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Susan E. Gegan

Nicholas Ernesto Rodriguez

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VICTIMS' ROLES IN THE CRIMINAL JUSTICE SYSTEM: A FALLACY OF VICTIM EMPOWERMENT?

Victims of crime[1] play a critical role in the criminal justice system.[2] The victim often provides eyewitness information to the police, which aids in the capture of suspects.[3] Furthermore, prosecu-

[1] *See* OR. REV. STAT. § 137.530.4 (Anderson 1991). " 'Victims' means the person or persons who have suffered financial, social, psychological or physical harm as a result of an offense, and includes, in the case of any homicide, an appropriate member of the immediate family of any such person." *Id.*; James E. Bayley, *The Concept of Victimhood*, *in* TO BE A VICTIM 53, 53 (Diane Sank & David I. Caplan eds., 1991).

> People are victims if and only if (1) they have suffered a loss or some significant decrease in well-being unfairly or undeservedly and in such a manner that they were helpless to prevent the loss; (2) the loss has an identifiable cause; and (3) the legal or moral context of the loss entitles the sufferers of the loss to social concern.

Id.; Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 951 (1985).

> In the criminal law context, the word 'victim' has come to mean those who are preyed upon by strangers: 'Victim' suggests a nonprovoking individual hit with the violence of street crime by the stranger. The image created is that of an elderly person robbed of her life savings, an 'innocent bystander' injured or killed during a holdup, or a brutally ravaged rape victim. . . . In short, the image of the 'victim' has become a blameless, pure stereotype, with whom all can identify.

Id.

[2] *See* HAW. REV. STAT. § 801D-1 (1988). Hawaii has delineated the rights of victims and witnesses in criminal proceedings in "recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this State . . . ." *Id.*; John R. Anderson & Paul L. Woodward, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUDICATURE 221, 221 (1985) (stating that victims and witnesses have always played vital roles in criminal justice system); *see also* Donald J. Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 980 (1975) ("a victim plays a significant informal role in the prosecution and disposition of a criminal case"); Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 391 (1989) ("Victims of crime are a powerful force in the American criminal justice system."); Christopher W. Ewing, Comment, Payne v. Tennessee: *The Demise of* Booth v. Maryland, 23 PAC. L.J. 1389, 1390-91 (1992) (indicating that legislatures have promulgated statutes that provide for admission of victim-impact evidence during criminal trial sentencing phase).

[3] *See* Hellerstein, *supra* note 2, at 391 (noting that victim provides significant information to criminal justice system); *see also* Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521. "In many early societies, crime victims or their families or clans were expected to take responsibility for avenging a harm." *Id.* These private "blood feuds" turned into public trials as criminal prosecutions evolved. *Id.* Law enforcement in colonial America was fashioned similarly to that of England. *Id.* A victim was responsible for the investigation of the crime and identification of the culprit. *Id.* After identification, the victim paid the official to have the perpetrator arrested, after which the victim was compensated for his loss. *Id.* However, the emphasis, which was originally on compensation to the victim, changed to punishment of the wrongdoer. *Id.*; Juan Cardenas,

tors and judges tend to rely heavily on a victim's testimony in court.[4] Despite its reliance on victims, the American system of jurisprudence has emphasized the interests of offenders.[5] Consequently, the needs and concerns of victims have become subordinate to those of the offenders.[6]

The Crime Victim in the Prosecutorial Process, 9 HARV. J.L. & PUB. POL'Y 357, 366 (1986). A victim in the English system participated in the criminal process as a private party, subject to certain limitations which restricted potential abuses. *Id.* This approach developed from the theory that:

> He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a 'friendless man,' he is a wolf.

Id. at 359 (quoting 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF THE ENGLISH LAW 449 (2d ed., 1898)). More importantly, a crime was treated as a wrong perpetrated against the victim rather than against the King. *Id. See generally* Ellen Yaroshefsky, *Balancing Victims' Rights and Vigorous Advocacy for the Defendant*, 1 ANN. SURV. AM. L. 135, 140 (1989) (discussing victim's historical role in criminal justice system).

[4] *See* Anderson & Woodward, *supra* note 2, at 221 (asserting that victims supply vital information necessary to prosecute offenders); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 117 (1984). "The victims of crime are truly the forgotten people in the American criminal justice system and are all too often victimized twice—first by the crime and then by the system." *Id.* The author also argues that the victim's role has been relegated to that of a witness. *Id.* at 125-31; Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 15 (1984) [hereinafter Kelly, *Victims' Perceptions*] (stating that victims are major force in criminal justice system, yet they are often unheard); *see also* Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 29 (1984) (encouraging victim cooperation will aid apprehension, conviction, and deterrence of criminals to achieve lower overall crime rate).

[5] *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (a criminal's "right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."); Johnson v. New Jersey, 384 U.S. 719, 730 (1966) (noting that *Escobedo* and *Miranda* "encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion."); Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court held that the "prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendants unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination." *Id.*; Baxstrom v. Herold, 383 U.S. 107, 110 (1966). The Court held that the offender "was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York." *Id.*; *see* Roger J. Miner, *Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y.L. SCH. L. REV. 757, 758-59 (1985). "Other traditional concerns of the criminal justice system revolve around the detection, apprehension and prosecution of offenders. The system always has focused on the wrongdoer." *Id.*; Yaroshefsky, *supra* note 3, at 163-64 (stating that victims believe that prosecutor is there to represent them, but are somewhat disillusioned when they discover that is not necessarily true); *see also* Anne M. Morgan, Comment, *Victim Rights: Remembering the "Forgotten Person" in the Criminal Justice System*, 70 MARQ. L. REV. 572, 572 (1987). "[T]he American criminal justice system has lost sight of its fundamental purpose—to protect the innocent and punish the guilty." *Id.*

[6] *See* John T. Chu, *A Systems Science Approach to Crime, Criminal Justice, and Victim Justice*, *in* TO BE A VICTIM, *supra* note 1, at 117, 117-23. "The U.S. Constitution offers a good deal

In recent years, a "victims' rights movement" has developed to curb this inequitable trend.[7] The movement began as a coalition of various organizations seeking to redress the criminal justice system's inadequate treatment of victims.[8] As the movement matured, these organizations began to advocate for legislation addressing the plight of the victim.[9] This notion has been

of protection to those who are accused of committing a crime, but not much to those accused of civil wrongdoing, and almost none to the victims." *Id.* at 117-18. The criminal justice system frequently ignores the desires of the "victim, or the victim's family, for justice." *Id.* at 119; *see also* Abrahamson, *supra* note 3, at 517 (contending that criminal justice system fails victim because offender is favored); George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in American Jurisprudence*, 23 PAC. L.J. 815, 822 (1992). After California voters adopted Proposition 115, the legislature announced that "the rights of crime victims are too often ignored . . . and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system. . . ." *Id.* (quoting CAL. CONST. art. I, § 14.1 (Deerings Supp. 1992)). Proposition 115 was an initiative proposing significant procedural changes in the handling of criminal cases. *Id. See generally* Morgan, *supra* note 5, at 572 & n.1 (stating that victims have become "forgotten" in criminal justice system).

[7] *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597, 2613 (1991) (Scalia, J., concurring). Justice Scalia observed there is a "public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement." *Id.*; *see* Abrahamson, *supra* note 3, at 518 (declaring that victims' rights movement provides alternative blueprint for criminal justice system, which could give victims prominent role throughout criminal system); Deborah P. Kelly, *Have Victim Reforms Gone Too Far—Or Not Far Enough?*, CRIM. JUST., Summer 1991, at 22, 22 [hereinafter Kelly, *Victim Reforms*] (declaring that numerous reforms made in criminal justice system give victim opportunity to participate); Karyn E. Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 242 (1990) (noting that great progress has been made over past decade in recognizing rights of victims); Kirk Johnson, *The Law: Crime Victims Getting a Day, and a Say, in Court*, N.Y. TIMES, Apr. 1, 1988, at B7 (asserting that over last 8 years, 44 states have enacted legislation to protect victim from victimization by criminal justice system).

[8] *See* Deborah P. Kelly, *Victim Participation in the Criminal Justice System*, *in* VICTIMS OF CRIME 172, 172-73 (Arthur J. Lurigio et al. eds., 1990) [hereinafter Kelly, *Victim Participation*] (stating that feminist movement aroused public awareness of treatment of rape victims by criminal justice system); Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 5-6 (1984) (indicating that "groundswell of support" was provided by organizations formed by victims); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 517 (1982). The author describes the widespread support for victims:

> Victims and potential victims—often crossing ideological boundaries—are pressing for fuller enforcement of the criminal law, more rapid disposition of cases, and more effective sentences. Women, and feminists, press for prosecution of husbands who beat their wives and question the frequency with which rape charges are reduced to indecent assault. Blacks and Hispanics protest a double standard that treats the ghetto as a lawless enclave in which crimes committed by one resident against another are ignored while crimes committed by those who stray outside the ghetto are routinely prosecuted. Consumers complain of the failure to prosecute frauds and white collar crimes. The elderly, and all of us, call for stricter enforcement of laws dealing with street crimes.

Id.

[9] *See* Deborah P. Kelly, *How Can We Help the Victim Without Hurting the Defendant?*, CRIM.

underscored by the number of states that have furnished victims with constitutional safeguards, assuring victims of a right to participate in the criminal justice system.[10]

The United States Supreme Court provided additional support through its holding in *Payne v. Tennessee*,[11] which reshaped the legal limits of victim involvement in criminal trials.[12] In *Payne*, the Court held that the Eighth Amendment did not preclude juries from considering Victim Impact Statements ("VIS") in capital sentencing cases.[13] This decision, in conjunction with Congress's 1991 amendment to the Federal Rules of Criminal Procedure mandating the inclusion of VIS in presentence reports, served to expand the victim's role during sentencing.[14] The use of VIS en-

JUST., Summer 1987, at 14, 14 [hereinafter Kelly, *Help the Victim*] (asserting that various organizations joined to support victims' reforms); Yaroshefsky, *supra* note 3, at 141-42 (briefly describes development of victims' rights movement); Morgan, *supra* note 5, at 575 (discussing government's role in aiding victims); *see also* Carrington & Nicholson, *supra* note 8, at 1-5 (stating that victims' rights movement has only recently gained national exposure through legislation on federal and state levels which has restored victims' rights); Diane Kiesel, *Crime and Punishment—Victims' Rights Movement Presses Courts, Legislatures*, A.B.A. J., Jan. 1984, at 25, 25 (declaring that criminal justice system has positively responded to crime victims).

The victims' rights movement has spawned international concern for victims. *See, e.g.*, *U.N. Resolution Renews Debate on Victim Rights Movement*, CRIM. JUST. NEWSL., Oct. 1, 1985, at 5, 5 [hereinafter *Resolution*]. The resolution calls on countries to permit "the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected without prejudice to the accused and consistent with the relevant national criminal justice system." *Id.* at 6. The article notes that the resolution's general language may be interpreted as advocating victim involvement at sentencing and possibly parole. *Id.*; *Declarations of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. GAOR, Supp. No. 53, at 213-15, U.N. Doc. A /40/53 (1986).

[10] ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16(b); MICH. CONST. art I., § 24; MO. CONST. art. I, § 32; N.J. CONST. art. I, § 22; R.I. CONST. art. I, § 28; TEX. CONST. art. I, § 30; WASH. CONST. art. I, § 35. Although the states' constitutional amendments vary in form and content, all provide victims basic rights of notification, information, retribution, and participation.

[11] 111 S. Ct. 2597 (1991).

[12] *See generally* Keith L. Belknap Jr., *The Death Penalty and Victim Impact Evidence:* Payne v. Tennessee, 111 S. Ct. 2597 (1991), 15 HARV. J.L. & PUB. POL'Y 275, 275 (1992) ("Over the last few years, the victims' rights movement has persuaded the criminal justice system to heighten its concern for crime victims, particularly during criminal sentencing); Catherine Bendor, Note, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, 111 S. Ct. 2597 (1991), 27 HARV. C.R.—C.L. L. REV. 219, 220 (1992) (exploring effects of victim impact statements on defendants, victims, and families of victims); Ewing, *supra* note 2, at 1392 (discussing victim impact statements used during capital sentencing); Craig E. Gilmore, Note, Payne v. Tennessee: *Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U. L. REV. 469 *passim* (1992) (ramifications of *Payne*).

[13] *Payne*, 111 S. Ct. at 2612.

[14] FED. R. CRIM. P. 32(c)(2)(D). *See generally* Michael I. Oberlander, Note, *The* Payne *of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621,

able victims to describe the extent of any physical, emotional, or psychological effects caused by the crime.[15]

This Note examines the various roles and rights victims have in the criminal justice system, focusing on plea bargains and parole hearings. Part One explores victim involvement during the plea-bargaining phase and illustrates the advantages of heightened victim interaction with the criminal justice system. Part Two probes the use of impact statements at parole hearings. Part Three addresses the notification problems that impede the effective application of victim rights' legislation. Finally, Part Four recommends state constitutional amendments as the best method of enforcing the rights of crime victims in the criminal justice system.

I. VICTIM INVOLVEMENT AT THE PLEA-BARGAINING STAGE

Nearly ninety percent of all criminal actions in the United States are disposed of by guilty pleas, most of which result from plea negotiations.[16] Plea bargains grant certain concessions in exchange for a guilty plea by the defendant.[17] Prosecuting attorneys routinely decide whether or not to offer the defendant the oppor-

1621-28 (1992) (noting increased role of victims in criminal justice system). *But see* Jimmie O. Clements, Jr., Note, *The Scope of the Eighth Amendment Does Not Include a Per Se Bar to the Use of Victim Impact Evidence in the Sentencing Phase of a Capital Trial*, 23 ST. MARY'S L.J. 517, 535-40 (1991) (suggesting that VIS will impinge on defendant's rights).

[15] *See, e.g.*, ALASKA STAT. § 12.55.022 (1992) (VIS shall describe medical, financial, and emotional effects of crime and need for restitution by victim); ARIZ. REV. STAT. ANN. § 13-4410 (1992) (same). *See generally* BLACK'S LAW DICTIONARY 1567 (6th ed. 1990) (VIS is "statement read into the record during the sentencing phase of a criminal trial to inform the court about the impact of the crime on the victim or the victim's family.").

[16] *See, e.g.*, Judge Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 472 (1984) (90% of summary jury trial cases settle before full trial); A.B.A., PROJECT ON STANDARDS IN CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1.2 (1968) ("The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 percent of the criminal cases are disposed of in this way."); JOHN A. HUMPHREY, PH.D. & MICHAEL E. MILAKOVICH, PH.D., THE ADMINISTRATION OF JUSTICE 117 (1981) ("At present 90 percent of all defendants in criminal cases plead guilty."); PETER C. KRATCOSKI & DONALD B. WALKER, CRIMINAL JUSTICE IN AMERICA 180 (1978) ("85-90 percent of cases are resolved through plea bargaining"); Joel Henderson, Ph.D. & G. Thomas Gitchoff, *Using Experts and Victims in the Sentencing Process*, 17 CRIM. L. BULL. 226, 232 (1981) ("Approximately 90% of criminal cases involve guilty pleas and plea bargaining.").

[17] *See* KRATCOSKI & WALKER, *supra* note 16, at 181 ("In plea bargaining, the prosecutor offers concessions to the defendant in return for a plea of guilty."); *see also* MORTON BARD & DAWN SANGREY, THE CRIME VICTIM'S BOOK 124 (1986) (stating that prosecutors may agree to lessen or even dismiss charges in exchange for guilty plea); MILTON HEUMANN, PLEA BARGAINING 1 (1977) ("Plea bargaining is the process by which the defendant in a criminal case relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence." (footnote omitted)).

tunity to plead guilty to a reduced charge.[18] The victim's feelings regarding the bargain is not the main concern of prosecutors, who often "forget" that the victim is the reason why they are in court.[19] Most victims do not realize that district attorneys are not acting as their personal attorneys, they represent the general public, and must perform to benefit society as a whole.[20]

Appeals by victims' rights supporters for increased victim participation at the plea-bargaining stage have been acknowledged by many states.[21] Although there is legislation permitting the use of

[18] *See* Dix v. County of Shasta, 963 F.2d 1296, 1298 (9th Cir. 1992) (holding that prosecutor is sole authority to determine how to proceed in criminal prosecution (citing Dix v. Superior Court, 807 P.2d 1063, 1066-67 (Cal. 1991))); *see also* Joel Cohen, *Should Prosecutors Obey the Wishes of Crime Victims in Negotiating Pleas?*, N.Y.L.J., Apr. 20, 1991, at 1, col. 2 ("[I]t is self-evident that plea decisions should be made by neutral professionals who can objectively assess all of the relevant factors, including the likelihood of conviction at trial.").

[19] *See* Robert C. Davis et al., *Expanding the Victim's Role in Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 492 (1984) (victim becomes "forgotten person"); *see also* John Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 317-18 (1982) (there has not been enough research conducted on how criminal justice process affects victims).

[20] *See, e.g.*, BARD & SANGREY, *supra* note 17, at 122 (prosecuting lawyer serves on behalf of people); *see also* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 650 (1976) (suggesting that prosecutor makes decisions based upon public interest, not victim's particular concerns).

[21] *See, e.g.*, DEL. CODE ANN. tit. 11, § 4331(d) (1991 & Supp. 1992) (VIS are required in cases of conviction by plea); FLA. STAT. ANN. § 921.143(1) (West 1992 & Supp. 1993) (court shall permit victim or next of kin to submit oral or written statement prior to accepting plea bargain); HAW. REV. STAT. ANN. § 801D-4(1) (1992) (victim shall be consulted and advised of plea bargain); IDAHO CODE § 19-5306(b) (1992 & Supp. 1993) (victim may submit VIS into presentence report); ILL. ANN. STAT. ch. 38, para. 1404 (Smith-Hurd 1992) (victim may have details of any plea); IND. CODE ANN. § 35-35-3 (West 1992) (crime victims' bill of rights); KAN. STAT. ANN. §§ 22-3436, 74-7333 (1990 & Supp. 1991) (prosecutor shall inform victim of nature of plea); ME. REV. STAT. ANN. tit. 15, § 812 (West 1992) (prosecutor must inform victim of plea offer before notifying court); MD. CRIM. LAW CODE ANN. § 4-609 (1991) (presentence investigation shall include VIS if defendant caused victim psychological, physical or economic injury); MINN. STAT. ANN. §§ 609.115, 611A.031 (West 1992) (prosecutor must make reasonable effort to consult with victim about plea bargain); MONT. CODE ANN. § 46-24-104 (1991) (prosecutor shall consult with victim in all felony cases to get view about plea bargaining); N.J. STAT. ANN. § 52:4B-44(15) (West 1992 & Supp. 1993) (victim may submit written statement to prosecutor's office prior to formal decision about whether charges will be filed); N.M. STAT. ANN. § 31-24-5 (Michie 1992 & Supp. 1993) (extensive list of victims' rights); N.Y. CRIM. PROC. LAW § 390.90 (McKinney 1992) (prosecutors should consult with victims of violent crimes before plea bargaining with defendant); N.D. CENT. CODE § 12.1-34-02 (Michie 1991) (extensive list of victims' rights); OHIO REV. CODE ANN. § 2943.041 (Anderson 1991) (court has broad discretion in deciding when and how victim will make VIS); R.I. GEN. LAWS ANN. § 12-28-4.1 (1991 & Supp. 1992) (VIS shall be presented to court by prosecution for review prior to acceptance of plea negotiation); S.C. CODE REGS. § 16-3-1530(B)(12) (Law. Co-op. 1991 & Supp. 1992) (victim has right to discuss views with prosecutor before plea bargain is offered); S.D. CODIFIED LAWS ANN. § 23A-7-8 (1992) (victim must have opportunity to comment on plea bargain); TENN.

VIS at sentencing in almost every state, victim involvement at the plea-bargaining stage has not developed to the same degree.[22] Even in states that address the issue, the specific rights of victims vary widely, ranging from mere notification that a plea bargain has been offered[23] to a requirement that victims' views on the matter be expressed to the deciding authority.[24] It is important to note, however, that no jurisdiction includes a means of enforcing these rights.[25] Too often, a plea bargain is arranged, or a trial is held without notice to the victim or the victim's representative.[26] This frequently leaves victims feeling cheated by the judicial system, resulting in "double victimization."[27]

Despite its procedural flaws, plea bargaining serves a number of pragmatic and instrumental purposes.[28] However, because the

CODE ANN. §§ 8-7-206(3), 40-38-103(2) (1992) (victim has right to be present during plea bargaining); W. VA. CODE § 61-11A-6(5)(C) (1992) (prosecutor must obtain views of victim about plea negotiations).

[22] Telephone Interview with John Stein, Director of National Organization of Victims Assistance (NOVA) (Oct. 1, 1992) [hereinafter Stein Telephone Interview].

[23] *See, e.g.*, ILL. ANN. STAT. ch. 38, para. 1404 (victim receives details of plea bargain); N.M. STAT. ANN. § 31-24-5(C)(8) (provides merely for notification to victim that bargain has been accepted).

[24] *See, e.g.*, DEL. CODE ANN. tit. 11, § 4331(d) (court requires VIS before accepting plea bargain); R.I. GEN. LAWS ANN. § 12-28-4.1 (VIS shall be taken by prosecutor and presented to court for review prior to acceptance of plea negotiations).

[25] *See supra* note 21 and accompanying text (no state allows for victim veto of plea bargain); *see also* Kelly, *Victim Participation, supra* note 8, at 177 (no state gives victim veto over plea bargain); Don Siegelman & Courtney W. Tarver, *Victims' Rights in State Constitutions*, 1 EMERGING ISSUES IN ST. CONST. LAW 163, 168 (1988). "The chief problem . . . is that the rights are unenforceable: none of the bills of rights provide for redress for victims who have been denied a right. In fact, most of the bills of rights contain language clearly stating that no cause of action may be maintained or damages awarded for denial of a right." *Id.*

[26] *See* Karen L. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 432 (1989) (stating that only attorneys participate at plea negotiation stage and victims typically are not notified).

[27] *See* Henderson, *supra* note 1, at 981. "A victim who is not notified about a possible plea bargain, particularly in which the defendant pleads to a lesser charge, may view the bargain as an invalidation of his or her experience." *Id.*; *see also* Kennard, *supra* note 26, at 417 (arguing that victims who do not participate suffer "second victimization" from system); John Milne, *Panel to Study Sexual Assault Laws; Plea Bargains to Get Special Attention in Wake of* Alton *Case*, BOSTON GLOBE, Sept. 1, 1991, at 1. In the *Alton* case, a seventy-six-year-old woman was raped in her bed by a burglar, who among other things, broke her jaw. *Id.* The defendant pleaded guilty to two counts of rape, which carried the same sentence as stealing a $1,000.00 stereo. *Id.* The victim was not informed of the deal by the prosecutor. *Id.*

[28] *See* Henderson, *supra* note 1, at 977 & n.197. "There are three general types of plea bargains: a plea to some charges in return for dismissal of others; a plea to a lesser included offense in exchange for dismissal of more serious charges, with a corresponding reduction in penalty; or a plea to charges with some sentencing considerations." *Id.*; *see also* KRATCOSKI & WALKER, *supra* note 16, at 143-44 (listing different types of concessions typically offered to defendants).

plea-bargaining process directly affects victims, their rights need to be developed and strengthened. The efficiency and expediency of plea bargaining must be weighed against the satisfaction that victims derive from participating in the decision-making process.[29]

A. *Opposition to Victim Involvement*

Judges and prosecuting attorneys were slow to accept the utility and importance of increased victim involvement during plea bargaining.[30] A research project conducted in 1985, based on "decision simulation technique," showed that prosecutors and judges placed little, if any, emphasis on victim participation.[31] Prosecutors generally believe that greater involvement will disrupt the criminal process and drastically increase their workload.[32] They fear that the victim's vindictiveness may override the public interest in certain cases.[33] Prosecutors argue that they are in a better

There are many reasons for prosecutors to consent to a plea: their case may not be strong; there may be mitigating circumstances that help explain defendant's conduct; or the bargain may carry the same penalties the defendant would have received had he or she gone to trial. *See* Henderson, *supra* note 1, at 978 & n.200. Additionally, plea bargains help relieve the burden on the courts and allow prosecuting attorneys to keep up with their heavy caseloads. *See* Kennard, *supra* note 26, at 432.

[29] *See* Henderson & Gitchoff, *supra* note 16, at 233 ("[i]mportance of the victim still must be balanced with the concerns of the community and reconciled with the law."); *see also* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 91 ("Victims participating in guilty plea hearings will experience many of the same positive psychological benefits which ordinarily are realized at trial, but are absent in plea bargaining.").

[30] WILLIAM F. MCDONALD, U. S. DEP'T OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 62-70 (1985) (research project showed that both judges and prosecutors did not utilize victim information in making plea decisions).

[31] *Id.* at 62-68. Attorneys and judges from five different states were asked to imagine themselves in a hypothetical jurisdiction, being asked by a junior colleague for advice on whether to plea bargain in a particular situation. *Id.* They were then presented with 39 labelled cards containing information about the hypothetical case. *Id.* They were instructed to pick items of information they needed to know and to stop when they had reached a decision. *Id.* Only 41% chose the card labelled "Victim's Opinion" towards the bargain in a burglary plea bargaining simulation. *Id.* Of that 41%, the victim information was not chosen before they reached their quota of cards (6) for the experiment. *Id.* In many cases, by this point a decision had already been reached. *Id.*

[32] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 310 (1987) ("Prosecutors . . . reason that victim participation will impair quick summary disposition."); *see also* Siegelman & Tarver, *supra* note 25, at 170 (prosecutors feared victim participation would put greater demands on "scarce prosecutorial and judicial resources").

[33] Telephone Interview with Daniel Sullivan, Assistant District Attorney, Queens County (Dec. 9, 1992). Mr. Sullivan raised the scenario of a car being stolen, and later used in a burglary. *Id.* Usually the car-theft charges would be dropped in a plea bargain if the defendant agreed to plead guilty to burglary. *Id.* If the victim of the car theft were given an opportunity to state his opinion of the plea negotiations from the narrow perspective of

position to assume the entire prosecutorial role because of their impartiality and familiarity with the law and its application.[34] They feel that victim participation will hinder the plea-negotiation process, without providing any new insight for the decisionmaker.[35]

Statistics, however, do not support the arguments of those opposed to victim input during the plea-bargaining stage.[36] In a 1978 study conducted in Dade County, Florida, pretrial conferences that included the victim, defendant, police officers, and the prosecuting and defense attorneys disposed of cases more rapidly than normal.[37] By gathering the parties at a formal meeting, the attorneys saved time normally wasted telephoning one another.[38]

how the crime affected him personally, it could jeopardize the judge's acceptance of the plea bargain. *Id.* If the judge is not willing to accept the bargain because of the victim's position, the case may be forced to go to trial. *Id.* This would lead to increased costs, further overcrowding of the court system, and possible acquittal. *Id.*

[34] *See* Goldstein, *supra* note 8, at 554-55 (arguing that prosecutors are more impartial and less vindictive than victims or members of general public); *see also* BARD & SANGREY, *supra* note 17, at 125. The authors state that prosecutors sometimes are aware of mitigating circumstances that call for leniency, or may believe evidence is insufficient to sustain the charge, but may be sufficient to sustain a lesser charge. *Id.* Therefore, the prosecutor may plea bargain to ensure a conviction. *Id.*

[35] *See* Welling, *supra* note 32, at 310. Since defendants may feel that victim input will not result in lenient bargains, prosecutors fear that victim participation will result in fewer defendants pleading guilty. *Id.*; *see also* Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 L. & SOC'Y REV. 349, 351 (1979) [hereinafter Heinz & Kerstetter, *Pretrial Settlement*]. Attorneys and judges from 20 different communities felt that increased victim participation would absorb too much judicial time, lead to emotional and violent conflicts between victims and defendants, hinder candid discussions between attorneys, and cause misunderstandings about the conference discussions. *Id.*

[36] *See* Anne M. Heinz & Wayne A. Kerstetter, *Victim Participation in Plea-Bargaining: A Field Experiment*, *in* PLEA-BARGAINING 164, 174 (William F. McDonald & James A. Cramer eds., 1980) [hereinafter Heinz & Kerstetter, *Victim Participation*] (explaining that opponents' predictions that victim participation would disrupt system did not occur); Heinz & Kerstetter, *Pretrial Settlement*, *supra* note 35, at 349 (victims were not vindictive); Kelly, *Victims' Perceptions*, *supra* note 4, at 21 (allowing victims to participate reduces sense of disorder).

Victims are not always emotionally out of control. *See, e.g.*, *No Hatred for the Killer, Widow Says*, PENINSULA TIMES TRIB. (Palo Alto), Jan. 24, 1984, at B1 (wife no longer felt hatred for killer of her husband); *Parole is Opposed for Arthur Bremer*, WASH. POST, May 24, 1985, at C11. Former Alabama governor George Wallace was shot and permanently paralyzed by Arthur Bremer. *Id.* When Bremer came up for parole, Wallace claimed he had forgiven him and did not oppose his release. *Id.*

[37] *See* Heinz & Kerstetter, *Victim Participation*, *supra* note 36, at 170 (on average, cases were disposed of in under ten minutes).

[38] *See* Heinz & Kerstetter, *Pretrial Settlement*, *supra* note 35, at 358. "Since the professional participants probably would otherwise engage in sequential bilateral discussions by phone or in person, the conference procedure did not substantially increase the time they devoted to case disposition." *Id.* Using the single conference "reduced the time to disposi-

Furthermore, the expected "victim outbursts" and "unrealistic recommendations for dispoition" were absent from the process.[39] The victims' remarks were general and usually corresponded with those suggested by the attorney.[40] In fact, one of the three test courtrooms showed a reduced incarceration rate, with the victims favoring sentences that involved community service and restitution.[41] In addition, criminal law commentators argue that prosecuting attorneys focus too much upon reducing the backlog in the courts and their own heavy caseload.[42] Some groups further point out that prosecuting attorneys oppose victim involvement during plea negotiations because they fear losing control of the case's disposition.[43] Studies have shown that affording the victim a more active role in plea bargaining does not disrupt the court system.[44] First, the defendant does not have a constitutional right to a plea bargain.[45] Second, if the victim managed to force the prosecutor into offering a severe sentence, a defendant would be free to re-

tion in all three courtrooms by roughly three weeks." *Id.* at 360. *See generally* DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING 1 (1984) (plea negotiations can take place sequentially in offices, over phone, or in hallways).

[39] *See* Heinz & Kerstetter, *Victim Participation*, *supra* note 36, at 168-73 (according to study, victims' recommendations were usually generalized approval of agreements arranged by attorneys).

[40] *Id.* at 172. The study found that many victims were unaware that there were forms of punishment aside from incarceration. *Id.* Victims were open to ideas of community service, and working out repayment schedules that would allow the defendants to resume their normal life. *Id.*

[41] *Id.* at 173; *see* Hagan, *supra* note 19, at 327 (finding reduction for demands of harsher sentences where victims were present in court).

[42] *See* Gifford, *supra* note 29, at 94 (arguing that prosecutors may give lenient sentences due to personal and institutional interests in having cases disposed of quickly); *see also* BARD & SANGREY, *supra* note 17, at 187. The authors argue that there is no way of judging whether the plea bargain was a result of the prosecutor's careful weighing of issues, or his overwhelming caseload. *Id.* at 125. "[P]lea-bargaining is probably most often an attempt to reduce the number of cases going to trial." *Id.*

[43] *See* Davis et al., *supra* note 19, at 504 (suggesting that prosecutors risk having judge accept victim's position over their own); Welling, *supra* note 32, at 347 & n.247 (prosecutor's power would be diminished by victim participation); *see also* Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 36 (1987) (suggesting prosecutor's and victim's interests are not always the same).

[44] *See, e.g.*, Heinz & Kerstetter, *Pretrial Settlement*, *supra* note 35, at 365 (data showed victim participation may decrease total time and cost invested by court system).

[45] U.S. CONST. amend. VI. A defendant has a constitutional right to a speedy trial and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted by the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have defense counsel. *Id.*; *see* HEUMANN, *supra* note 17, at 1-2 (plea bargaining is process in which defendant gives up certain constitutional rights in exchange for more lenient sentence, but is not itself a constitutional right).

ject the offer and await trial.[46]

B. *Some Steps in the Right Direction*

As state legislatures began to recognize victims' rights, judicial attitudes regarding victim participation in the plea-bargaining stage changed.[47] Referring to plea bargains, one judge indicated that the system should be fair to all participants, and that it cannot be perceived as fair if it prohibits judges from reacting to the views of crime victims.[48] Some judges have directed prosecuting attorneys to confer with the victims before offering a plea bargain and required attorneys to either bring victims into court to express their views, or provide a summary of their views in a statement.[49]

The most triumphant moment for victims' rights advocates may have occurred when New York County District Attorney Robert M. Morgenthau called a press conference to discuss the plea bargain made with Robert Chambers, in what was known as the "Preppy Murder" case.[50] Mr. Morgenthau told reporters that the victim's parents were consulted about the plea bargain and had agreed to it.[51] Such a consultation was standard in Mr. Morgenthau's office.[52] John Stein, director of the National Organization

[46] *See* Kennard, *supra* note 26, at 433-34 (defendant would have same constitutional protection in bargaining process that included victim).

[47] *See infra* notes 48-49 and accompanying text (illustrating belief that judges are beginning to see advantages of victim participation at plea bargaining).

[48] People v. Sales, 129 Misc. 2d 731, 733, 493 N.Y.S.2d 945, 946 (Sup. Ct. Kings Cty. 1985); *see Plea Offer Can Be Withdrawn if it is Deemed Not Binding:* People v. Talisha Easterling, N.Y.L.J., June 11, 1991, at 28, col. 2 (post-plea bargain information provided by victim convinced judge to withdraw probation agreement).

[49] *See, e.g.*, People v. Hoffman, N.Y.L.J., July 18, 1991, at 26, col. 1. Justice Fischer directed the assistant district attorney to confer with the victim to get his opinion of the disposition before it was accepted. *Id.* It was reported that victim did agree to the proposed disposition, and the plea was entered upon the agreed conditions. *Id.* Upon later learning that the victim was very much against the terms of the agreement, the Judge vacated it and ordered the case to trial. *Id.*

[50] People v. Chambers, 134 Misc. 2d 688, 512 N.Y.S.2d 631 (Sup. Ct. N.Y. County 1987). Robert Chambers was indicted for killing Jennifer Levin after meeting her in a Manhattan bar. *Id.* at 688, 512 N.Y.S. 2d at 632. *See generally 'Preppy' Sentenced: Apologizes for Killing*, CHI. TRIB., Apr. 16, 1988, at C3 (gained recognition as "Preppy Murder" case because Robert Chambers and Jennifer Levin came from privileged East Coast backgrounds).

[51] *Preppy Murder Case Illustrates Advances Made in Victims' Rights*, CRIM. JUST. NEWSL., Apr. 15, 1988, at 4, 5 [hereinafter *Preppy Murder*]. The Levins were consulted about the plea bargain and were "satisfied with it." *Id.*

[52] *Id.*

of Victim Assistance ("NOVA"),[53] viewed the *Chambers* case as indicative of changing values.[54] The victims' rights movement has progressed, but Mr. Stein recognizes that significant hurdles remain before victims have a meaningful voice in the criminal justice system.[55]

C. *Reasons To Allow Victim Participation*

Victims may experience a positive catharsis of their vengeful instincts as a result of participation in plea-bargain negotiations.[56] This could be achieved if the prosecutors would adhere "strictly to a policy of 'consulting' with victims before accepting pleas as required under Justice Department Guidelines. . . . In this manner, the individual victims of crime would be assured an appropriate avenue to express their particular concerns for consideration."[57] Victims' presence in court has been shown to decrease their assessment that the system is too lenient on criminals.[58] Consultation with the victims would provide them with a sense of participation, rather than forced acquiescence.[59] Victims' interests

[53] *See* Stein Telephone Interview, *supra* note 22. NOVA is a private, nonprofit organization of victim and witness practitioners, criminal justice professionals, researchers, former victims, and others committed to the recognition of victims' rights. *Id.*

[54] *NOVA Sponsors Forum on Constitutional Amendment*, NOVA NEWSLETTER, (NOVA, Washington, D.C.), Mar. 1986, at 7. Mr. Stein expressed the belief that prosecutors were finally realizing that victims should have a voice. *Id.*

[55] Stein Telephone Interview, *supra* note 22 (Mr. Stein indicated that lack of uniformity and enforceability of current statutes have impeded objectives of victims' rights legislation); *see also Preppy Murder*, *supra* note 51, at 4-5 ("even where [victim consultation] is on the books, it's not honored in a lot of cases").

[56] *See* Gifford, *supra* note 29, at 91 & n.282 (researchers felt that victims who had participated in the experiment were generally satisfied with results of plea bargain); *see also* Gittler, *supra* note 4, at 140-42 (criminal justice system fills in as substitute for victims' need for restitution).

[57] A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY, Stnd. 14-3.3(b)(i) (1987). "The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of the victims . . . before reaching a plea agreement." *Id.*; *see* U.S. DEP'T OF JUSTICE, 4 YEARS LATER—A REPORT ON THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME 1, 27 (1986) (prosecutors must establish procedures to ensure that victims' views are brought to court at every stage of trial process); Cohen, *supra* note 18, at 5 (prosecutors are required to get victims' views on plea disposition).

[58] *See* Hagan, *supra* note 19, at 325 (when victims attend sentencing, they are less likely to think sentence was too lenient); *see also* Gifford, *supra* note 29, at 91 & n.282 (researchers felt that victims who participated in experiment were generally satisfied with results of plea bargain).

[59] Kennard, *supra* note 26, at 417, 436-37; *see* Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 19 (1987) (crime systems which offer no participation foster greater feelings of helplessness for victim).

are not the same as those of the prosecutor, and therefore, should be given independent recognition.[60] To ensure the system's fairness and to provide the judge a complete view,[61] victims need to possess an enforceable role.[62] As the process now stands, enforcement of victims' rights legislation is controlled by the practices and policies of local jurisdictions.[63] Although the information the victim has to offer may not change the opinion of the prosecutor or the deciding body on how the case should be resolved, the victim deserves an opportunity to be heard.[64]

Consistent with the goals of the plea-bargaining stage, post-sentencing victim participation has been advocated to further strengthen the victim's role in the criminal justice system.

II. VICTIM INVOLVEMENT AT PAROLE HEARINGS

A. *Background*

Over the past few years, correctional facilities have been burdened with an influx of prisoners as crime rates soared.[65] This has

[60] *See* Goldstein, *supra* note 8, at 556-57 (arguing that judge needs victim information to flesh out facts given by attorneys in order to make sure agreements are consistent with public interest); *see also supra* note 48 and accompanying text (victim's statement shed new light on police report).

[61] *See supra* notes 48 & 49 and accompanying text (victims' information convinced judges that plea bargain was not in society's best interest).

[62] *See supra* note 2 and accompanying text (noting importance of victim participation in criminal justice system).

[63] *See* Goldstein, *supra* note 8, at 519-20 (victim plays secondary role and must rely on local officials); *see also* S.C. CODE ANN. § 16-3-1540 (1985) (victims' rights legislation does not create new cause of action against state); W. VA. CODE § 61-11A-6(b) (1984) (same); Welling, *supra* note 32, at 344 (flaw with many states' legislation, which grant victims some right of participation at plea bargaining stage, is lack of clarity).

[64] *See, e.g.*, Dix v. County of Shasta, 963 F.2d 1296, 1298 n.3 (9th Cir. 1992) ("[the] victim deserves a voice in our criminal justice system . . . [and] should have a right to participate in hearings before the court on dismissals, guilty pleas and sentences" (quoting Goldstein, *supra* note 8, at 547)).

[65] Polito, *supra* note 7, at 241.

> In 1988, 35.8 million people were the victims of crime. Of this total, 5.9 million were violent crimes (rape, robbery, simple and aggravated assault); 14 million were crimes of personal theft; and 15.8 million were household crimes (burglary, household theft, motor theft). Unfortunately, nearly two-thirds of all National Crime Survey (NCS) crimes, including about half of all violent crimes, were not reported to the police in 1988. These statistics, our daily newspapers, and the media are all reminders that crime permeates society; *it is here to stay and it is getting worse.* The chance of any one of us becoming a victim of crime is high.

Id. (emphasis added); *see* Paul Avery, *Bill on Victims' Rights is Pressed by Coalition*, N.Y. TIMES, Oct. 7, 1990, at 1. Crime rates have soared and if one multiplies these figures "by three, four or more family members victimized by the loss or injury of a loved one, . . . the total over the years is staggering." *Id.*; *Maryland*, U.S.A. TODAY, July 25, 1992, at 8A ("Vi-

resulted in prison overcrowding, which indirectly affected victims' rights.[66] In response, correction administrators implemented early parole programs aimed at defusing the prison-population crisis.[67]

The allowance of early releases has engendered public dissatisfaction with the criminal justice system.[68] While information regarding the circumstances of the crime is relegated to a presentence report,[69] offenders are afforded the right to speak at parole hearings and are often represented by legal counsel.[70]

olent crimes—murder, rape, robbery and aggravated assault—in Baltimore increased 21.4% during the first 6 months of [1992]. Murders increased 4.8%.").

[66] *See Probationers a Serious Threat to the Public, Study Finds,* PROBATION UPDATE (Nat'l Council on Crime and Delinq., New York, N.Y.), Mar. 1, 1985, at 5 (prisons are overcrowded and "probation is being used to catch the overflow"); Shirley E. Perlman, *Does Early Release Compound a Crime?*, NEWSDAY (New York), Oct. 25, 1991, at 35 (prisons are required to submit names of eligible offenders who may qualify for release because of overcrowding); Laurie Robinson, *A Year of Crucial Change in the Law: Criminal Justice,* NAT'L L.J., Aug. 6, 1984, at 20 (crackdown on crime through tougher legislation has resulted in serious jail overcrowding).

As early parole becomes a common practice, offenders are less likely to serve their full sentences. *See* David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 55-56 (1989). Prison overcrowding has had a "significant effect on the criminal justice system." *Id.* Felons are less likely to be sentenced to a maximum term or face imprisonment at all. *Id.*; *see also* Perlman, *supra,* at 35. The mother of a deceased victim commented that work release programs should not be available to an offender unless he or she has served the maximum sentence; otherwise, it would be a mere slap on wrist for the offender. *Id.*

[67] Renee Haines & Kathy Fair, *Parolee Freed 2 Years Before Board Suggested,* HOUS. CHRON., July 8, 1992, at A15 (counsel for crime victims noted state's chronic prison crowding forces system into early-release habit); *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE 1989, at 1 (1990). Approximately three-fourths of all convicted offenders are being supervised in the community, not within prisons or jails. *Id.* Parole population grew 12.1% during 1989. *Id.*; *States Struggle to Solve Prison Overcrowding Problems,* CRIM. JUST. NEWSL., Jan. 1985, at 1, 1 (prison-overcrowding law reduced prison sentences, resulting in early releases for approximately 2,000 prisoners).

[68] *See* BRIAN E. FORST & JOLENE C. HERNON, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CRIMINAL JUSTICE RESPONSE TO VICTIM HARM 1 (1984). This report noted the public's frustration with the criminal justice system's failure to consider victims. *Id.* Critics contend that the criminal justice system caters to the offender, while disregarding "the truly injured party—the victim." *Id.*; *see also* Proclamation No. 4831, 3 C.F.R. § 18 (1982) (victims' experiences with legal process foster attitudes that system will not protect victims); Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality,* 18 J. CRIM. JUST. 19, 21 (1990) (discussing victims' frustrations with judicial processes); Goldstein, *supra* note 8, at 515 ("There is a remarkable consensus that our public institutions—police, prosecutor, courts, and prisons—are doing badly with the crime problem.").

[69] *See, e.g.,* FORST & HERNON, *supra* note 68, at 2. Presentence reports alone may not provide a clear picture of the severity of the crime committed. *Id.* " 'Victim harm' encompasses the total effect of victimization including psychological trauma, physical injury, and financial loss." *Id.*; Goldstein, *supra* note 8, at 556 (impact statements are essential in providing parole board with first-hand view of crime and its effects on victim).

[70] *See, e.g.,* NEV. REV. STAT. ANN. § 213.1513(2) (Michie 1991). The statute allows a parolee to:

(a) appeal and speak on his own behalf; (b) obtain counsel; (c) present any relevant

As a result, state legislatures have promulgated statutes empowering victims with a voice at parole hearings.[71] These enactments were crafted primarily to provide the victim with some form of participation during parole hearings, ensuring that parole boards are furnished with a complete picture when deciding whether or

> letters or other documents and any person who can give relevant information; (d) confront and question any person who appears against [the parolee] unless, in the opinion of the inquiring officer, the informant would be subjected to a risk of harm by the disclosure of his identity.

Id.; *see* Mark W. May, Note, *Victims' Rights and the Parole Hearing*, 15 J. CONTEMP. L. 71, 76 (1989) (when offenders are permitted to have friends and relatives testify at parole hearings, victims should be accorded similar treatment); Janet Naylor, *Parole Panel Opposes Bill to Open Hearings to Victims*, WASH. TIMES, Feb. 25, 1991, at B3 (victim should have opportunity to be heard at parole hearing if offender is granted that privilege).

[71] *See, e.g.*, ALASKA STAT. § 33.16.120 (Supp. 1991) (victim has right to make oral or written statement); ARIZ. REV. STAT. ANN. § 13-4414 (1991) (victim permitted to be present during any parole proceeding); CAL. PENAL CODE § 3043.2 (West 1992) (victim has right to submit oral, written, audiotaped or videotaped statement); COLO. REV. STAT. ANN. § 17-2-214 (West 1990) (victim may be present at any parole hearing, and express his or her views); CONN. GEN. STAT. ANN. § 54-126a (West 1992) (same); DEL. CODE ANN. tit. 11, § 4350 (1987) (victim is permitted to make oral statement); FLA. STAT. ANN. § 960.001 (West 1992) (right to submit written statement); GA. CODE ANN. § 17-10-1.1 (Harrison Supp. 1992) (right to submit written VIS if not previously afforded opportunity to do so); IDAHO CODE § 19-5306 (Supp. 1992) (right to make oral or written statement); ILL. ANN. STAT. ch. 38, para. 1003-3-4 (Smith-Hurd 1992) (VIS may be made in person, in writing, on film, videotape or "any other electronic means available"); IND. CODE ANN. § 11-13-3-3 (West 1992) (parole board must weigh "attitudes and opinions" of victim); IOWA CODE ANN. § 910A.10 (West 1992) (right to appear before parole board or file a written VIS); KY. REV. STAT. ANN. § 439.340 (Michie/Bobbs-Merrill Supp. 1992) (parole board will consider any written or oral VIS); LA. REV. STAT. ANN. § 46:1844 (West 1992) (same); MD. ANN. CODE art. 41, § 4-609 (Supp. 1992) (presentence reports containing VIS will be made available to parole board); MASS. GEN. LAWS ANN. ch. 127, § 133A (West 1992) (right to make oral or written statement); MICH. COMP. LAWS ANN. § 780.771 (West 1992) (same); MO. ANN. STAT. § 595.209 (Vernon 1992) (same); NEB. REV. STAT. ANN. § 81-1848 (1991) (same); NEV. REV. STAT. ANN. § 213.010 (Michie 1991) (written VIS is permitted); N.H. REV. STAT. ANN. § 651-A:11-a (Supp. 1991) (victim may "reasonably express his views concerning the offense and the person responsible"); N.J. STAT. ANN. § 30:4-123.55 (West 1992) (victim may testify before parole board); N.Y. EXEC. LAW § 259-i (McKinney 1992) (right to make written VIS); N.C. GEN. STAT. § 15A-1341 (Supp. 1991) (victim must be given "an opportunity to be heard" by parole board); N.D. CENT. CODE § 12.1-34-02 (Supp. 1991) (right to submit written VIS, but violent crime victims may appear in person); OHIO REV. CODE ANN. § 2943.041 (Anderson Supp. 1991) (written VIS may be submitted); OKLA. STAT. ANN. tit. 57, § 332.2 (West 1992) (victim is permitted to provide information or input to parole board); OR. REV. STAT. § 137.530 (1991) (right to submit oral or written VIS); PA. STAT. ANN. tit. 61, § 331.22a (1992) (same); R.I. GEN. LAWS § 11-37-8.7 (Supp. 1991) (victim may provide parole board with statement); S.C. CODE ANN. § 16-3-1550 (Law. Co-op. Supp. 1991) (right to submit oral or written statement); S.D. CODIFIED LAWS ANN. § 23A-28C-1(10) (Supp. 1992) (victim may provide input at parole hearings); TEX. CRIM. PROC. CODE ANN. § 42.18 (West 1992) (written statement is permitted); UTAH CODE ANN. § 77-27-9.5 (Supp. 1992) (right to submit oral or written statement); VA. CODE ANN. § 19.2-299 (Michie Supp. 1992) (written statement is permitted); WIS. STAT. ANN. § 950.045 (West 1992) (same); WYO. STAT. § 7-13-402 (Supp. 1992) (same).

not to grant a prisoner parole.[72] Victims have a viable interest in the criminal justice system, and therefore, deserve the opportunity to be heard at parole hearings.[73]

B. Participation by the Victim

Supplemental VIS provide an avenue for victim involvement at parole hearings.[74] These subsequent VIS describe "the continuing nature and extent of any physical harm or trauma suffered by the victim, the extent of any loss of earnings or the ability to work suffered by the victim and the continuing effect of the crime upon the victim's family."[75] Most states allowing victim involvement require that victims submit written statements,[76] while others permit

[72] May, *supra* note 70, at 75 (statute which enabled victims to participate at parole hearings was designed to provide parole board with balanced viewpoint, not as vehicle for therapy); *see* Kelly, *Help the Victim*, *supra* note 9, at 15. "Initial legislative reforms for crime victims were motivated by practical reasons [rather] than by a rush of compassion . . . . [V]ictim cooperation was essential, yet often such cooperation seemed to be missing." *Id.*; Maureen McLeod, *Getting Free: Victim Participation in Parole Board Decisions*, CRIM. JUST., Spring 1989, at 12, 13 (victim input during parole hearing may aid evaluation of "present dangerousness" by providing additional details of crime); *see also* Naylor, *supra* note 70, at B3. "Supporters say open parole hearings help not only victims and their families but the community. Letting residents know how parole decisions are made keeps [the community] informed about possible threats to their safety and how their tax money is spent." *Id. But see* Donald R. Ranish & David Shichor, *The Victim's Role in the Penal Process: Recent Developments in California*, FED. PROBATION, Mar. 1985, at 50, 55. "A victim can rarely contribute any substantive information regarding the offender's current status or the degree to which there has been any rehabilitation by the criminal in question. It seems clear that the victim's participation in the hearing is designed to put pressure on the board." *Id.*

[73] *See* Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) ("Justice, though due to the accused, is due the accuser also."); Erez, *supra* note 68, at 22 (victims should be entitled to same opportunities accorded to offenders); Roland, *supra* note 66, at 56 (victims have "understandable interest" in parole proceedings).

[74] *See, e.g.*, GA. CODE ANN. § 17-10-1.1 (allowing VIS if victim suffered "physical, psychological or economic injury" as result of crime); McLeod, *supra* note 72, at 14 (noting that some statutes provide victim with opportunity to voice concerns through VIS at parole hearings); *Views of The Week*, OTTAWA CITIZEN (Canada), Oct. 13, 1991, at B3 (Canadian crime victims have established themselves as prominent force in their legal system essentially via impact statements); *see also* May, *supra* note 70, at 75 (Utah statute permits victim to appear before parole board and encourages victim and his or her family to be involved in judicial process).

[75] N.J. STAT. § 30:4-123.54(b)(2); *see* N.Y. STATE DIVISION OF PAROLE, VICTIM IMPACT POLICY (1991) [hereinafter VICTIM IMPACT POLICY] (written statement may contain "information concerning the offense, the extent of the injury or economic loss, the victim's attitude toward the offender's potential parole release, and other information that the victim may consider relevant"); McLeod, *supra* note 72, at 14 (describing usual contents of oral and written impact statements).

[76] *See, e.g.*, ALASKA STAT. § 33.16.120 (Supp. 1991) (parole board will consider victim's written impact statement); VA. CODE ANN. § 19.2-299 (Supp. 1992) (allowing victim to submit written statement prior to parole hearing describing effects of crime and opinion as to prisoner's release); WIS. STAT. ANN. § 950.045 (West 1992) (granting victim right to submit

the victim to make an oral statement before the parole board.[77] Some victims, unable to effectively transcribe their feelings onto paper, have expressed a preference for oral statements.[78] A limited number of states, however, have enabled victims to interject their thoughts through the use of videotapes, tape recordings, or other electronic means.[79] This method is most desirable because it avoids face-to-face confrontations between the victim and the offender, which are often very taxing and distressing. In addition, the use of such technology eliminates the need for victims to incur expenses in traveling to prisons.

State legislatures have recognized the need to treat victims with "fairness, sensitivity, and dignity at all times."[80] Legislators are aware that without the victim's assistance, the legal system would significantly be impaired.[81] Increased victim satisfaction will, in effect, enhance the criminal justice system by "encouraging future victim involvement and promoting system efficiency."[82]

written statements regarding parole); WYO. STAT. § 7-13-402 (Supp. 1992) (requiring that board make attempts to notify victims prior to parole and grant victims time to submit written comments before parole is granted).

[77] *See* ARIZ. REV. STAT. ANN. § 13-4414 (1991) (allowing victim "to be present and be heard" at parole proceedings); CONN. GEN. STAT. ANN. § 54-126a (West 1992) (same); DEL. CODE ANN. tit. 11, § 4350 (1987) (same); IOWA CODE ANN. § 910A.10 (West 1992) (permitting victim to "appear personally or by counsel . . . to express opinion regarding parole"); KY. REV. STAT. ANN. § 439.340 (Michie/Bobbs-Merrill Supp. 1992) (requiring notices of parole hearings be sent to victim); *see also* VICTIM IMPACT POLICY, *supra* note 75. A crime victim may submit an oral statement to board, which "may not simply repeat the circumstances of the crime, but should describe the impact of the crime on the victim or the survivor, and may include discussion of recognized trauma syndromes." *Id.*

[78] Steve Mills, *Victim Statements Can Be Made Directly to Parole Boards,* GANNETT NEWS SERVICE, May 9, 1991, *available in* LEXIS, Nexis Library, OMNI file. *But see* McLeod, *supra* note 72, at 14-15 (although victim participation has been recognized as essential, "policies permitting victim attendance at the actual parole hearing have not been so widely accepted").

[79] CAL. PENAL CODE § 3043.2; ILL. ANN. STAT. ch. 38, para. 1003-3-4 (Smith-Hurd 1992).

[80] KAN. STAT. ANN. § 74-7333 (1989). "Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system." *Id.*; *see* LA. REV. STAT. ANN. § 1841 (West 1985). "[T]he legislature declares its intent . . . to ensure that all victims of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended . . . to victims of crime are honored and protected by the law enforcement agencies . . . no less vigorously than the protection afforded the criminal defendants." *Id.*; N.M. STAT. ANN. § 31-24-5 (Michie 1992) (recognizing victim's "right to be treated with dignity and compassion").

[81] *See* McLeod, *supra* note 72, at 13. The author concludes that the criminal justice system is a "consumer-oriented organization" requiring continued cooperation from the victim in order to function properly. *Id.* Victims will be apprehensive about cooperating with the system if disillusioned with prior experiences. *Id.*; *see also supra* notes 1 & 3 and accompanying text (victims are powerful force in criminal justice system).

[82] McLeod, *supra* note 72, at 13. Those who embrace rehabilitation and incapacitation

"From the victim perspective, the consideration of victim needs and opinions may improve the quality of the victim's life by aiding the victim to regain a sense of control over his or her life."[83] Despite the satisfaction that the victim may attain by participating, there are those individuals who are not at all interested in participating.[84] Some victims are reluctant to cooperate with parole boards because they fear reprisals.[85] Yet others find time and distance to be insurmountable factors.[86]

In spite of being a vital part of the legal system, victim involvement at parole hearings has nonetheless engendered opposition.[87]

as legitimate correctional aims advocate victim participation during parole process. *Id.*; *see* Erez, *supra* note 68, at 23. Victim participation may "contribute to improvement of the process and to 'real' justice by increasing accuracy at sentencing stage." *Id.* Some observers have asserted that weighing information at the sentencing stage without incorporating the victim's view is one-sided. *Id.*; Kelly, *Help the Victim*, *supra* note 9, at 16 (victims contend that criminal justice system subordinates their concerns to state's interest in prosecuting criminals).

[83] McLeod, *supra* note 72, at 13; *see* EDWIN VILLMOARE & VIRGINIA V. NETO, U.S. DEP'T OF JUSTICE, VICTIM APPEARANCES AT SENTENCING UNDER CALIFORNIA'S VICTIMS' BILL OF RIGHTS 4 (1987). Judges noted that impact statements had very little effect on sentences, but rights were beneficial to victims who could "air their grievances or 'get it off their chests.' " *Id.*; James R. Adams, *Victims, Truth, and Detention—The People Speak*, 23 PAC. L.J. 973, 989-90 (1992) (enabling victims to voice their opinions often serves as therapeutic mechanism); Erez, *supra* note 68, at 23 ("Participation and input may be necessary for victims' psychological healing."); Ranish & Shichor, *supra* note 72, at 56 (opportunity for victim to be heard at parole hearing may have "cathartic effect").

Some commentators argue that victims' input rarely affects judicial decisions. *See* Adams, *supra*, at 989-90; Kiesel, *supra* note 9, at 26.

> I know that there is vengeance out there, but I don't see why the criminal justice system should do anything to encourage it or enhance it. I wince when I hear that the victim ought to testify at the sentencing or before the parole board. This is not a tort, this is a crime against society.

Id (quoting Professor Yale Kamisar).

[84] *See* McLeod, *supra* note 72, at 41.

> In several jurisdictions where victim notification is automatic, parole administrators cited examples of victims who resented the unsolicited board notice as an intrusion into their personal lives. In large part, these victims either did not want to be reminded of the traumatizing incident or did not want their previously uninformed spouses or families to know that the victimization had occurred.

Id.

[85] *See* 1983 Ark. Acts 525, § 4 (parole hearings held at state prisons occasionally result in "undue hardship and intimidation of the victims and relatives of victims"); Anderson & Woodward, *supra* note 2, at 228 ("Intimidation is one of the most serious problems faced by crime victims and witnesses.").

[86] *See* Susan Hillenbrand, *Crime Victims Report: Open Parole Hearings*, 1987 A.B.A. CRIM. JUST. SEC. 9, 13 (noting that "[t]ime, distance and financial cost will undoubtedly discourage many" from attending parole hearings).

[87] *See, e.g.*, Donald Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 261 (1991) ("The individual victim is but a part of that broader society and should not be invited to make an explicit recommendation as to the offender's specific sentence."); Ranish & Shichor, *supra* note 72, at 55. If victims speak at a parole hearing,

Correctional administrators have been the primary opponents, contending that their growing caseloads would be magnified and the parole mechanism hampered by allowing victims to appear at parole hearings.[88] Furthermore, detractors of victim involvement argue that victims should be excluded from parole hearings because including them would only serve to make parole hearings a vehicle for vengeance by victims.[89]

VIS advocates adamantly deny that the victim is interested in making vindictive statements against the offender.[90] Proponents of victim involvement maintain that victims seek only the right to be placed on equal footing with the offender.[91]

the focus is no longer on the question of guilt or the initial sentence. *Id.*; *Resolution*, *supra* note 9, at 6. This article states that victim participation at parole hearings is inappropriate. *Id.* " 'If the [offender] has paid his debt to society, I don't know what's relevant about what a victim could say. I don't think vengeance is a response we want to encourage.' " *Id.* (quoting Professor Lynne Henderson).

[88] *See* McLeod, *supra* note 72, at 15. "Understaffed boards are already faced with staggering caseloads, and the introduction of additional voices could further paralyze the parole release mechanism." *Id.*; *see also* May, *supra* note 70, at 76 (although Board of Pardons member acknowledged victims' rights, he concluded that victim testimony would further delay board's overburdened caseload).

Allowing victim participation may further burden state expenditures. *See* Naylor, *supra* note 70, at B3. "Open hearings would require more paid parole board hearing officers, larger hearing rooms (most can only hold three or four people) and guards to protect participants . . . . [This] could cost the state up to $1 Million." *Id.*

[89] *See, e.g.*, Goldstein, *supra* note 8, at 557 ("victims may be too vindictive"); Henderson, *supra* note 1, at 996 (vengeance may adversely affect victim's recovery from violent crime); Bendor, *supra* note 12, at 242-43 (parole process "encourages a spirit of vengeance, which may not be the most constructive way for family members to cope with their loss"); Avery, *supra* note 65, at 1. Critics contend that too much involvement by victims could prejudice proceedings against the accused. *Id.* "Prosecutors also worry that discretion to . . . dispose of cases efficiently could be hampered by constant conferring with victims." *Id.*; Eileen McNamara, *Revenging Angels*, BOSTON GLOBE, Feb. 23, 1992, at 12 (although original intention of victims' rights movement was to give victims a voice, "these days it just as often gives vent to their demands for vengeance").

[90] *See* Erez, *supra* note 68, at 25 (research study has indicated that victims do not usually request maximum sentences and are no more punitive than general public); Kelly, *Victim Reforms*, *supra* note 7, at 27-28 (there is virtually no evidence indicating victim participation is at offender's expense); *see also* VILLMOARE & NETO, *supra* note 83, at 2 (victims are more interested in knowing status of case than in participating); Yaroshefsky, *supra* note 3, at 159. "Maybe it's being too optimistic, or having too rosy a view about human nature, but I think that victims are more compassionate than we sometimes would anticipate. If [victims] had that voice and received that understanding, they would be even less punitive than some of them are." *Id.*

[91] *See* Eikenberry, *supra* note 43, at 49 ("[T]he solution . . . to bring fairness to victims in criminal proceedings should be to give their rights constitutional protection."); Erez, *supra* note 68, at 26-27 (discussing victim's fundamental right to participate in criminal justice system); Polito, *supra* note 7, at 268 (constitutional amendment would place victim on equal footing with defendant); Debra Cassens Moss, *New Tack for Victims' Rights*, A.B.A. J., Mar. 1988, at 32, 32 ("Without having victim rights secured . . . the rights of victims will be forever subordinated to the rights of other people in the system. . . ."); Richard Pliskin,

Victims' rights legislation has underscored the importance of recognizing the plight of crime victims.[92] Despite its successes, legislation has not proven to be a panacea.[93] Some of the legislation's ineffectiveness stems from the victim's unawareness of accorded rights.[94] Advocates vigorously contend that the effectiveness of these statutes has been abbreviated by the lack of specific language requiring enforcement.[95]

III. NOTIFYING VICTIMS OF THEIR RIGHTS

A major problem facing the victims' rights movement is the failure of the legal system to notify victims of their rights to be in-

Victims' Rights Amendment Under Fire, N.J. L.J., Oct. 25, 1990, at 1, col. 2 (advocates of victims' rights favor constitutional guarantees to put victim on same footing as defendant).

Proponents of victim participation wish to see victims able to voice their concerns. *See* Pliskin, *supra*, at 1. "Supporters of the victims' rights amendment say their goal is not to allow victims to call the shots in a criminal prosecution. They say, for instance, they do not want veto power over plea bargains; they just want to be told before they happen." *Id.*; *see also* Kelly, *Help the Victim*, *supra* note 9, at 39 (victims advocate constitutional amendment to ensure victim reforms are not "relegated to 'unenforceable advice' " (quoting NATIONAL ORGANIZATION OF VICTIM ASSISTANCE NEWSLETTER)).

[92] *See* PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 1, 15-111 (1982) [hereinafter PRESIDENT'S TASK FORCE] (recognizing plight of victim and necessity of redressing these inequities); Roland, *supra* note 66, at 35-36 (over last two decades, there has been increased awareness by numerous organizations regarding needs and rights of crime victims); *see also supra* note 2 and accompanying text (criminal justice system has neglected interests of victim).

[93] *See, e.g.*, Kelly, *Victim Reforms*, *supra* note 7, at 22, 26. Advocates of victim legislation have vigorously maintained that victims' reforms have been "paper promises adopted by the legislators looking for a way to placate constituents worried about crime." *Id.* at 22; Yaroshefsky, *supra* note 3, at 158 (victim legislation has only been "cosmetic"); May, *supra* note 70, at 74. "While the victims' rights [statute] is an admirable first step in the advancement of victims' rights, it lacks the substance necessary to motivate enforcement of the [statute]." *Id.*; *cf.* Siegelman & Tarver, *supra* note 25, at 168 ("some victim advocates . . . believe that in many respects victims are in little better position today than prior to the passage of the victim's legislation").

[94] *See* Kelly, *Victim Reforms*, *supra* note 7, at 26 (research studies demonstrated that most victims are unaware of their rights); Chuck Bell, *Victims and Their Families Have a Say On Criminal's Parole*, ATLANTA J. & CONST., Apr. 11, 1991, at 4 (some victims may not be aware of their right to appear before parole board).

[95] *See, e.g.*, IDAHO CODE § 19-5306 (1989) ("Neither the failure of any state, county or municipal officer or employee to carry out the requirements of this section nor compliance with it shall subject the state or the officer or employee to liability in any civil action."); Frank Carrington, *Parole Boards, Victims and Society*, *in* CRIME AND PUNISHMENT IN MODERN AMERICA 329, 329 (Patrick B. McGuigan & Jon S. Pascale eds., 1986) (noting contrast between police officer who may be sued by public, and custodial officials who enjoy immunity from consequences of their actions). *But see* Peter Archer, *Crime Victims Given Right to Challenge Parole Decisions*, PRESS ASS'N NEWSFILE, June 19, 1991 *available in* LEXIS, Nexis Library, OMNI file. ("Under a new parole system, due to come into effect [in England] next year, decisions to free prisoners early will have to be justified, giving detailed reasons which could be challenged through judicial review.").

volved at both the plea bargaining and parole stages.[96] Victims are often unaware of their rights, despite legislation giving them the right to participate.[97] Lack of organization by district attorney offices during the notification process results in a large percentage of victims not being notified of plea bargains.[98]

One of the most serious impediments to successful victim notification during parole hearings is locating the victim.[99] Because of our "society's mobility, the passage of time, and the environmental reminders of some particularly heinous crimes, many victims change their residences after the commission of the crime."[100] As a result, many enactments have made victim notification contingent upon the victim's providing an appropriate mailing address or notifying the prosecutor or parole board of their intention to submit a statement.[101]

[96] Telephone Interview with Mary Wong, Organizer of the Bronx Chapter of Parents of Murdered Children (Oct. 5, 1992) [hereinafter Wong Telephone Interview]. Lack of notification to victims and their families of impending parole hearings has essentially rendered these enactments impotent. *Id.*; *see* Kelly, *Victim Reforms*, *supra* note 7, at 26. Victims are rarely notified of their right to participate. *Id.* For example, legislative enactments in Texas require that the Board of Pardon and Parole notify victims of pending parole hearings. *Id.* The Parole Board is supposed to receive the victim's mailing address from the prosecutor's office. *Id.* Problems arose when prosecutors failed to provide the Parole Board with the necessary information. *Id.* "[O]f the 5,850 victim impact statements obtained by prosecution, only 106 (1.8%) were forwarded to the Board and of these 106, only six victims were notified by the Board about pending parole hearings." *Id.* (quoting TEXAS CRIME VICTIMS' CLEARINGHOUSE, CRIME VICTIM IMPACT: A REPORT TO THE 70TH LEGISLATURE (1987)).

[97] *See* Davis et al., *supra* note 19, at 500 (victims not informed of outcome of case "expressed dissatisfaction with their experience in the criminal justice system."); Hudson, *supra* note 4, at 55 (describing notification provisions as "piecemeal measures lacking effective enforcement or monitoring"); *see also* Heinz & Kerstetter, *Victim Participation*, *supra* note 36, at 169 (in Dade County experiment, researchers found that majority of victims who did not participate in experiment did not because of lack of notification, not lack of faith in criminal justice system).

[98] *See* Heinz & Kerstetter, *Pretrial Settlement*, *supra* note 36, at 357. Secretaries of the Prosecutor's Office were instructed to notify the victims of the scheduled meetings. *Id.* A high percentage of victims were never notified. *Id.* The task required too much of the secretaries' time, they weren't enthusiastic about the extra work, and there was little organization. *Id.* Even when victims were reached, the information given was often erroneous or incomplete. *Id.*

[99] *See* VILLMOARE & NETO, *supra* note 83, at 3 ("Probation departments reported difficulty in locating some victims because of incorrect names or addresses provided by other law enforcement agencies."); McLeod, *supra* note 72, at 41 (growing number of jurisdictions are advising victims that advance notification is contingent upon victim's updating his or her address in parole board files).

[100] McLeod, *supra* note 72, at 41.

[101] *See, e.g.*, ALASKA STAT. § 33.16.120 (1989) (parole board shall make every reasonable effort to notify victim only upon request by victim); KY. REV. STAT. ANN. § 439.340 (Michie/Bobbs-Merrill 1990) (victim shall notify parole board if he or she will provide written statement or attend hearing); MO. ANN. STAT. § 595.209 (Vernon 1992) (same); PA.

The problem of victim alienation associated with plea bargaining could be resolved if prosecutors simply provided more information to victims.[102] These problems could be alleviated by instituting uniform standards of notification.[103] Victim notification systems are not cost-free, but are relatively inexpensive because of the availability of powerful information-processing systems.[104] Because prosecutors' offices generally are equipped with information systems that contain relevant data about the victims in their cases, their offices would be the logical choice to coordinate victim notification.[105] Such a procedure would ensure that victims have the opportunity to air their concerns since the majority of cases are disposed through plea bargaining. Thus, it is maintained that victim satisfaction will grow if victims are permitted to inject their opinions at earlier phases of the criminal process rather than being forced to wait a number of years to participate during the parole hearing.

A large number of victim-advocacy groups have emerged from the private sector to stem the problem of notification.[106] Notification systems administered by victim services agencies[107] should

STAT. ANN. tit. 61, § 331.22a (West 1992) (parole board shall notify victim of hearing, but victim must notify board within 30 days from date of notice of intention to participate).

Many states make a victim's right to involvement dependent upon his or her full cooperation with the prosecutor's office, which includes giving any notification as to change of address. *See, e.g.*, HAW. CODE ANN. § 801D-4 (Michie 1992) (victim may consult with prosecutor regarding plea bargaining but only upon written request by victim); 1992 La. Acts 383 (victims may participate to extent they provide current address and telephone number).

[102] *See* Henderson, *supra* note 1, at 980-81 (discussing solutions to victim alienation associated with plea bargaining); *see also* FORST & HERNON, *supra* note 68, at 60 (being informed about case outcome correlated with victim satisfaction).

[103] *See* MARGARET O. HYDE, THE RIGHT OF THE VICTIM 62 (1983) (National District Attorneys' Association advocates "that victims be kept informed at every step about progress of a case" by listing specific procedures that should be employed).

[104] *See generally* Brian Forst, *Overburdened Courts and Underutilized Information Technology: A Modern Prescription for a Chronic Disorder*, 68 JUDICATURE 30 *passim* (1984) (article discusses advanced technology for managing court information).

[105] *See* HYDE, *supra* note 103, at 62 (advocating "around-the-clock" notification system to let witness know when his or her presence is required).

[106] *See generally* TO BE A VICTIM, *supra* note 1, at 439, 439-62 (listing advocacy groups which provide assistance to victims of crime or injustice); Robert C. Davis & Madeline Henley, *Victim Service Programs: Problems, Policies, and Programs*, *in* VICTIMS OF CRIME, *supra* note 8, at 157 (describing evolution of victim services and current status).

[107] *E.g.*, Bronx Crime Victims' Center, associated with the District Attorney's Office in the Bronx; Claremont Victims' Services, Bronx, New York; Criminal Court/Family Court Services, Bronx, New York; Kings County Victims' Services Agency, associated with the District Attorney's Office in Kings County; Victims Services and Travellers Aid Assistance Corp; New York, N.Y. (provides support and information services for victims). New York

supplement governmental procedures in order to assure that the aims of victim reforms are effectuated.[108] For instance, in Boston, the Joey Fournier Victim Services advocacy group has endeavored to inform those individuals victimized by criminals before 1984 of their right to voice concerns before parole boards.[109] In New York, Mary Wong has organized the Bronx chapter of Parents of Murdered Children.[110] Ms. Wong stated that one of the primary purposes of victim services agencies is to make victims aware of the rights they possess and to help them utilize these rights in the most effective way possible.[111]

IV. PROPOSAL TO CONSTITUTIONALIZE VICTIMS' RIGHTS

"Since . . . 1975, Congress and the various state legislatures have enacted some 1,500 statutes and programs" directed toward victims' concerns.[112] "This legislation also includes a series of procedural reforms which mandate that victims be given a voice" in different stages of the trial process.[113] Although this legislative activity illustrates the growing concern for victims' rights, the victory is a pyrrhic one.[114] The statutes vary from state to state in the

City Victims' Services Agency, associated with the District attorney's Office in Manhattan.

[108] *See, e.g.*, CAL. PENAL CODE § 13897 (West 1992) (establishing victims' resource center to help victims understand their rights); N.D. CENT. CODE § 12.1-34-02.5 (1992) (same).

[109] *See* John Ellement, *Funds Set for Crime-Victim Outreach*, BOSTON GLOBE, July 2, 1992, at 54 ("goal of outreach is to notify victims that they have a right to know when the offender is up for parole, is transferred within the prison system, is released, has escaped or is being considered for commutation").

[110] Wong Telephone Interview, *supra* note 96.

[111] *Id.*

[112] Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victim's Perspective*, 34 WAYNE L. REV. 51, 52 (1987); *see* 18 U.S.C.S. § 3509(f) (Law. Co-op. Supp. 1992) (allowing child victim's and his or her family's views concerning victimization to be placed into pre-sentence report); FED. R. CRIM. P. 32(c)(2)(D) (probation officer's pre-sentence report must contain VIS).

[113] Young, *supra* note 112, at 52; *cf.* Avery, *supra* note 65, at 1.

> The laws on the books today are good laws . . . . They're an excellent foundation for the protection of the victim's rights within the political justice system, but they are without teeth and so are just a set of guidelines to be followed by some and ignored by others. Advocates of the constitutional amendment approach have termed these statutes the 'so what laws.'

Id. (quoting James K. O'Brien, chairman of Coalition of Crime Victims' Rights, a New Jersey victims' rights group). *See generally* 18 U.S.C.S. § 3509(f) (reforming procedure at federal level by allowing VIS).

[114] *See* Young, *supra* note 112, at 52. "[T]he duty to give victims' interest decent consideration is a rhetorical facade behind which it is bureaucratic business as usual." *Id.* In addition, the author notes that:

> The idea that victims should be notified about what has or will happen in the criminal justice system has few opponents. Despite this general agreement, however,

degree and type of rights granted to the victim, and none provide relief when victims are not informed of their rights.[115] The victim is subject to the discretion of the prosecutor and trial judge, who may emphasize the importance of victim opinion,[116] or may disregard it.[117] Having "rights" does not benefit the victim without some means of effectively enforcing these rights.[118] Victims' rights advocates are exasperated by the concept that the defendants' rights, because they are constitutionalized, carry more weight.[119] A constitutional amendment at the state level could be used to balance the rights of victims and defendants.[120]

> there exists a substantial disparity . . . [among] the states regarding what aspects of the case should require notice to the victim. In addition, notification itself has different meanings in different states. For example, notification about parole may mean notification about the date of parole release, notification about the date of a parole hearing, or it may simply require information that the defendant has been paroled. Further, the victim may have an obligation to notify the agency from whom the information is received that he wants information.

Id. at 62. None of the statutes provide a remedy if notification is not given. *Id.*

[115] *See id.* at 62. States have enacted different types of legislation, including VIS provisions, but victims have no recourse when they do not receive the rights afforded by these pieces of legislation. *Id.*; *see also* Eikenberry, *supra* note 43, at 45 (no remedy for victim who is not notified). *Compare* N.M. STAT. ANN. § 31-24-5 (Michie 1991) (giving victim right to be informed about and present at every critical stage of criminal process, right to submit VIS into court, and right to be heard prior to sentencing) *with* S.D. CODIFIED LAWS ANN. § 23A-28C-1 (1991) (providing only that victim can submit written or oral VIS).

[116] *See* Eikenberry, *supra* note 43, at 44 (Supreme Court has given some credibility to victim opinion through former Chief Justice Burger's view that disregarding victim opinion would discourage victims from reporting violations).

[117] *See* Avery, *supra* note 65, at 1 (victim opinion could prejudice proceedings and slow process); Siegelman & Tarver, *supra* note 25, at 169 ("Prosecutors and Judges, lacking constitutional authority or demands, are reluctant or wary to provide statutorily *recommended* rights.") (emphasis added).

[118] *See* Eikenberry, *supra* note 43, at 48-49 (rights are given but enforcement is problematic); Young, *supra* note 112, at 62 (no remedy for victim if rights are not enforced).

[119] *See* Eikenberry, *supra* note 43, at 46. Since the rights of the accused are directly supported by the Constitution, they will always be more powerful than mere statutory rights passed for the victim. *Id.* at 48; *see also* Young, *supra* note 112, at 52 (advocates of victims' rights want amendment to Constitution). *But see* Charlton T. Howard III, Booth v. Maryland—*Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 730 (1988).

> Problems of rebuttal remain. There is no practical way for the defendant to refute most of the information contained in a VIS. A claim that the defendant broke the victim's arm can be medically verified; a claim of emotional trauma cannot. Because the 'essence' of due process is 'the right to a fair opportunity to defend against the State's accusations,' the denial of such an opportunity, for whatever reason, is constitutionally troublesome.

Id. (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

[120] *See* Siegelman & Tarver, *supra* note 25, at 170. The Victims' Constitutional Amendment Network (Victims' CAN) advocates the following wording for a state constitutional amendment: "The victim of crime or a representative shall have the right to be informed of, to be present at, and to be heard at all criminal justice proceedings at which the defendant has such rights, subject to the same rules of evidence which govern defendant's rights."

Opponents of constitutionalizing victims' rights fear that it would erode those rights guaranteed to defendants under the Constitution.[121] In reality, however, constitutionalization of victims' rights would merely give them an enforceable right to be present and be heard.[122] It would not infringe upon the defendant's constitutional rights, but would provide equal treatment for the victim.[123] One proponent contends that a sentence addressing victims' rights should be included in the Sixth Amendment.[124] This addition would grant the victims standing to enforce their rights.[125] In 1986, NOVA adopted a proposed twenty-sixth amendment to the Constitution which would provide victims with the right to be heard at all critical stages of the trial process to the extent that they do not infringe upon the defendants' rights.[126]

Opponents, however, argue that criminal law has traditionally been guided by state law, rather than federal law.[127] They propose that each state could enact an amendment that would reflect its own needs rather than enacting an amendment to the United States Constitution.[128] Several states have already enacted constitutional amendments that deal with victims' rights, including Arizona, California, Florida, Michigan, Missouri, New Jersey, Rhode Island, Texas, and Washington.[129] John Stein, of NOVA says that

Id.; Stein Telephone Interview, *supra* note 22. Mr. Stein stated that a main objective of NOVA is to get a victims' rights constitutional amendment in all 50 states. *Id.*

[121] *See* Avery, *supra* note 65, at 1 (discussing opposition to constitutionalizing victims' rights); *see also* Howard, *supra* note 119, at 730 (discussing problem of constitutionalizing amendment for victims' rights).

[122] *See* PRESIDENT'S TASK FORCE, *supra* note 92, at 66 (victims want equal treatment under law).

[123] *See* Eikenberry, *supra* note 43, at 34.

> A constitutional victims' rights amendment would not only grant certain rights to victims, but would provide a means of enforcing those rights. Depending on the stage of the judicial proceedings, the victim's remedy for a violation of his constitutional rights would be a new hearing or a damage award. If the court or prosecutor failed to notify the victim of any pretrial proceedings—setting of bail, motions for continuance or a change of venue, or a motion to dismiss—the victim could demand a new hearing, of which the victim would be notified.

Id.

[124] *See* Young, *supra* note 112, at 67 (amendment will ensure that victims' rights during entire criminal justice process are not ignored).

[125] *Id.*

[126] SEE NOVA NEWSLETTER, *supra* note 54, at 7. NOVA formulated this amendment from suggestions by forum members. *Id.*

[127] *Id.*

[128] *Id.*

[129] *See supra* note 10 and accompanying text (listing states which have amended their constitutions to incorporate victims' rights).

constitutionalizing victims' rights in each of the fifty states is the primary focus of his organization.[130] Another group of advocates says that "victims will gain a significant role only when all 50 states have adopted constitutional amendments proclaiming a 'victims' bill of rights.' "[131] The victims' rights amendments that have been enacted vary widely in form and specificity.[132] Regardless of the form the amendment takes, "the constitutional aspect will make it tougher for the states to deny funding and will make the system do a better job of notifying victims of the opportunity to be heard."[133]

CONCLUSION

Victims are an integral part of the criminal justice process. Their rights must be respected by acknowledging that their input is necessary and should be factored into the disposition of a case. Although great strides have been made in the victims' rights movement, further advancement has been undermined by an absence of substantive rights for victims. Because victims' rights are not constitutionalized, they are subordinated to those of the defendant during the trial process. Raising victims' rights to a state constitutional level will not erode a defendant's rights; the two would merely be placed on equal footing. Thus, enacting state constitutional amendments would ensure victims a forum where their voices could be heard.

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[130] Stein Telephone Interview, supra note 22.

[131] Lis Wiehl, *Victim and Sentence: Resetting Justice's Scales*, N.Y. TIMES, Sept. 29, 1989, at B5.

[132] *Compare* N.J. CONST. art. I, § 22 (1991) (general statement of victims' rights) *with* ARIZ. CONST. art. II, § 2.1 (1990) (enumerating myriad rights of victims).

[133] Wiehl, *supra* note 131, at B5 (quoting Linda Barker-Lowrence, head of national group, Victims' Constitutional Amendment Network).