

## Comparing the Role Victims Play in Criminal Court: Mexico vs. North Carolina

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**Categories :** [Procedure](#), [Uncategorized](#)

**Tagged as :** [mexico](#), [victims](#)

**Date :** September 30, 2019

Two years ago, I [wrote](#) about training prosecutors, forensic experts, and investigative police in Mexico. I've been back a couple of times since, including last week. Each time I learn something that makes me reflect on the workings of our own justice system. On my most recent trip, I learned more about the role of the victim in Mexico, and it got me thinking about the role of the victim in our criminal courts.

**The victim vs. the prosecution.** I spent an afternoon at a Mexican courthouse observing criminal proceedings. Some felt familiar, like the first appearance for a defendant arrested for selling drugs. The judge assessed whether there was sufficient evidence to support the charge, and finding that there was, decided whether to release the defendant pending trial or to detain him.

Other proceedings were alien to me. The most interesting was a hearing in which the prosecutor sought the judge's permission to dismiss a case over the objection of the victim and the victim's attorney. The victim's attorney is called the *asesor jurídico*, and the victim's right to be represented by an attorney was enacted as part of Mexico's recent criminal justice reforms. The defendant wasn't present for the hearing, and the victim and her attorney sat at the table where the defendant normally would have been. The prosecution argued that the case was weak and that the victim had been difficult to work with, while the victim replied that the prosecution had failed to seek out readily available evidence that she was prepared to provide. The judge sided with the victim and ordered that the prosecutors continue to pursue the case.

**Prosecutors and the authority to dismiss in North Carolina.** There's no opportunity for a similar proceeding in North Carolina, where the appellate courts have held that "a prosecutor has the authority and discretion to dismiss charges against a defendant at any stage of the proceedings." *State v. Murphy*, 193 N.C. App. 236 (2008). *See also* [G.S. 15A-931](#) ("[T]he prosecutor may dismiss any charges stated in a criminal pleading . . . by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time.").

That's the historical norm in the United States, though it isn't the law everywhere in the United States today. In some states, and in federal court, the prosecution must move to dismiss and obtain the court's approval. *See generally* Wayne R. LaFave et al., *Criminal Procedure* § 13.3(c) (noting that the common law rule was that the prosecutor could terminate a prosecution without permission, but that this authority has been constrained over time in some places); *Power of Court to Enter Nolle Prosequi or Dismiss Prosecution*, 69 A.L.R. 240 ("[A]ccording to the weight of authority, the entering of a nolle prosequi lies in the sole discretion of the prosecuting officer, in the absence of statute. Under statutes in some states, however, and independently of statute in a few jurisdictions where long practice has established the rule, the prosecuting attorney does not have power to enter a nolle prosequi without the consent of the court."). Even where leave of court is required to dismiss, the court's involvement is typically intended to present prosecutorial abuses of the defendant, not to protect the interests of victims. *See Rinaldi v. United States*, 434 U.S. 22, 29 n. 15 (1977) (stating that the principal purpose of the federal requirement of judicial approval of dismissals "is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection").

**Are we becoming more like Mexico?** Mexico is certainly becoming more like us. Recent reforms to Mexico's system have brought changes like a presumption of innocence and adversarial oral trials. But in some regards, we are becoming more like Mexico by giving victims a larger place in our justice system. About 20 years ago, victims were given a statutory right to "consult with the prosecuting attorney . . . about the disposition of the case, including the victim's views about dismissal." [S.L. 1998-212](#) § 19.4(a) (provision in state budget enacting the Crime Victims' Rights Act, codified as amended in pertinent part at G.S. 15A-832(f)). This year, [S.L. 2019-216](#), the implementing legislation for the Marsy's Law amendment to the state constitution, added a new provision giving the victim "[t]he right to be reasonably heard at court proceedings involving a plea that disposes of the case or the conviction, sentencing, or release of the accused." The victim may assert a violation of his or her rights through a motion in the criminal case, including through an attorney, though there is no right to appointed counsel for victims. *See id.*

These new provisions probably don't yet give a victim the right to be heard regarding the state's decision to dismiss charges. Perhaps one could argue that a dismissal is a "court proceeding[]" involving . . . release of the accused," and that a victim therefore has the right to be heard regarding the dismissal of charges. But (1) a dismissal doesn't actually require a "court proceeding," as it may be effected by filing a written dismissal, and (2) the leading out-of-state case holds that somewhat similar language did not create a right to be heard regarding a dismissal, *see Gansz v. People*, 888 P.2d 256 (Colo. 1995) (holding that a provision of the Colorado Constitution, granting victims the right to be heard at "all criminal stages of the criminal justice process," did not grant victims the right to be heard regarding the state's decision to dismiss charges, and noting that the state constitution instead granted victims the right to consult with the prosecution regarding dismissals).

Still, these provisions are part of a national trend toward giving victims a greater voice in criminal cases. *See, e.g.,* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights*, 9 *Lew. & Cl. L. Rev.* 559 (2005) (noting "the increasingly prominent role of the victim in the criminal justice process"); Andrew Nash, Note, *Victims by Definition*, 85 *Wash. U. L. Rev.* 1419 (2008) ("[D]uring the last thirty years victims have come to play an increasingly central role in American criminal justice."). Where that movement will stop remains to be seen.

**The big picture.** My general understanding of the distinction between criminal court and civil court has been that in criminal court, the case belongs to the state. The state is the aggrieved party, and the victim of the crime is basically a witness. By contrast, in civil court, the victim – called the plaintiff in that context – is the aggrieved party and the case belongs to him or her. But my experience in Mexico got me thinking about how things aren't really that tidy. For example, the opportunity for victims to seek restitution in criminal court blurs the line between the two types of proceeding. And things are getting even less tidy as victims have ever greater voice in the criminal justice system, including the right to be heard regarding plea agreements and on sentencing. Mexico has continued down that road, having granted victims the right to contest dismissals. Other countries have gone further still. According to [this](#) USDOJ comparison of legal systems, in some civil law countries, "victims may bring civil claims, e.g., for monetary damages, in the context of a criminal prosecution."

I'm not sure whether this blurring of the lines between civil and criminal cases is a good thing or a bad one. It has the potential to complicate proceedings, but also to be more responsive to victims' legitimate interests – interests that often cannot realistically be realized in civil court. As always, I welcome your thoughts.