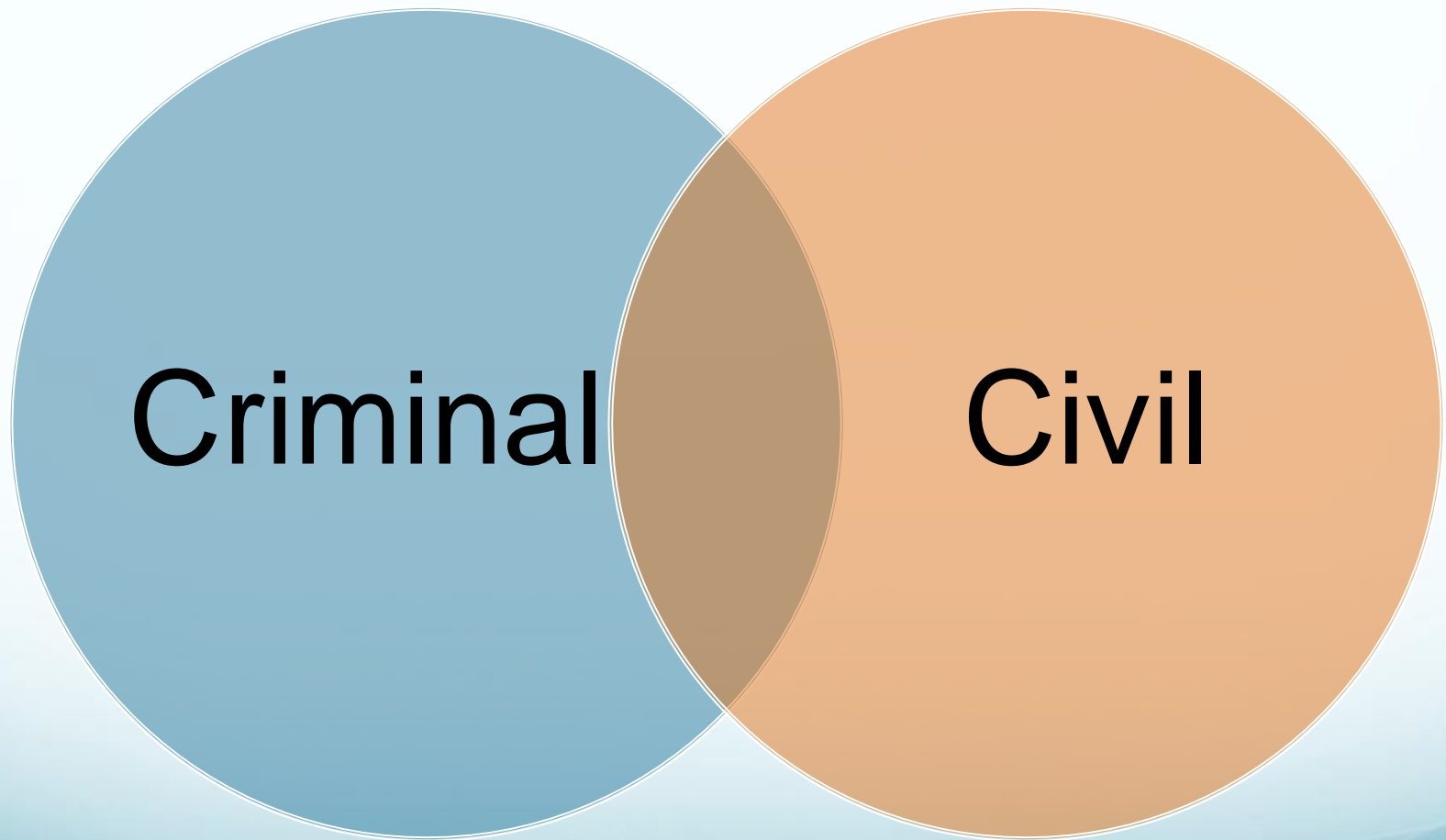


Victims' Rights in Criminal and Civil Court

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What's the Difference?



The Difference

Criminal

- Punishing the defendant
- State maintains prosecutorial discretion
- Defendant's constitutional rights versus victim's constitutional rights
- Victims' Bill of Rights applies
- "Beyond a reasonable doubt" standard
- Restitution

Civil

- Making the victim whole
- Plaintiff maintains discretion
- Level(er) playing field
- Victim is more exposed
- "Preponderance of the evidence" standard
- Damages

Criminal Court Realities

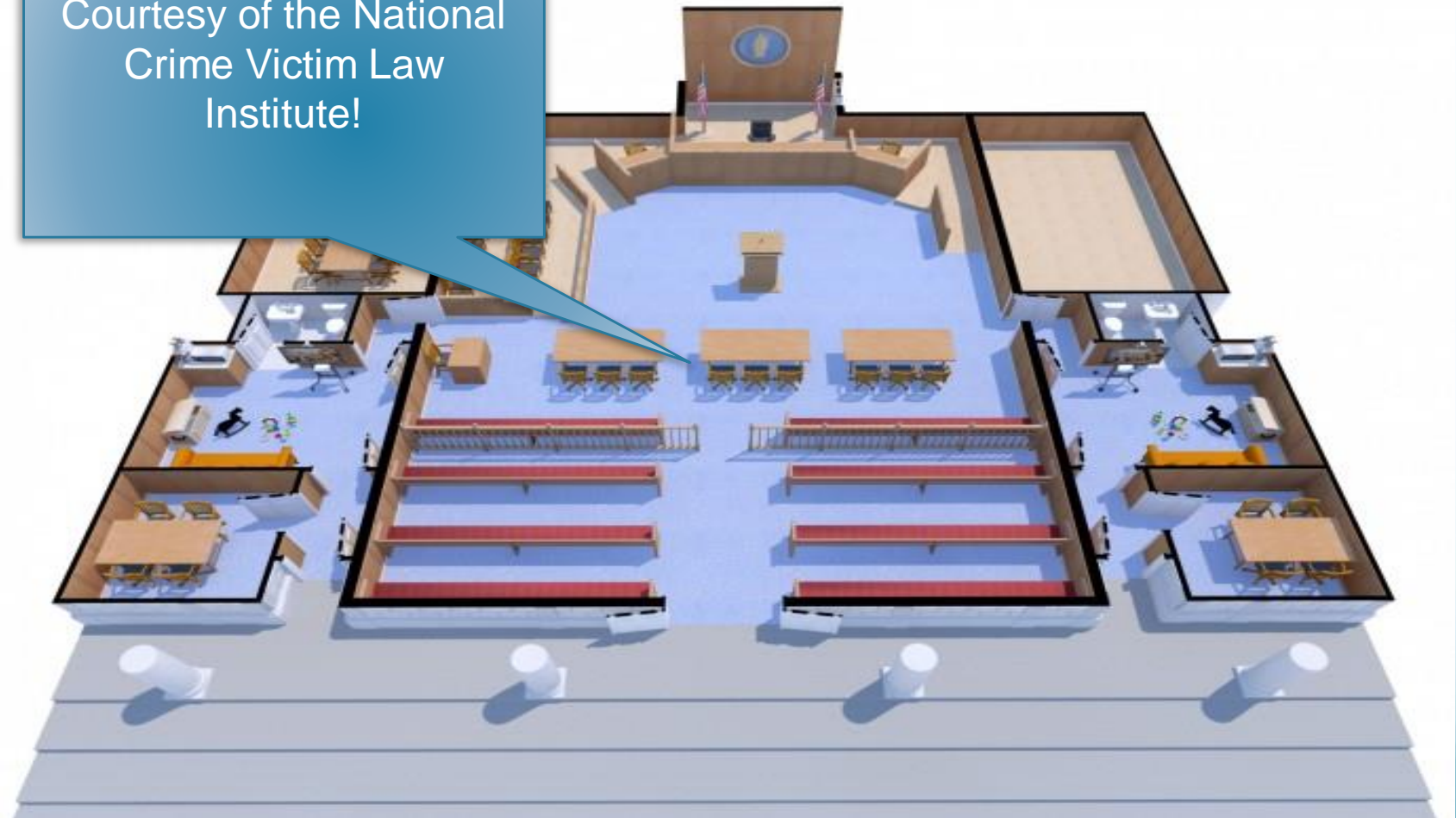
“The legal system... provides strong guarantees for the rights of the accused but essentially no guarantees for the rights of the victim. If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than ***a court of law.***”

- Judith Herman, MD

- Victim is treated like a piece of evidence
- Victims are intimidated/afraid
- Victim has little say in outcome(s)
- Lack of notice
- No language access

A Third Table

Courtesy of the National
Crime Victim Law
Institute!



Victims' Bill of Rights

1. [B]e treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal ... process, and informed of the victim's constitutional rights
2. Be “reasonably informed”
3. Be heard
4. Confer with prosecution, and inspect documents
5. Prompt and full restitution
6. Prompt and final conclusion of case
7. **All rules governing criminal procedure and admissibility of evidence protect victims' rights**

S.C. Const. Art. 1, § 24

Not Rights

Reed v. Becka (1999)

- A victim possesses no rights in the appellate process... No victim standing to appeal trial court's order
- No right to veto a proposed plea agreement
- Prosecutorial discretion not limited by victims' rights laws

Ex parte Littlefield (2000)

- VBOR not a drastic transformation of the criminal justice system whereby victim is given control over solicitor's broad discretion
- But "judiciary is empowered to infringe upon the exercise of prosecutorial discretion when ... necessary to review and interpret the results of the prosecutor's actions when those actions violate certain constitutional mandates

Victims' Right to Privacy

Constitutional

- **Implied** federal constitutional right to privacy (*Griswold v. CT* and progeny)
- **Explicit** state constitutional right to privacy (S.C. Const. Art. 1, § 10)

Statutory

- Rape Shield Law (SC Code § 16-3-659.1)
- Psychotherapist-Patient Privilege (SC Code § 19-11-95)
- SC Code § 40-75-190(B)

Enforcing Victims' Rights in Criminal Courts

- Enforceable by writ of mandamus – not an appeal

- Extraordinary remedy

SO

- Victim should assert rights early and in writing
- If rights are ignored/violated, victim should contact an attorney



Hypothetical #1

Jane Smith is sexually assaulted by a male family member, John Smith. The crime is reported to law enforcement, Jane gives a statement, and John is arrested. Two weeks later, unbeknownst to Jane, John is released on bond. Jane finds out that John has been released when he begins sending her threatening text messages. At the same time, Jane's counselor receives a subpoena from the Solicitor's office seeking "any and all records relating to Jane Smith." Jane does not want anyone to see her therapy records. Later, the Solicitor enters into a plea agreement with John without consulting with Jane. Jane incurred significant medical expenses as a result of the assault and isn't sure how she'll pay the bills.

Respectfully submitted,

Better Luck in Civil Court?

- More legal theories available to the survivor
- Lower burden of proof
 - “beyond a reasonable doubt” v. “preponderance of the evidence”
- No presumption of innocence
- Survivor **arguably** maintains more control
- Damages

Potential Causes of Action v. Perpetrator

- Assault, Battery, False Imprisonment
- Negligence
 - Breached a duty, causing damage
- Intentional/Negligent Infliction of Emotional Distress (“money” tort)
- Invasion of Privacy

Potential Causes of Action v. Third-Parties

- Third-parties may include:
 - School administrators, landlords, religious institutions, businesses, foster parents, nursing homes, treatment centers, etc.
- Where third-party failed to use **reasonable** care to protect against a **foreseeable** sexual assault (i.e. “negligent supervision”)
- *See Doe v. Bishop of Chas.* (“systematic practice of secrecy and concealment of knowledge of sexual abuse by employees”)

Statutes of Limitation

- Complicated! Call a lawyer!
- Generally
 - S.C. Code § 15-3-530(5) – An action for assault, battery, or any injury to the person or rights of another... within **three years**
 - S.C. Code § 15-3-535 - ...Must be commenced within **three years** after the person **knew** or by the exercise of **reasonable diligence should have known** that he had a cause of action

Statutes of Limitations - Exceptions

- **Tolling**

- S.C. Code § 15-3-40 – Under 18 or insane
- Up to 1 year after 18th birthday, or within three years of injury producing event, whichever comes later

- **Child Sexual Abuse**

- S.C. Code § 15-3-555 – Victim may bring action within **6 years of age 21**, or within **three years** of time where victim realizes that injuries were caused by child sexual abuse, whichever comes later

Hypothetical #2

John Doe attended St. Peter's Catholic Church from ages 8 – 16. During that time, beginning around age 7, Priest began sexually assaulting John. Priest made John promise not to tell; otherwise, he said, John and his family would go to hell. John never told a soul.

When John was 22, he learned that other children who had attended SPCC were alleging sex abuse at the hands of Priest and suing SPCC.

May John join in the lawsuit? Assume the assault took place post-2002.

Hypo #2 Con't

Same basic fact pattern, except John suppressed the memories of sexual assault. John does not realize that he was injured until age 33. May John file? If so, how long does he have to do so?

What if John's assault took place in 1980? Assume John is 33 years old.

Best Practices

- Avoid simultaneous criminal and civil litigation

BUT

- Imperative to pay attention to statute(s) of limitation
- Exhaust administrative remedies
- Avoid social media
- Document damages

Closing Thoughts

- Victims' legal needs extend beyond criminal and civil lawsuits – education, public benefits, housing, bankruptcy, family, etc.
- Ask: How can we make this victim whole?
- Areas of opportunity: “Issue spotting” training for providers, educating pro bono attorneys on victims' rights and compiling a referral list
- Won't move the needle until the majority of victims are represented in criminal and civil proceedings

Resources

National Crime Victim Law Institute – www.ncvli.org

Legal Remedies for Adult Victims of Sexual Violence -
<https://law.lclark.edu/live/files/6470-a-criminal-justice-guide-legal-remedies-for-adult>

Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors -
<http://law.lclark.edu/live/files/6469-rights-and-remedies-meeting-the-civil-legal-needs>

SCVAN's Legal Assistance to Victims Program

- Providing holistic legal representation to South Carolina crime victims, with a focus on sexual assault, domestic violence, harassment, & stalking
- Practice areas: **Family, Victims' Rights, Privacy, Immigration**, Education, Housing, Public Benefits, etc.
- Providing training and technical assistance to victim service providers, law enforcement, community partners, etc.

Referring Survivors to SCVAN's LAV Program

Contact

- Jessica Garrido (Spanish, English)
(864) 312-6454
jessica@scvan.org

OR

- Cindy Chavez (Spanish, English)
(864) 312-6456
cindy@scvan.org

*Intakes take place every Tuesday by phone