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## CHAPMAN LAW REVIEW

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Citation: Ariel J. Romero, “*Some Days It’s Tough Just Gettin’ Up*”: *How the Current Civil and Criminal Legal Remedies Fail to Protect Mass Shooting Victims*, 24 CHAP. L. REV. 529 (2021).

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# **“Some Days It’s Tough Just Gettin’ Up”: How the Current Civil and Criminal Legal Remedies Fail to Protect Mass Shooting Victims**

*Ariel J. Romero\**

## I. INTRODUCTION

On October 1, 2017 at 10:01 pm, the sound of gunfire rang out. Thousands of concertgoers at the Route 91 Harvest Festival in Las Vegas initially mistook these sounds of gunfire for fireworks popping off in the distance. One of those people was me. By the time my mind realized what the sounds *were not*, it was too late. I had been shot in the face with a hollow point bullet from an AR-15. It entered my right cheek, exploded inside my jaw, and exited the back of my neck. A choice to sing and dance near the front of the concert stage that night was one that gave rise to ten excruciating minutes of gruesome sights and horrific sounds that will never leave me.

At the time of the attack, I was a twenty-three-year-old woman, unknowledgeable about guns, uninformed of their history, ignorantly indifferent to the gun debate in our society, uneducated about the rights of victims of gun violence, and completely unaware of what gunfire sounded like. Now, gunfire is a sound I cannot and will not forget. It plays on a continual loop in my head almost every single day, blasting against the backdrop of the lyrics playing when a loved one and I were shot: “Some days it’s tough just gettin’ up.” Those Jason Aldean lyrics became the soundtrack to a new reality for me: I now live in a world where I survived, and she did not. Witnessing the carnage of mass murder, fighting for a renewed will to live, and continuing to survive through trauma inspired this Article.

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\* J.D. Candidate, Expected May 2021, Chapman University Dale E. Fowler School of Law. In honor and loving memory of Christiana Mae Duarte. Thank you to my family and friends, but especially my parents. This Article was built upon their infinite love and support. A special thank you to Stephanie Lascelles, Professor of Law at Chapman University Dale E. Fowler School of Law, whose guidance and spirit touched this Article and my life. Finally, thank you to my amazing team of medical professionals. No words can describe my appreciation for all of you: Douglas M. Galen, DDS; William G. Lang, MD; Vivian F. Credidio, PhD; and Patty Brown, PT.

This Article proposes amending United States laws dealing with rights and remedies for victims who survive mass shootings.<sup>1</sup> Mass shootings are at the forefront of news and political platforms. Each new occurrence triggers renewed pleas for prayers and reform. Time and time again, humanity exhibits its goodness by providing consolation and comfort to the victims in their initial time of need. Our nation's politicians, however, have failed to enact meaningful reform to ameliorate the crisis. Victims of mass shootings face complex, outdated, and ineffective laws that do little to redress the trauma victim's experience in the days, months, and years after the shooting. Victims lack the resources and legal knowledge to effectively advocate for solutions. Victims are expected to make decisions with serious legal ramifications immediately following the shootings, or shortly thereafter. Most of the time victims make these decisions without being adequately informed of the civil and criminal justice mechanisms designed for victims of gun violence. This is largely because the necessary information to make informed legal decisions is scattered throughout many different agencies, civil statutes, criminal statutes, and other data sources. There is no uniform, reliable platform containing all this information, making it extremely complicated for victims to navigate. This Article is intended to be a single source outlining both the civil and criminal remedies available to victims in an effort to provide greater transparency and cohesiveness to the literature. It will also aid victims and scholars alike in analyzing mass shooting victims' redresses through my first-hand account and perspective, specifically utilizing the Route 91 Harvest Festival mass shooting to recount personal experiences. Further, this Article proposes concepts that, if implemented, would prevent further victimization of mass shooting victims. In the civil context, it includes offering various non-monetary remedies to victims. In the criminal context, it includes implementing measures for sufficient follow-through with victims in addition to creating a domestic terrorism federal cause of action for more accountability and equity. When civil and criminal remedies overlap, this Article recommends streamlining the civil and criminal procedures for victims to manageably navigate.

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<sup>1</sup> It is important to note that this Article is not meant to undermine other gun violence victims. There are countless victims of gun violence attributed to suicide, homicide, domestic violence, hate crimes, unintentional shootings, and other gun incidents. This Article is meant to specifically shed a light on the inadequacy of current victims' remedies for mass shooting victims.

Part II of this Article provides a short history of mass shootings and the relevant law pertaining to victims’ civil and criminal remedies. Part III and IV separately discuss the deficiencies in civil and criminal remedies, including their failure to address the psychological and emotional injuries suffered by mass shooting victims, and briefly proposes various non-monetary solutions for victims. In the civil context, this Article recommends: allowing victims the opportunity for catharsis, advocacy, and reputational harm, forbidding non-disclosure clauses in settlement agreements with victims of mass shootings, and tolling statutes of limitation for mass shooting victims. In the criminal context, this Article recommends: enacting private victim compensation funds specifically for victims of mass shootings and stronger enforcement of codified victims’ rights. Part V highlights the civil and criminal remedies’ overlap and its legal implications, and proposes a stronger interdisciplinary approach to victims’ rights by recognizing all mass shootings as acts of domestic terrorism, thereby creating a federal domestic terrorism cause of action. Part VI concludes.

## II. BACKGROUND

### A. History of Mass Shootings

There is no universally accepted definition of a public mass shooting.<sup>2</sup> Some experts classify a mass shooting as a shooting killing four or more people.<sup>3</sup> Using this narrow definition, “mass” shooters have killed 1,300 people between August 1, 1966 and April 12, 2021.<sup>4</sup> While some might view that figure as surprisingly high and others might view it as shockingly low, the sentiment remains the same: the victims and their families should receive the remedies afforded victims in other tort contexts. And let us not forget the thousands of victim-survivors who have suffered catastrophic injuries, broken families, and psychological damage.<sup>5</sup>

Mass shootings have occurred in the United States as early as 1891.<sup>6</sup> That year, a man fired his doubled barreled shotgun

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<sup>2</sup> See Bonnie Berkowitz, Chris Alcantara, & Denise Lu, *The Terrible Numbers that Grow with Each Mass Shooting*, WASH. POST (Apr. 12, 2021), <http://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/> [<http://perma.cc/RMM6-LHV7>] (noting that most of these shootings are carried out by a “lone shooter”).

<sup>3</sup> See *id.* (excluding shootings tied to robberies or domestic shootings in private homes).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See Maria Esther Hammack, *A Brief History of Mass Shootings*, BEHIND THE TOWER, <http://behindthetower.org/a-brief-history-of-mass-shootings> [<http://perma.cc/ARU7-V8A3>] (last visited Mar. 20, 2021).

into a crowd of students and faculty attending a school exhibition in Mississippi, severely injuring over fourteen people—mostly children.<sup>7</sup> The next month, a man went inside a school in New York and shot several children playing on the playground.<sup>8</sup> While none of the victims were killed as a result of these first mass shootings, these shootings mirror the scenes and traumas of modern-day mass shootings.

In the twentieth century, mass shootings started as early as 1903. However, it was not until the University of Texas at Austin shooting on August 1, 1966 when the number of people killed and injured in mass shootings began to rise.<sup>9</sup> That shooting lasted ninety-six minutes, killed seventeen people, and injured more than thirty.<sup>10</sup> Mass shootings that followed were equally harrowing, which included but are not limited to: the McDonald's mass shooting in California in 1984 that killed twenty-one and injured nineteen;<sup>11</sup> the Post Office shooting in Oklahoma in 1986 that killed fourteen and injured six;<sup>12</sup> the Cleveland Elementary School shooting in California in 1989 that killed five children and wounded thirty-two others;<sup>13</sup> the General Motor shooting in Florida in 1990 that killed eight and injured five;<sup>14</sup> the Luby's Cafeteria shooting in Texas in 1991 that killed twenty-two and injured more than twenty others;<sup>15</sup> the Jonesboro Middle School shooting in Arkansas in 1998 that killed five and injured ten;<sup>16</sup> and one of the last mass shootings of the century being the Columbine High School shooting in Colorado in 1999 that killed thirteen and wounded more than twenty others.<sup>17</sup>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Twenty-one people are shot to death at McDonald's*, HIST., <http://www.history.com/this-day-in-history/twenty-one-people-are-shot-to-death-at-mcdonalds> [<http://perma.cc/5Z4D-GGNP>] (last updated July 20, 2020).

<sup>12</sup> Dianna Everett, *Edmond Post Office Massacre*, OKLA. HIST. SOC'Y, <http://www.okhistory.org/publications/enc/entry.php?entry=ED003> [<http://perma.cc/3TBY-XXKD>] (last visited Mar. 20, 2021).

<sup>13</sup> *Five Children Killed as Gunman Attacks a California School*, N.Y. TIMES (Jan. 18, 1989), <http://www.nytimes.com/1989/01/18/us/five-children-killed-as-gunman-attacks-a-california-school.html> [<http://perma.cc/G3AJ-J7VD>].

<sup>14</sup> *A Look Back: GMAC Mass Shooting*, FLA. TIMES-UNION (Apr. 10, 2019), <http://www.jacksonville.com/photogallery/LK/20190410/NEWS/409009969/PH/1> [<http://perma.cc/U9N8-68J4>].

<sup>15</sup> Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES (Oct. 17, 1991), <http://www.nytimes.com/1991/10/17/us/gunman-kills-22-and-himself-in-texas-cafeteria.html> [<http://perma.cc/CHR4-JFFZ>].

<sup>16</sup> Jonathan Ford, *Westside School Shooting*, ENCYCLOPEDIA OF ARK., <http://encyclopediaofarkansas.net/entries/westside-school-shooting-3717/> [<http://perma.cc/8Z4B-U6RV>] (last updated July 29, 2019).

<sup>17</sup> *Columbine Shooting*, HIST., <http://www.history.com/topics/1990s/columbine-high-school-shootings> [<http://perma.cc/62FN-KTM6>] (last updated Mar. 4, 2021).

The twenty-first century has witnessed some of the most disturbing mass shootings to date: the Virginia Tech shooting in Virginia in 2007 that killed thirty-two people and injured seventeen;<sup>18</sup> the Fort Hood Shooting in Texas in 2009 that killed thirteen and injured thirty-two;<sup>19</sup> the Sandy Hook shooting in Connecticut in 2012 that killed twenty-seven and injured two others;<sup>20</sup> the Pulse nightclub shooting in Florida in 2016 that killed forty-nine and wounded fifty-three others;<sup>21</sup> the Sutherland Springs Texas church shooting in 2017 that killed twenty-six and injured nineteen others;<sup>22</sup> the Marjory Stoneman Douglas High School shooting in Parkland, Florida in 2018 that killed seventeen and wounded fourteen others;<sup>23</sup> the Tree of Life synagogue shooting in Pittsburgh in 2018 that killed eleven and wounded six others;<sup>24</sup> the Saugus High School shooting in California in 2019 that left two dead and three wounded;<sup>25</sup> the shooting in Dayton, Ohio in 2019 that killed nine and injured twenty-seven others;<sup>26</sup> the shooting at Walmart in Texas in 2019

<sup>18</sup> Kalhan Rosenblatt, *Las Vegas Shooting is Deadliest in Modern U.S. History*, NBCNEWS (Aug. 20, 2018, 3:56 PM), <http://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-shooting-deadliest-modern-u-s-history-n806486> [<http://perma.cc/JSF7-7U2C>].

<sup>19</sup> Kyle Rempfer, *The Mass Shooting at Fort Hood Was 10 Years Ago, on Nov. 5, 2009*, ARMY TIMES (Nov. 5, 2019), <http://www.armytimes.com/news/your-army/2019/11/05/the-mass-shooting-at-fort-hood-was-10-years-ago-on-nov-5-2009/> [<http://perma.cc/VJ78-HQF5>].

<sup>20</sup> Michael Ray, *Sandy Hook Elementary School Shooting*, BRITANNICA, <http://www.britannica.com/event/Newtown-shootings-of-2012> [<http://perma.cc/24U9-YBX7>] (last visited Mar. 20, 2021).

<sup>21</sup> Haley Tsukayama et al., *Gunman Who Killed 49 in Orlando Nightclub Had Pledged Allegiance to ISIS*, WASH. POST (June 13, 2016, 6:28 AM), <http://www.washingtonpost.com/news/post-nation/wp/2016/06/12/orlando-nightclub-shooting-about-20-dead-in-domestic-terror-incident-at-gay-club/> [<http://perma.cc/46FG-H9N5>]; Lizette Alvarez & Richard Pérez Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html> [<http://perma.cc/AB4G-KHQJ>].

<sup>22</sup> *Texas Church Killings: What We Know and Don't Know*, N.Y. TIMES (Nov. 5, 2017), <http://www.nytimes.com/2017/11/05/us/texas-church-killings-what-we-know.html> [<http://perma.cc/ZU2R-F268>].

<sup>23</sup> Elizabeth Chuck et al., *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBCNEWS (Feb. 15, 2018, 7:20 AM), <http://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101> [<http://perma.cc/8ECC-ZHQJ>].

<sup>24</sup> Kellie B. Gormly et al., *Suspect in Pittsburg Synagogue Shooting Charged with 29 Counts in Deaths of 11 People*, WASH. POST (Oct. 27, 2018, 7:50 PM), <http://www.washingtonpost.com/nation/2018/10/27/pittsburgh-police-responding-active-shooting-squirrel-hill-area/> [<http://perma.cc/Q4PA-CJ7V>].

<sup>25</sup> Jason Silverstein, *There Were More Mass Shootings than Days in 2019*, CBSNEWS, <http://www.cbsnews.com/news/mass-shootings-2019-more-than-days-365/> [<http://perma.cc/C5FT-PZUL>] (last updated Jan. 2, 2020, 11:45 AM).

<sup>26</sup> James Doubek & Vanessa Romo, *Police Identify Suspected Dayton, Ohio, Shooter: 9 Dead, 27 Injured*, NPR (Aug. 4, 2019, 4:33 AM), <http://www.npr.org/2019/08/04/747989695/9-killed-at-least-16-injured-in-shooting-in-dayton-ohio> [<http://perma.cc/5RJB-4CJV>].

that killed twenty-three and injured twenty-six;<sup>27</sup> the shooting in Virginia Beach in 2019 that killed twelve and wounded four;<sup>28</sup> the Molson Coors campus shooting in Milwaukee, Wisconsin in 2020 that killed five;<sup>29</sup> the spa shootings in Atlanta, Georgia in 2021 that killed eight and injured one other;<sup>30</sup> and also witnessed the “deadliest” mass shooting with the highest number of victims in modern history at the Route 91 Harvest Festival mass shooting in Las Vegas in 2017 that killed fifty-eight and wounded over five hundred others.<sup>31</sup>

A total of 196 shooters perpetuated mass killings between 1966 and 2021. 104 of them died either at the scene of the shooting or nearby,<sup>32</sup> and most of them killed themselves.<sup>33</sup> The killings occurred in forty-two states and the District of Columbia.<sup>34</sup> California has been the state home to most of these mass shootings—thirty-two have taken place in the state.<sup>35</sup>

The paucity of public health research on gun violence, resulting in part from a federal law enacted in 1996 that restricts federal funding for firearms research, makes it difficult to solve these problems.<sup>36</sup> The 1996 law eliminated \$2.6 million worth of federal funding to the agency that was used for research related to gun violence.<sup>37</sup> A provision, known as the Dickey Amendment, stated

<sup>27</sup> Peter Martinez, *El Paso Walmart Shooting Victim Dies, Raising Death Toll to 23*, CBS NEWS (Apr. 27, 2020, 12:10 PM), <http://www.cbsnews.com/news/el-paso-walmart-shooting-guillermo-garcia-dies/> [<http://perma.cc/98QZ-CCUE>]; Vanessa Romo, *El Paso Walmart Shooting Suspect Pleads Not Guilty*, NPR (Oct. 10, 2019, 4:31 PM), <http://www.npr.org/2019/10/10/769013051/el-paso-walmart-shooting-suspect-pleads-not-guilty> [<http://perma.cc/4BGL-CM5Y>].

<sup>28</sup> Michael James & Doug Stanglin, *‘War Zone’: 12 Killed in Virginia Beach Shooting at Municipal Center; Gunman Dead After Long Gun Battle*, USA TODAY (June 3, 2019, 12:16 PM), <http://www.usatoday.com/story/news/nation/2019/05/31/police-shooter-opens-fire-virginia-beach-courthouse/1305277001/> [<http://perma.cc/Q7YE-3YJN>].

<sup>29</sup> WPR Staff, *Police: 5 People, Gunman Dead After Shooting at Molson Coors Campus in Milwaukee*, WIS. PUB. RADIO (Feb. 27, 2020, 6:10 AM), <http://www.wpr.org/police-5-people-gunman-dead-after-shooting-molson-coors-campus-milwaukee> [<http://perma.cc/SJ9Y-DFM9>].

<sup>30</sup> Elinor Aspegren, Ryan W. Miller, & Christal Hayes, *Atlanta Spa Shooting Updates: All Victims Identified; Suspect Disowned by Church; Biden in Georgia Says ‘Silence is Complicity’*, USA TODAY (Mar. 20, 2021, 9:03 AM), <http://www.usatoday.com/story/news/nation/2021/03/19/atlanta-shooting-updates-biden-harris-asian-american-hate-crime/4752589001/> [<http://perma.cc/5AUA-BYZF>].

<sup>31</sup> Doug Criss, *The Las Vegas Attack is the Deadliest Mass Shooting in Modern US History*, CNN, <http://www.cnn.com/2017/10/02/us/las-vegas-attack-deadliest-us-mass-shooting-trnd/index.html> [<http://perma.cc/DX59-LJ3G>] (last updated Oct. 2, 2017).

<sup>32</sup> See Berkowitz et al., *supra* note 2.

<sup>33</sup> See *id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *How the NRA Suppressed Gun Violence Research*, UNION OF CONCERNED SCIENTISTS (Oct. 12, 2017) [http://www.ucsusa.org/resources/how-nra-suppressed-gun-violence-research#.W\\_gg5JNKh-U](http://www.ucsusa.org/resources/how-nra-suppressed-gun-violence-research#.W_gg5JNKh-U) [<http://perma.cc/X58D-ZLZ8>].

<sup>37</sup> See *id.*

that none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention (“CDC”) may be used to advocate or promote gun control.<sup>38</sup> Arkansas Representative Jay Dickey introduced this provision into the federal spending bill.<sup>39</sup> Before he passed away, Dickey wrote an essay urging research into the causes of gun violence. He co-authored the essay with a former official of the CDC, whom he previously interrogated on the accuracies of a study on gun violence during a Congressional hearing in 1996. In 2015, he told the Huffington Post that he wished he kept the research going all this time, admitting that he had “regrets” implementing the amendment.<sup>40</sup>

For the first time in twenty years, the 2020 Labor, Health and Human Services, Education and Related Agencies (LHHS) funding bill (H.R. 2740) provides funding to ensure the CDC can conduct scientific research to reduce injuries and save lives from gun violence.<sup>41</sup> It passed the House of Representatives in June 2019,<sup>42</sup> and it had its third cloture motion in the Senate on October 31, 2019.<sup>43</sup> The bill specifically provides for firearm injury research, the findings of which will directly impact the approach to victims’ road to recovery in both civil and criminal processes.

## B. Overview of Remedies and Victim Rights in the Civil and Criminal Context

Under current law, victims of mass shootings have limited access to remedies that foster healing for their injuries. Victims

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<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Matt Schudel, *Jay Dickey, Arkansas Congressman Who Blocked Research on Gun Safety, Dies at 77*, WASH. POST (Apr. 22, 2017), [http://www.washingtonpost.com/national/jay-dickey-arkansas-congressman-who-blocked-research-on-gun-safety-dies-at-77/2017/04/22/39e363a0-26bb-11e7-a1b3-faff0034e2de\\_story.html](http://www.washingtonpost.com/national/jay-dickey-arkansas-congressman-who-blocked-research-on-gun-safety-dies-at-77/2017/04/22/39e363a0-26bb-11e7-a1b3-faff0034e2de_story.html) [http://perma.cc/TF2H-Y64U].

<sup>41</sup> See *Appropriations Committee Releases Fiscal Year 2020 Labor-HHS-Education Funding Bill*, HOUSE COMM. ON APPROPRIATIONS (Apr. 29, 2019), <http://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2020-labor-hhs-education-funding> [http://perma.cc/F3CX-MCXW] (“The bill includes a total of \$8.3 billion for CDC—\$921 million above the 2019 enacted level and \$1.7 billion above the President’s budget request. This includes \$854 million in transfers from the Prevention and Public Health Fund and \$225 million in transfers from the HHS Nonrecurring Expenses Fund for a new research support building and campus infrastructure improvements. For the first time in more than 20 years, the bill includes funding—\$25 million—to specifically support firearm injury and mortality prevention research.”).

<sup>42</sup> *H.R.2740—Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020*, CONGRESS.GOV, <http://www.congress.gov/bill/116th-congress/house-bill/2740/all-actions?r=111&overview=closed&s=3#tabs> [http://perma.cc/M4N3-7PUZ] (last visited Mar. 20, 2021).

<sup>43</sup> *Id.*



may choose to utilize tort law in the form of civil litigation and settlement, but they also face steep procedural and emotional barriers that make it extremely difficult to litigate. Victims may also have the option to employ criminal law with the prosecution and filing of criminal charges against the offender, but there is rarely a living offender to prosecute. Concurrently with the civil and criminal systems, victims may also connect with administrative agencies that investigate the shooting, assist in relaying the requisite information for counseling, and informing victims of other compensation funds. However, their assistance is often introductory and limited in both personalization and duration.

### 1. Civil Context

Tort law has two primary goals: making wronged victims whole again and providing compensation to these victims to deter wrongdoers from continuing to engage in unreasonable conduct that causes harm to others.<sup>44</sup> In this area, scholars tend to take a law and economics approach, articulating the main goal as reducing the societal costs accompanying accidents in our society.<sup>45</sup> Businesses and other organizations take this approach when they implement precautionary measures, because otherwise they would be liable if an accident happened—and these payouts are more costly than implementing safety precautions in the first place.<sup>46</sup>

But tort law remedies only work when the victim can secure and collect on a fair judgment.<sup>47</sup> In reality, victims face countless barriers when attempting to establish that certain elements exist for liability purposes.<sup>48</sup> Further, liable parties are typically unable to compensate victims for the fully entitled amount.<sup>49</sup>

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<sup>44</sup> See Kathleen A. Zink, *Note: Should Neither Wind Nor Rain Nor Hurricane Keep Victims from Recovery? Examining the Tort and Insurance Systems' Ability to Compensate Hurricane Victims*, *FORDHAM L. REV.* 1621, 1652–53, 1654 (2014) (“[C]ompensation is seen as ‘repairing plaintiff’s injury or of making him whole as nearly [as possible] by an award of money. . . . Another primary goal of tort law is deterrence or the reduction of accidents.’”); see also Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 *TEX. L. REV.* 1567, 1570 (1997) (explaining that making victims whole is a traditional tort law goal); cf. Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort’s Soul*, 48 *U. LOUISVILLE L. REV.* 1, 26–28 (2009) (noting that tort law is “not concerned with making the victim whole but rather with righting wrongs”).

<sup>45</sup> See David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 *ARIZ. L. REV.* 357, 364 (1994).

<sup>46</sup> See *id.* at 365.

<sup>47</sup> See Carl L. Buck, *Expansion of Bankruptcy Court Jurisdiction as a Means to Provide More Adequate Remedies to Victims of Mass Torts*, 15 *W. NEW ENG. L. REV.* 257, 257–58. (1993).

<sup>48</sup> For example, mass shootings are frequently criminal acts committed in a public place. Thus, in most jurisdictions, when suing an establishment where the mass shooting

Civil litigation through tort actions is a common remedial approach in the mass shooting context. Mass tort litigation, specifically, usually consists of numerous severely injured victims as potential plaintiffs—all of whom have a common set of injuries that were sustained in either the same or similar circumstances—in actions involving one or more defendants.<sup>50</sup> These mass tort actions began in the 1960s and evolved in the 1980s.<sup>51</sup> Federal courts became flooded with filings as people began to sue corporations for losses, injuries, or diseases from “catastrophic events, pharmaceutical products, medical devices, or toxic substances.”<sup>52</sup> The typical “mass” tort injury usually results from corporate activities like the manufacturing and distribution of defective products, or from a catastrophic event that occurred as a result of the corporation’s misconduct, rather than from the acts of individuals acting in their personal capacity.<sup>53</sup>

The victims typically include laypersons, distinguishable from other mass tort or class action contexts like securities or antitrust actions where the plaintiffs are typically shareholders or entities with larger financial resources.<sup>54</sup> This classification of plaintiffs in mass tort actions can also be imputed to the makeup of victims of public mass shootings, as this class of victims is more likely to consist of everyday people with little to no encounters with, or desire to engage with the legal system.<sup>55</sup> Indeed, a solicitation letter I received regarding the massive litigation against MGM for liability in the Route 91 Harvest Festival shooting described Route 91 mass shooting victims as some of the most litigation averse individuals the attorney had encountered.<sup>56</sup>

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occurred, a victim must prove the criminal act was foreseeable. See Michael Steinlage, *Liability for Mass Shootings: Are We at a Turning Point?*, ABA (Feb. 7, 2020), [http://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/the\\_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point/](http://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point/) [http://perma.cc/K42V-N82U].

<sup>49</sup> See *id.*

<sup>50</sup> See Leonard J. Long, *Bankruptcy Lesson of Future Mass Tort Claims*, 16 QUINNIPIAC L. REV. 357, 380 (1997); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1355–56 (1995).

<sup>51</sup> See Coffee, *supra* note 50, at 1356; see also JOHN G. FLEMING, *The American Tort Process* 1, 3–4 (1991).

<sup>52</sup> Coffee, *supra* note 50, at 1355.

<sup>53</sup> See Long, *supra* note 50, at 363.

<sup>54</sup> See Coffee, *supra* note 50, at 1355; Noah Smith-Drelich, *Article: Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 5 (2014).

<sup>55</sup> See Amy Novotney, *What Happens to the Survivors*, AM. PSYCH. ASS’N (Sept. 2018), <http://www.apa.org/monitor/2018/09/survivors> [http://perma.cc/8WQM-2K9F].

<sup>56</sup> See Letter from Catherine R. Lombardo, Attorney, Lombardo L. Firm, to Ariel Romero (Mar. 29, 2019) (on file with author).

Development in mass litigation has created a trend for tort reform against traditional private litigation.<sup>57</sup> States have implemented tort reforms that have effectively curtailed proceedings in courts, caused procedural barriers to victims, and imposed caps on statutory remedies.<sup>58</sup> Powerful companies are the primary catalysts for such reforms.<sup>59</sup> Opponents of private mass actions argue that private mass actions are subject to abuse in several ways—higher transaction costs for both victims and society, and the threat of private injury lawyers neglecting their duty to advocate on behalf of their client for the greater good of society.<sup>60</sup> The alternative to a private mass action may be a class action, which are also criticized for their murky settlement agreements that “provide a mechanism for defendants to resolve mass liability exposure without the risk of a class trial.”<sup>61</sup> These settlements have emerged in recent decades and revealed new strategies for defendants—create an uneven power dynamic between parties, take advantage of absent class members, and settle cheap before any damaging information gets out.<sup>62</sup>

Despite the power struggle between victims and powerful defendants in the tort system, it is still seen as a viable avenue for victims: it provides flexibility with several forms of relief, its underlying goal promotes deterrence of bad acts for public safety, and it is more sensitive to a victim’s needs than certain governmental and administrative agencies.<sup>63</sup> This is because a return to a more traditional approach of individual case litigation is inefficient and more costly than the mass tort litigation alternative.<sup>64</sup> Ultimately, mass tort class actions do work to deliver monetary compensation to victims of mass shootings despite the likelihood that attorneys can self-deal and solidify settlements subject to criticism.<sup>65</sup>

## 2. Criminal Context

Shooting incidents, for the most part, are considered homicides or attempted homicides—which is how these shootings enter into the criminal justice realm of law. In fact, this may be

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<sup>57</sup> Jack B. Weinstein, *Compensation for Mass Private Delicts*, U. ILL. L. REV. 947, 967 (2001).

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. U. L. REV. 951 (2014).

<sup>62</sup> *See generally id.*

<sup>63</sup> *See* Weinstein, *supra* note 57, at 969–71.

<sup>64</sup> *See* Coffee, *supra* note 50, at 1346.

<sup>65</sup> *See id.* at 1349.

the first time that these gun violence victims are introduced to the criminal justice court system.<sup>66</sup> Involvement in the criminal justice system can be extremely confusing and frustrating for victim-survivors because in most cases, the shooter either has not been found, has been killed, or cannot be arrested because of lack of evidence.<sup>67</sup>

Many programs were created to help victims of crime during the 1970s and 1980s victims’ rights movement.<sup>68</sup> Laws were enacted at all levels—local, state, and federal—to encapsulate victims’ rights.<sup>69</sup> While state and local authorities investigate crimes where a state law violation has occurred, the Federal Bureau of Investigation (“FBI”) investigates crimes where U.S. Federal Criminal Code violations have occurred.<sup>70</sup> The victims of these federal crimes have different rights and assistance enacted under federal law.<sup>71</sup> There is a caveat as these rights and services are not inherent—most of these rights provided for in federal law apply only after charges have been filed by a U.S. Attorney.<sup>72</sup> However, whether or not charges are filed, the FBI is responsible for assisting victims continuously until their own investigation is closed *or* until the case is turned over to the U.S. Attorney’s Office to begin the prosecution process.<sup>73</sup>

The past thirty years proved beneficial for victims’ rights as every state, the District of Columbia, and other territories have provided for basic rights and protections for victims of crime in their respective statutory codes.<sup>74</sup> These rights include: the right to attend and be present at criminal justice proceedings, the right to be heard in the criminal justice process, the right to restitution from the offender, the right to apply for crime victim compensation, and the right to enforcement of these rights and access to other available remedies.<sup>75</sup> The right to restitution is another victims’ right that is more commonly known among the public. The term “restitution” refers to the payment of damages

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<sup>66</sup> See *Navigating the Criminal Justice System*, EVERYTOWN FOR GUN SAFETY, <http://everytown.org/survivors/resources/navigating-the-criminal-justice-system/> [<http://perma.cc/AZG3-XS53>] (last visited Mar. 21, 2021).

<sup>67</sup> See *id.*

<sup>68</sup> See *Rights of Federal Crime Victims*, FBI, <http://www.fbi.gov/resources/victim-services/rights-of-federal-crime-victims> [<http://perma.cc/4EVQ-MV34>] (last visited Mar. 21, 2021).

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *About Victims’ Rights*, OFF. OF JUST. PROGRAMS, <http://victimlaw.org/victimlaw/pages/victimsRight.jsp> [<http://perma.cc/GJ2Z-7UQD>] (last visited Mar. 21, 2021).

<sup>75</sup> 18 U.S.C. § 3771.

by the defendant for the harm which he or she caused.<sup>76</sup> Almost two-thirds of states have constitutions that provide for guaranteed rights to victims of crime.<sup>77</sup>

The Justice for All Act of 2004, commonly known as the Crime Victims' Rights Act ("CVRA"),<sup>78</sup> establishes crime victims' rights in federal criminal justice cases, provides "mechanisms for victims to enforce those rights, and gives victims and prosecutors standing to assert victims' rights."<sup>79</sup> These enumerated rights compensate for the gap in the Constitution that fails to provide for victims' rights.<sup>80</sup> The CVRA was inspired and passed due to the stories of various victims whose families were either not notified of, or excluded from, certain criminal proceedings against those who killed their loved ones.<sup>81</sup> Laws like the CVRA usually do not apply to victims of mass shootings since the perpetrators are often dead, and therefore cannot be criminally prosecuted.

Victim compensation is an important tool for victims as their injuries result in an immediate monetary need. The Victims of Crime Act was enacted to help victims with the costs associated with surviving terrorism or mass violence, which includes but is not limited to, medical bills, counseling sessions, and lost wages.<sup>82</sup> This Act, passed in 1984, created the Crime Victim's Fund.<sup>83</sup> This Fund is administered by the Office for Victims of Crime, which "provides financial assistance to victims of crime through state-based compensation programs, as well as indirectly through state grants that help finance state victim service organizations."<sup>84</sup> These funds come from various sources: they may come from criminal law mechanisms like the "U.S. Attorneys' Offices, federal courts, or the Federal Bureau of Prison, which collect criminal fines, forfeited bail bonds, penalties, and special assessments, and are subsequently deposited into the Crime Victims Fund."<sup>85</sup> This Office for Victims

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<sup>76</sup> See *About Victims' Rights*, *supra* note 74.

<sup>77</sup> See *id.*

<sup>78</sup> 18 U.S.C. § 3771.

<sup>79</sup> *Id.*

<sup>80</sup> See Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, LEWIS & CLARK L. REV. 581, 591 (2005) ("During Crime Victims' Week in April 2004, victims' advocates . . . suspended their effort to amend the U.S. Constitution and turned instead toward enacting a comprehensive federal statute."); see also H.R. REP. NO. 108-711 (2003) (explaining the bill being prompted because "[v]ictims of crime have long complained that they are the forgotten voice in the criminal justice system").

<sup>81</sup> See Kyl, *supra* note 80, at 582-83.

<sup>82</sup> See 34 U.S.C. §§ 20101-44.

<sup>83</sup> See *Victims of Crime Act*, RAINN, <http://www.rainn.org/articles/victims-crime-act> [<http://perma.cc/ZN35-UMWX>] (last visited Mar. 21, 2021).

<sup>84</sup> *Id.*

<sup>85</sup> *Victims of Crime Act: Rebuilding Lives through Assistance and Compensation*,

of Crime is headed by a director (“Director”) who is appointed by the President of the United States.<sup>86</sup> This Director is allowed to make supplemental grants to:

States for certain eligible crime victim compensation and assistance programs, and to victim service organizations, public agencies (including Federal, State, or local governments) and nongovernmental organizations that provide assistance to victims of crime, which shall be used to provide emergency relief, including crisis response efforts, assistance, compensation, training and technical assistance, and ongoing assistance, including during any investigation or prosecution, to victims of terrorist acts or mass violence occurring within the United States.<sup>87</sup>

The Act allows for victims to submit invoices for the reimbursement of certain out-of-pocket costs incurred.<sup>88</sup> However, a victim must first submit an application and receive a claim number from the program before submitting their costs for reimbursement.<sup>89</sup>

Every state has its own designated crime victim compensation program and the eligibility for each program is determined through an application process, which varies across states.<sup>90</sup> A common process involves the following: the application is sent in, and either accepted or rejected by a board. That same board decides what costs will and will not be reimbursed for each individual victim.<sup>91</sup> Determining which costs fall under the reimbursement or non-reimbursement category differs by state.<sup>92</sup> Of note, these programs are reimbursement-based. This means that victims are expected to pay for all expenses out-of-pocket, and then fully or partially reimbursed for *approved* expenses (usually medical, dental, counseling, funeral, burial, and lost wages associated with a crime).<sup>93</sup>

Victims have more options for recovery under the state crime system since state courts are not limited by subject matter jurisdictional constraints the way federal courts are.<sup>94</sup> There are

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OFF. FOR VICTIMS OF CRIME, [http://www.ovc.gov/pdf/VOCA\\_Chart\\_hr.pdf](http://www.ovc.gov/pdf/VOCA_Chart_hr.pdf) [<http://perma.cc/E66K-Z3PJ>] (last visited Mar. 21, 2021).

<sup>86</sup> 34 U.S.C. § 20111(b).

<sup>87</sup> 34 U.S.C. § 20105(b).

<sup>88</sup> *See Victims of Crime Act*, *supra* note 83.

<sup>89</sup> *See id.*

<sup>90</sup> *See Crime Victim Compensation: Financial Assistance After a Crime*, EVERYTOWN FOR GUN SAFETY, <http://www.everytown.org/survivors/resources/crime-victim-compensation/> [<http://perma.cc/LKK6-9C2S>] (last visited Mar. 21, 2021).

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See* Jeffrey A. Parness, Laura Lee, & Edmund Laube, *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 820 (2010) (“State trial court jurisdictional

many recovery claims of both federal and state crimes which lay outside of federal court authority.<sup>95</sup> Thus, victims often use the state crime system for recovery even when a federal law crime occurred.<sup>96</sup>

### 3. Recent Developments: Classifications of Mass Shootings as Acts of Domestic Terrorism

The western world has had an indisputable and disturbing white nationalist domestic terrorist problem<sup>97</sup>—even if these mass shootings are not referred to as such.<sup>98</sup> Clearer cases of this type of domestic terrorism in the context of mass shootings have occurred, such as the shooting in El Paso, Texas that left twenty-three people dead.<sup>99</sup> The U.S. Department of Homeland Security has now formally recognized the increased number of mass shootings in America as domestic terrorism.<sup>100</sup> Homeland Security even went as far as stating: “[T]he Nation also faces a growing threat from domestic actors inspired by violent extremist ideologies, as well as from those whose attacks are *not* ideologically driven.”<sup>101</sup> For the first time, government agencies are starting to pay attention to “conspiratorial” and “hateful” communities that originate online as domestic terrorist threats.<sup>102</sup> Future designations of mass shootings as acts of domestic terrorism have enormous potential legal implications, as discussed later in this Article.<sup>103</sup>

If mass shootings of this nature are classified as domestic terrorist attacks, victims may be afforded additional remedies.

authority typically is unlimited.”).

<sup>95</sup> See U.S. CONST. art. III; see also Parness, Lee, & Laube, *supra* note 94.

<sup>96</sup> See Parness, Lee, & Laube, *supra* note 94.

<sup>97</sup> See Robert O’Harrow et al., *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/> [http://perma.cc/5UFV-DP79].

<sup>98</sup> See Editorial Board, *We Have a White Nationalist Terrorist Problem*, N.Y. TIMES, (Aug. 4, 2019), <http://www.nytimes.com/2019/08/04/opinion/mass-shootings-domestic-terrorism.html> [http://perma.cc/54AJ-ABVT].

<sup>99</sup> See *id.*; see also Julio-Cesar Chavez, *Death Toll Reaches 23 from Last Year’s Mass Shooting in El Paso, Texas*, THOMSON REUTERS (Apr. 26, 2020), <http://www.reuters.com/article/us-texas-shooting/death-toll-reaches-23-from-last-years-mass-shooting-in-el-paso-texas-idUSKCN22901V> [http://perma.cc/6A2R-WG9J].

<sup>100</sup> See *Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence*, U.S. DEPT. OF HOMELAND SEC. (2019), [http://www.dhs.gov/sites/default/files/publications/19\\_0920\\_ply\\_strategic-framework-countering-terrorism-targeted-violence.pdf](http://www.dhs.gov/sites/default/files/publications/19_0920_ply_strategic-framework-countering-terrorism-targeted-violence.pdf) [http://perma.cc/UFZ3-2R3S] (“[W]e face a growing threat from domestic terrorism and other threats originating at home, including the mass attacks that have too frequently struck our houses of worship, our schools, our workplaces, our festivals, and our shopping spaces.”).

<sup>101</sup> *Id.* (emphasis added).

<sup>102</sup> See Jana Winter, *Exclusive: FBI Document Warns Conspiracy Theories Are a New Domestic Terrorism Threat*, YAHOO! NEWS (Aug. 1, 2019), <http://news.yahoo.com/fbi-documents-conspiracy-theories-terrorism-160000507.html> [http://perma.cc/7S4F-NMN8].

<sup>103</sup> See discussion *infra* Part V.A.2.

Through the Victims of Crime Act, the Office of Victims of Crime established the Antiterrorism Emergency Reserve, which uses funds from the Crime Victims Fund.<sup>104</sup> The Director may use these Emergency Reserve funds for the Antiterrorism and Emergency Assistance Program (“AEAP”), which is meant to support victims who have lived through “incidents of terrorism or mass violence”<sup>105</sup> by responding to their immediate and ongoing needs after these incidents occur.<sup>106</sup> There are five funding “streams” offered to “qualified applicants,” which include state victim assistance and compensation programs, public agencies, federally recognized Indian tribal governments, U.S. Attorneys’ Offices, public institutions of higher education, and nongovernmental and victim service organizations. However, it is important to note that a disclaimer remains on its webpage: “Limited funding may be available to cover administrative costs necessary and essential to the delivery of services and assistance to victims.”<sup>107</sup>

### III. MASS SHOOTING VICTIMS’ AVAILABLE REMEDIES: CIVIL CONTEXT

#### A. Ineffective Existing Remedies

Mass shooting victims are inadequately served through the current civil mechanisms available to them. Existing laws and the current state of litigation misses the mark for this specific subset of victims for numerous reasons, but especially because tort laws are outdated and ineffective in achieving justice for mass shooting victims.

##### 1. Weaknesses of Class Actions for Mass Torts

There are plausible arguments against the effectiveness of class actions for mass torts in helping compensate victims both monetarily and emotionally. In these actions, individual plaintiffs have little to no control over attorneys. This results in both plaintiffs’ and defense lawyers being extremely susceptible to collusion, and ultimately reaching suspicious settlements because they agree on such settlements in early stages of litigation before significant evidence is discovered. This quickly

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<sup>104</sup> Office for Victims of Crime, *Antiterrorism and Emergency Assistance Program (AEAP): OVC Supports Communities Responding to Terrorist Attacks and Mass Violence*, U.S. DEPT. OF JUST., <http://www.ovc.gov/AEAP/pg2.html#eligibility> [<http://perma.cc/P4AV-AWWD>] (last visited Mar. 20, 2021).

<sup>105</sup> *Id.*

<sup>106</sup> See Office for Victims of Crime, *Antiterrorism and Emergency Assistance Program (AEAP): AEAP FAQs*, U.S. DEPT. OF JUST., <http://www.ovc.gov/AEAP/faqs.html> [<http://perma.cc/WG53-8MQV>] (last visited Mar. 20, 2021).

<sup>107</sup> *Id.*



and cheaply gets rid of the action without paying much attention to the interests of the plaintiffs.<sup>108</sup>

Lack of control is frequently an issue for victims in class actions because only the “representative parties have the power to make important decisions regarding the lawsuit.”<sup>109</sup> This means that unless a person is one of the *named* representatives in the class action, there is basically no incentive to consider that person’s thoughts or opinions on the case. Additionally, since causation, liability, and damages are often difficult and costly to prove in a mass tort context, these victims rarely instigate individual lawsuits.<sup>110</sup>

However, victims of mass shootings are in a different position than plaintiffs in other mass tort actions, such as products liability or toxic torts. The emotional scars left by bullet wounds and the long-term emotional distress are not as readily evident as other mass tort harms like a toxic oil leak that visibly contaminates sea water. Thus, the legal elements like causation, liability, and damages are much harder to prove.<sup>111</sup> There is also longer durational awareness surrounding other torts. For example, the countless attorney commercials soliciting people with potential product liability claims of mesothelioma caused by asbestos or auto accidents<sup>112</sup> play on television frequently and have aired for decades. Mass shootings receive headlines on news outlets for a few days following the tragedies, yet the headlines quickly change, and the victims’ plight is not heard or discussed again.

Class actions are vulnerable to abuse and exploitation by defense counsel.<sup>113</sup> One scholar highlights the lack of consideration toward victims under intense pressure or severe physical and psychological distress, and whether they have received “sufficient neutral, dispassionate” information to make

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<sup>108</sup> See Coffee, *supra* note 50, at 1346–49.

<sup>109</sup> *The Pros and Cons of Class Action Lawsuit*, MARGARIAN L. (Oct. 30, 2018), <http://margarianlaw.com/class-action-lawsuit-pros-cons/> [<http://perma.cc/7AFZ-XPG4>].

<sup>110</sup> See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal-Analysis*, 59 BROOK. L. REV. 961, 968 (1991) (noting that “no claim in a mass tort litigation will have value until plaintiffs are able to establish causation, liability and damages”).

<sup>111</sup> See John P. Rafferty, *9 of the Biggest Oil Spills in History*, BRITANNICA, <http://www.britannica.com/list/9-of-the-biggest-oil-spills-in-history> [<http://perma.cc/LBV5-H9YF>] (last visited Mar. 28, 2021).

<sup>112</sup> See injurylawassociates, *Mesothelioma*, YOUTUBE (Aug. 29, 2008), <http://www.youtube.com/watch?v=zIJErvIVOY8> [<http://perma.cc/6JCK-GVZS>]; see also Larry H. Parker, *Larry H. Parker TV Commercial—Accident Attorney Through the Years*, YOUTUBE (Jul. 1, 2009), <http://www.youtube.com/watch?v=5QnITZm9nFo> [<http://perma.cc/H3DU-PS9A>].

<sup>113</sup> See Coffee, *supra* note 50, at 1349.

informed decisions about their case.<sup>114</sup> Defense counsels sometimes use this leverage against victims in mass tort class actions to manipulate them into settling for “cheap.”<sup>115</sup> In fact, defendants actually prefer to resolve these claims by urging plaintiffs’ counsel to bring class actions in hopes of reaching a settlement.<sup>116</sup> A criticism that relates to all class actions is that attorneys representing members of a class action are “rarely” responsive to clients and retain clients who are supposed to be representative of the class, but are usually hand-selected by the attorneys themselves, rendering the other class members powerless since they are technically not parties to the action.<sup>117</sup> Thus, an inherent conflict of interest exists in these class actions since the attorneys’ interests are primarily in their attorney fees, while class member interests primarily lie in the award to the entire class.<sup>118</sup> A U.S. Court of Appeals for the Seventh Circuit scathingly remarked that the incentive of class counsel is complicit with defendant’s counsel, which is “to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.”<sup>119</sup>

The modern class action is becoming a *shield* for defendants.<sup>120</sup> News of class action settlements with these entity defendants carries less “force” or assurance of “merit” as opposed to holding an entity and/or its agents criminally or civilly liable.<sup>121</sup> While class members of a mass tort litigation case may sometimes uncover and obtain information that only litigation can unearth, the “private mass-dispute resolution systems” they use to obtain it are often not public, and the lack of transparency

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<sup>114</sup> See Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 833, 837–38 (2012).

<sup>115</sup> See Coffee, *supra* note 50, at 1350.

<sup>116</sup> See *id.*

<sup>117</sup> *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (“Class counsel rarely have clients to whom they are responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel; the other class members are not parties and have no control over class counsel.”).

<sup>118</sup> See *id.* (“The result is an acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class.”).

<sup>119</sup> *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (quoting *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011)).

<sup>120</sup> Coffee, *supra* note 50, at 1350 (“Once a sword for plaintiffs, the modern class action is in some contexts increasingly becoming a shield for defendants.”).

<sup>121</sup> Russell M. Gold, *Compensation’s Role in Deterrence*, 91 NOTRE DAME L. REV 1997, 2001 (2016).

throughout the process leaves many scholars troubled.<sup>122</sup> Additionally, corporations stand to face irreparable harm from incriminating information coming out during the discovery process or trial.<sup>123</sup> The most effective reputational harm to a corporation occurs in the stage after a complaint is filed but before the announcement of a settlement.<sup>124</sup> If a settlement is not reached quickly, reputational harm may emerge from media attention of certain actions in the case (like motion filings or any negative information revealed in discovery).<sup>125</sup>

This occurred in the litigation that stemmed from the Route 91 Harvest Festival in Las Vegas, when MGM filed lawsuits against the victims as a response to victims filing suit against the corporation.<sup>126</sup> In response, the corporation received backlash from victims and non-victims alike.<sup>127</sup> However, MGM escaped accountability and admitting liability altogether because the case never saw the courtroom. In fact, because little to no reputational harm attached to MGM, MGM Resorts International was able to close a deal in February 2020 for approximately \$4.6 billion, resulting in the sale of MGM Grand and Mandalay Bay resorts and casinos to a joint venture with MGM Growth and Blackstone Real Estate Trust, Inc.<sup>128</sup> That same joint venture purchased the Bellagio casino in 2019 for \$4.25 billion.<sup>129</sup> That same year, MGM

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<sup>122</sup> *Id.* at 2045–46.

<sup>123</sup> *See id.* at 2019 (“Discovery can provide proof of the underlying wrong, and trial may reveal that proof publicly.”).

<sup>124</sup> *See id.* at 2015–16.

<sup>125</sup> *See id.*

<sup>126</sup> *See, e.g.,* Camila Domonoske, *MGM Files Lawsuits Denying Liability over Las Vegas Shooting*, NPR (July 17, 2018), <http://www.npr.org/2018/07/17/629740001/mgm-files-lawsuits-denying-liability-over-las-vegas-shooting> [<http://perma.cc/RU52-LTEV>]; Gillian Brassil, *MGM Sues More Than 1,000 Victims of Las Vegas Shooting, Denying Liability for the Massacre*, CNBC (Jul 17, 2018, 12:21 PM), <http://www.cnbc.com/2018/07/17/mgm-resorts-files-suit-against-more-than-1000-route-91-victims.html> [<http://perma.cc/A3A4-KLR7>]; Joshua Barajas, *MGM's Lawsuit Against Las Vegas Shooting Victims, Explained*, PBS (July 18, 2018, 9:20 PM), <http://www.pbs.org/newshour/nation/mgms-lawsuit-against-las-vegas-shooting-victims-explained> [<http://perma.cc/NT8C-HY45>].

<sup>127</sup> *See, e.g.,* Mili Mitra, *MGM Files Awful Lawsuit Against Las Vegas Shooting Survivors*, WASH. POST (July 19, 2018), <http://www.washingtonpost.com/blogs/post-partisan/wp/2018/07/19/mgm-files-awful-lawsuit-against-las-vegas-shooting-survivors/> [<http://perma.cc/6D5P-TF3Z>]; Amanda Woods, *MGM Already Facing Backlash After Suing Las Vegas Shooting Victims*, N.Y. POST (July 18, 2018, 12:40 PM), <http://nypost.com/2018/07/18/mgm-already-facing-backlash-after-suing-las-vegas-shooting-victims/> [<http://perma.cc/FP8N-PYDR>].

<sup>128</sup> *See* Dow Jones Newswires, *MGM Makes a Deal to Sell MGM Grand, Mandalay Bay to Joint Venture*, BARRON'S (Jan. 14, 2020 3:58 PM), <http://www.barrons.com/articles/mgm-resorts-makes-a-deal-to-sell-mgm-grand-mandalay-bay-to-joint-venture-51579035517> [<http://perma.cc/2VPA-2PN3>]; Bailey Schulz, *MGM Resorts' Landlord Says Company Meeting Rent Obligations*, LAS VEGAS REV. J. (May 5, 2020, 2:21 PM), <http://www.reviewjournal.com/business/casinos-gaming/mgm-resorts-landlord-says-company-meeting-rent-obligations-2021716/> [<http://perma.cc/QJ62-VAE2>].

<sup>129</sup> *See id.*

sold the Circus Circus casino and 37 acres of nearby land for \$825 million.<sup>130</sup>

Class actions may appear to be an advantageous course of litigation for mass tort victims, but they are far from ideal. While the development of mass tort litigation has developed to better serve victims and their interests, monetarily compensating victims is only one aspect that helps their healing and recovery from their injuries.<sup>131</sup> Arguably, monetary victim compensation is not as important in the attempt to make victims whole. It is only a small piece of the puzzle to make victims of mass shootings whole because adequate monetary compensation is often unavailable, difficult, or meager for this class of victims. This is precisely why measures must be taken to help victims’ healing through non-monetary mechanisms.

The current remedies available for mass torts are far from adequate, for both victims and society.<sup>132</sup> More adequate remedies (other than compensation) for mass shooting victims may include a variety of distinctive but effective measures. It may simply consist of an entity defendant formally or informally making a statement to admit liability. Lawsuits resulting from mass shootings are becoming a typical mass tort scenario and thus, corporations should have a stake in the game and be liable for these acts in order to help prevent and deter them in the future. Thus, another remedy may focus on including language in either a settlement agreement or court order from an entity defendant that creates a binding commitment to implement stronger safety procedures and policies that will better protect the patrons they serve. Another measure, which offers an opportunity for catharsis, is allowing victims to speak out on the record to voice their grievances against an entity defendant during litigation. Alternatively, the elimination of any confidentiality, non-disclosure, or non-disparagement clause in order to prevent the silencing of victims wanting to speak out about an entity defendant’s wrongdoing.<sup>133</sup>

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<sup>130</sup> See *id.*; *MGM Resorts, Seeking Cash, Sells Stakes in MGM Grand and Mandalay Bay Casinos for \$4.6B*, CBS NEWS, (Jan. 14, 2020, 3:09 PM), <http://www.cbsnews.com/news/mgm-resorts-selling-mandalay-bay-and-mgm-grand-casinos/> [<http://perma.cc/8NQC-M5SX>].

<sup>131</sup> See Coffee, *supra* note 50, at 1356.

<sup>132</sup> See Buck, *supra* note 47, at 262.

<sup>133</sup> See Katie Wilcox & Bianca Buono, *One Mediator in Las Vegas Shooting Settlement is Daughter to Former MGM Security Vice President*, 12 NEWS (June 9, 2020, 6:28 PM), <http://www.12news.com/article/news/investigations/some-survivors-question-las-vegas-shooting-settlement/75-a30fe101-b4da-4858-8c44-f5b682722821> [<http://perma.cc/QGU3-CS2B>] (highlighting 1 October Las Vegas mass shooting victims afraid to speak out due to a non-disclosure clause in their settlement agreement, despite discovery that the mediator assigned to their case is the daughter of MGM’s former Vice President of

## 2. Inability to Sue the Proper Parties

What about the victims of public mass shootings, which are so frequently characterized as “mass accidents”?<sup>134</sup> Mass shooters kill themselves more than half the time, which eliminates a victim’s ability to pursue criminal prosecution for accountability purposes.<sup>135</sup> Gun manufacturers are protected by product liability law, and the establishments where the massacres are carried out are also protected from liability.<sup>136</sup> These laws include the Protection of Lawful Commerce in Arms Act in 2005,<sup>137</sup> which exempts the gun industry from tort lawsuits when criminals use their guns.<sup>138</sup> Victims and victims’ families from the Sandy Hook shooting still attempted to take this avenue by suing the gun manufacturers.<sup>139</sup> They ultimately failed.<sup>140</sup> Heidi Li Feldman, a Georgetown Law professor, states this problem is attributed to Congress’ “specific intent to make it difficult.”<sup>141</sup>

Because the perpetrators are often deceased and the gun manufacturers are shielded from suit, victims sometimes attempt

Security, Surveillance, and Safety at Mandalay Bay Resort and Casino at the time of the shooting).

<sup>134</sup> See, e.g., Long, *supra* note 50, at 357 (explaining that one class of tort litigation may be classified as “mass accidents” when a catastrophic event occurs and as a result, masses of people are injured); see also Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 546–48 (1989) (noting the difference between “mass accident” cases and “mass exposure” cases); R. Joseph Barton, *Note: Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL OF RTS. J. 199, 201 (1999) (“Whereas those injured in a mass accident suffer injuries as a result of one uniform cause, plaintiffs in a mass tort suffer a variety of injuries over a long period of time and the causation of such injuries must be evaluated in light of individual aspects of the person.”).

<sup>135</sup> See Berkowitz, Alcantara, & Lu, *supra* note 2.

<sup>136</sup> Some courts have held that liability was not proven in a products liability cause of action brought by victims of shootings by third-party criminals against the manufacturer or sellers of the guns used in the attacks. See *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986) (holding that the manufacturer of a gun used in a criminal act in which the plaintiff was injured cannot be held strictly liable based on the tory that the gun was a defective product); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. App. 1988) (holding that the plaintiff’s products liability theory failed since the product was not proven to have a defect) *overruled on other grounds by* *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992). Additional courts have held that no negligence occurred on the part of an establishment for third-party criminal acts. See *Lopez v. McDonald’s Corp.*, 193 Cal. App. 3d 495, 509–10 (Cal. Ct. App. 1987) (holding that a mass shooting occurring in a fast-food restaurant was unforeseeable as a matter of law); *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 669 (Wash. 2015) (holding that the third-party criminal act is unforeseeable as a matter of law if the “criminal act that injures the plaintiff is not sufficiently similar in nature and location to prior act(s) of violence”).

<sup>137</sup> 15 U.S.C. §§ 7901–03.

<sup>138</sup> See Kirk Siegler, *Why It Will Be Tough to Hold Hotel Legally Responsible for the Vegas Shooting*, NPR, (Oct. 13, 2017, 5:07 AM), <http://www.npr.org/2017/10/13/557520555/lawsuits-begin-after-las-vegas-massacre> [http://perma.cc/VR5J-MDQQ].

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> *Id.*

to sue third parties to hold them accountable for harmful acts they failed to prevent.<sup>142</sup> This is exemplified from the first negligence lawsuit filed against MGM Grand as a result of the Route 91 Harvest Festival mass shooting. The lawsuit was filed on behalf of Paige Gasper, who suffered a bullet wound that lacerated her liver and broke her ribs.<sup>143</sup> She was twenty-one at the time of the shooting.<sup>144</sup> According to a personal injury lawyer and law professor at the University of Denver, proving negligence in cases suing venues is a tough feat.<sup>145</sup> That statement has been subsequently proven, as Gasper’s case (along with many other Route 91 victims’ cases), was dismissed a few months after filing.<sup>146</sup> Other victims who attempted to sue bigger venues where mass shootings took place have also lost. Victims of the Aurora movie theater massacre of 2012 tried to sue the Century 16 theater chain and lost.<sup>147</sup> The Aurora mass shooting victims had to come to terms not only with the additional trauma of losing the lawsuit, but also being ordered to pay the company’s legal fees stemming from the lawsuit.<sup>148</sup>

In regard to the aforementioned Sandy Hook, Aurora, MGM cases, and other cases that deal with mass shootings that occurred in public venues with corporate defendants, the venues are sometimes labeled as “victims” themselves since they claim injury due to “lost business” and “other harm.”<sup>149</sup> One line of reasoning behind this sentiment from MGM, as a corporate defendant, is that hotels cannot be blamed for failure to predict that the gunman would go up to the thirty-second floor with an arsenal of guns, break the windows, and start to fire at people below.<sup>150</sup> Labeling these venues as “victims” is a backward attempt to avoid and shift liability, which ultimately does more harm to the actual victims who were physically, mentally, emotionally, and financially injured as a result of the shootings.

This fear of businesses being subject to unnecessary ruin was a huge factor after the September 11th attack—it is what

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<sup>142</sup> See Mary Anne Franks, *Our Collective Responsibility for Mass Shootings*, N.Y. TIMES (Oct. 9, 2019), <http://www.nytimes.com/2019/10/09/opinion/mass-shooting-responsibility.html> [<http://perma.cc/E9CN-4QTC>].

<sup>143</sup> Siegler, *supra* note 138.

<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See Paige Gasper et al. v. MGM Resorts International et al.*, TRELIS, <http://trellis.law/case/BC684143/PAIGE-GASPER-ET-AL-VS-MGM-RESORTS-INTERNATIONAL-ET-AL> [<http://perma.cc/X2YQ-93RM>] (last visited Mar. 28, 2021).

<sup>147</sup> Siegler, *supra* note 138.

<sup>148</sup> *See id.*

<sup>149</sup> *See id.*

<sup>150</sup> *See id.*

prompted legislation known as The SAFETY Act,<sup>151</sup> which changed long standing product liability laws.<sup>152</sup>

Congress passed the Homeland Security Act of 2002.<sup>153</sup> The Act consolidated twenty-two agencies and bureaus and effectuated the Department of Homeland Security (“DHS”) in an effort to work together and “protect the homeland from the myriad threats” confronting the country.<sup>154</sup> The Homeland Security Act has many subsections—the SAFETY Act being one of them.<sup>155</sup> This part of the Act designated the Secretary of the DHS as responsible for administration of the Act and determining which anti-terrorism technologies qualify for protection under the Act.<sup>156</sup> Most importantly, the position is also responsible for determining whether a particular act qualifies as a terrorist attack.<sup>157</sup> This part of the Act creates a federal cause of action for “claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the seller” of such qualified anti-terrorism technologies.<sup>158</sup> Mass shootings have become almost commonplace and pervasive enough in our culture to classify them as acts of domestic terrorism. However, these potential designations of mass shootings as domestic terrorist attacks are exactly what venues and entities want.<sup>159</sup> This creates an irreparable conflict for victims who widely recognize these acts as domestic terrorism and would benefit emotionally from its classification as such, yet in that

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<sup>151</sup> Support Anti-terrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act of 2002, 6 U.S.C. §§441–44, 442(a)(1) (2002).

<sup>152</sup> See Karen Shichman Crawford & Jeffrey Axelrad, *Article: Legislative Modifications to Tort Liability: The Unintended Consequence of Public Health and Bioterrorism Threats*, 45 CREIGHTON L. REV. 337, 349 (2012).

<sup>153</sup> *Homeland Security*, U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., <http://www.hsgac.senate.gov/issues/homeland-security> [<http://permacc/S8L7-3V6U>] (last visited May 9, 2020).

<sup>154</sup> *Id.*

<sup>155</sup> Homeland Security Act of 2002, 6 U.S.C.A §§ 441–44 (2002).

<sup>156</sup> See *id.* § 442(a)(1) (2002).

<sup>157</sup> See *id.*

<sup>158</sup> *Id.*

<sup>159</sup> This is because once these entities file a lawsuit under the SAFETY Act, there is a rebuttable presumption that this government contractor’s defense applies, in which the liability is passed on the person or company that sold the qualified anti-terrorist technology, ensuring protection of the company that complied with a federal government contract that otherwise would be subject to liability without this defense. See Brian Coleman & Jennifer Moore, *Government Contractor Defense: Military and Non-Military Applications*, AM. BAR ASS’N (Sept. 12, 2016), <http://www.americanbar.org/groups/litigation/committees/products-liability/practice/2016/gvt-contractor-defense-military-non-military-applications/> [<http://perma.cc/ZLN2-KWHC>].

same breath, would be precluded from establishing liability against an entity due to the classification because terrorist attacks are protected under the SAFETY Act.<sup>160</sup>

For example, MGM filed declaratory judgment actions against almost 2,000 victims, seeking a declaration that any state-law claims arising against MGM from the Route 91 Harvest Festival mass shooting are barred by the SAFETY Act of 2002, thereby eliminating MGM’s liability.<sup>161</sup> Had the SAFETY Act applied to this case as a result of Homeland Security designating the mass shooting as a terrorist attack, victims would have been forced to litigate the case in the federal court system of MGM’s choosing, limiting the entities from which victims could seek liability.<sup>162</sup> This takes advantage of Congress’ intent in enacting this law, which arose from the adverse impact that future acts of this type of terrorism would have in the country.<sup>163</sup> Thus, Congress’ goal was to “stimulate private industry to create products and services by providing companies with legislative protections to limit liability exposure.”<sup>164</sup> Congress did not intend to bar liability for incidents in these mass shooting contexts.<sup>165</sup>

These enacted laws fail to address the ever-evolving problem with mass shootings: victims are foreclosed from suing the proper parties because the mass shooter is dead and cannot be brought to justice by trial, the mass shooter’s estate is not sizeable enough to compensate the victims for their injuries from the

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<sup>160</sup> See *id.*; see also *In re Route 91 Harvest Festival Shootings in Las Vegas, Nev.*, on October 1, 2017, 347 F. Supp. 3d 1355, 1357 (J.P.M.L. 2018).

<sup>161</sup> See 347 F. Supp. 3d at 1357.

<sup>162</sup> Victims would most likely only be able to sue CSC, the entity that provided the security services for the Route 91 Harvest Festival. See Mary Jo Smart, *The Route 91 Harvest Festival Shooting: How MGM is Attempting to Escape Liability*, 51 U. PAC. L. REV. 179, 187 (2019) (“[I]f the SAFETY Act were to apply in this case and the Secretary determines Paddock’s attack was a terrorist attack, the victims would be forced to litigate in the federal court MGM chose and face limited options in who they could seek redress from, likely only CSC.”).

<sup>163</sup> See Crawford & Axelrad, *supra* note 152.

<sup>164</sup> *Id.*

<sup>165</sup> The SAFETY Act was enacted by Congress when our nation was facing an epidemic of *foreign* terrorism. Compare *SAFETY Act: About Us*, U.S. DEPT. OF HOMELAND SEC., <http://www.safetyact.gov/lit/hfhtml/AboutUs> [<http://perma.cc/4ENU-NWSQ>] (last visited Mar. 29, 2021) (“As we approach the 20th anniversary of the 9/11 attacks it is important to re-affirm the *foundational principles* of the SAFETY Act and its role in providing critical incentives for the development and deployment of effective anti-terrorism offerings.”) (emphasis added) with *Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence*, *supra* note 100 (introducing a new initiative titled *Strategic Framework for Countering Terrorism and Targeted Violence*, which was the first time the Department of Homeland Security recognized mass shootings as an act of domestic terrorism: “[T]he country confronts an evolving challenge of terrorism . . . [W]e face a growing threat from domestic terrorism and other threats originating at home, including mass attacks that have too frequently struck our houses of worship, our schools, our workplaces, our festivals, and our shopping spaces.”).



shooting, and both the gun manufacturer and third-party entity defendant are shielded from liability.

### 3. Inadequate Statute of Limitations

The California Code of Civil Procedure states the following: “An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another” may be filed within two years of the victim’s injury.<sup>166</sup> This means that the victim has two years to file a lawsuit for their personal injury claim, and once that time period passes, the ability to file that legal claim disappears.<sup>167</sup> In the aftermath of a mass shooting, victims are coming to grips with their new realities: dealing with trauma, grief, depression, PTSD, anxiety, sleep issues, somatic complaints, cognitive issues, suicidal ideation, survivor’s guilt, and tending to their physical injuries.<sup>168</sup>

Following mass violence, victim-survivors experience their trauma in three phases: the acute phase, the intermediate phase, and the long-term phase.<sup>169</sup> The acute phase includes denial, shock, and disbelief.<sup>170</sup> The intermediate phase includes “fear, anger, anxiety, panic, retaliatory attacks, difficulty paying attention at work or school, depressed feelings, and disturbed sleep.”<sup>171</sup> The long-term phase includes alternative periods of adjustment and relapse, where behavioral health could possibly develop into illnesses that require specialized mental health and disorder-related services.<sup>172</sup>

Though the literature on the effects of gun violence is sparse,<sup>173</sup> research suggests that these victims may be at greater

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<sup>166</sup> CAL. CIV. PROC. CODE § 335.1 (West 2020).

<sup>167</sup> See *Statute of Limitations*, CAL. CTS.: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/9618.htm?rdeLocaleAttr=en> [<http://permacc/KE6D-6BBL>] (last visited May 16, 2020).

<sup>168</sup> See Rebecca G. Cowan et al., *Supporting Survivors of Public Mass Shootings*, 14 J. SOC., BEHAV., & HEALTH SCIENCES 169, 171 (2020).

<sup>169</sup> See *Disaster Technical Assistance Center Supplemental Research Bulletin, Mass Violence and Behavioral Health*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (September 2017), <http://www.samhsa.gov/sites/default/files/dtac/srb-mass-violence-behavioral-health.pdf> [<http://perma.cc/2DJU-GFFH>].

<sup>170</sup> See *id.*

<sup>171</sup> *Id.*

<sup>172</sup> See *id.*; see also Amy Novotney, *What Happens to the Survivors*, AM. PSYCH. ASS’N: MONITOR ON PSYCH. (2018), <http://www.apa.org/monitor/2018/09/survivors> [<http://perma.cc/XH8E-PU6J>].

<sup>173</sup> See *supra* Part II.A and discussion *infra* Part III.B.3; see also William Wan, *Shooting Victims Have Increased Risk of Mental Harm Long After Physical Injuries Have Healed, Study Finds*, WASH. POST (Nov. 20, 2019, 8:28 AM), <http://www.washingtonpost.com/health/2019/11/20/shootings-victims-have-increased-risk-mental-harm-long-after-physical-injuries-have-healed-study-finds/> [<http://perma.cc/47PJ-7GFA>] (mentioning a report published in 2019 as part of a “new wave of gun research that has grown after a decades-long drought of funding, data, and political support”).

risk of mental health issues than other victims. For example, one study published in *Behavior Therapy* found that the percentage of the mass shooting victim-survivors from the Northern Illinois University shootings in 2008 experienced persistent PTSD that was higher than the average experienced “among trauma survivors as a whole.”<sup>174</sup> Other studies approximate between 40% and 95% of victims develop PTSD after mass shootings.<sup>175</sup> Further, victims who were directly exposed to a mass shooting with physical injuries, victims who witnessed others get shot, or victims that lost a friend or loved one and also perceived their life to be in danger are at a much higher risk for long-term PTSD and other mental health complications.<sup>176</sup> Another recent study has discussed the need for gun injury treatment to change. The evidence suggests “gunshot trauma [is harder] to recover from than other types of injuries.”<sup>177</sup>

However, victims are pressured to swap these concerns with economic ones and are inadvertently forced to begin consultations with lawyers to secure representation and avoid missing statutory deadlines. This is purportedly unfair when trauma surgeons and researchers like Mark Seamon know that the trauma of these victims is different, yet cannot fully articulate why:

We also just don’t know enough about gun violence and what makes it so different than other injuries . . . . I see it in my work as a trauma surgeon. Patients who can’t sleep, who say they can get it out of their heads. Other traumas may cause greater physical injury, but the mental toll from gun shots is deeper for some reason.<sup>178</sup>

Until extensive and cohesive data is compiled to understand the disparate injuries mass shooting and other gun violence victims face in contrast to other tort victims, victims of mass shootings should be afforded a tolling of the statute of limitations to file a legal claim to prevent the re-victimization of those who were not in a proper mental or physical state to file a claim

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<sup>174</sup> See generally Lynsey R. Miron et al., *Differential Predictors of Transient Stress Versus Posttraumatic Stress Disorder: Evaluating Risk Following Targeted Mass Violence*, 45 BEHAV. THERAPY 791 (2014).

<sup>175</sup> See Cowan, *supra* note 168.

<sup>176</sup> See generally Laura C. Wilson, *Mass Shootings: A Meta-Analysis of the Dose-Response Relationship*, 27 J. TRAUMATIC STRESS 631, 631–38 (2014).

<sup>177</sup> See Wan, *supra* note 173 (citing Michael A. Vella et al., *Long-term Functional, Psychological, Emotional, and Social Outcomes in Survivors of Firearm Injuries*, 155 JAMA SURGERY 51, 51–59 (2020)).

<sup>178</sup> Wan, *supra* note 173; Cowan, *supra* note 168, at 177 (“More literature is also needed specifically concerning effective treatment and intervention with survivors of mass shootings . . . . This research could further explore how survivors of mass shootings navigate the post-event phase structure put forth by the U.S. Department of Veteran Affairs’ (2018) National Center for PTSD and SAMHSA (2017) . . . .”).

within two years of the injury—a time period victims claim still feels excruciatingly close to the dates of their attack.<sup>179</sup>

## B. Meaningful and Fulfilling Remedial Alternatives: Civil Context

Victims of mass shootings will never get back what was lost—loved ones, innocence, feelings of safety, a sense of normalcy, and so much more. This does not mean the legal system cannot someday provide innovative solutions to make victims feel adequately protected or fully redressed. The following discussion encompasses non-monetary remedies that legislative committees should also consider in the larger conversation surrounding gun violence and mass shootings.

### 1. Opportunity for Catharsis and Advocacy Notwithstanding Settlement Agreements

When litigating a matter involving violence and trauma, the opportunity for “catharsis” has a significant effect on victims.<sup>180</sup> Catharsis may manifest in many different ways. It may involve victims meeting with company executives or perpetrators held liable for their actions (or inactions) or victims sharing details of the harm inflicted upon them and the loss they suffered as a result of their tragedy.<sup>181</sup> This is proven to have strong psychological effects on victims in their future well-being—especially considering that settlements with responsible parties act as a placeholder for a victim’s “day in court.”<sup>182</sup> When victims are not afforded the opportunity to tell their stories and be heard, it becomes a failure to address victims’ psychological needs. This can reduce victim participation rates in settlements to such an extent that it actually weakens a settlement’s effectiveness and legality.<sup>183</sup>

As mentioned throughout this Article, monetary compensation does not make a victim feel “whole.”<sup>184</sup> When victims are severely harmed by a traumatic experience, they also find solace and fulfillment in advocacy—usually fighting for other

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<sup>179</sup> To date, it has been over three years since the 1 October Route 91 Harvest Festival shooting in Las Vegas. I frequently tell my family and close friends how it feels as if the shooting happened “like yesterday,” largely in part to the recurring nightmares and other constant interferences in my everyday life. I am also still monitoring my physical injury as it requires additional surgeries. All of these factors contribute to the shooting’s continued proximity to both my mind and heart.

<sup>180</sup> See Dodge, *supra* note 61, at 385.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*

<sup>184</sup> See Steven P. Croley & Jon D. Hanson, *Article: The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1913 (1995) (“[M]oney cannot possibly make the victim whole . . .”).

victims who share similar experiences.<sup>185</sup> Victim advocates typically focus on implementing solutions that prevent the same tragedies from occurring over and over again.<sup>186</sup> As an advocate, victims can generate support for legislative reform and use their journeys as a coping mechanism.<sup>187</sup> Nevertheless, a path of advocacy is not without its own trials and tribulations.<sup>188</sup> Victim advocates face collateral damage in the form of organizational backlash, public denials of corporate responsibility, and other countless efforts to silence victims.<sup>189</sup>

## 2. Achieving Reputational Harm by Forbidding Non-Disclosure and Non-Disparagement Clauses in Settlement Agreements

Providing victims with opportunities to seek reputational harm against an entity denying liability for a mass shooting as a form of behavior deterrence is valuable, despite being widely unrecognized by scholars.

Russell M. Gold has written on this topic.<sup>190</sup> Gold recognized most scholars focus on legal damages in a way that virtually advertises damages as the sole remedy to deter wrongdoers.<sup>191</sup> While litigation is most certainly one way to deter future wrongdoings, it is not the only way to effectively deter behavior and inflict reputational harm upon entities. Non-legal avenues exist as well.<sup>192</sup> From the corporate standpoint, any media coverage or publicity that stems from a corporate wrongdoing affects company morale, company reputation, the corporate image, corporate relationships with customers, suppliers, and the

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<sup>185</sup> See, e.g., Brad Brooks & Sharon Bernstein, ‘Still a mess’: Trauma Haunts U.S. Mass Shooting Survivors Due to Gaps in Mental Healthcare, REUTERS (Mar. 25, 2021, 1:03 PM), <http://www.reuters.com/article/us-colorado-shooting-trauma/still-a-mess-trauma-haunts-u-s-mass-shooting-survivors-due-to-gaps-in-mental-healthcare-idUSKBN2BH35R> [<http://perma.cc/NYR2-JEP8>]; see also Dodge, *supra* note 61, at 385.

<sup>186</sup> See Brooks & Bernstein, *supra* note 185.

<sup>187</sup> See *id.*

<sup>188</sup> See Emily Wax-Thibodeaux et al., *Gun-control Activists Gird for Tough National Fight in Wake of Deadly Rampages: ‘We’re playing the long game’*, WASH. POST (Mar. 27, 2021), [http://www.washingtonpost.com/national/gun-control-movement-boulder/2021/03/27/17a36a46-8e50-11eb-9423-04079921c915\\_story.html](http://www.washingtonpost.com/national/gun-control-movement-boulder/2021/03/27/17a36a46-8e50-11eb-9423-04079921c915_story.html) [<http://perma.cc/F8YM-T9S4>].

<sup>189</sup> See *id.*; see also Jeffrey Kasky, *Opinion: Parkland Father Prepares Boulder Shooting Survivors for Inevitable Backlash* (Mar. 31, 2021, 3:37 PM), <http://www.denverpost.com/2021/03/31/boulder-shooting-parkland-gun-control/> [<http://perma.cc/FLV6-CU3P>]. Cf. Heidi Schlumpf, *Catholic #MeToo Victims and Advocates Face Backlash* (July 17, 2018), <http://www.ncronline.org/news/accountability/catholic-metoo-victims-and-advocates-face-backlash> [<http://perma.cc/48HZ-UX3S>] (highlighting adversity other trauma victim advocates face).

<sup>190</sup> See, e.g., Gold, *supra* note 121.

<sup>191</sup> See *id.* at 1997.

<sup>192</sup> See *id.*

government, future business relationships with other corporate entities, and share market prices.<sup>193</sup>

Reputational harm garners crucial benefits for victims. It disseminates information about an entity's wrongdoing to the community, exposing details of the harm to the general public and aiding in deterrence efforts to prevent future harm. This type of harm also allows direct competitors to take advantage of the wrongdoing entity's failures, resulting in direct financial loss to wrongdoers. Further, reputational harm provides impetus for wrongdoing entities to implement stronger safety policies and procedures to avoid costly legal ramifications.<sup>194</sup>

Reputational harm does not reach its full potential or provide any redress to victims when entities utilize victims' weaker bargaining position and their need for compensation by incorporating non-disclosure and non-disparagement clauses into settlements. Civil and class action settlements should not be seen as a mechanism for powerful defendants to "buy-out" and silence victims who may have simultaneous criminal or administrative proceedings.<sup>195</sup> Thus, forbidding non-disclosure and non-disparagement clauses in settlement agreements with mass shooting victims would provide assurance for individual victims to hold leverage against powerful corporate defendants by maintaining their ability to speak out regarding their personal injustices, which is vital to their psychological healing and may not be possible if such clauses are valid.

### 3. Tolling the Statute of Limitations for Mass Shooting Tort Actions

Civil litigation can only be filed within certain time periods prescribed by laws.<sup>196</sup> There is generally a two-year statute of limitations to file suits for personal injury, including wrongful death.<sup>197</sup> Causes of action "accrue," or begin to toll, once the

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<sup>193</sup> See *id.* at 2010.

<sup>194</sup> See *id.* at 2022.

<sup>195</sup> Weinstein, *supra* note 57, at 982.

<sup>196</sup> See ZERNE P. HANING ET AL., CALIFORNIA PRACTICE GUIDE: PERSONAL INJURY ¶ 5:104 (2019); CAL. CIV. PROC. CODE § 312 (West 2020).

<sup>197</sup> See generally ALA. CODE § 6-2-38 (2020); ALASKA STAT. § 9.10.070 (2020); ARIZ. REV. STAT. ANN. § 12-542 (2020); CAL. CIV. PROC. CODE § 340 (2020); COLO. REV. STAT. § 13-80-102 (2020); CONN. GEN. STAT. § 52-584 (2020); DEL. CODE ANN. tit. 10, § 8119 (2020); GA. CODE ANN. § 9-3-33 (2020); HAW. REV. STAT. § 657.7 (2020); IDAHO CODE § 5-219 (2020); ILL. COMP. STAT. §13-202 (2020); IND. CODE § 34-11-2-4 (2020); IOWA CODE § 614.1 (2020); KAN. STAT. ANN. § 60-513 (2020); MINN. STAT. §§ 541.05, 541.07 (2020); NEV. REV. STAT. § 11.190 (2020); N.J. STAT. ANN. § 2A:14-2 (2020); OHIO REV. CODE ANN. § 2305.10 (2020); OKLA. STAT. tit. 12, § 95 (2020); OR. REV. STAT. § 12.110 (2020); 42 PA. CONS. STAT. § 5524 (2020); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (2020); VA. CODE ANN. § 8.01-243 (2020); W. VA. CODE § 55-2-12 (2020). *But cf.* ME. STAT. tit. 14, § 752

wrongful act is committed or once liability arises.<sup>198</sup> Some causes of action may delay the tolling until a plaintiff *discovers* facts constituting the cause of action, or *should have been put on notice* that his or her injury was caused by the wrongdoing.<sup>199</sup> It postpones accrual of the cause of action until the plaintiff suspects or reasonably should suspect (1) that he or she has been injured; (2) the cause of the injury; and (3) the tortious nature of the conduct causing the injury.<sup>200</sup>

Under a newly enacted statute in California’s Code of Civil Procedure, victims of childhood sexual abuse may bring an action “within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later. . . .”<sup>201</sup> While victims of mass shootings and victims of childhood sexual abuse live through different traumatic events, both sets of victims experience similar lifelong, chronic health detriments.<sup>202</sup>

Both victims experience neurobiological impacts with various degrees of PTSD, re-victimization, mental illness, anxiety, nightmares, avoidance of stimuli that triggers trauma, hyper-alertness, hypervigilance, feelings of detachment, irritability, and many other symptoms that last for years after the wrongful act or acts have taken place.<sup>203</sup> Without conflating the two traumas, mass shooting victims similarly feel guilt and shame in asking for help, such that many survivors wait many years before making the decision to come forward and get treatment.<sup>204</sup>

Additionally, monetary recovery is generally a complicated issue for victims and takes years for them to sort through.<sup>205</sup> An

(2020) (six-year statute of limitation for personal injury claim).

<sup>198</sup> HANING ET AL., *supra* note 196, ¶ 5:106.

<sup>199</sup> *Id.* ¶ 5:107–08.1.

<sup>200</sup> *Id.* ¶ 5:108.1.

<sup>201</sup> CAL. CIV. PROC. CODE, § 340.1(a) (West 2020).

<sup>202</sup> See Harvard Women’s Health Watch, *Past Trauma May Haunt Your Future Health*, HARV. HEALTH PUBL’G (Feb. 12, 2021), <http://www.health.harvard.edu/diseases-and-conditions/past-trauma-may-haunt-your-future-health> [<http://perma.cc/G57S-BQTA>].

<sup>203</sup> See, e.g., *The Mental Impact of Mass Shootings*, BRADY UNITED AGAINST GUN VIOLENCE 8–9, <http://brady-static.s3.amazonaws.com/Report/MentalHealthImpactOfMassShootings.pdf> [<http://perma.cc/4DW7-GMJN>]; Brooks & Bernstein, *supra* note 185 (quoting Columbine survivor, Heather Martin: “We learned that 13 years later we were still struggling—that there was a whole group of us who were still a mess[.]”); Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, DEP’T. OF JUST. CAN. (2019), [http://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](http://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf) [<http://perma.cc/6NKG-NQP4>].

<sup>204</sup> See *The Mental Impact of Mass Shootings*, *supra* note 203, at 9.

<sup>205</sup> See Michelle Maiese, *Compensation and Reparations*, BEYOND INTRACTABILITY, <http://www.beyondintractability.org/essay/compensation> [<http://perma.cc/REJ5-NGKX>] (2003).

[B]ecause many survivors suffer from impoverishment, receiving any money

internal struggle exists since victims may feel litigation only provides a fraction of the necessary monetary compensation for the trauma inflicted upon them, yet they recognize the absolute necessity of the money to begin paying back current and future medical costs<sup>206</sup> (which may not be fully accounted for at the outset of the attack). Experts may not accurately predict a victim's lifelong medical costs because research suggests serious gaps exist in the counseling literature, and there is scarce written guidance on both how to treat mass shooting victims and the psychological consequences of public mass shootings.<sup>207</sup>

Further, some victims have a moral affliction and psychological aversion to accepting money from wrongdoing entities or offenders and would rather receive compensation through different avenues.<sup>208</sup> I classify my experience in this vein. I did not participate in the \$800 million settlement with MGM for the Route 91 Harvest Festival mass shooting because I personally felt both plaintiff and defense counsels in the case were not interested in truth and justice.<sup>209</sup> After years of feeling

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will help them to meet their immediate needs. As a result they are often compelled to prioritize their immediate need for short-term payment over the prospect of any long-term or symbolic reparations. While many survivors will initially be satisfied with monetary compensation, they may grow increasingly dissatisfied as time passes. If victims do not feel that justice has been served, they will find it difficult to put the past behind them.

*Id.*

<sup>206</sup> *See id.*

<sup>207</sup> *See Cowan, supra* note 168, at 170.

However, there are significant gaps in the counseling literature. For instance, a content analysis of three influential counseling journals (*The Journal of Counseling and Development*, *The Journal of Mental Health Counseling*, and *Counselor Education and Supervision*) conducted by Webber et al. (2017) found only 10 articles (0.004%) published between 1994 and 2014 on mass trauma (disaster, n = 1; terrorism, n = 7; war, n = 2), none of which provided guidance on how to support survivors of mass shootings. Since the conclusion of the Webber et al. (2017) study, a review of the literature identified just two additional articles on mass trauma (Day et al., 2017; Tarvydas et al., 2017) published in *The Journal of Counseling and Development* and no articles in *The Journal of Mental Health Counseling* or *Counselor Education and Supervision*. Therefore, the purpose of the present article was to examine what is currently known in the limited scholarly literature on the psychological consequences of public mass shootings and to offer treatment alternatives.

*Id.*

<sup>208</sup> There is limited research on this issue in the mass shooting context. However, studies of sexual assault survivors revealed that some victims perceived financial awards from civil suits against their offenders as “dirty money,” “hush money” or “blood money,” and took other avenues for compensation (i.e., state compensation). *See* Bruce Feldthusen et al., *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse*, 12 CAN. J. WOMEN & L. 66, 98 (2000).

<sup>209</sup> One solicitation letter I received from a Las Vegas-based attorney representing victims wrote the following: “Las Vegas is an extremely tight knit legal community and I have personal relationships with most of the judges and defense lawyers in Las Vegas . . . .” For a victim that personally felt like corruption played a huge role in the tragedy, this was not a sentiment I

conflicted and sometimes regretful for my decision not to participate, my intuition proved me right when Robert Eglet, plaintiffs’ counsel for approximately 4,400 victims of the shooting, eventually praised MGM for its “outstanding corporate citizenship” and deemed MGM as a “shining example” of corporate America at the settlement press conference.<sup>210</sup> Not to mention, the mediator assigned to that case, Jennifer Togliatti, is the daughter of George Togliatti, MGM’s former Vice President of Security, Surveillance, and Safety at Mandalay Bay Resort and Casino at the time of the shooting.<sup>211</sup> Thankfully, my heightened apprehensions due to my law school experience and faith (both of which have been a constant in my recovery and healing) prevented me from making a decision I would fully regret.<sup>212</sup> Other victims of this shooting may have also elected alternative avenues for monetary compensation had they been allowed more

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cared to read. See Letter from Brian D. Nettles, Attorney, Nettles Morris, to Ariel Romero (undated) (on file with author). For discussion of importance of truth and transparency for victims, see also Maiese, *supra* note 205.

Passively accepting reparations can be experienced by the survivor as a disrespectful act that betrays the loss they have endured or the memory of those killed. It is only the ongoing combination of truth, justice, and survivor-support that may one day be sufficient to make some survivors feel at ease with accepting reparations as a symbolic replacement for what has been lost.

*Id.* (quoting Brandon Hamber, *Repairing the Irreparable: Dealing with Double-Binds of Making Reparations For Crimes of the Past*, INCORE 12–13 (1998)).

<sup>210</sup> See Dana Gentry, *Once a Fierce Critic, Attorney for LV Shooting Victims Praises MGM Following Settlement*, NEV. CURRENT (Oct. 3, 2019), <http://www.nevadacurrent.com/2019/10/03/once-a-fierce-critic-attorney-for-lv-shooting-victims-praises-mgm-following-settlement/> [<http://perma.cc/CGE9-QHCW>]. Robert Eglet’s comments and handling of the case make me wonder whether he represented victims or was in MGM’s pocket: “They’ve made me the most loyal customer they’ll ever have,” Eglet said during his press conference. “If I have family and friends in town I’ll put them up at an MGM property every time. They have to me shown the most outstanding corporate citizenship I’ve ever witnessed.” Eglet also said the following about MGM: “What MGM has done here through this process, and through this mediation, represents the highest standard of corporate citizenship I have ever seen in my career,” he said. “They are, quite frankly, a shining example of what corporations can do in America, in that they can both do well for their shareholders as well as do well for the community. And MGM proved that in this case.” Amanda Bronstad, *Robert Eglet: MGM Agrees to Pay Up to \$800M to Settle Las Vegas Shooting Lawsuits*, THE INNER CIRCLE OF ADVOCS. (Oct. 3, 2019), [http://www.innercircle.org/News/1329352/MGM-Agrees-to-Pay-Up-to-\\$800M-to-Settle-Las-Vegas-Shooting-Lawsuits](http://www.innercircle.org/News/1329352/MGM-Agrees-to-Pay-Up-to-$800M-to-Settle-Las-Vegas-Shooting-Lawsuits) [<http://perma.cc/R4Y7-KDBG>].

<sup>211</sup> See Wilcox & Buono, *supra* note 133.

<sup>212</sup> While I did not receive compensation from the civil settlement with MGM, the California Victim Compensation Board partially reimbursed medical costs during the first year of my recovery. Emmy Dean, a Kappa Alpha Theta sorority sister, kickstarted a GoFundMe campaign that paid for the medical costs from my two-week ICU hospitalization in Las Vegas. I also received grants from the Kappa Alpha Theta foundation and California ChangeLawyers (formerly California Bar Foundation). Lastly, my parents, insurance, and medical professionals provided for additional medical costs—all of which helped alleviate immense mental and physical stress during a painful time in my life.



time to process their feelings and address these civil litigation issues and concerns.

Thus, mass shootings victims should be entitled to delayed or tolled statutes of limitations—similar to those enacted for victims of childhood sexual abuse. Those who have not experienced similar traumas have a hard time acknowledging how long it takes victims to come to terms with their experiences.<sup>213</sup> Once victims have worked through the initial shock or grief that comes with being subjected to sexual abuse or gun violence, it may be too late.

#### IV. MASS SHOOTING VICTIMS' AVAILABLE REMEDIES: CRIMINAL CONTEXT

##### A. Ineffective Existing Remedies

Criminal statutes have effectuated honor to victims by codifying victims' rights,<sup>214</sup> but miss the mark in carrying out their intended effects for mass shooting victims. State Victim Compensation Funds ("VCF") enacted for the protection of victims often cause more psychological harm and stress because of the state VCF's inability to adequately compensate victims for medical bills or failure to timely notify victims of decisions against reimbursement for certain medical expenses.<sup>215</sup> However, no mechanism currently exists to enforce or rectify non-notification to victims. Thus, victims are yet again unable to hold responsible parties accountable.

##### 1. Victim Compensation Funds: Caps, Deadlines, and Oversight

Victims have caps on how much compensation they may recover and a time limit as to how long they have the opportunity to collect it.<sup>216</sup> Because VCF deadlines widely vary across states, it is pertinent for victims to know exactly how much time they have to apply.<sup>217</sup> "A victim in Kentucky has five years after the

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<sup>213</sup> See *Counseling Center: Trauma*, NC STATE U., <http://counseling.dasa.ncsu.edu/trauma/> [<http://perma.cc/8WZX-F37P>] ("People react to the extreme stress of traumatic experiences in different ways. Some people respond immediately, while others have delayed reactions which sometimes occur months or even years after trauma.") (last visited Apr. 10, 2021); see also *Treatment Improvement Protocol (TIP): Trauma-Informed Care in Behavior Health Sciences*, CTR. FOR SUBSTANCE ABUSE TREATMENT, [http://www.ncbi.nlm.nih.gov/books/NBK207191/table/part1\\_ch3.t1/](http://www.ncbi.nlm.nih.gov/books/NBK207191/table/part1_ch3.t1/) [<http://perma.cc/7NFG-T9PR>] (referencing Exhibit 1.3-1, which is a graph entitled "Immediate and Delayed Reactions to Trauma") (last updated 2014).

<sup>214</sup> See discussion *supra* Part II.B.2.

<sup>215</sup> This statement is supported by my own records and correspondence with the California Victim Compensation Board, or CalVCB (on file with author).

<sup>216</sup> See Parness, Lee, & Laube, *supra* note 94, at 845–46.

<sup>217</sup> See *Crime Victim Compensation: Financial Assistance after a Crime*, *supra* note 90.

commission of a crime while a victim in Indiana only has 180 days to apply to file claims to the compensation fund.”<sup>218</sup> Victims also have fixed time periods to collect compensation that differs considerably among states, which creates complications and confusion.<sup>219</sup>

Each state VCF has a cap on the total amount of money authorized for payment to any individual victim.<sup>220</sup> There are also statutory caps on how much money may be paid out for each category of expense (lost wages or loss of support, medical expenses, or mental health counseling).<sup>221</sup> The National Association of Crime Victim Compensation Boards claims that the maximum benefits paid out from state VCFs average around \$25,000 per victim, with some states having lower limits and some states having the ability to offer more.<sup>222</sup> Funeral costs, burial costs, mental health counseling, and lost wages often have the lowest caps.<sup>223</sup>

Governmental agencies have attempted to aid states’ lack of funding and infrastructure to help victims in various national tragedies, including the Route 91 Harvest Festival shooting.<sup>224</sup> Most recently in the effort to assist victims, the Department of Justice granted \$2.3 billion in grants to victims across the nation through the Crime Victims Fund.<sup>225</sup> Out of that \$2.3 billion, approximately \$136 million will be given to state victim compensation programs.<sup>226</sup> While this is a generous lump sum, splitting it amongst participating states leaves each state with an extremely diluted award to provide for the enormous financial strains resulting from medical fees, lost wages, funeral expenses, etc.<sup>227</sup>

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<sup>218</sup> Parness, Lee, & Laube, *supra* note 94, at 847.

<sup>219</sup> See Parness, Lee, & Laube, *supra* note 94, at 875.

<sup>220</sup> See *Crime Victim Compensation*, RAINN, <http://www.rainn.org/articles/crime-victim-compensation> [<http://perma.cc/V8NA-VJQX>] (last visited Mar. 29, 2021).

<sup>221</sup> See *id.*

<sup>222</sup> *Crime Victim Compensation: An Overview*, NAT’L ASS’N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=14> [<http://perma.cc/955F-T8GL>] (last visited Mar. 29, 2021).

<sup>223</sup> See *id.*

<sup>224</sup> See *Justice Department Awards More than \$8.3 Million to Support California Victims of the Las Vegas Mass Shooting*, U.S. DEPT. OF JUST. (Feb. 7, 2019), <http://www.justice.gov/opa/pr/justice-department-awards-more-83-million-support-california-victims-las-vegas-mass-shooting> [<http://perma.cc/H8RX-8BHD>].

<sup>225</sup> See *Department of Justice Awards over \$2.3 Billion in Grants to Assist Victims Nationwide*, U.S. DEPT. OF JUST. (Oct. 29, 2019), <http://www.justice.gov/opa/pr/department-justice-awards-over-23-billion-grants-assist-victims-nationwide> [<http://perma.cc/Y78J-KTX6>].

<sup>226</sup> See *id.*

<sup>227</sup> See Nicole Raz, *Victims of Crime Receives 4k Claims in Las Vegas Shooting*, LAS VEGAS REV. J. (Dec. 12, 2017), <http://www.reviewjournal.com/crime/shootings/victims-of-crime-receives-4k-claims-in-las-vegas-shooting/> [<http://perma.cc/2MRD-HZ9F>] (highlighting

Unfortunately, inability to finance the monetary plight of victims ultimately hurts the individual victim again. I have previously submitted invoices for reimbursement of medical treatments (which I've paid out-of-pocket) that take over a year to compensate.<sup>228</sup> And more often than not, certain invoices go ignored without any indication of repayment.<sup>229</sup> No explanation. Just ignored. This phenomenon is hard to reconcile, considering the Route 91 Harvest Festival mass shooting involved many state compensation funds that were actively encouraging victims to apply to and receive funds from before the deadline.<sup>230</sup> It begs the question: if funds are not being completely disbursed and victims making claims are not receiving full reimbursement, then where does the money go? Questions of handling and budgeting oversight lead to more questions as to how victims can address these concerns.

## 2. No Enforcement of Rights or Remedies

Victim rights and remedy provisions enacted in state constitutions and in federal statutes relating to victim notification and recoveries are not typically enforceable.<sup>231</sup> In *People v. Superior Court of L.A. County*, the court found that no procedures existed to enforce the duty of notification to victims, nor were there any remedies for victims when a failure to notify occurred.<sup>232</sup> Governmental failures to secure and enforce recoveries benefiting crime victims do not prompt separate claims against the government. In California, the state

Nevada's Victims of Crime program receiving 4,013 claims and its program accepting applications from anyone attributing claims to the event despite where they live, and mentioning its fund having about \$12 million to disburse as of mid-October).

<sup>228</sup> This statement is supported by my own personal records and correspondence with CalVCB (on file with author).

<sup>229</sup> *See id.*

<sup>230</sup> *See, e.g., Route 91 Harvest Festival Victims of Crime Program Oct. 1 Application Deadline Quickly Approaching*, MICHIGAN.GOV (Aug. 2, 2018), <http://www.michigan.gov/som/0,4669,7-192-29942-474370--,00.html> [<http://perma.cc/2SZV-S425>] (stating only 21% of people who purchased tickets to the Route 91 Harvest Festival in Las Vegas have applied for any kind of state fund compensation, and only seventeen applications have been received by Michigan residents when sixty Michigan residents purchased tickets); Rebekah L. Sanders, *Deadline Nears for Arizona Victims of Las Vegas Shooting to Apply for Assistance Funds*, AZ CENTRAL (Sept. 1, 2018), <http://www.azcentral.com/story/money/business/consumers/2018/09/01/deadline-soon-apply-las-vegas-shooting-funds-arizona-route-91-harvest-festival/1057982002/> [<http://perma.cc/QXG8-959K>] (noting that hundreds of Arizonans attended the Route 91 Harvest Festival, yet only 89 Arizona residents applied to the Nevada State Victims of Crime Program: "An estimated 500 to 600 Arizonans who attended the Route 91 Harvest festival haven't applied for benefits . . .").

<sup>231</sup> *See Parness, Lee, & Laube, supra* note 94 at 826, 860.

<sup>232</sup> *People v. Superior Court of L.A. Cnty.*, 154 Cal. App. 3d 319, 322 (Cal. Ct. App. 1984) (denying the victim's petition that a probation order should be set aside since he was not notified of a sentencing hearing since it concluded there was "no authority to afford any relief").

constitution has a section that enumerates a victim’s rights.<sup>233</sup> It states that criminal activity has a “serious impact” on the citizens of California.<sup>234</sup> The state constitution further states that the rights of victims of crime and their families in “criminal prosecutions are a subject of grave statewide concern.”<sup>235</sup> It begs the question of whether the phrase “criminal prosecutions” should be eliminated from the state constitution, as there is a growing number of victims of crime left without the ability to criminally prosecute anyone even though they deal with the same traumatic and crippling experiences of those who have the ability to go through that process.

“As in many states, crime victims in the federal courts do not have claims when a United States officer fails to honor victims’ rights.”<sup>236</sup> The federal statute dealing with victim compensation and assistance outlines the services it provides for victims.<sup>237</sup> It specifically provides that a “responsible official shall provide a victim the earliest possible notice of the status of an investigation of a crime during the investigation, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation.”<sup>238</sup> On its face, the statute is self-explanatory and favorable to victims. However, a subsection of this statute lays out that no “cause of action or defense in favor of any person arising out of the failure of a responsible person to provide information as required by [the earlier subsections].”<sup>239</sup>

This makes sense, as the government would like to balance protecting victims’ rights with the limiting interference of government officials’ ability to do their jobs, which may result in findings that a victim may not agree with. As a middle ground, the government has allowed victims to file a complaint for certain violations (i.e., the right to be protected from the accused, the right to notice of any public court proceeding, the right to be treated with fairness and respect for the victim’s dignity and privacy, etc.).<sup>240</sup>

Nonetheless, the complaint procedure is not an easy process, nor is it generally well-known to any victims. First, the complaints must be submitted in writing to the point of contact (“POC”) of the relevant office or offices of the Department of

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<sup>233</sup> See CAL. CONST. art. I, § 28.

<sup>234</sup> *Id.* § 28(a)(1).

<sup>235</sup> *Id.*

<sup>236</sup> Parness, Lee, & Laube, *supra* note 94, at 860.

<sup>237</sup> See 42 U.S.C. § 10607.

<sup>238</sup> *Id.* § 10607(c)(3)(A).

<sup>239</sup> *Id.* § 10607(d).

<sup>240</sup> See 28 C.F.R. § 45.10 (outlining the complaint process for violations of 18 U.S.C. § 3771).

Justice.<sup>241</sup> If that complaint creates a conflict of interest for the POC to investigate (which undoubtedly would occur most of the time since the complaint would likely be against the POC), then it is forwarded to the Department of Justice Victims' Rights Ombudsman ("VRO").<sup>242</sup> The caveat to this process is that complaints *must* be submitted to the POC within sixty days of the "victim's knowledge of a violation, but not more than one year after the actual violation."<sup>243</sup> Additionally, the VRO has the final say on what action is taken on the complaint and this decision cannot be challenged.<sup>244</sup> Thus, the threshold to submit a complaint is a high barrier as victims must somehow be *aware* of these rights, and then form a formal and timely written complaint before the decision is ultimately decided by a "neutral" ombudsman who works within the organization that the victim is formally complaining about. This complaint process hardly seems fair to victims since it gives government entities *carte blanche* in investigative procedures and essentially authorizes the potential mishandlings of investigations, which undermines a victim's basic right to an adequate and informative investigation.

## B. Meaningful and Fulfilling Remedial Alternatives: Criminal Context

The criminal statutes and governmental agencies working for victims in the criminal context have a solid foundation to build upon when crafting newer solutions for this unfortunate growth of mass shooting victims. While victims' rights have been codified in our nation's statutes, victims need stronger mechanisms to ensure compensation and enforce their existing rights.

### 1. Regularize Private Victim Compensation Funds

Scholars suggest state legislatures should help create additional compensation funds in which private individuals are allowed to contribute.<sup>245</sup> These compensation funds would supplement a completely separate fund—one that is distinct from the established state compensation funds already in place in states.<sup>246</sup> Private citizens would have the option to contribute to

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<sup>241</sup> See *id.* § 45.10(c).

<sup>242</sup> See *id.*

<sup>243</sup> *Id.* § 45.10(e)(3).

<sup>244</sup> See *id.* § 45.10(c)(7)–(8).

<sup>245</sup> See Michelle Findley, *Statutory Tort Caps: What States Should Do when Available Funds Seem Inadequate*, 46 IND. L. REV. 849, 868 (2013) (suggesting solutions when states face catastrophic events when the available funds do not amount to enough compensation for victims).

<sup>246</sup> See *id.*

these funds, as was the case of citizens who donated to the 9/11 victim compensation fund because they felt a sense of “patriotism” and “collective unity” in doing so.<sup>247</sup> This solution addresses the problem with disbursement of funds exceeding statutory cap levels and also aligns with policy goals to keep statutory caps, all the while providing greater compensation to victims.<sup>248</sup>

The World Trade Center Compensation Fund was the first “large-scale use of a no-fault, non-litigation fund” used in attempt to resolve mass torts claims in the United States.<sup>249</sup> The fund instituted helpful mechanisms for victims to take advantage of, like providing *pro se* counsel for victims.<sup>250</sup> With that being said, no research has solidified whether or not victims that opted out of the fund and pursued litigation fared financially better than the victims who opted in.<sup>251</sup>

## 2. Enforce Rights and Remedies

When victims feel slighted by procedural failures through the government process as a victim of crime, there is no relief afforded to them. While creating a cause of action against any government agent that fails to properly adhere to the enumerated victims’ rights in state constitutions or federal statutes seems extreme, the current mechanisms fall on the other end of the spectrum—miserably inferior. At a minimum, the complaint process for violations should be reworked to undo the government insulation, and instead outsource review of complaints to neutral magistrates. Further, complaint procedures should be mandatorily communicated to any and all victims involved in a criminal investigation.

## V. CIVIL AND CRIMINAL REMEDY OVERLAP

### A. Inability to Navigate Civil and Criminal Contexts Simultaneously and Cohesively

Immediately following a mass shooting, victims struggle to identify and navigate the uniquely separate civil and criminal remedies afforded to them. The applicable laws are outdated and

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<sup>247</sup> *Id.* at 868–69 (citing Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 678 (2003)).

<sup>248</sup> *See id.* at 869.

<sup>249</sup> Mullenix, *supra* note 114, at 833 (citing Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 793–96 (2003)).

<sup>250</sup> *See id.* at 842.

<sup>251</sup> *See id.* at 863.

complex, and are typically communicated to victims in a disjointed manner that muddies the interplay between the civil and criminal contexts—or worse, not communicated to victims at all.

### 1. Ineffective Interdisciplinary Approach to Victims

The civil and criminal legal systems should operate cohesively to allow victims the opportunity to utilize “criminal and administrative controls and sanctions while [also] compensating individuals for their losses in a coordinated proceeding.”<sup>252</sup> However, problems naturally arise when criminal and administrative functions require crossover and fusion into spaces that are typically occupied and resolved in civil contexts. These various agencies lack integration. This lack of integration creates a bottleneck in communication between agencies and victims, which ultimately affects a victim’s ability to be adequately informed and receive their entitled compensation.<sup>253</sup> Thus, the current interplay between civil, criminal, and administrative agencies that were all designed to help victims just serves as another source of frustration due to the agencies’ inability to convey a legal roadmap to victims. The agencies’ inability to consolidate and amalgamate such information for victims explains how overwhelming it currently is for victims to navigate and decipher the available information regarding their rights and entitled compensation.

Victims need an abundance of information, transparency, and advice when assessing their legal options.<sup>254</sup> It also matters *how* this sensitive information is communicated. For the victims of the Route 91 Harvest Festival mass shooting, the administrative agency in charge, the FBI, concluded its investigation with no significant findings.<sup>255</sup> On the state criminal side of the investigation, the Las Vegas police department closed their investigation in August of 2019 without finding a motive.<sup>256</sup>

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<sup>252</sup> Weinstein, *supra* note 57, at 960.

<sup>253</sup> *See id.*

<sup>254</sup> Mullenix, *supra* note 114, at 841. Victims need information that includes:

- (1) the deadline for electing remedies, as well as relevant statutes of limitations impelling imminent decision;
- (2) the scope of the release or waiver,
- (3) potential claims, defendants, and applicable law,
- (4) eligibility for, evaluation of, and amount of the potential awards,
- (5) the jurisdiction and venue for potential litigation,
- (6) a risk assessment of potential litigation, and
- (7) the status of future claims.

*Id.*

<sup>255</sup> *See* FBI, *Key Findings of the Behavioral Analysis Unit’s Las Vegas Review Panel (LVRP)*, U.S. DEPT. OF JUST. (Jan. 29, 2019), <http://www.hsdl.org/?view&did=820782> [<http://perma.cc/M3MS-GA5Q>].

<sup>256</sup> *See id.*

As a victim, I learned of both these investigative findings after they became public. I learned from others that the public investigative reports contained triggering information, including but not limited to, the locations of where identified victims’ bodies were found, and pictures of the shooter’s arsenal. I did not receive updates regarding either investigation while they were ongoing, nor did I know what kind of information was going to be released in these reports. Victims do not deserve to be revictimized and retraumatized when agencies neglect to inform them of sensitive details pertaining to investigations surrounding the worst day in their lives—and I certainly deserved to know what type of bullet hit me before the general public did.

Criminal and administrative agency overlap also tends to alienate victims because other important details, collateral to legal issues, slip through the cracks.<sup>257</sup> For example, most victims would be surprised to know that every year, National Crime Victims’ Rights Week (“NCVRW”) takes place.<sup>258</sup> This year is NCVRW’s fortieth anniversary.<sup>259</sup> During this week, “victim advocacy organizations, community groups and state, local and tribal agencies traditionally host rallies, candlelight vigils, and other events to raise awareness of victims’ rights and services.”<sup>260</sup> Notification of information like this is crucial for victims because these are the events and communities that may be necessary to utilize once all of their legal avenues and options have been exhausted.

Victims are disparaged by the various agencies and legal mechanisms created to aid their ongoing medical issues. Camille Biros worked on mediating settlement agreements for 9/11 victims and their relatives, the Boston Marathon bombing, and the Pulse nightclub shooting.<sup>261</sup> She stated that, “[a]t the end of the day, these individuals don’t get anywhere near the amount of

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<sup>257</sup> See Weinstein, *supra* note 57, at 975.

<sup>258</sup> See *Department of Justice Commemorates National Crime Victims’ Rights Week*, U.S. DEP’T. OF JUST. (Apr. 20, 2020), <http://www.justice.gov/opa/pr/departement-justice-commemorates-national-crime-victims-rights-week> [<http://perma.cc/6KH5-EJ6N>].

<sup>259</sup> Office for Victims of Crime, *National Crime Victims’ Rights Week*, U.S. DEP’T. OF JUST. (May 18, 2020), <http://ovc.ojp.gov/program/national-crime-victims-rights-week/overview> [<http://perma.cc/9RE3-5W6U>].

<sup>260</sup> *Department of Justice Commemorates National Crime Victims’ Rights Week*, *supra* note 258. I discovered this information in conducting research for this Article by searching the Department of Justice’s press release page rather than from any personal connection to any particular victim compensation program or governmental agency, despite both organizations having my personal contact information and the ability to send this information to victims.

<sup>261</sup> See David Gambacorta & Helen Ubiñas, *Shot and Forgotten*, PHILA. INQUIRER (Nov. 28, 2018, 5:00 AM), <http://www.inquirer.com/news/gun-violence-philadelphia-shooting-victims-columbine-wheelchair-jalil-frazier-ralph-brooks-20181127.html> [<http://perma.cc/Q494-E8LP>].



money they need to cover their medical expenses throughout the rest of their lives.”<sup>262</sup> Victims of mass shootings find out hospital bills are only a small fraction of the financial burden that stems from being shot.<sup>263</sup> Despite needing a wheelchair since April 20, 1999, when he was shot eight times at Columbine High School,<sup>264</sup> Richard Castaldo was denied quality of life equipment, which included a \$1,500 wheelchair cushion.<sup>265</sup> The wheelchair cushion was necessary because Richard developed an ulcer on his backside.<sup>266</sup> His mother and grandmother later paid for the cushion themselves.<sup>267</sup>

Joshua Nowlan was forced to accept money from a GoFundMe that his friends created to cover the medical expenses of his leg amputation.<sup>268</sup> Nowlan was shot in the leg when he used his body to shield another woman during the Aurora, Colorado mass shooting in 2012.<sup>269</sup> His leg required amputation years after the attack as a result of bullet damage complications.<sup>270</sup> Some victim-survivors of mass shootings initially receive media attention and charitable donations from the public that provides for “immediate medical debt,” but most victims discover they must continue to fight for years to receive resources, guidance, and compensation for their long-term healing.

Part of a victim’s inability to not only financially, but emotionally support themselves stems from a lack of information given to victims at the outset. Because victims are initially unaware of the magnitude and implications that come with becoming a mass shooting victim-survivor, it is harder to come to terms with a reality they could not have possibly anticipated—simply because they were not instructed on how to navigate and acclimate into their new lives. Jami Amo, another Columbine victim, posed the question: “Why isn’t there a national clearinghouse that gun-violence survivors could consult to find all of the resources—state, local, and federal—that they could be entitled to, with a clear explanation of how to navigate the application processes?”<sup>271</sup> Even worse, when victims *are* able to navigate the web of local, state, and federal assistance programs, they discover these programs have steep backlogs and smaller caps on monetary assistance.<sup>272</sup>

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<sup>262</sup> *Id.*

<sup>263</sup> *See id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *See id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* (“Many struggle to navigate a confusing web of local, state, and federal assistance programs, which are plagued by *steep backlogs* and in some cases can award as

## 2. Inconsistent Terrorist Attack Designations and Its Impact in Civil and Criminal Litigation

Certain mass shootings are designated as terrorist attacks while others are not.<sup>273</sup> These designations have different legal ramifications and implications for victims of the attack.<sup>274</sup> As touched upon earlier when discussing MGM’s attempt to utilize the SAFETY Act as a bar to tort liability for the Route 91 Harvest Festival mass shooting, Homeland Security’s potential classification of the attack as an act of domestic terrorism would essentially render MGM liability free.<sup>275</sup> As of the writing of this Article, Homeland Security has not classified the Route 91 Harvest Festival mass shooting as an act of domestic terrorism. While technically this is a favorable outcome for this specific set of victims in their battle for compensation, its non-classification undermines the significance of the attack and also deflects from addressing domestic terrorism’s growth in recent years.

Unfortunately, there are many conflicting and competing definitions of terrorism.<sup>276</sup> A state law definition of terrorism may encompass acts by a mass shooter while the federal definition may not. For example, Nevada’s state law defines an act of terrorism as involving:

[T]he use or attempted use of sabotage, coercion or violence which is intended to: (a) cause great bodily harm or death to the general population; or (b) cause substantial destruction, contamination, or impairment of: (1) any building or infrastructure, communications, transportation, utilities or services; or (2) any natural resource of the environment.<sup>277</sup>

Under the Federal Criminal Code, terrorism is defined as

[Activities that involve violent . . . or life-threatening acts . . . that are a violation of the criminal laws of the United States or of any State and . . . appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation

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little as \$1,500 to victims whose injuries require expensive lifelong care.”) (emphasis added).

<sup>273</sup> See JEFFREY CONNOR & CAROL ROLLIE FLYNN, REPORT: LONE WOLF TERRORISM, GEO. U. SEC. STUDIES PROGRAM: NAT’L SEC. CRITICAL ISSUE TASK FORCE 9 (2015).

<sup>274</sup> See *id.* Mass killings involving white non-Muslim and Muslim culprits have revealed a pattern: white non-Muslim culprits are designated as killers whereas Muslim culprits are designated as terrorists, which creates a legal distinction in which *killers* are prosecuted criminally outside of the counterterror process, but *terrorists* are prosecuted on both grounds. *Id.*

<sup>275</sup> See *supra* Part III.A.2.

<sup>276</sup> See Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes and Double Standards*, 112 NW. U. L. REV. 187, 193 (2018) (“This is due in part to the competing and conflicting definitions of terrorism, defined broadly by U.S. law enforcement and military, and theorized even more broadly by scholars.”).

<sup>277</sup> NEV. REV. STAT. § 202.4415 (2003).

or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and . . . (C) occur primarily within the territorial jurisdiction of the United States . . . .<sup>278</sup>

Under the SAFETY Act, a terrorist act is a term of art that includes any unlawful act “designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.”<sup>279</sup> Some scholars have defined terrorism as “terrorist attacks carried out by persons who (a) operate individually, (b) do not belong to an organized terrorist group or network, and (c) whose *modi operandi* are conceived and directed by the individual without any direct outside command or hierarchy.”<sup>280</sup> However, these various state and federal definitions of “terrorism” merely describe what would constitute a “terrorist attack.” But in reality, federal law supersedes a state’s jurisdiction over these acts,<sup>281</sup> and federal officials cannot charge a perpetrator with a terrorism charge *unless* that person acts on behalf of the approximately sixty groups that the State Department designated as foreign terrorist organizations.<sup>282</sup> A separate terrorism charge for domestic terrorism simply does not exist.

In the United States, the law provides for charges of international terrorism.<sup>283</sup> If an attack is classified as an international terrorist attack, the law allows for “broader surveillance, wider criminal charges, and more punitive treatment for crimes labeled as international terrorism.”<sup>284</sup> Thus, the harsher penalties tend to be applied to attacks perpetrated by U.S. Muslims and designated as international attacks while attacks from white nationalists are not elevated to the same level of wrongdoing.<sup>285</sup>

<sup>278</sup> 18 U.S.C. § 2331.

<sup>279</sup> 6 C.F.R. § 25.2.

<sup>280</sup> Ramón Spaaij, *The Enigma of Lone Wolf Terrorism: An Assessment*, 33 *STUD. CONFLICT & TERRORISM* 854, 856 (2010).

<sup>281</sup> Mike Valerio, *Las Vegas Shooting: Why Isn't it Domestic Terror?*, WUSA9 (Oct. 3, 2017), <http://www.wusa9.com/article/news/national/las-vegas-shooting-why-isnt-it-domestic-terror/65-480495186> [<http://perma.cc/5WSY-W2GX>] (“In reality, a state does not have jurisdiction over a deemed act of terrorism—the federal law supersedes all,” said Dr. Scott J. White, a former intelligence officer . . .”).

<sup>282</sup> See Greg Myre, *What Is, and Isn't, Considered Domestic Terrorism*, NPR (Oct. 2, 2017), <http://www.npr.org/2017/10/02/555170250/what-is-and-isnt-considered-domestic-terrorism> [<http://perma.cc/P8HR-X7FL>] (“A person who carries out a mass attack and survives can face a range of charges, but unless the person is linked to one of the banned groups, a federal terrorism charge won't be one of them.”).

<sup>283</sup> See Shirin Sinnar, *Article: Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 *MICH. L. REV.* 1333, 1334 (2019).

<sup>284</sup> *Id.*

<sup>285</sup> See *id.*

To a significant degree, law enforcement polices, prosecutes, and punishes terrorism differently according to whether it is considered international or domestic in nature, even with respect to conduct by U.S. citizens and residents within the United States. The law treats international terrorism more harshly

Confusion regarding the laws of terrorism stems from the non-existence of any single federal crime called “terrorism.” Instead, the U.S. criminal code lists certain offenses that are classified as being related to terrorism, and also includes a “wider variety of offenses” as federal crimes of terrorism.<sup>286</sup> Federal officials hesitate to classify white nationalist cases as terrorism “because federal terrorism charges are less available in domestic cases.”<sup>287</sup> These legal divides cause inequities for the people who fall victim to these attacks.

To further illustrate the disparate treatment between international and domestic terrorism, it is important to note that federal prosecutors handle most international terrorism cases while local prosecutors are technically supposed to handle domestic terrorism cases under applicable state laws.<sup>288</sup> Unfortunately, while many states have enacted terrorism laws, state prosecutions rarely use these laws.<sup>289</sup> This contributes to the disconnect of the “differential conceptualization of the threat and differential enforcement” of terrorism.<sup>290</sup>

While the public may think that the international terrorist threat is statistically greater than those threats of domestic terrorism, that sentiment does not justify a different set of remedies for victims merely because they were attacked by a terrorist that does not fit under the international terrorist criteria. Victims are still affected the same way whether or not the classification changes. In fact, current numbers suggest that certain agencies, like the FBI, should devote more resources to fight cases of domestic

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than domestic terrorism and requires less oversight of law enforcement and intelligence activities investigating it.

*Id.*

<sup>286</sup> *Id.* at 1352.

These crimes fall into three general categories. The first category covers offenses committed with particular weapons—such as chemical, biological, and nuclear weapons or more common explosives—and tactics historically associated with terrorism, such as taking hostages or hijacking aircraft. As a result of this category of offenses, federal jurisdiction sometimes turns on the choice of weapon. In particular, an assailant who used a bomb would fall within various federal terrorism statutes, while a suspect using a gun might not.

*Id.* (footnotes omitted).

<sup>287</sup> See *id.* at 1337; see also Ryan J. Reilly, *There’s a Good Reason Feds Don’t Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFINGTON POST (Jan. 11, 2018, 9:32 AM), [http://www.huffingtonpost.com/entry/white-terrorists-domestic-extremists\\_us\\_5a550158e4b003133ecceb74](http://www.huffingtonpost.com/entry/white-terrorists-domestic-extremists_us_5a550158e4b003133ecceb74) [<http://perma.cc/ZYS8-TCKD>] (noting that Justice Department domestic terrorism counsel stated that federal prosecutors do not describe cases as domestic terrorism where they do not deploy terrorism charges).

<sup>288</sup> See Sinnar, *supra* note 283, at 1338–39.

<sup>289</sup> See Lisa Daniels, *Prosecuting Terrorism in State Court*, LAWFARE (Oct. 26, 2016, 11:33 AM), <http://www.lawfareblog.com/prosecuting-terrorism-state-court> [<http://perma.cc/VC47-XAVZ>].

<sup>290</sup> Sinnar, *supra* note 283.

terrorism, and that the current structure allocating 80% of its agents to stopping threats of international terrorism is extremely lopsided.<sup>291</sup> More Americans have been killed in domestic terrorist attacks than “Islamic terror attacks” since September 11, 2001.<sup>292</sup>

The federal criminal code has made it difficult for government agents to bring charges against domestic terror suspects.<sup>293</sup> As aforementioned, this is because domestic terrorism is not a federal crime.<sup>294</sup> Attacks like the 2015 Emanuel AME Church shooting in Charleston, South Carolina that killed nine people and traumatized five others, or the 2018 Tree of Life Synagogue shooting in Pennsylvania that killed eleven people and left six others wounded, involve prosecutions of only criminal “hate crime” charges since no domestic terrorism statute nor charge exists.<sup>295</sup>

## B. Solutions for Civil and Criminal Streamlining

### 1. Stronger Interdisciplinary Approach to Victim Remedies Incorporating Psychology

Victims are often confused about their recovery options.<sup>296</sup> Victims should be able to access and visualize all their applicable recovery options in a manageable way, with the ability to instantly cross-reference between civil and criminal databases. In addition to creating websites that publicize and outline “recovery avenues,” one scholar suggested creating a handbook on crime victim rights that outlines “recovery avenues” that is *always* distributed to victims of a significant crime.<sup>297</sup> The streamlined information system would significantly reduce the “threat of duplicative litigation,” while providing judges with both a “more complete picture of victims’ needs” and an opportunity to create more effective remedies for victims.<sup>298</sup>

An initiative attempting to solve this problem is currently making its way through our government’s legislative system.

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<sup>291</sup> See Alexander Mallin, *Democrats Grill FBI, DHS Officials on White Supremacy Threat*, ABC NEWS (June 4, 2019), <http://abcnews.go.com/Politics/lawmakers-grill-trump-administration-officials-white-supremacy-threat/story?id=63478001> [<http://perma.cc/94UZ-BQVW>]. From 2009–2018, “far-right extremism was responsible for 73% of extremist murders, while international terrorism was responsible for 23% of terrorism deaths.” *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *See id.*

<sup>294</sup> *See id.*

<sup>295</sup> *See id.*

<sup>296</sup> See Parness, Lee, & Laube, *supra* note 94, at 875 (“Too often, recoveries are difficult to secure and judgments are difficult to enforce. Crime victims can also be confused about their recovery options.”).

<sup>297</sup> *Id.*

<sup>298</sup> Weinstein, *supra* note 57, at 977.

United States Senator Bob Casey and United States Representative Dwight Evans introduced the Resources for Victims of Gun Violence Act of 2019<sup>299</sup> to address the challenges that victim-survivors, their friends, and families face in the aftermath of their tragedies, and to support them in managing their long-term needs.<sup>300</sup> The Act would establish an “interagency Advisory Council to gather and disseminate information about the resources, programs and benefits that can help victims of gun violence.”<sup>301</sup> This interagency Advisory Council would consist of federal representatives from various agencies, in addition to victims of gun violence, and victim assistance professionals like medical professionals and social workers.<sup>302</sup>

This council would also be responsible for evaluating the medical, legal, financial, educational, workplace, housing, transportation, assistive technology, and accessibility needs of victims of gun violence, and thereafter disseminating the information about “resources, programs and benefits.”<sup>303</sup> Their responsibility would not stop there. After the council disseminates the requisite information to victims, it would be required to submit a report about its findings to Congress—the report would have to identify “any gaps in policy that the government could address.”<sup>304</sup>

It is clear that the effects of gun violence are not known due to the lack of evidence-based research, which only contributes to government, medical, and legal agencies lacking requisite knowledge to aid victims.<sup>305</sup> While current literature and evidence-based research suggests laws revolving around the gun violence issue would be extremely “low-yield”, “ineffective”, and “wasteful of scarce resources”,<sup>306</sup> the growing community of victim-survivors

<sup>299</sup> Resources for Victims of Gun Violence Act of 2019, S. 1352, 116th Cong. (2019).

<sup>300</sup> See Casey, Evans Push to Support Victims of Gun Violence, U.S. CONGRESSMAN DWIGHT EVANS <http://evans.house.gov/media-center/press-releases/casey-evans-push-support-victims-gun-violence> [<http://perma.cc/DQW9-3PFQ>] (last visited Apr. 10, 2021).

<sup>301</sup> *Id.*

<sup>302</sup> See *id.* (“The interagency Advisory Council would be composed of federal representatives from the [Department of Health and Human Services, the Department of Justice], the Department of Education, [the Department of Housing and Urban Development, the Department of Veterans Affairs], the Social Security Administration . . .”).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> See *The Mental Health Impact of Mass Shootings*, *supra* note 203.

<sup>306</sup> James L. Knoll & George D. Annas, *Mass Shootings and Mental Illness*, AM. PSYCH. ASS’N 81, 81–82 (2016). Cf. Katie Young & Contessa Brewer, *Rise in Mass Shootings Leads to ‘rapid growth’ in Active Shooter Insurance*, CNBC (Jan. 10, 2020), <http://www.cnbc.com/2020/01/10/rise-in-mass-shootings-boosts-active-shooter-insurance.html> [<http://perma.cc/3CYV-ELDB>] (exemplifying the very real impact these shootings have, not only on a personal and emotional level, but in business and economics as insurance companies have seen an increase in underwriting for deadly weapons coverage: “[We] saw the number of policies grow by 235% in 2018 and by 270% in 2019.”).

would beg to differ and are tired of being forgotten. Government-funded research, encompassed in the Gun Violence Act, is a necessary step forward in its commitment to address the interagency problems that currently work against victims.

## 2. Classifying Mass Shootings as Acts of Domestic Terrorism and Codifying as a Federal Crime

Domestic terrorism should be treated the same under state and federal law to protect victims. Federal terrorism charges should be made available for domestic terrorism victims, and there should be a civil cause of action for domestic terrorist acts. The treatment of domestic terrorism on the federal level could help victims by providing greater resources than the state level may provide, enable a centralized approach to aiding victims, and also compensate in ways that a state remedy may be inadequate.<sup>307</sup> Acts of lone wolf terrorism should not be an exemption from terrorism classifications. Additionally, classification of domestic terrorist attacks should not preclude an entity's liability and their ability to be sued. The argument that the percentage of mass shootings being miniscule in relation to gun violence as a whole cannot be used as a sword and shield. If this premise is true, then the legal system would not falter by expanding the available remedies to victims, allowing certain mass shootings to be designated as domestic terrorist attacks, and thereafter, creating a civil cause of action for the victims of these attacks. FBI Assistant Director for Counterterrorism, Michael McGarrity, has said he would personally "welcome Congress passing a law that makes domestic terrorism a federal crime."<sup>308</sup>

## VI. CONCLUSION

Once the front-page headlines detailing the latest mass shooting disappear, the plight and suffering of victims does not end—it is only just beginning. These victims of trauma are long overdue for meaningful and innovative reform in both the civil and criminal legal contexts to better address the pain and suffering they undeservingly endure for the rest of their lives.

Please do not wait to act. Do not wait until it happens to yourself or a loved one, or until you feel the debilitating grief and hopelessness that mass shootings bestow upon everyone they touch. Do not wait until every new day is "tough just gettin' up."

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<sup>307</sup> See Sinnar, *supra* note 283, at 1338–39.

<sup>308</sup> Mallin, *supra* note 291.