are entitled to the money from the estate.[307] To allow a substitute party to be appointed would allow that person to spend money that is not his or hers.

The court could adopt a rule which would require permission from the heirs and next of kin to continue an appeal. But, the persons who are entitled to the proceeds of the estate may be in dispute. It is doubtful that a court would want to wait for inheritance disputes to be settled before hearing an appeal.

Another disadvantage of substitution is that the result of an appeal would be academic. If the appeal results in a new trial, it could not go forward, as there would be no one to try.[308] No judgment could be effected (barring fines or restitution) if the appeal were upheld.[309] Thus, except in those cases that involve fines or restitution, there is no practical reason to have an appeal anyway.[310]

Furthermore, courts have a policy against deciding moot questions.[311] The reason for this is one of judicial economy—courts should not waste

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303. Surland v. State, 895 A.2d 1034, 1041 (Md. 2006); Sauder, *supra* note 101, at 370-71.

304. *See* Sauder, *supra* note 101, at 370-71. Those who advocate client-centered lawyering would likely be opposed to substitution. It is the client who provides the scope of authority to the lawyer in a given matter. *See* David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach 236-37 (2d ed. 1991). A client must live with the consequences of the legal action, and the client's money is used to pay the costs, so advocates of client-centered lawyering entrust clients with control over important decisions. *See id.* at 272. It makes little sense, in this view, for a lawyer to take as large a step as to file up to three appeals on behalf of a client who is not alive to approve of it.

305. Sauder, *supra* note 101, at 371.

306. *See* Commonwealth v. Walker, 288 A.2d 741, 745 (Pa. 1972) (Pomeroy, J., dissenting) ("Does the family, if there is one, have the duty to pick up the case and carry it forward? If not, is the lawyer who represented the deceased in his lifetime obligated to seek full appellate review for a non-existent client, and regardless of remuneration for his services?"); Sauder, *supra* note 101, at 370-71.

307. *See* Laura Dietz et al., 28 Am. Jur. 2d *Estates* § 1 (2006).

308. *Surland*, 895 A.2d at 1042.

309. *Id.*

310. *See id.*

311. *Walker*, 288 A.2d at 744 (Pomeroy, J., dissenting); *see also* 5 Wayne R. LaFave et al., Criminal Procedure §27.5(a) (3d ed. 2000).

scarce resources on appeals that would have no practical effect.[312] Therefore, the defendant could never get vindication of his position.[313]

E. *Option 5: Dismiss the Appeal with an Acknowledgment of Its Existence (Permanent Non-disposition)*

Alabama is the lone state that requires an acknowledgment of an appeal in the trial record, but then dismisses that appeal as moot.[314] This rule was adopted in *Wheat v. State*,[315] in which the defendant pleaded guilty to five counts of capital murder and received the death penalty.[316] He died after filing an appeal with the appeals court.[317] Citing a prior abatement case, the appeals court abated the defendant's case ab initio.[318] The state petitioned the Supreme Court of Alabama for review.[319]

The court held that the precedent relied upon below was procedurally distinguishable,[320] and declared itself unconstrained by stare decisis in determining abatement policy.[321] The court recognized that the decision regarding which doctrine to adopt is a "difficult choice[]."[322] It could either abate the conviction, which would presume that the appeal would have been successful, or it could leave the conviction in place and deprive the defendant of his right to review of his conviction.[323]

Choosing what the court referred to as "a mean between the two extremes," it articulated the following rule:

> [T]he Court of Criminal Appeals shall instruct the trial court to place in the record a notation stating that the fact of the defendant's conviction removed the presumption of the defendant's innocence, but that the conviction was appealed and it was neither affirmed nor reversed on

312. *Walker*, 288 A.2d at 745 (Pomeroy, J., dissenting).

313. *See* State v. McDonald, 424 N.W.2d 411, 417 (Wis. 1988) (Day, J., dissenting).

314. *See Surland*, 895 A.2d at 1036. It is fairly evident that this method is essentially the same as non-abatement, other than the fact that the appeal is acknowledged in the record.

315. 907 So. 2d 461 (Ala. 2005) (per curiam).

316. *Id.* at 461.

317. *Id.*

318. *Id.* at 461-62 (citing Ex Parte Estate of Cook, 848 So. 2d 916 (Ala. 2002)).

319. *Id.* at 461.

320. That case, *Estate of Cook*, involved a motion for a trial de novo in the circuit court, from the judgment of a municipal court. *Id.* at 462. A trial de novo necessarily annuls the previous conviction and gives the defendant a fresh trial in the higher circuit court. *Id.* If a defendant dies awaiting such trial, there is no conviction to be enforced against him. *See id.* (quoting Louisville & Nashville R.R. v. Lancaster, 25 So. 733, 735 (Ala. 1899)). *Wheat*, by contrast, involved the direct review of a trial court conviction, which removed his presumption of innocence. *See id.* at 462.

321. *See id.* at 462-63.

322. *Id.* at 462.

323. *See id.*

> appeal because the defendant died while the appeal of the conviction was pending and the appeal was dismissed.[324]

Essentially, the effect of this rule is the same as that of non-abatement. The appeal is not heard and the judgment stands. So why did the court adopt this rule as "a mean between . . . two extremes"?[325] The difference is in how the justice system treats the conviction. It explicitly refuses to pronounce the conviction valid, whereas presumably the courts which use non-abatement (at least implicitly) do.

Possibly, this is a desire by the Alabama Supreme Court to convey just how difficult the abatement question is. It does not want to say anything about the validity of a conviction because neither possible disposition is fully correct, as no appeal could be completed. However, it is doubtful that anyone will substantially benefit from such a pronouncement, certainly not the defendant's estate, which would still be as liable for fines and restitution as if non-abatement were used.

This method renders a case incompletely disposed, like a novel that ends with plotlines unresolved. This is an unsatisfying result for a system that is supposed to render final decisions.[326] At least non-abatement declares the conviction valid and thus reaches a final disposition for the case.

III. SOLUTION: THE ABATEMENT HEARING

A. *What's Wrong with the Existing Doctrines?*

This Note has discussed five alternative doctrines that courts have used to resolve the issue of what to do when an appellant dies. There are major flaws that underlie each alternative. Under each option, either there are certain cases in which a fair result will not follow, or there are certain aspects of the option that render it impractical. This Note suggests that a new approach is necessary to ensure fundamental fairness in all cases.

The flaw of options 1 and 2, discussed in Part II, is the same. Neither rule produces a fair result in all cases. To illustrate the flaw, imagine two situations. The first is a case similar to Ken Lay's: An executive commits fraud and swindles his company's shareholders out of $40 million.[327] The second is the case of a blue-collar factory worker who is arrested for DWI after a night of drinking.

Why is option 1 flawed? Imagine that these two cases take place in the same state, for example in Illinois, which uses abatement.[328] If the executive died after being convicted of fraud, but before appealing, Illinois

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324. *Id.* at 464. Because the court declared the conviction "neither affirmed nor reversed," the case was essentially left permanently unresolved. *See id.* Thus, this Note refers to Alabama's method as the "permanent non-disposition" method.

325. *Id.* at 464.

326. *See* Staggs, *supra* note 65, at 516.

327. *See supra* Introduction.

328. *See* People v. Robinson, 719 N.E.2d 662, 664 (Ill. 1999).

law would abate his conviction and the shareholders could not get their money back. This would work a major unfairness, as the executive's estate would get to keep his ill-gotten proceeds. (On the other hand, it would preserve the executive's right of appeal.)

In the case of the drunk driver, the abatement doctrine is a perfectly fair course of action. There is no restitution and no identifiable victim. There is no interest that countervails the drunk driver's right to appeal. The use of abatement would preserve that right and recognize the futility of sustaining the conviction.

We can see the similar flaw in option 2 if we move the executive and the drunk driver to Georgia, which does not use abatement.[329] In this state, the executive's situation is resolved fairly, with the victims collecting on restitution based on a presumptively valid conviction. However, the drunk driver's name is tarred forever with a conviction that may or may not be based on solid evidence—and for no rational purpose. He has effectively been deprived of his right of appeal, and no one is made better off because of it. The executive's right to appeal, on the other hand, yields to the victim's arguably stronger right to restitution.

Neither rule produces a fair result in both cases. This is because the composition of interests is different in both. Why should the court use the same rule in both cases if this is true?

Some courts choose to apply neither rule but instead attempt to enforce a compromise.[330] As this Note has detailed, there are three "compromise" positions (options 3, 4, and 5). These positions suffer from major flaws that suggest a better approach could be found.

Option 3, the *Dudley* compromise where restitution is preserved and the other aspects of the conviction abated, is an incomplete compromise.[331] It would fail to protect other interests valued by the victims and society, such as the interest in condemnation of someone who has done wrong.[332] Thus, in cases involving a particularly heinous crime, it would undesirably result in the proclamation of the defendant's innocence.[333]

Option 4, substitution, is disadvantageous because it forces the court and the estate to waste money on an essentially moot question—the appeal on the merits.[334] The money spent doing this would belong to others not a party to the case.[335] The heirs and next of kin would be unfairly burdened by such a rule.

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329. *See generally* Taylor v. State, 72 S.E. 898 (Ga. 1911) (articulating Georgia's policy on abatement for the first time).

330. *See supra* Part II.C-E.

331. *See supra* notes 247-62 and accompanying text.

332. *See supra* note 190 and accompanying text.

333. *See supra* notes 277-86 and accompanying text.

334. *See supra* notes 311-13 and accompanying text.

335. *See supra* note 307 and accompanying text.

Using option 5, permanent non-disposition, has the exact same practical result as using option 2.[336] The explicit refusal to affirm or deny the conviction would be of little comfort to the defendant's estate, which is treated as if the conviction were valid.[337] Use of this option leaves the case permanently unresolved, which is not an ideal policy for a court of law.

In sum, no one existing rule can efficiently produce a fair and complete result for all parties in all cases. This is true because the interests are, of course, different in all cases. There is no restitution in some cases. Some crimes are a cause of social outrage, while others are conduct crimes with no victims. The solution to this problem must be flexible enough to account for each case's unique allocation of interests.

B. *The Solution*

The optimal solution to this problem must first, be able to take into account each interest involved in a case proportional to such interest's magnitude. Second, it must come to a resolution as quickly as possible so as not to waste precious judicial resources. Third, it must either abate everything in full or fully preserve the conviction and judgment.[338]

1. The Abatement Hearing

If, after a defendant has been convicted, he or she dies before having an opportunity to pursue an appeal of right, the following procedure should take place. If the court of appeals has jurisdiction already, it should remand the matter to the trial court. If no appeal has yet been filed, the trial court should retain jurisdiction. The trial court should then conduct a short hearing.[339] At this hearing, the attorney for the decedent should continue to represent him or her. The purpose of the hearing would be to determine whether the case against the decedent should be abated ab initio or whether the conviction should be allowed to stand as final. There would be no third option. The court should hear evidence, including witness testimony, if necessary.

Due to the fact that these cases have differing allocations of opposing interests, the court should not use a per se rule. Instead, the court should consider and balance four factors to determine which option to take. The first two factors should carry greater weight than the final two. Each of the

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336. *See supra* note 314.

337. *See supra* Part II.E.

338. Either the defendant's interest in review of his or her conviction will prevail, or the victim's interest in restitution and retribution will. *See supra* Part I.C. These are the only two dispositions consistent with logic, and thus they are the ideal dispositions. It makes little sense to say that a conviction is abated ab initio (does not exist) but the defendant still has some duty arising out of it (such as the obligation to pay restitution). They are also both final resolutions to the case, leaving nothing unresolved. This serves society's and the courts' interest in efficient administration of justice. *See supra* Part I.C.4-5.

339. The purpose of having a short and final hearing is to minimize the amount of time and resources courts spend on moot cases such as these. *See supra* Part I.C.5.

four factors is intended to represent one or more of the important interests that exist in the abatement context.

2. The Four-Factor Test

a. *Presence and Amount of Restitution*

The first factor to be considered is whether there is (or would likely be) an order of restitution attached to the conviction. If there is such an order, the court should take into consideration the amount involved. The presence of restitution should, of course, militate against abatement. The greater the amount, the greater the weight against abatement should be. The lack of any restitution should weigh in favor of abatement. This factor is included in the test, of course, to represent a victim's interest in restitution.[340]

The potential loss of restitution is one of the signature injustices of the abatement doctrine. Restitution exists as a means to force the criminal to compensate the crime victim for his or her economic loss.[341] Where there are multiple victims or a large amount of money is involved, the court should be reluctant to deny the restitution that would flow from a presumptively valid conviction. A person convicted of a crime is presumed guilty until such person can convince an appellate court to throw out the conviction.[342]

b. *Heinousness of the Crime*

Second, the court should consider the heinousness of the offense in its particular locality. Crimes that involve a high level of moral depravity, such as child molestation, rape, and terrorism, should have the second factor weigh against abatement. Conversely, victimless crimes, such as drug use or DWI not resulting in injury, should have the second factor militate in favor of abatement. The second factor should also weigh more heavily against abatement the greater the sentence given for the offense. This factor is included to represent the victim's interest in "closure" and society's interest in deterring crime.[343]

As the cases of Salvi and Geoghan demonstrate,[344] application of abatement can lead to massive public outrage and reopen wounds felt by victims and their families. Courts should hesitate to use judicial policy to inflict emotional distress. A guilty verdict, as this Note has mentioned,[345]

340. *See supra* note 189 and accompanying text.

341. *See supra* notes 149-50 and accompanying text. Of course, the purpose of restitution, whether to punish or to make the victim whole, is controversial. *See generally* Kleinhaus, *supra* note 121 (discussing the conflict in the federal courts on this question).

342. *See* Herrera v. Collins, 506 U.S. 390, 399-400 (1993).

343. *See supra* notes 190, 194-95 and accompanying text.

344. *See supra* notes 277-86 and accompanying text.

345. *See supra* notes 277-86 and accompanying text.

represents more than a license to punish a defendant; it represents societal condemnation of what the defendant has done. It signifies that justice has been done. The court should not cavalierly erase that justice because of a technicality.

There is no reason to uphold a conviction, of course, when no one has been victimized by the defendant's actions. By comparison, the defendant's loss of his right to appeal is greater than the harm to society of erasing the conviction (all other considerations being equal, of course).

c. *Involvement of Victims*

Third, the court should consider the level of involvement and interest of the victims and their families in the outcome of the case. The greater their participation in the trial (including actions such as attending court, giving victim-impact statements, and testifying at trial), the more this factor should weigh against abatement. The third factor, like the second factor, should weigh in favor of abatement when there is no identifiable victim. This is included to account for any heightened interest of the particular victim above and beyond the general interest of victims protected by the second factor.

Even if society itself would not necessarily be outraged by abatement of a particular conviction, the court should consider the potential outrage on a more localized level. It should not disregard victims or families of victims who have felt genuine pain and hurt from the actions of the defendant and who have expressed it in a measurable way. Conversely, if victims have made peace with how they have been wronged, or fail to show a real interest in the developments in the defendant's trial, abatement would not be as much of an injustice.

d. *Effect on Decedent's Family, Heirs, and Next of Kin*

Finally, the court should consider any negative effect of the conviction on the decedent's family, heirs, and next of kin.[346] If these people are destitute or public charges, then this factor should militate in favor of abatement if restitution or fines are involved.[347] Also, if the presence of the

346. This factor should not be construed to say, for example, the higher the restitution payment, the harsher the effect on the heirs and next of kin. This is an examination of circumstances specific to these family members of the decedent, rather than the effect the decedent's actions have had on his family. For example, under this factor, the court would consider that the defendant's mother recently went bankrupt from catastrophic medical expenses. It would not consider the fact that the defendant was ordered to pay $1 million in restitution, and that payment of such restitution from the estate would deprive an otherwise financially stable heir of a large sum of money.

347. This is also a consideration for family courts in deciding whether to enforce a prenuptial agreement. Courts are reluctant to enforce agreements that would result in a spouse being placed on the public dole. *See, e.g.*, Binek v. Binek, 673 N.W.2d 594, 599 (N.D. 2004) (citing a provision of the Uniform Premarital Agreement Act adopted by the North Dakota legislature).

conviction has a negative social or economic effect on a family member,[348] it should weigh in favor of abatement. If the family members showed strong support for the defendant and maintained he or she was innocent, this should be taken into account. This is meant to account for the interest of the defendant's family in avoiding punishment they do not deserve.[349]

As has been said numerous times, the purpose of the criminal law is not to punish the defendant's family.[350] The court should bear that rationale in mind when considering this factor. If the heirs and next of kin would, absent the inheritance, be public charges, then society has an interest in transferring the estate to them. Such interest may outweigh the victim's interest in restitution.[351] It would probably outweigh society's interest in collecting a fine that is purely for punishment of the defendant.

The final two factors individually should weigh less heavily than the first two factors individually. If the first two factors do not clearly call for one option or the other, the final two can be used to tip the balance.[352]

2. The Determination

After hearing arguments and evidence related to the four factors, the court should issue a ruling that will either order abatement ab initio or dismissal of the appeal as moot with preservation of the conviction. It shall

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348. The government is not heartless toward the effects of the criminal justice system on defendants' families. The federal sentencing guidelines will consider whether a defendant's "extraordinary family circumstances" warrant a reduced sentence, and such "downward departures" have been upheld. *See generally* Jason Binimow, Annotation, *Downward Departure from United States Sentencing Guidelines (U.S.S.G. §§ 1A1.1 et seq.) Based on Extraordinary Family Circumstances*, 145 A.L.R. Fed. 559 (1998). One such extraordinary circumstance depends on whether the defendant is the "sole or primary provider[]." *Id.* §3(a). A second relates to a possible "extraordinary effect" that incarceration of the defendant may have upon his or her child. *Id.* §4(a).

349. *See supra* note 183 and accompanying text.

350. *See supra* note 76 and accompanying text.

351. If the victim or the victim's family has not demonstrated a great personal interest in assisting with prosecuting or otherwise participating in trial, it would demonstrate to the court that the victim or family member places a low value on the restitution.

352. For example, consider if Osama bin Laden were brought to trial for the September 11th attacks, convicted, and ordered to pay restitution to the victims. If he were murdered in prison before filing an appeal, there would be no need to look at the final two factors, as the first two factors would clearly show that abatement should not be invoked. Flying planes into inhabited buildings is clearly a heinous crime, and the amount of restitution bin Laden would be ordered to repay would be staggering. There would be no way, in this situation, that factors three and four could sway the balance the other way. Conversely, if a police officer discovers marijuana in the car of the defendant during a constitutionally questionable traffic stop, the situation would be the opposite. If the defendant is convicted and challenges the traffic stop in the appeals court, and then dies in the middle of the process, the two factors would weigh so heavily for abatement that it would be a waste of time to consider the final two factors. There would be no restitution owed, and simple marijuana possession can hardly be equated with a heinous offense such as terrorism. Many times judges will encounter no clear result from the first two factors. Maybe there is some restitution and the crime was moderately reprehensible. The purpose of factors three and four is, of course, to tip the balance in situations such as these.

include findings of fact based on the hearing. The court should explain its findings in relation to all four factors, and it shall explain its reasoning based on consideration of each factor and the weight it gave to each.

3. Review

The losing party should be allowed to appeal the decision of the trial court. The appeals court may overrule the decision only if it is clearly erroneous based on the findings of fact, or if the findings of fact or the reasoning is inadequate. This should be designed to make an appeal as unattractive as possible, while preserving the ability of a higher court to overrule any patently illogical decision.

C. *Advantages of the Abatement Hearing*

The abatement hearing option, as an alternative to the current five blanket-rule options, has three main advantages.

1. Flexibility

The court would be empowered to consider evidence related to four factors that represent the different interests involved in the appeal of a criminal case. Because each case involves different interests to different degrees, this approach gives judges the flexibility to arrive at whichever solution would produce the fairest result in the situation. The judge would be empowered to account for the unique circumstances of each case.

2. Efficiency

Once the client is dead, it is in the best interest of the judicial system to resolve the situation as quickly as possible. Continuing the appeal on the merits would have little benefit, and whatever judgment came out of it could only be enforced in a limited way (restitution and fines). Rather than forcing an attorney to spend hours crafting legal briefs and preparing for arguments on the merits of a moot appeal, it is more efficient to have a short hearing at the trial level—after which restitution and fines could also be collected. Obviously it is not as efficient as applying a per se rule, but it is desirable to forego some efficiency in the name of ensuring greater fairness.

3. Finality

The result of the abatement hearing can only be one of two dispositions—abatement ab initio or dismissal of the appeal and preservation of the conviction. Whichever option is chosen, the case will

be over, and no more time or resources will have to be spent on it. Also, the disposition will not be logically inconsistent.[353]

D. *Disadvantages*

No solution to any complex problem is perfect, and this Note does not aver that the abatement hearing option is any different. It is important to address disadvantages for two reasons. One, it identifies the areas in which the solution may need to be improved. Two, it helps to demonstrate the strength of the plan if the disadvantages can be minimized.

1. High Level of Judicial Discretion

Because this solution uses a flexible multifactor test with a relatively vague weighing system, the test would entail a substantial degree of judicial discretion. The test essentially encourages the use of guided intuition to arrive at a fair result. Obviously judges have certain biases. As such, there would be a high level of uncertainty about what the court would do outside of a few very obvious situations.

There are a couple of features that help to mitigate this problem. First, the court is required to make findings of fact and explain in detail its analysis of the situation based on the test. This prevents completely arbitrary rulings by allowing the parties to examine the judge's reasoning. Second, there is a level of appellate review that is designed to overrule the decision only if it is based on inadequate findings of fact or if the conclusion is clearly erroneous.

2. Questionable Attorney Incentive

This solution runs into the same problem that continuing the appeal with a substitute party would entail—the attorney would essentially be representing someone who could not make authorizations as to his or her actions.[354] There would be no client to make sure the attorney is acting in his best interest. Further, the hearing would still entail costs, which would have to be paid from the estate.

This procedure is superior to continuing the appeal because it is designed to be shorter in duration and require less complex legal argument than an appeal (the test is designed to be intuitive, thus the arguments will be more equity-based rather than legalistic). Thus, it should save both money and time, lessening the damage.

3. Need to Take Evidence and Have Appellate Review

Appling a multifactor test after a factual hearing, in terms of time and effort, is more costly than applying a blanket rule to every situation. The

353. *See supra* note 337.
354. *See supra* Part II.D.

fact that this ruling must have a layer of appellate review above it to prevent irrational decisions also increases its costliness. However, the degree of fairness returned in exchange for these efforts makes the abatement hearing worth the effort. It would be more beneficial overall to society if the Justice Department could have a short hearing before Judge Lake about the disposition of Ken Lay's case rather than applying a blanket rule and denying thousands of people their justly deserved restitution without batting an eyelash. Each case is unique, and if the court system must take a bit more time and expend a bit more energy to take that into account, so be it.

CONCLUSION

Ever since the state first took responsibility for the prosecution of criminal law and began to protect the rights it had granted to criminal defendants through the appeals process, courts have needed an answer to what should happen when a defendant, by his or her death, loses an opportunity to make an appeal of right. Most courts recognized the primarily punitive nature of criminal law and reasoned that a dead defendant need not stand convicted. In a criminal law regime that excluded the interests of those victimized by crime from protection, this was a perfectly logical solution.

Proponents of victims' rights began, in the late-twentieth century, to have a greater influence on the philosophy behind criminal law. Soon, criminal law became about more than punishment; it became about justice for those who had been harmed. The introduction of this new set of interests into the equation turned what was, frankly, an obvious policy of abatement into a doctrine that could potentially work a massive injustice. This led to a rebellion in many of the states, manifested by decisions overturning decades of precedent and the adoption of one of four alternative doctrines that exist today.

Some courts simply shifted to non-abatement and would uphold the conviction. Others declined to abandon the interest of the decedent in the appeals process and decided to compromise. Some of these compromisers kept restitution orders, abating the rest of the conviction. Others allowed another person to substitute for the defendant and pursue the appeal. Alabama stood alone in declaring the case permanently indisposed while not vacating the judgment.

These are all per se rules that are supposed to be applied to cases with differing interests with differing intensities. This is analogous to trying to force many differently shaped pegs into a round hole. To achieve what is truly fair, courts need a flexible, low-cost procedure that takes the interests of all parties into account for each situation. For this purpose, the abatement hearing option is ideal. The judge would consider four factors, which he or she would balance together to reach the fairest result, case by case. Courts should work to maximize the level of fairness and justice that comes out of the criminal justice system. No per se rule can do that.

In the case of Ken Lay, the court would likely have found that no abatement should take place under the abatement hearing method. If Judge Lake were allowed to consider all the interests at play, he would have been empowered to reach the fairest result based on common sense. Then, the Ken Hortons of the world could have finally received the justice they welcomed on May 25, 2006.