Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems

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There is a growing recognition that crime victims have identifiable interests of sufficient legitimacy and significance to justify expanding their role in criminal proceedings beyond that as a mere non-party witness. This article traces the history of the victim in society and suggests reforms which will help to place the crime victim back into a more meaningful position in the American criminal justice system. Comparisons are made between differing state, national, and international victim programs and the author provides some well-needed insight into the costs and benefits of implementing new ideas which would assist in redefining the role of the victim in a criminal action.

I. INTRODUCTION

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. In the last two

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decades, however, the plight of crime victims increasingly has been recognized by public policy-makers, official criminal justice agencies, the legal community, and the general populace. 2 Public consciousness regarding the problems faced by crime victims is due largely to what is known as “the victim’s rights movement,” which encompasses a number of different organizations, groups, and individuals with a common commitment to improving the treatment and position of the victim, notwithstanding their varied agendas. 3

Much of the initial impetus for this movement stems from concern about rape victims generated by feminists and women’s organizations in the 1960’s. 4 The problems of other types of victims—those plagued by family violence, 5 the elderly victim, 6

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2. Some indication of the heightened awareness of the problems and needs of crime victims is demonstrated by the fact that President Ronald Reagan designated the week of April 19, 1982 as Crime Victim’s Week and established a Task Force on Victims of Crime. See Proclamation No. 4929, 47 Fed. Reg. 16,313 (1982); President’s Task Force Report, supra note 1.

3. For example, the National Organization for Victim Assistance (NOVA) serves as a focus for advocacy on behalf of victims of crime. The American Bar Association—Criminal Justice Section’s Committee on Victims has developed model legislation and recommendations for public policymakers, aimed at protecting the victim-witness from intimidation and promoting fair treatment of victims. The Victim’s Assistance Legal Organization (VALOR) serves as a national clearinghouse of information on victim’s rights litigation and as a source of assistance for litigation in this area. On the state and local level there are a number of organized victim advocacy efforts; for a partial listing of organizations, see National Organization for Victim Assistance, Program Directory (1983).

4. In the 1970’s, rape and other types of sexual assault became the subject of a number of books and articles and received a great deal of media attention. See, e.g., S. Brownmiller, Against Our Will (1975) (major feminist statement on the crime of forcible rape); Forcible Rape: The Crime, The Victim and the Offender (D. Chappel, R. Geis & G. Geis eds. 1977) (compilation of articles by leading authorities on many aspects of the problems surrounding sexual assault); Field & Barnett, Forcible Rape: An Updated Bibliography, 68 J. Crim. L. & Criminology 146 (1977) (bibliography listing 371 items). This literature and publicity led to a public recognition of the seriousness of sexual assault. Much concern was generated about the inadequacy of institutional response to assault, and the insensitivity exhibited toward sexual assault victims by criminal justice agencies. As a consequence, the laws and procedures governing the investigation, prosecution, trial, and disposition of rape cases subsequently became a target of reform efforts.

As a result of these reform efforts, numerous programs and projects providing training for professionals who provide services and assistance for victims were established. Laws were enacted that redefined the crime of rape as sexual assault, eliminated or restricted the definition of consent as a defense to rape, prohibited or limited the admissibility of evidence about the victim’s prior sexual conduct, restricted the corroboration requirement, and changed the penalties for various forms of sexual assault. See Brienen, Rape III—National Developments in Rape Reform Legislation, 6 Women’s Rts. L. Rep. 171, 207 (1980); Kneedler, Sexual Assault Law Reform in Virginia—A Legislative History, 68 Va. L. Rev. 469 (1982) [hereinafter cited as Kneedler].

5. The first problem with respect to family violence to surface was the problem of the abused child. In the 1950’s the “battered child syndrome” was identified and reported in the medical literature; see Kempe, et al., The Battered Child Syn-

State legislatures reacted to concern about abused and neglected children by passing laws requiring physicians and members of other groups to report suspected cases of child abuse and neglect, establishing central registries for child abuse reports, and strengthening the role of child protective agencies. For a review and analysis of child abuse reporting laws and related legislation, see NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILD ABUSE AND NEGLECT STATE REPORTING LAWS (1978); Schecter, The Violent Family and the Ambivalent State: Developing a Coherent Policy for State Aid to Victims of Family Violence, 20 J. FAM. L. 1 (1981-82).

In the latter half of the 1970's, concern about family violence widened to include the problem of the battered or abused spouse. Police, prosecutors and judges were generally criticized on the ground that they failed to acknowledge the seriousness of this problem and to deal with it accordingly. See generally R. Gelles, FAMILY VIOLENCE (1979); R. Langley & R. Levy, WIFE BEATING (1977); D. Martin, BATTERED WIVES (1976); R. Straus & G. Hotaling, THE SOCIAL CAUSES OF HUSBAND AND WIFE VIOLENCE (1981); U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY (1981). The initiatives undertaken to aid victims of spouse abuse include the creation of programs to provide services and assistance, such as emergency shelters and counseling; the enactment of laws allowing victims to obtain protective orders and making violation of such orders a crime; and litigation on behalf of victims against the police and other criminal justice system personnel who have denied them adequate assistance. See generally Lerman, Protection of Battered Women: A Survey of State Legislation, 6 WOMEN'S RTS. L. REP. 271 (1980); Woods, Litigation on Behalf of Battered Women, 7 WOMEN'S RTS. L. REP. 39 (1981).

6. Although the overall rate of criminal victimization of the elderly appears to be less than that of the general population, the elderly may be more vulnerable to crime than the general population. In addition, they are often less able than the general population to cope with physical injuries, emotional trauma and financial losses resulting from victimization. See generally CRIME AND THE ELDERLY (J. Goldsmith & S. Goldsmith eds. 1976) [hereinafter cited as CRIME AND THE ELDERLY]; Goldsmith, The Elderly Victim and the Criminal Justice System: A Time for Advocacy, in FORGOTTEN VICTIMS, supra note 1, at 145; Rifai, The Impact of Crime on the Elderly: An Urban Crisis, in FORGOTTEN VICTIMS, supra note 1, at 151; Clemente & Kleiman, Fear of Crime Among the Aged, 16 GERENTOLOGIST 207 (1976).

Concern about crimes against the elderly has led to the establishment of special preventive programs, such as special police investigative units and assistance programs for elderly crime victims. See E. Younger, THE CALIFORNIA EXPERIENCE IN CRIME PREVENTION PROGRAMS WITH SENIOR CITIZENS in CRIME AND THE ELDERLY, supra at 159; NEW YORK STATE CRIME VICTIM'S COMPENSATION BOARD, THE CRIME VICTIM AND THE CRIMINAL JUSTICE SYSTEM 89-90 (1982) [hereinafter cited as N.Y. CRIME VICTIM REPORT].

State legislatures have also attempted to help the elderly. For example, some states have enacted legislation increasing the penalties for crimes against the elderly, prohibiting plea bargaining in cases involving the elderly, and creating a criminal offense for abusing, neglecting or exploiting the elderly and for failure to report such treatment. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE,
the victim of drunk driving—subsequently received similar attention. Concern about particular types of victims, however, has gradually evolved into a general concern for all victims.

Efforts to improve the plight of crime victims have been broad, ranging from attempts to make financial compensation and referral services more available to victims to basic reform of criminal laws and procedures. A major focus of the victims' rights move-

VICTIM AND WITNESS ASSISTANCE, BUREAU OF JUSTICE STATISTICS BULL. 4 (May 1983) [hereinafter cited as BUREAU OF JUSTICE STATISTICS BULL.].

7. The growing concern about the victims of drunk drivers has spawned a movement to strengthen the penalties for drunk driving and to secure vigorous enforcement of the laws. Organizations such as Mothers Against Drunk Driving (MADD) and Remove Intoxicated Drivers (RID) have been in the forefront of this movement. See States Toughen Drunk-Driving Laws, 13 CRIM. JUST. NEWSLETrER 6-7 (Feb. 15, 1982).

8. Many of the efforts to make financial compensation more available to crime victims have involved the creation of state-operated victim compensation programs. In 1965, California became the first state to enact a crime victim compensation statute, and in 1966 New York followed suit. N.Y. CRIME VICTIM REPORT, supra note 6, at 2. Today at least 38 states have crime victim compensation programs. BUREAU OF JUSTICE STATISTICS BULL., supra note 6, at 3. For a survey and analysis of compensation statutes and programs, see generally NATIONAL INSTITUTE OF JUSTICE, U.S. DEPT OF JUSTICE, CRIME VICTIM COMPENSATION (D. Cartow ed. 1980); NATIONAL INSTITUTE OF JUSTICE, U.S. DEPT OF JUSTICE, CRIME VICTIM COMPENSATION—PROGRAM MODEL (D. Cartow ed. 1980); Rizel, A Survey of 27 Victim Compensation Programs, 63 JUDICATURE 485 (1980). There have also been efforts to make financial assistance more available to crime victims through expansion of restitution in criminal cases. See infra notes 59-65 and accompanying text.

In addition, there has been an increase in victim suits aimed at establishing third-party liability for negligent victimization. See generally Carrington, Victims' Rights: A New Tort, 14 TRIAL MAG. 39 (1978); Aynes, Government Responsibility and the Right Not to be a Victim, 11 PEPPERDINE L. REV. Symposium (1984). To further monetary civil remedies for crime victims, laws have been enacted providing that income realized by a criminal offender from an offense is to be held in escrow. Damages awarded the victim in a civil tort suit then may be paid out of such funds. E.g., N.Y. EXEC. LAw § 632-a (Consol. Supp. 1982); see also Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of Criminal Courts, 30 U.C.L.A. L. REV. 52, 67 (1982) [hereinafter cited as Harland].

Recognition that many victims need social and medical services in coping with the impact of victimization, as well as financial assistance, has led to the establishment and expansion of victim service programs. These programs may provide direct or referral services to victims, which may be short-term crisis intervention programs or long term services. See generally EVALUATING VICTIM SERVICES (S. Salaisin ed. 1981). Victim services may be provided through victim-witness assistance program units in prosecutors' offices, other criminal justice agencies, or independent agencies. See generally M. BARD & D. SANDREY, THE CRIME VICTIM'S BOOK 142, 198-207 (1979); R. KNUDTEN, A. MEADE, M. KNUDTEN & W. DOERNER, VICTIMS AND WITNESSES: THE IMPACT OF CRIME AND THEIR EXPERIENCE WITH THE CRIMINAL JUSTICE SYSTEM 44 (1976) [hereinafter cited as KNUDTEN]. See also infra note 12.

9. For example, the 1982 California Victims' Bill of Rights (Proposition 8), an initiative encompassing a statute and constitutional amendment, contains a number of provisions which address the basic structure and operation of the criminal justice system. Proposition 8 prohibits plea bargaining in certain classes of cases, eliminates the criminal defense of diminished capacity, limits the insanity
ment has been the role of victims in criminal proceedings. At the present time, such proceedings involve only two official parties: the state, as represented by the public prosecutor, and the defendant. The victim's role is defined as that of a witness, not a party. This limitation of the victim's role is an outgrowth of the characterization of the harm resulting from the crime and the purpose of criminal prosecution. As one commentator has explained:

Crime is regarded as offense against the state. The damage to the individual victim is incidental and its redress is no longer regarded as a function of the criminal justice process . . . . The criminal justice system is not for his benefit but for the community's. Its purposes are to deter crime, rehabilitate criminals, punish criminals, and do justice, but not to restore victims to their wholeness or vindicate them.10

Beginning about a decade ago, a concern began to develop about the treatment of crime victims in their role as witnesses as well as other witnesses in criminal proceedings.11 This concern
has led to various initiatives designed to ease the burdens of testifying in criminal cases. These initiatives include the establishment of victim/witness assistance programs to assist victims in dealing with the criminal justice process, the protection of victims and witnesses from intimidation intended to discourage cooperation with the prosecution of criminal cases, the reduction and prompt notification of scheduling changes which affect the attendance of victims and witnesses at criminal proceedings, the payment of higher fees for witnesses, the protection of victims prompted by fear of the lawyers, fear of the defendant or his friends, and fear of the unknown. In sum, the experience is dreary, time-wasting, depressing, exhausting, confusing, frustrating, numbing and seemingly endless.

Ash, supra note 1, at 390.

12. In the early 1970's the Law Enforcement Assistance Administration (LEAA) launched an initiative to federally fund victim/witness programs, and by 1979 more than 90 victim/witness assistance projects were funded. The goal of this initiative was to improve the treatment of victims and witnesses within the criminal justice system, in an attempt to produce greater cooperation in the investigation and prosecution of criminal cases. The National District Attorneys Association, funded with a grant from LEAA, created the Commission on Victim-Witness Assistance and has taken the lead in promoting victim-witness assistance units in prosecutors' offices. For a description and evaluation of various victim/witness assistance projects, see generally President's Task Force Report, supra note 1, at 121-25; National Dist. Att'y Ass'n Commission on Victim Witness Assistance, Help for Victims and Witnesses (1976); Vera Institute of Justice, An Evaluation of the Victim/Witness Assistance Project's Court Based Services (1976); Vera Institute of Justice, An Impact Evaluation of the Victim-Witness Assistance Project's Appearance Management Activities (1975).

Several states have enacted legislation institutionalizing and funding victim-witness assistance units. See ABA, Section of Criminal Justice Victim/Witness Legislation: Considerations for Policy Makers, 77-84 (1981) [hereinafter cited as ABA, Victim/Witness Legislation]. See also President's Task Force Report, supra note 1, at 37, 47-49 (recommendating that Congress enact legislation providing federal funding for victim-witness agencies and that the federal government establish a resource center for victim and witness assistance).

13. In 1979 the American Bar Association, Criminal Justice Section, Committee on Victims held hearings on victim-witness problems and developed a model statute to protect victims and witnesses from intimidation and retaliation. ABA, Criminal Justice Section, Victims Committee, Committee Proceedings (June 4 & 5, 1979); ABA, Criminal Justice Section, Victims Committee, Reducing Victim/Witness Intimidation: A Package (1981). This model statute has served as the basis of some of the provisions of the recently enacted Federal Victim and Witness Protection Act and state legislation. See S. Rep. No. 532, 97th Cong., 2d Sess. 15, reprinted in 1982 U.S. Code Cong. & Ad. News 2515; Bureau of Justice Statistics Bull., supra note 6, at 3. See also State Legislation In Aid of Victims and Witnesses of Crime, 10 J. Legis. 394 (1983) (discussion of elements of mode statute); President's Task Force Report, supra note 1, at 63, 66-67; ABA, Criminal Justice Section, Guidelines for Fair Treatment of Crime Victims in the Criminal Justice System: Recommendation and Report to the House of Delegates 1, 7-8 (approved by ABA House of Delegates, Aug. 1983) [hereinafter cited as ABA Guidelines].

14. See President's Task Force Report, supra note 1, at 67-68, 74-77; ABA Guidelines, supra note 13, at 1, 8.

15. Florida, Nebraska and Nevada have enacted legislation substantially in-
and witnesses from being dismissed or penalized by their employers because of absenteeism caused by participation in criminal proceedings, the expedited return to victims of recovered property which constitutes evidence in criminal proceedings, and the use of depositions of victims and witnesses in lieu of court appearances in certain types of cases.

Increasingly, demands are being made not only for better treatment of victims as witnesses, but also for expansion of the role of the victim beyond that of a witness. The limitation of the victim's role to that of a witness has typically meant that they have little formal input into or control of the criminal litigation process or its outcome. As one authority has observed:

[The victim's] injury becomes the occasion for a public course of action, but he has no "standing" to compel prosecution of the crime against him or to contest decisions to dismiss or reduce the charges or to accept plea bargains, or to challenge the sentence imposed on the offender who injured him, or to participate in hearings on restitution.

... The prosecutor need not tell him whether a charge has been filed or why it has been reduced from the offense complained of to a lesser one. Neither prosecutor nor judge need advise him of the terms of plea arrangements or sentences. And little or nothing need be done in the criminal case to facilitate his obtaining financial compensation for his increasing witness fees for court appearances, and similar bills are pending in other states. BUREAU OF CRIMINAL JUSTICE STATISTICS BULL., supra note 6, at 3; ABA VICTIM/WITNESS LEGISLATION, supra note 12, at 53-57.

16. See President's Task Force Report, supra note 1, at 108-09. ABA GUIDELINES, supra note 13, at 2, 8-9. In Oklahoma, Washington and Wisconsin, statutory victims' Bills of Rights grant victims and witnesses the right to employer intercession services in order to discourage employers from penalizing employees who must make court appearances by withholding pay or other benefits. In Illinois, New York and Wisconsin, legislation has been enacted prohibiting employers from dismissing or penalizing an employee who is absent from work in response to a subpoena in a criminal case. ABA, VICTIM/WITNESS LEGISLATION, supra note 12, at 56-58; BUREAU OF JUSTICE STATISTICS BULL., supra note 6, at 3.

17. See President's Task Force Report, supra note 1, at 57, 59-60, 63, 68-69, 73, 81; ABA GUIDELINES, supra note 13, at 3, 17. Kansas has enacted legislation which provides that a photograph of recovered property is admissible if a description of the property is handwritten on the picture under oath by the investigating officer. Once so photographed, the property can be returned to the victim/owner. ABA VICTIM/WITNESS LEGISLATION, supra note 12, at 37-38.

18. See President's Task Force Report, supra note 1, at 17, 21-22. In Connecticut, Florida, Missouri and New York, legislation encouraging the use of depositions in lieu of courtroom appearances for designated classes of cases, such as those involving sexual battery, child abuse, and mentally disturbed or seriously injured witnesses, has been enacted. BUREAU OF CRIMINAL STATISTICS BULL., supra note 6, at 4. See ABA VICTIM/WITNESS LEGISLATION, supra note 12, at 50-52.
In recent years, crime victims' rights advocates have urged that victims be given the right to more fully participate in criminal proceedings, and there does appear to be a noticeable trend in the direction of greater victim participation in criminal actions. One of the specific proposals made in this regard is that the victim be informed of the status of the case at various stages in the criminal justice process, and such proposals have been implemented in some jurisdictions. There have also been proposals to ensure that the victim's interests are known and considered in decisions affecting those interests by prosecutors, defense attorneys, and judges. For example, it has been proposed that victims have the opportunity to make their views known concerning negotiated guilty pleas. It has also been suggested that victim-impact statements be used in the sentencing of convicted offenders and that victims be given the right of allocution at sentencing hearings, and such proposals are beginning to be implemented in some jurisdictions.

Some victims' rights advocates have gone beyond the aforementioned proposals and suggest that victims be allowed to initiate criminal actions and be represented by counsel at trial, at least under some circumstances. Perhaps the most sweeping proposal made to date is that of the President's Task Force on Victims of Crime, which recommended the adoption of a federal constitutional amendment stating that "the victim in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

Despite the activity in this area, there is surprisingly little scholarly literature on the role of the victim in a criminal proceeding, and little thought appears to have been devoted to the construction of a coherent and consistent conceptual rationale for a restructuring of the victim's role. It is the purpose of this article to provide an overview of the issues and problems raised by expanding the victim's role at various stages of criminal proceedings. More specifically, this article explores the justifications for...

20. See infra notes 108-29 and accompanying text.
21. See infra notes 156-57 and accompanying text.
22. See infra notes 141-55 and accompanying text.
23. See infra notes 170-83 and accompanying text.
24. See infra notes 170-83.
25. See infra notes 125-37 and accompanying text.
26. See infra notes 129-37 and accompanying text.
expanding the victim's role and the feasibility and desirability of such expansion.

The article is divided into five sections: Part II describes the historical evolution of the role of the victim in a criminal action; Part III identifies the victim's interests and the systemic and societal interests which might justify expanding the role of the victim; Part IV deals with the implications of expanding the victim's role in terms of decision-making at several stages of the criminal process; Part V discusses the extent to which legal systems of other countries might provide models for an expansion of the role of the victim; and Part VI addresses alternatives to the criminal action, such as mediation and arbitration, which might better meet victims' needs.

II. THE ROLE OF THE VICTIM IN A CRIMINAL PROCEEDING: THE HISTORICAL BACKGROUND

In assessing efforts to expand the role of the crime victim in a criminal proceeding, it is useful at the outset to examine how and why the victim's role came to be narrowly defined as a non-party witness. Even though there has been a growing interest in crime victims, the crime victim has been largely overlooked as a subject of historical research. There are, however, historical studies relating to the public prosecution of criminal offenders and the use of restitution which provide insights into the historical evolution of the crime victim's role in the criminal proceeding.

A. Emergence of a System of Public Prosecution

The current limitation of the role of the crime victim to that of witness is partly the result of the emergence of a system of public prosecution during the American colonial period and its subsequent development. By the time of the American Revolution, all of the original thirteen colonies were under English political control and had been populated largely by English colonists who brought with them the English common law tradition. When the colonies were being settled in the seventeenth century, the English system of criminal prosecution was primarily a system of private prosecution, where the victim or interested individual had the right to bring and prosecute the case against a criminal of-
Although it is difficult to generalize about colonial criminal prosecutions because of the differences between the colonies and the paucity of historical research, the system in most of the colonies resembled the English system of private prosecution. During this period, however, a public prosecution function developed which gradually superceded the private system, and the public prosecutor became predominantly an officer of local government.


29. The most extensive studies of the historical development of the American public prosecutor during the colonial period have been done by Jack Kress and Joan Jacoby. See Kress, Progress and Prosecution, 423 ANNALS 99 (1976) [hereinafter cited as Kress]; J. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 3-39 (1980) [hereinafter cited as J. JACOBY].

30. See J. JACOBY, supra note 29, at xvii, 10; McDonald, Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim, 13 AM. CRIM. L. REV. 649, 651-54 (1976) [hereinafter cited as McDonald].

31. The Virginia experience is an illustration of the process by which private prosecution was superceded by local public prosecution. In Virginia, the first colony to be settled, the office of public prosecutor began in 1643 with the appointment of a King's attorney to represent the interests of the English Crown in the colony's courts. This officer, who was in effect Virginia's first attorney-general, acted as an advisor to the general court and later to the oyer and terminer courts. Most of his duties originally involved ascertaining the law through correspondence with legal authorities in England. His participation in criminal prosecutions was initially confined to cases directly involving the royal interest but later expanded to serious criminal cases. During the late 1600's, special deputy attorneys general were occasionally appointed in some counties; in 1687, the attorney general, at the direction of the General Court, nominated deputy attorneys general for the county courts; and by 1711, deputy attorneys general were appointed by the Governor, upon the recommendation of the attorney general. The powers and responsibilities of these deputy attorneys general gradually increased, and in 1751 all accusers and witnesses were required to consult with a deputy attorney before filing complaints, placing him in a position to review and influence the charging process. See O. CHITWOOD, JUSTICE IN COLONIAL VIRGINIA 120-21 (1971); J. JACOBY, supra note 29, at 13; H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 55 (1965) [hereinafter cited as H. RANKIN]; A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 66, 80 (1930).

The Connecticut experience provides another example of the growth of the public prosecutor function and its replacement of private prosecution. Like Virginia, Connecticut had a King's or Queen's Attorney. The earliest such attorney was appointed in 1602 at Hartford. In 1704, however, Connecticut established local public prosecutors in all county courts and became the first colony entirely to do away with the system of private prosecution. See J. JACOBY, supra note 29, at 16; see also B. GROSMAN, THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION 136 (1969) [hereinafter cited as B. GROSMAN]. For experiences in some of the other colonies, see generally J. GOEBEL & R. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 324-383 (1944) [hereinafter cited as J. GOEBEL & R. NAUGHTON]; E. PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE 59-60, 102-11 (1959) [hereinafter cited as E. PAGE]; R. SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 21-40.
The derivation of the office of the American public prosecutor as it evolved during the colonial period is something of an historical enigma. The most logical source of the American public prosecution function would seem to be the English common law tradition inasmuch as American colonial law in most areas was based upon the English law. Since, however, at the time of the American colonization, the English system of criminal prosecution was primarily a system of private prosecution, the American system of public prosecution would not appear to be attributable to English legal influences.

Nevertheless, it has frequently been asserted that the American public prosecutor could be traced to certain incipient elements in the English common law tradition. For example, it has been asserted that the American public prosecutor was modeled after the English attorney general. The difficulty with this assertion is that the English attorney general conducted prosecutions only to protect the Crown's interest in a relatively few serious criminal cases, and the English Director of Public Prosecutions, which is the closest analog to the American public prosecutor, was not established until 1879, well after the appearance of the public prosecutor in the American colonies. There are also other theories about the possible English common law origins of the American public prosecutor but these theories are highly speculative in nature.


32. See WICKERSHAM COMMISSION, supra note 28, at 6; Kress, supra note 29, at 100; see also J. Jacoby, supra note 29, at 4 (discrediting this view).

33. For a concise description of the history and operation of the British Office of the Director of Public Prosecutions, see generally R.M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 86-88 (7th ed. 1977) [hereinafter cited as R.M. JACKSON]. It should be noted that the system of private prosecution was not eliminated by the establishment of the Office of the Director of Public Prosecution and that private prosecutions can be and are still brought in England. See infra notes 187-200 and accompanying text.

34. It has been suggested that the early English justices of the peace performed a prosecutorial-type role in cases of serious crime and that the American public prosecutor might be modeled after these officials. This theory is based upon the research of Professor John Langbein, who found that in the sixteenth century, justices of the peace assumed investigatory and forensic functions similar to those of the modern public prosecutor, as well as magisterial functions in serious felony cases. See Langbein, The Origins of Public Prosecution at Common Law, 17 AM. J. LEGAL HIST. 313 (1973). Professor Kress has pointed out that these officials were "firmly established by the time of the American colonization," and that "the appearance of a separate public prosecutor in the colonies might be ex-
Another possible source of the American system of public prosecution is the Dutch schout. The Dutch colony of New Netherlands took in portions of what later became, under English control, the colonies of New York, New Jersey, Pennsylvania, Delaware, and Connecticut with the most populous Dutch settlement, now New York City. The Dutch brought with them to their American colonies their legal institutions including the schout, a public official who combined the powers and duties of a sheriff and public prosecutor. When the English wrested final control of New Netherlands from the Dutch, and English common law became the controlling law in the former Dutch settlements, the title of schout disappeared in these settlements—but it appears that some of his functions were carried on through the office of sheriff. Yet it is questionable whether it was the Dutch influence as a fairly logical next step, that is, a pragmatic division of the separate magisterial and prosecutorial functions.” Kress, supra note 29, at 102. Kress, however, goes on to point out that “more research is certainly required before we may support such a so far undocumented claim of influence upon the colonies.” Id.

In addition, it has been suggested that the concept of the American office of the public prosecutor might be drawn from various English proposals for a public system of prosecution that began to be made in the sixteenth century. As early as 1534, King Henry VIII criticized the system of private prosecutor because it led to imperfect execution of the penal laws and proposed that sergeants of the Commonwealth act as prosecutors to enforce penal laws throughout the country. See B. Grosman, supra note 31, at 10. Criticism of the system of private prosecutions and proposals for public prosecutors continued to be made periodically until 1879 when the Office of the Director of Public Prosecutions was created. For a legislative history of proposals for public prosecution, see Kurland & Waters, Public Prosecutions in England, 1854-79: An Essay in English Legislative History, 4 Duke L.J. 493 (1959); P. Howard, Criminal Justice in England 58-85 (1931). Here again, however, the available historical evidence does not reveal any nexus between such proposals and the growth of the American system of public prosecution. Kress, supra note 29, at 101.

35. M. Scott Van Alstyne, Jr. originally propounded the thesis that the American public prosecutor was a legacy of the Dutch administration of the New Netherlands and, more particularly of the Dutch schout. Comment, The District Attorney — A Historical Puzzle, 1952 Wis. L. Rev. 125 (1952) [hereinafter cited as Van Alstyne Comment]. See also Kress, supra note 29.

36. In about 1655, New Amsterdam became the first Dutch settlement to establish the office of schout. The office of schout was also established in the settlements of New Jersey, Pennsylvania, and Delaware. See Van Alstyne Comment, supra note 35, at 130-31, 133-35. The schout had some arrest powers, was involved in the collection of evidence, notified the accused of the charges against him and acted as a prosecutor in court. See J. Jacoby, supra note 29, at 14; Van Alstyne Comment, supra note 35, at 129-31, 133-35.

37. J. Jacoby, supra note 29, at 14-15; Van Alstyne Comment, supra note 35, at 132-37. The New Netherlands have a complicated history because of alternating Dutch and English administrations of the colony. While the New Netherlands was first settled by the Dutch, the English claimed the lands comprising New Netherlands. In 1664 the English captured New Amsterdam and took over the New Netherlands colony. The Dutch retook the colony in 1673, but the English regained control in 1674. During the period of British control from 1664 to 1673, the English governor promulgated a code of law, establishing the English system of law and governance. The Dutch schout, however, remained in office and continued
ence that was the predominant influence in producing the American public prosecutor, in view of the fact that the Dutch population outside of New Amsterdam was small, that Dutch control over its colonies was brief, and that the public prosecutor had developed earlier in colonies where the Dutch had neither settlements nor influence.38

Another claimed civil law source of the American public prosecutor is the French concept of public prosecution which was institutionalized in the form of the French prosecutor de roi and which was well established in France by the American colonial period.39 The 1931 landmark Wicksham Report on Prosecution, which asserted that French influence had shaped the institution of the American public prosecutor, stated that this influence stemmed from post-revolutionary rejection of English institutions and enthusiasm for French institutions.40 However, this argument ignores the fact that the American public prosecutor took firm root during the colonial period.41

In addition to the aforementioned claims about the origin of the American public prosecutor which focus upon its possible English, Dutch, and French antecedents, there is another explanation—namely, that the office is largely a result of an American colonial environment and experience that led the colonies to create a unique form of prosecution, or at least adapt existing forms of prosecution in a unique manner. One commentator has speculated that "[f]or the colonists, bound together by the overriding need to conquer a foreign and alien environment, the focus on the

38. See Kress, supra note 29, at 104. See also J. Goebel & R. Naughton, supra note 31, at 332-33. Goebel and Naughton, who did the leading study of law enforcement in colonial New York, state that it cannot be assumed that "the development of a public prosecutor was merely an adaptation of Dutch usage," particularly since there were other possible models for the practice of having a public official conduct criminal prosecutions. Id. at 332.
39. See Wickersham Commission, supra note 28, at 7; see also J. Jacoby, supra note 29, at 4; Kress, supra note 29, at 102-03.
41. See supra notes 32-39 and accompanying text. See also J. Jacoby, supra note 29, at 4; Kress, supra note 29, at 103.
survival of the colony may have given rise to the concept of public protection" which in turn gave rise to the public prosecutor.42

A system of public prosecution might also have been perceived as more consistent than a system of private prosecution with the colonial commitment to a more democratic society. Under a system of private prosecution, the prosecution of criminal offenses depends upon the ability and willingness of the victim or other interested individuals to bring prosecutions, which the poor and powerless are less able and willing to do. Accordingly, one of the reasons for establishing the office of public prosecutor might have been to ensure that poor victims as well as rich victims would be able to obtain redress for crimes committed against them or their property.43

Moreover, there were problems associated with private prosecutions to which the development of the American office of the public prosecutor may well have been a response. Thus, the fact that a system of private prosecution depended upon the ability and willingness of victims and other private individuals to prosecute undoubtedly meant the sometimes uncertain and ineffective enforcement of the penal laws.44

Furthermore, the system of private prosecution produced certain abuses, such as compounding.45 Under the system of private prosecution, informers who reported criminal offenses to the

42. J. Jacoby, supra note 29, at 17.

43. The English system of private prosecution was repeatedly criticized on the ground that the poor could not afford the expense of bringing a private prosecution. One historian commented:

[T]ill about a century ago private persons had to pay all the costs of every prosecution. This was complained of by Lord Hale . . . . Fielding in his essay on the causes of the increase of robberies, repeats and enforces this complaint. The extreme poverty of prosecutors, he says is one cause of the escape of offenders.

J. Stephen, supra note 28, at 498.

Another historian concluded that the old English system of private prosecution was "a part of a system of government by the rich and for the rich," and stated:

The colonists' substantial adaption of the machinery of criminal justice as administered by the English justices of the peace was apparently deliberate. It was what they were used to, and, as the system was developed initially in Massachusetts, it provided wide latitude for the exercise of magisterial discretion; consequently, it comported well with the leaders' ideas about the functions of government and law . . . indeed it worked even more successfully in the colonies partly because the community was small . . .

D. Campbell, The Puritan in Holland, England and America 444 (1899) (quoted in J. Jacoby, supra note 29, at 13).

44. See McDonald, supra note 30, at 653-54; see also supra note 34.

45. For example, historical records indicate that the Virginia Governor's appointment in 1711 of deputy attorneys general as prosecuting attorneys for the Virginia county courts was done to insure the cessation of compounding. See O. Chitwood, supra note 31, at 120.
courts and prosecuted the offenders received a percentage of the fine imposed with the remainder of the fine going to the Crown. The practice of compounding involved the payment of a negotiated percentage of the anticipated fine to the informer by the offender in return for the informer's agreement not to report or not to prosecute the offense. This practice was viewed as a serious problem because it undermined the impact of the criminal laws and deprived colonial courts of needed revenue. There is also some evidence that the public prosecutor was seen as a protection against other abuses, such as malicious prosecutions.46

After the colonial period, the office of public prosecutor continued to develop until it reached its present position of great stature and authority. One of the most significant changes which occurred in the course of its development was its shift from an appointive office to an elective one.47 The impetus for this shift was the democratization of the American body politic which began in the 1820's, was highlighted by the election of Andrew Jackson in 1828, and continued up to the Civil War.

A change also occurred in the characterization of the public prosecutor as a judicial official. The public prosecutor became a member of the executive, rather than the judicial, branch of government and the judicial and prosecutorial functions were clearly separated.48 The local public prosecutor's status as a member of the executive branch of government combined with his status as an elected official served to consolidate prosecutorial power and discretion in the office of the public prosecutor.

A concomitant of the emergence of public prosecution during the colonial period, and its subsequent development, was a rejection—in theory and practice—of private prosecution. While vestiges of private prosecution in an attenuated form remain in some jurisdictions, it constitutes something of an anomaly where it does exist.49 The rise of a system of public prosecution at the expense of private prosecution has directly affected the role of the victim in a criminal proceeding. It has meant that the local public

46. J. Jacoby, supra note 29, at 18.
47. In 1932, Mississippi became the first state to adopt a constitutional provision for the popular election of local district attorneys, and almost all states subsequently made provision for a popularly elected local prosecutor either in their constitutions or statutes. See J. Jacoby, supra note 29, at 19-28.
48. Id. at 25-27.
49. See infra notes 187-203 and accompanying text.
prosecutor rather than the victim initiates and controls the prosecution, and as a result, the victim's role has become limited to that of a witness in the criminal proceeding.\textsuperscript{50}

\textbf{B. The Decline of Restitution}

The current limitation of the role of the victim in the criminal proceeding to that of a witness is traceable not only to the emergence and development of a system of public prosecution, but also to the decline of restitution as a criminal sanction. While the term "restitution" has been defined in a number of ways, as used here the term refers to the payment of money or services by the offender as compensation for financial losses or injuries caused by crime.\textsuperscript{51}

Restitution as a criminal sanction in Anglo-American law has its roots in practices in England during the Anglo-Saxon period. The very long and complicated history of restitution may be briefly summarized as consisting of the following major stages: "Private vengeance, collective vengeance and the blood feud, a system of composition or restitution, and the displacement of the system of offender restitution by the sovereign."\textsuperscript{52}

The history of restitution in America is a variation on this theme. During the colonial period, a variety of punishments were imposed for criminal offenses, many of them quite harsh by present day standards. Among the common criminal sanctions were

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\textsuperscript{50} The culmination of this process can be seen in Connecticut, the first colony to substitute a system for private prosecution in 1704. Writing in 1927, a Connecticut judge declared:  
\textquote{In all criminal cases in Connecticut, the state is the prosecutor. The offenses are against the state. The victim of the offense is not a party to the prosecution, nor does he occupy any relation to it other than that of a witness, an interested witness, perhaps, but nonetheless, only a witness. It is not required for the injured party to make a complaint, nor is he required to give bond to prosecute. He is in no sense a relator. He cannot in any way control the prosecution and whether reluctant or not, he can be compelled like any other witness to appear and testify.}
\textquote{Pickett, The Office of Prosecutor in Connecticut, 17 J. CRIM. L. & CRIMINOLOGY 348, 356-57 (1927).}
\textsuperscript{51} See A. HARLAND, RESTITUTION TO VICTIMS OF PERSONAL AND HOUSEHOLD CRIMES 1-2 (1980) [hereinafter cited as RESTITUTION TO VICTIMS OF PERSONAL AND HOUSEHOLD CRIMES]. For a description of statutory definitions using the term "restitution" see Harland, supra note 8, at 60-66. For a typology of restitution formats see Siegel, Court Ordered Victim-Restitution: An Overview of Theory and Action, 5 NEW ENG. J. PRISON L. 135-136 (1979) [hereinafter cited as Siegel].
\end{flushright}
the death penalty, corporal punishment, the pillory, the admonition, the local gaol, the workhouse, fines, and last but not least, restitution. Colonial records indicate that restitution was the basic penalty for theft, along with other punishments, throughout the colonies.

The decline of restitution in America began in the late eighteenth century after the Revolution with the advent of the penitentiary. In the late 1700's, the first state penitentiaries were opened in Massachusetts, Pennsylvania, and New York, and by the 1820's, there were penitentiaries throughout the states of the Northeast. As penitentiaries were established, incarceration became the prevailing penalty for many crimes which had previously subjected the offender to a variety of older sanctions such as restitution.


Perhaps the most extensively studied colony with respect to crime and punishment was the Puritan colony of Massachusetts Bay, and these studies furnish some interesting insights into the function and use of restitution during the colonial period. The law and practice with respect to restitution in theft cases was an amalgam of English common law precedents and Biblical prescriptions. Prior to 1646, the magistrate had discretionary power to fashion sanctions for theft, but in 1646, and later in 1736, statutes were enacted which specified penalties for the theft offenses. Under the 1736 theft statute, the punishment for theft was a session on the gallows with a rope around the neck, a whipping, and treble damages payable to the victim. If offenders were unable to pay damages, they could be sold into service, either to the victim or a third party, to work off the damage judgment. Servants found guilty of stealing from their masters could be required to pay monetary damages or forced to serve beyond their stipulated term of service, and since few servants probably had the funds to pay damages, an additional period of service was undoubtedly the more typical method of punishment. G. HASKINS, supra note 53, at 153; Hirsch, supra note 53, at 1227-28. See also Nelson, Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective, CRIMINAL JUSTICE IN AMERICA 93, 104-08 (R. Quinney ed. 1974).


56. The well documented Massachusetts experience again provides a good ex-
Differing explanations have been offered for the rise of the peni-
tentiary and criminal incarceration which was associated with the
decline of restitution.\textsuperscript{57} While further historical research is neces-

ample of this trend. In 1785, Massachusetts enacted legislation establishing its
first prison on Castle Island in Boston harbor and providing for labor on Castle
Island as a punishment for twenty-four crimes, including several theft offenses. A
sentence to hard labor on Castle Island initially was an alternative to, rather than
a substitute for, the imposition of other sanctions. Thus, Castle Island incar-
ceration was not to be imposed for theft unless the old sanction of payment of
treble damages to the victim was unworkable, but use of incarceration gradually
expanded, the courts began to impose the penalty of incarceration for theft even
in cases where the old penalty of treble damages could be used. In 1805, a new
and larger prison was opened in Charleston, and a new penal code was enacted
which made all crimes punishable by fines, incarceration, or the death penalty,
and which eliminated the provision for offender payment of treble damages to the
victim in theft crimes. Hirsch, \textit{supra} note 53, at 1246-47, 1249-50; McDonald, \textit{supra}

\textsuperscript{57} David Rothman's well known work, \textit{The Discovery of the Asylum}, traces
these developments to a post-revolutionary penal and correctional reform move-
ment which swept America after the revolution. D. ROTHMAN, \textit{supra} note 55.
Rothman asserts that, during the colonial period, the purpose of criminal punish-
ment was viewed as expiatory and retributive, a view reflecting religious precepts
and influences. He further asserts that this view of the purpose of criminal pun-
ishment did not dictate the widespread use of incarceration. He maintains that,
after the Revolution, Americans, faced with increasing crime and receptive to pe-
nal and correctional reform, were influenced by the concepts of the European En-
lightenment, particularly the criminological philosophy of Cesare Beccaria.
Beccaria believed that there was a causal connection between the increase in
crime and harsh and inconsistent penal codes; that punishment should be utilita-
rian; and that therefore deterrence or the prevention of future crime rather than
objectives such as restitution should be the purpose of punishment. According to
Rothman, the deterrence approach to criminal punishment propounded by Bec-
caria became the initial justification for incarceration. Rothman's further thesis is
that, by the Jacksonian period in the 1820's, social conditions had become identi-
ified as the chief cause of crime, that rehabilitation consequently had replaced de-
terrence as the articulated purpose for punishment, and that incarceration was
seen as promoting rehabilitation of offenders by removing them from their cor-
rupting environments.

Although Rothman's interpretation of the rise of the penitentiary and criminal
incarceration has been highly influential, it has been recently criticized on the
ground that it does not comport with the historical evidence. Adam Hirsch has
put forth another explanation for the rise of the penitentiary and criminal incar-
ceration based upon a study of these developments in late eighteenth century
Massachusetts. Hirsch, \textit{supra} note 53. Hirsch locates the impetus for these develop-
ments in a series of demographic and social changes. Seventeenth century
Massachusetts consisted of small, tightly knit communities with non-mobile popu-
lations and the emphasis in dealing with criminal offenders, most of whom were
lifelong residents of the community, was to use "criminal sanctions which would
draw the resident back into the community through rehabilitation, deterrence and
an expression of community forgiveness." \textit{Id.} at 1223-24. The seventeenth century
Massachusetts magistrates, however, did not ignore the victim for there was a rec-
ognition that victim and offender could return to their customary roles when the
breach between them was healed. In the eighteenth century, Massachusetts un-
derwent a rapid growth in its population, the mobility of its population increased,
and by the middle 1800's there was "a small but significant floating population of
men and women at the bottom of society who moved from seaport to seaport and
town to town in search of work." \textit{Id.} at 1229; see also Nelson, \textit{supra} note 54, at 109-
ecessary before any definite conclusions can be reached as to the reasons for the rise of the penitentiary and criminal incarceration, it is clear that the accompanying decline of restitution in the criminal justice system had a negative effect upon the role of victims in criminal proceedings. This decline signaled a rejection of criminal law as a vehicle for the victim to obtain redress from the offender for damages, and the victim’s remedy became instead primarily the civil tort action. It is not surprising that victims were relegated to the role of a witness in a criminal proceeding once they were no longer perceived as having a direct restitutive interest in the criminal proceeding.

III. REDEFINING THE ROLE OF THE VICTIM IN A CRIMINAL PROCEEDING: A REFORM IN SEARCH OF A RATIONALE

A. The Victim’s Interests

The efforts which have been made in recent years to expand the crime victim’s role beyond that of an ordinary witness in the crim-

13. At the same time this was occurring, crime was climbing steadily and generating great public concern.

It is Hirsch’s thesis that these changes caused a breakdown in the effectiveness of its traditional criminal sanctions and weakened the original system of crime control and that Massachusetts lawmakers turned to the penitentiary and criminal incarceration in order to bring crime under control. One of the sanctions which seems to have broken down was restitution which was linked to the sale into servitude. The seventeenth century practice of selling into service a thief who was unable to pay the victim treble damages in order to work off the damage judgment depended upon there being a willing buyer. As early as 1702, problems began to be encountered in finding buyers for convicted thieves and, by the late 1700’s, this market had virtually collapsed. Hirsch hypothesizes that one of the reasons the demand for the labor of convicted thieves fell off was because of a change in the status of the offender and points out that “[i]t was one thing for a community member to admit into his household a wayward individual whom he had known, or known of, since birth; it was quite another to take charge of a transient pauper whose sole connection to the town was born of misconduct.” Id. at 1232.

58. Some of the treatises on criminal law published in the mid-nineteenth century illustrate that a distinction was made between criminal offenses and civil (tort) wrongs, that restitution was rejected as a goal of the criminal law, and that there was an acceptance of the principle that the crime victim should turn to civil law in order to obtain redress from the offender. See F. HILLIARD, THE ELEMENTS OF LAW: BEING A COMPREHENSIVE SUMMARY OF AMERICAN CIVIL JURISPRUDENCE 221-26 (1835); T. WALKER, INTRODUCTION TO AMERICAN LAW 32 (3rd ed. 1855).

Similarly, one of the leading modern treatises on criminal law emphasizes the differing functions of criminal law and civil tort law. See W. LAFAVE & A. SCOTT, THE CRIMINAL LAW 11 (1972) [hereinafter cited as W. LAFAVE & A. SCOTT] (“The function of tort law is to compensate someone who is injured for the harm he has suffered. With crimes, the state itself brings criminal proceedings to protect the public interest but not to compensate the victim.”) (emphasis added).
inal proceeding constitute something of a reform in search of a rationale. In order to determine whether expansion of the victim's role is justified, it is necessary to examine at the outset whether the criminal proceeding is likely to have a major impact upon the legitimate and significant interests of the victim and whether the public prosecutor is able and willing to represent those interests adequately.

1. The Victim's Interest in Restitution

Crime victims arguably have an interest in restitution which may be affected by the criminal proceedings. As noted previously, the use of restitution in the context of the criminal law has clear historical precedent. In the last several decades, there has been a rediscovery of restitution within the criminal justice system. Almost all states and the federal government have statutes dealing with restitution. These statutes typically authorize restitution at the sentencing of a convicted offender as a condition of probation. States have also increasingly enacted legislation authorizing restitution in connection with other kinds of sentences. In addition, several states have passed legislation authorizing restitution as a condition of a pre-trial diversion agreement and other preadjudicatory dispositions. While many of these statutes give the court the discretionary power to order restitution, others require restitution or mandate its consideration. Moreover, a variety of restitution programs have been established for both adult and juvenile offenders in connection with pre-trial diversion, probation, and parole.

59. See supra notes 53-56 and accompanying text.
60. Harland, supra note 8, at 69-70 (compilation of relevant statutory citations).
61. Id. at 70-77 (compilation of relevant statutory citations).
62. Id. at 68 (compilation of relevant statutory citations).
64. E.g., 18 U.S.C. § 3579(a)(2) (1982) (court must state on the record the reasons for not ordering restitution or for ordering only partial restitution).
65. The federal government through the Law Enforcement Assistance Administration (LEAA) has been a major source of support for the development and evaluation of restitution programming for adult criminal offenders, and the federal government, through the Federal Office of Juvenile Justice and Delinquency Prevention, has been a major source of support for the development and evaluation of restitution programming for juvenile offenders. See Restitution to Victims of Personal and Household Crimes, supra note 51, at 3. See also A. Harland, M. Warren & E. Brown, A Guide to Restitution Programming (1979); National Op-
The contemporary growth in the acceptance of restitution as a sentencing alternative has led to a reexamination of the theoretical bases of restitution and its relation to the goals of the criminal justice sanctioning process. It is significant that the modern revival of restitution began during a period when the rehabilitative ideal was in vogue and was originally seen as a means of promoting rehabilitation.\(^6\) Restitution is still sometimes seen as aiding the rehabilitation of the offender by instilling a sense of responsibility in the offender, enhancing the offender's self-esteem, and leading to an increased reintegration of the offender into the community.\(^6\) Restitution is also sometimes seen as a component of, or at least compatible with, other traditional goals of the criminal sanctioning process, including specific and general deterrence, and retribution.\(^6\)

With the rise of the victim's rights movement, the focus of proponents of restitution has shifted. Restitution has increasingly come to be regarded as an independent major function of a crimi-

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\(^6\) See, e.g., Eglash, Creative Restitution, supra note 66, at 40. See also Keve, The Therapeutic Uses of Restitution, in Offender Restitution in Theory and Action 59 (B. Galaway & Joe Hudson eds. 1978) [hereinafter cited as Offender Restitution].

\(^6\) See McDonald, Expanding the Victim's Role in the Disposition Decision: Reform in Search of a Rationale in Offender Restitution, supra note 10, at 101. For a critical analysis of the relationship between restitution and deterrence see Tuttle, Restitution and Deterrence: An Evaluation of Compatibility, in Offender Restitution, supra note 67, at 33. For a critical analysis of the relationship between restitution and retribution, see McAnany, Restitution as Idea and Practice: The Retributive Process, in Offender Restitution, supra note 67, at 15.
nal prosecution, not just a means of promoting certain goals of the criminal justice sanctioning process. A restitutive theory of criminal justice has even been developed to justify redress to victims from a philosophical and ethical perspective. Under this theory, a crime is viewed as a violation of the “rights” of the victim by the offender which creates an imbalance between them, and the dominant concern of a criminal action is viewed as the rectification of this imbalance. Proponents of the theory take the position that victims should occupy a central, rather than peripheral role in the criminal process, based upon the principle that the function of a criminal action is to rectify the violation of the victim’s rights by the defendant.

The restitutive theory of justice has been criticized on the ground that the crime victim may seek restitution from the perpetrator of a crime in the civil courts through a tort action, whether or not a criminal prosecution is initiated or a restitutive sentence is imposed. Although such criticism may have some validity from a conceptual standpoint, it overlooks the inadequacies of the civil tort action in providing financial relief to the victim. Victims may be unaware of the availability of a tort remedy; victims


70. See Barnett & Hagel, supra note 69, at 25-26. Barnett and Hagel state that under a restitutive theory of criminal justice, the parties to a criminal action would be the victim and the defendant, with the state’s role restricted to mediating the dispute and enforcing the judgment. Id.

71. During the early nineteenth century there was a marked decline in the availability and use of restitution to victims of crimes in the criminal justice system. A civil tort action was regarded as the proper remedy for the victim of crime seeking redress against the criminal offender. See supra note 58 and accompanying text. There is a long-standing debate among philosophers and legal scholars as to the validity of traditional distinctions between the criminal law and the tort law. Compare O. W. HOLMES, THE COMMON LAW 44 (1881) [hereinafter cited as O.W. HOLMES] (“the general principles of criminal and civil liability are the same”) with Hall, Interrelations of Criminal Law and Torts, 43 COLUM. L. REV. 753 (1943) (critique of Holmes’ analysis). The rediscovery of restitution in the last several decades has injected new life into this debate. See, e.g., Epstein, supra note 69, at 231.

72. See R. MEINERS, VICTIM COMPENSATION 3-4 (1978) (public payments necessary because of inadequacies of civil proceedings). A 1967 study of 167 victims of personal violence in Toronto found that only 14.9 percent considered suing, 5.4 percent consulted an attorney, 4.8 actually sued, and only 1.8 percent recovered damages. Linden, Victims of Crime and Tort Law, 12 CAN. B.J. 17, 21-22 (1969).
may lack the resources to institute an action and be unable to obtain the assistance of counsel on a contingent fee basis; victims may be unwilling to undergo the inconvenience of bringing suit, especially if the damages are relatively small and the offender is insolvent; and victims, who have already been through a criminal proceeding, may not have the energy and stamina required to become involved in yet another proceeding.

Whatever the significance and wisdom of the traditional distinction between the punishment of criminal offenders through the criminal law and the compensation of crime victims through civil tort law, as a practical matter, the wide acceptance and use of restitution within the criminal justice system has already resulted in the partial merger of criminal and tort law. As a consequence, the victim can be viewed as having a direct interest of a restitutive nature in the criminal proceeding. This restitutive interest, of course, may be more illusory than real if restitution is not a viable sentencing alternative because of the offender's lack of financial resources or earning power. While it has been commonly assumed that many offenders cannot provide adequate compensation to their victims, one extensive study has concluded that "relatively few victimizations are so costly as to negate the possibility of restitutive disposition even bearing in mind the very low income levels of defendants." Nevertheless, restitution may be more feasible or desirable for certain types of offenses than for other types of offenses. In short, the victim's restitutive interest in a criminal proceeding will vary from case to case, depending on

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73. RESTITUTION TO VICTIMS OF PERSONAL AND HOUSEHOLD CRIMES, supra note 51, at vii.

74. For example, Professor Goldstein has argued that restitution is especially appropriate for the so-called white-collar crimes which he defines as "crime committed in an organizational setting, generally involving fraud or abuse of trust by persons or corporations of means." Goldstein, supra note 19, at 532. According to Professor Goldstein, restitution is especially appropriate for such crime for the following reasons:

First, these offenders—individual or corporate—are affluent and their victims are likely to be of modest means, confounding the usual stereotypes about victims as [sic] offenders. . . . Second, these crimes are usually committed by persons who calculate rationally to gain economic advantage and are more susceptible to stigma and to sanctions that impose economic costs. . . . Third, the prospect of financial compensation provides an obvious incentive to victims to bring the crimes committed against them to the attention of the authorities and to participate in their prosecution.

Id. at 533.

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factors such as the nature of the offense, damage sustained by the victim, and the offender's financial resources.

2. The Victim's Interest in Retribution

Crime victims may also arguably have an interest in retribution which may be affected by criminal proceedings. Even though retribution is one of the traditionally recognized goals of the criminal sanctioning process and has been characterized as the oldest theory of punishment, there is no consensus as to its definition or the concepts it embodies. One of the standard works on criminal law states that retribution is the imposition of "punishment (the infliction of suffering) ... by society ... because it is only fitting and just that one who has caused harm to others should himself suffer for it." Retribution, as a goal of the criminal sanctioning process, is often said to have its roots in individual vengeance against the offender by the victim.

There are a host of philosophical, ethical, as well as definitional and conceptual problems with the principle that retribution should be one of the aims of criminal punishment. Although the retributive theory of punishment has prominent defenders, it was until recently the least accepted theory of punishment among twentieth century American philosophers and scholars. There is a considerable body of literature assessing retribution from a philosophical and ethical perspective which does not lend itself to being briefly or easily summarized, but critics of retribution generally assert that punishment imposed without reference to a utilitarian calculus which weighs its benefits in terms of preventing future crimes against its costs is morally indefensible.

75. See W. LAFAVE & A. SCOTT, supra note 58, at 24.
76. Id. For an analysis of varying formulations of the retributive theory of criminal punishment, see N. WALKER, THE AIMS OF THE PENAL SYSTEM (1966) [hereinafter cited as N. WALKER]; Gerber & McAnany, Retribution in CONTEMPORARY PUNISHMENT, 39-40 (R. Gerber & P. McAnany eds. 1972); McAnany, supra note 68, at 15. While formulations of the retributive theory vary, they generally emphasize that the offender is responsible and deserves punishment, that the punishment should be proportional to the offense, and that the focus of punishment is the past offense not the prevention of future offenses. Id.
77. O.W. HOLMES, supra note 71, at 2-3, 40-41; 2 J. STEPHEN, A HISTORY OF THE COMMON LAW IN ENGLAND 80 (1863) ("The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."). But see B. VAN DEN HAAG, PUNISHING CRIMINALS 10-14 (1975) [hereinafter cited as B. VAN DEN HAAG] (revenge is confused with retribution and is not a justification for criminal punishment).
78. See, e.g., O.W. HOLMES, supra note 71, at 40-41.
79. W. LAFAVE & A. SCOTT, supra note 58, at 24; McAnany, supra note 68, at 15. See, e.g., N. WALKER, supra note 76; Kaufmann, Retribution and the Ethics of Punishment in ASSESSING THE CRIMINAL, supra note 10, at 211.
last several years, however, as other theories of punishment have fallen into disrepute, there has been a revival of interest in retribution among theorists.81

Among a considerable segment of the public and among crime victims, their families, friends, and associates, there appears to be substantial support for the retributive punishment of criminal offenders. Criminal offenses do in fact often produce a perceived need and desire for retaliation against the offender.82 To some extent, societal attitudes toward such needs and desires depend upon how they are characterized. The term "vengeance" has a negative connotation, whereas the term "justice" has a positive connotation. The victim who seeks vengeance may evoke disapproval, but the victim who seeks justice may evoke sympathy.83

Given the existence of a general need and desire for retaliatory punishment of the criminal offender, it has been asserted that punishment for retributive purposes is necessary "to maintain respect for the law and to suppress acts of private vengeance."84

Private vengeance outside of the criminal law and the criminal courts designed to "get even" with the offender may be attempted if there is little confidence that the criminal justice system is able or willing to impose retributive punishment. Since individuals obviously are reluctant to implicate themselves by reporting their acts of private vengeance, it is difficult to assess their frequency, and there is almost no research dealing with individual acts of private vengeance.85 Group vengeance or vigilantism is more eas-

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82. See Toby, Is Punishment Necessary?, 55 J. CRM. L., CRIMINOLOGY & POLICE Sci. 332, 333 (1964). See also N. Gage, Eleni (1973) (factual account of a son's attempt to find and punish the individuals responsible for his mother's death). Compare F. Alexander & A. Staub, The Criminal, the Judge, and the Public (rev. ed. 1956) (a psychoanalytic explanation of retribution) with Halleck, Vengeance and Victimization, 5 Victimology 99 (1980) (advocating rejection of retribution by victims and their families, on the ground that it is not conducive to mental health and produces further victimization and violence).

83. For an insightful inquiry into the relation between vengeance and justice, see J. Jacoby, Wild Justice (1954).


85. See Ziegenhagen, Toward a Theory of Victim-Criminal Justice System Interactions, in Criminal Justice and the Victim, supra note 1, at 261, 268-69. Fragmentary data suggests that personal vengeance exists in a substantial number of
ily documented and has been a recurrent phenomenon in American society.86

Finally, from the standpoint of the law-abiding crime victim, the state can be seen as displacing the victim's right to exact private vengeance and requiring the victim to channel any desires for retaliation against the offender through the criminal justice system.87 Thus, the criminal law can be regarded as establishing a social contract between the state and the victim—the victim gives up the right to private vengeance and the state undertakes to vindicate the wrong done to the victim by imposing a criminal sanction upon the offender. Accordingly, it would seem to follow that the victim should be deemed to have a retributive interest in the outcome of the prosecution.

3. Other Interests of the Victim

In addition to the interests of crime victims in restitution and retribution, there are several other identifiable interests which may be affected by criminal proceedings. The victim clearly has an interest in protecting his or her reputation, preventing his or her privacy from being unduly invaded, and in avoiding harassment and intimidation by the defendant. In some cases, the defense may allege that the victim precipitated or provoked the crime, thereby calling into question the victim's character and veracity.88 While the defense's questioning of the victim/witness is subject to some constraints, the victim, unlike the defendant, has no general right to refuse to testify, and he or she cannot be entirely insulated from defense attacks, given the adversarial nature

homicides which come to the attention of law enforcement authorities. Id. at 268-69. See, e.g., Wolfgang, Victim Precipitated Criminal Homicide, 48 J. CRIM. & CRIMINOLOGY 1-11 (1957) (in 62 percent of the homicide cases sampled, the victim had a history of victimizing others).

86. For a general history of vigilantism, see Brown, Violence in America: Historical and Comparative Perspectives (H. Graham & T. Gurr eds. 1969); Brown, Legal and Behavioral Perspectives on American Vigilantism, in PERSPECTIVES IN AMERICAN HISTORY 95 (D. Fleming & B. Bailyn eds. 1971). See also E. VAN DEN HAAG, supra note 77, at 13-14.


88. See Ash, supra note 1, at 398, 402-04. See also ABA VICTIM/WITNESS LEGISLATION, supra note 12, at 43. The invasion of a victim-witness's privacy, and attacks on his or her reputation, are a particular problem in cases of involuntary rape and other forms of sexual assault because of special evidentiary rules applicable in these cases. In rape cases, the defense has traditionally had wide latitude in inquiry into the victim's prior sexual conduct with other individuals and the victim's general reputation as to chastity for purposes of showing consent on the part of the victim. See generally Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977); Kneedler, supra note 4, at 486-97 (review of Virginia law prior to legislative reform in 1981). Even, however, in cases not involving rape or sexual assault, character evidence may be used to discredit a victim-witness. See 3A J. WIGMORE, ON EVIDENCE §§ 920-930 (1970 & Supp. 1979).
of criminal litigation and the defendant's constitutional right to confront and cross-examine an adverse witness.89

A related, but nonetheless distinct, interest is that of the victim in minimizing the psychological trauma of the victimization and contact with the criminal justice system. Mental health professionals report that a sense of powerlessness is a frequent component of the psychological trauma suffered by many victims of crime, particularly violent crime.90 Since victims have almost no real input into or control of the criminal court process, this sense of powerlessness may be intensified and exacerbated by contact with the criminal justice system.91 Although there has been little scientific investigation on this subject, one hypothesis is that allowing the victim to participate more fully in key decisions in the criminal litigation might serve to reduce the victim's sense of powerlessness and thereby reduce the victim's psychological trauma.

4. Representation of the Victim's Interests by the Public Prosecutor

Even if the crime victims are considered to have interests of a significant and legitimate nature in the criminal proceeding, there is no need to expand the role of victims in the proceeding provided the prosecutor can and does represent those interests ade-

89. During the last decade, United States Supreme Court decisions dealing with the scope of a defendant's federal constitutional right to confront and cross-examine the State's witnesses has indicated that this right is broad, albeit not unlimited. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974) (criminal defendant's right is paramount to state interest in protecting juvenile offenders and witnesses' interest in being spared the embarrassment and disclosure of his juvenile court record). See also Ohio v. Roberts, 448 U.S. 56 (1980); Chambers v. Mississippi, 410 U.S. 284 (1973); Mancusi v. Stubbs, 408 U.S. 204 (1972). Cf. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).


91. See D. Kelly, Major Issues of Victim Concern 5 (paper submitted to ABA Section of Criminal Justice).
quately. Certainly, the prosecutor's decisions—with respect to the initiation of prosecution, the offense or offenses to charge, the negotiation and acceptance of guilty pleas, and sentence recommendations—can greatly influence the interests of victims, particularly the restitutive and retributive interests. Victims in their current circumscribed role as witnesses, however, do not formally participate in such decision-making. They can make their wishes regarding these decisions known to the prosecutor, but the prosecutor is not obligated to comply with their wishes.

While prosecutors have been in the forefront of the victims' rights movement, and many are sensitive to victim interests, it is the prosecutor's duty and responsibility to represent the interests of the state. If a conflict, actual or perceived, arises between the state's and the victim's interests, the prosecutor must give priority to interests of the state. It must also be recognized that criminal courts are social organizations and that prosecutors perform their duties within that organizational context. Prosecutors work, over a period of time, with police officers, defense attorneys, and judges, and develop continuing relationships with such individuals. In contrast, the prosecutor's contact with any one victim is relatively brief and limited. Consequently, prosecutors have closer ties to the former group than to the latter group. Moreover, prosecutors tend to respond to organizational goals. One of the primary goals of the criminal courts, albeit often an unofficial

92. The possible negative consequences of prosecutorial decisions on the victim's restitutive interest have been described as follows:

If the prosecutor is insensitive to the victim's interests, the restitution issue may be neglected entirely or the issue of damages may be presented poorly to the probation officer or the court at the restitution hearing; or the prosecutor may be inattentive to the implications for restitution of obtaining a conviction on one charge alone or on a minor charge. And it may not occur to him to use the negotiations on a guilty plea as an occasion at which other offenses—charged or uncharged—might be admitted by the defendant in order to broaden the basis for restitution.

Goldstein, supra note 19, at 548.

93. The American Bar Association's Standards Relating to the Prosecution Function state that the prosecutor's multiple function is "to convict the guilty," "to enforce the rights of the public," and "to guard the rights of the accused." ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Function Standard 1.1 and commentary, at 43-46 (1971) (approved by ABA House of Delegates Feb. 8, 1971) [hereinafter cited as ABA PROSECUTION STANDARDS]. The ABA Standards do not expressly recognize any duty or responsibility on the part of the prosecutor with respect to the victim's interests. See also D. NISSMAN & E. HAGEN, THE PROSECUTION FUNCTION 1-2, 7-11 (1982).

94. See D. Kelly, Victims' Reactions to the Criminal Justice Response 3 (June 1982) [hereinafter cited as D. Kelly] (paper prepared for delivery at the 1982 meeting of the Law and Society Association); J. EISENSTEIN & H. JACOB, AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977); A. BLUMBERG, CRIMINAL JUSTICE 183 (1967) [hereinafter cited as A. Blumberg].
one, is to use limited resources efficiently by disposing of large numbers of cases as quickly as possible, and, in pursuing this goal, the victim's interests may be sacrificed. According to one well-known authority, prosecutors and other criminal justice officials may manipulate victims and respond to their needs only when it promotes their organizational as well as personal goals.

B. The Systemic and Societal Interest in Reducing Victim Alienation from the Criminal Justice System

It can also be argued that there are systemic and societal interests which dictate giving the crime victim a greater role in the criminal proceeding. More specifically, it can be argued that the victim's role should be enlarged in order to increase his or her cooperation in the reporting of crimes and the prosecution of criminal offenders. This justification for enlargement of the crime victim's role rests on a series of empirical assumptions. These assumptions are as follows: first, that there is substantial victim alienation from the criminal justice system; second, that affording


96. See McDonald, supra note 10, at 302-06. For example, McDonald reports that a tactic called "cooling the victim out" is widely used by prosecutors, as well as defense attorneys and judges, to manipulate the victim. Since victims "are most vengeful, upset, and therefore, likely to be a 'problem' immediately after the crime," the prosecutor will sometimes have the case "continued several months until the victim 'cools off' and can be reasonable." Id. at 303. Another example of prosecutorial tactics described by McDonald is as follows:

Take . . . the prosecutor who has a case that he would like to dismiss, but the victim is present in the courtroom and could be "a problem." The clever prosecutor waits for the victim to leave the courtroom for a few minutes' break and then quickly he case called and dismisses it. When the victim returns, the prosecutor profusely apologizes to him, explaining that he should never have left the room. When he did, the case was called and had to be dismissed because he was not present. Sometimes it is the "system" in general that is to blame. For example, when the prosecutor has agreed to a plea bargain that specifies that the prosecutor will keep the victim away from the sentencing hearing, the resourceful prosecutor will notify the victim to come at 1:00 P.M. although the hearing is scheduled for 11:00 A.M. When the victim arrives he will be told that "the system" is to blame for "a last minute change in the schedule."

Id. at 304.
victims more opportunity to have input into or even control of criminal proceedings would lead to greater victim satisfaction with the criminal justice system; third, that greater victim satisfaction with the system would translate into greater cooperation of victims in the reporting of crimes; and, fourth, that greater victim satisfaction with the system would translate into increased cooperation of victims in the prosecution of criminal offenders.

Turning to the initial issue of whether there is substantial victim alienation from the criminal justice system, the very existence of a large and active "victim's rights movement" would seem to be a manifestation of widespread victim alienation, though admittedly the victim's rights movement covers a multiplicity of organizations, groups, and individuals with a variety of experiences and attitudes.97 There are also a number of written and oral accounts by victims of their negative experiences with the criminal justice system which have in turn produced negative attitudes on their part towards the system.98 Despite the current interest in victims, however, there has been relatively little rigorous systematic empirical research dealing with victim alienation from the criminal justice system, and the research that has been done leaves many questions unanswered as to the extent and nature of such alienation.99

Assuming that substantial victim alienation from the criminal justice system does in fact exist, the next issue is whether greater victim participation and involvement in the criminal proceedings would reduce victim alienation by increasing victim satisfaction with the criminal justice system. Here again, there is a paucity of empirical research, and the research that has been done is somewhat inconclusive.100

97. See supra notes 2-27 and accompanying text.
98. See generally President's Task Force Report, supra note 1.
99. One oft-cited survey of a sample of crime victims in Milwaukee who had interactions with the criminal justice system concluded that "victims and witnesses are apparently far more satisfied with the performance of criminal justice officials than reformers have believed." Knudten, Victim Problems and Perceptions, supra note 1, at 143. Another more recent survey of a sample of crime victims involved in the criminal justice system in Toronto found that such involvement produced a negative assessment of the sentence imposed. Hagen, Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process, 73 J. CRIM. L. & CRIMINOLOGY 317, 327, 329 (1982). Still another recent survey of a small sample of rape victims in the Washington, D.C. metropolitan area who had contacts with the prosecutors and courts found that a significant proportion of these victims reported more dissatisfaction with prosecutorial services and treatment subsequent to such contact than before such contact. D. Kelly, supra note 94, at 13, 18-20.
100. A few evaluations of programs designed to increase victim participation in criminal proceedings have been conducted. The most comprehensive of these evaluations is that of an experimental program in Dade County, Florida in which
Even if increased victim participation and involvement in the criminal proceeding would significantly reduce victim alienation from the criminal justice system, there remains the issue of whether such satisfaction would translate into a higher rate of crime reporting by victims. Crime victims are the major initiators of the criminal justice process through the reporting of crimes. Some studies have shown that over eighty percent of crimes are known to the police only because of reports by citizens—the majority of whom are victims. Nevertheless, surveys of crime victimization have consistently indicated that the total amount of crime is greater than that which is reported and such non-reporting of criminal victimization has had a detrimental impact.

victims participated in pre-trial settlement conferences as a part of the plea negotiation process. According to the report of the evaluation of the Dade County program, many victims did not attend the conferences, and such non-attendance was difficult to interpret because many of the non-attending victims claimed they had not been notified. The evaluation found that the victims who did attend the conferences were generally satisfied with the processing of their cases and that attending victims were on the whole more satisfied than non-attending victims, but the attendance-related effects were statistically insignificant. The evaluation also found that attendance at the conferences by victims did not seem to affect their attitudes toward the criminal justice system. W. Kerstetter & A. Heinz, Pretrial Settlement Conference: An Evaluation 113, 115, 117, 119, 121, 124 (1979) [hereinafter cited as W. Kerstetter & A. Heinz].


102. The primary source of data about crime reporting by victims is the National Crime Panel (NCP) surveys which are conducted by the United States Bureau of the Census in connection with the Bureau of Justice Statistics of the United States Department of Justice. For a description of the history of the NCP surveys and the methodology of these surveys, see generally R. Sparks, supra note 101, at 41-93. According to the published findings of the 1979 NCP household survey, only thirty percent of all personal crimes were reported to the police and only thirty-six percent of all household crimes were reported to the police, with some variation in the rates of reporting of specific crimes within these two categories. Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Victimization in the United States, 1979, 15-16 (Sept. 1981) [hereinafter cited as 1979 NCP Survey]. The findings of NCP surveys in prior years with respect to reporting rates are the same or similar to those of the 1979 NCP survey. See, e.g., Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Victimization in the United States, 1978, 12 (Dec. 1980); Nat'l Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, Criminal Victimization in the United States 13 (1977).
upon the ability of the criminal justice system to effectively per-
form its crime prevention and control functions. The relation-
ship, however, between victim failure to report crimes, victim
dissatisfaction with the criminal justice system, and victim particip-
ipation in criminal proceedings is uncertain. Available survey
data indicates that decisions by victims not to report incidents of
victimization are most strongly related to the character of the vic-
timization, but the surveys which have produced this data have
not directly addressed whether and how much victim crime re-
porting behavior is influenced by their attitudes toward the crim-
nal justice system.

There is also the issue of whether increased victim satisfaction
with the criminal justice system, as a result of increased victim
participation and involvement in criminal proceedings, would pro-
duce more and better cooperation of victims in the prosecution of
alleged offenders. Non-cooperation of victims and other witnesses
in the prosecution of alleged offenders is a major problem leading
to the eventual dismissal of many cases. Existing studies sug-
ject that the problem of victim non-cooperation is attributable to
factors such as the cost and inconvenience of cooperation and the
lack of communication between prosecutors and witnesses.

103. If crimes are not reported, offenders, who constitute a serious and continu-
ing threat to the safety of the community, cannot be identified and dealt with by
the criminal justice system in a manner which will protect the community. More-
ever, if crimes are not reported, the general deterrent effect of the criminal law
may be undercut because a potential offender who knows or believes that the
commission of a crime will not be reported need not fear apprehension and even-
tual punishment for the crime.

104. For example, the NCP surveys ask victims about their reasons for not in-
forming the police of the crime, and the most frequent responses are that the inci-
dent was “not serious enough” to report or that “nothing could be done” due to a
lack of proof about the offender’s identity. 1979 NCP SURVEY, supra note 102, at 17.

105. Id.; see R. SPARKS, supra note 101, at 99.

106. A 1972 report prepared for the National Advisory Commission on Criminal
Justice Goals and Standards concluded that the failure of witnesses to “show up”
at court hearings was “throughout the country, the most prevalent reason for dis-
missal of cases for want of prosecution and a significant contributor to overall dis-
missal rates.” J. LACY, NATIONAL STANDARDS CONCERNING THE PROSECUTION
WITNESS 27 (1972) (quoted in VERA INSTITUTE OF JUSTICE MEDIATION AND ARBITRA-
TION IN FELONY ARREST CASES 90 (undated)) [hereinafter cited as VERA]. Sev-
eral empirical studies have provided statistical documentation of this problem. For
example, a study of felony cases in Washington, D.C. revealed that almost half of
the felony cases in the sample were rejected for prosecution at initial screening
because the witnesses were uncooperative. K. WILLIAMS, THE ROLE OF THE VICTIM
IN THE PROSECUTION OF VIOLENT CRIME 28 (1978) [hereinafter cited as K.
WILLIAMS].

107. The most frequently cited reasons in the literature for witness non-coopera-
tion are time delay, loss of income due to court attendance, inappropriate physi-
cal accomodations, and witness intimidation. See F. CANNABAILE & W. FALCON,
WITNESS COOPERATION 13-14 (1976). Some studies of this problem, however, have
indicated that witnesses who have some type of preexisting relationship with the
The available data, however, is not really sufficient to reach any definite conclusion about the causal links, if any, between victim non-cooperation in the prosecution of alleged offenders, victim dissatisfaction with the criminal justice system, and victim participation in criminal proceedings.

In summary, crime victims have several interests of relevance in determining the appropriate role of the victim in a criminal proceeding. One such important interest is restitution and another is retribution. Victims also have an interest in protecting their reputations and privacy, preventing intimidation and harassment by the defense, and minimizing the psychological trauma of the victimization and subsequent contact with the criminal justice system. The conduct and outcome of proceedings in the criminal courts obviously may have an impact upon these interests since the public prosecutor cannot be depended upon to always adequately represent these interests of victims inasmuch as they may conflict with the state’s interests as interpreted by the prosecutor. Therefore, a strong case can be made that the victim should be afforded more input into, and even control of, the criminal proceedings.

There are also systemic and societal interests in increasing victim cooperation in the reporting of crime and the prosecution of criminal offenders which may lend some additional support to giving victims a more significant role in criminal proceedings. It is unclear, however, whether such restructuring of the victim’s role would have the desired effect of increasing victim cooperation in the reporting of crimes and the prosecution of alleged offenders by reducing victim alienation from the criminal justice system.

IV. THE ROLE OF THE VICTIM AT SPECIFIC STAGES OF THE CRIMINAL PROCEEDING

As it has been pointed out, crime victims have interests in connection with the prosecution of alleged criminal offenders that provide a persuasive rationale for giving victims a greater role in accused are less likely to cooperate with the prosecutor than witnesses who are strangers to the accused. See, e.g., Williams, *The Effects of Victim Characteristics on the Disposition of Violent Crime*, in *CRIMINAL JUSTICE AND THE VICTIM*, supra note 1, at 204. Still another study, probably the most extensive thus far conducted, identified the chief cause of non-cooperation to be poor communication between prosecutors and witnesses resulting in the mislabeling of witnesses as uncooperative. F. CANNAVALE & W. FALCON, supra, at 75-100.
criminal proceedings. Before, however, the role of the victim is enlarged, the benefits of this role redefinition should be weighed against its costs, taking into account not only the interests of the victim but also the interests of the state and the defendant. It must be emphasized that the appropriate role for the victim to play may be different at different stages of the criminal proceeding.

A. Initiation of Criminal Action

1. Private Prosecution

While vestiges of the colonial system of private prosecution still exist, the initiation of a criminal action rests largely with the public prosecutor. It is difficult to determine precisely the extent to which victims can currently initiate a criminal action without the authorization or approval of the public prosecutor. First of all, there is no agreement as to what constitutes the commencement of a criminal proceeding—there is a tremendous variation in the methods utilized to commence criminal proceedings from state to state and within states from court to court. Furthermore, even if a victim or other citizen has the right to bring a criminal action without the authorization or approval of the public prosecutor, once a proceeding is commenced, the public prosecu-

108. See supra notes 28-30 and accompanying text.
110. The differences in the views as to what constitutes the commencement of a criminal action and the differences in the methods utilized to commence criminal actions have been summarized as follows:

In practically all jurisdictions statutes or rules provide a method whereby a private citizen may make a criminal accusation against one alleged to have violated the law by making oath, affidavit, complaint, or the like, before a judicial officer who, on finding probable cause to be present, may issue a warrant or process thereon. Under many provisions of this nature it is evident that the approval or authorization of the prosecuting attorney is not contemplated at the time the initial criminal accusation is made.

Under various methods of procedure, a criminal prosecution may be deemed to have been commenced with the issuance of a warrant, with the arrest of the person charged with crime, or, perhaps most commonly, when a formal written complaint or affidavit charging the commission of a public offense is filed with a judicial officer. Furthermore, in some jurisdictions a grand jury may, under appropriate circumstances, make a presentment or informal accusation or return an indictment, without any bill of indictment having been submitted by the prosecuting attorney, which may be deemed to be the commencement of a criminal prosecution.

The desirability of a uniform stance with respect to control over the institution of criminal proceedings has been recognized by the legal profession.

tor may have the power to dismiss or enter a *nolle prosequi*. Apparently, there are only a few states where a victim has a clear right to bring a criminal action, and the exercise of this right is generally restricted to cases involving minor offenses.

It is possible to envision a criminal justice system under which private prosecutions would be revived and the victim would be able to initiate a criminal action without the authorization or approval of the public prosecutor. Victim-initiated private prosecutions, however, would run counter to the well-established enormous discretionary power of the public prosecutor with respect to charging decisions—whether to file formal criminal charges, what offense or offenses to charge, and whether to dismiss the criminal action once brought. The discretionary

111. In some jurisdictions public prosecutors may dismiss or enter a *nolle prosequi* once a criminal prosecution is commenced in order to terminate the prosecution without the consent of the court, but in many jurisdictions the consent of the court is required. See C. TORCIA, WHARTON'S CRIMINAL PROCEDURE 419-22, 221 (12th ed. 1975 & Supp. 1983) and authorities therein cited; see also Annot. 66 A.L.R. 3d 732, 734 (1974). For a discussion of the public prosecutor's dismissal and *nolle prosequi* power see Miller, supra note 69, at 308-17. Under English common law, the Attorney General, who represented the Crown, had the unreviewable power in criminal cases when prosecution had been initiated by private persons to enter a *nolle prosequi* before judgment and thereby could exercise a measure of control over such private prosecution, and American public prosecutors came to exercise this power of the English Attorney General even though there was not the same need for this power in the absence of private prosecution. See C. TORCIA, supra, at 419; Goldstein, supra note 19, at 549.


113. While discretion is an elusive concept, Kenneth Culp Davis in one of his many works on this subject has stated that a public official has discretion "whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction. See K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969) [hereinafter cited as K. DAVIS]. There is considerable literature dealing with the prosecutorial charging discretion. This literature includes empirical studies of the prosecutorial charging process. See, e.g., R. FRASE, THE DECISION TO PROSECUTE FEDERAL CRIMINAL CHARGES: A QUANTITATIVE STUDY OF PROSECUTORIAL DISCRETION (1978); P. GREENWOOD, S. WILDHORN, E. POGGIO, M.
charging power of the prosecutor is characterized by a lack of formal legal constraints.\textsuperscript{114} Victims who wish to challenge prosecutorial failure to commence criminal proceedings have no effective legal remedy.\textsuperscript{115}

\textbf{a. The Private Prosecution and the Victim's Interests}

From the perspective of the crime victim's interests, the impact of allowing victim-initiated private prosecutions would be beneficial. If victims were allowed to initiate a criminal action, victims could forestall or override negative prosecutorial charging decisions that would adversely affect their restitutive and retributive interests. A victim may be precluded from obtaining restitution or retribution by the public prosecutor's discretionary decision.
not to bring a criminal action or to dismiss a criminal action after it has been brought. Likewise, the vindication of a victim's restitutive and retributive interests may be frustrated by the prosecutor's discretionary decisions to charge a single offense where the evidence would warrant charging several offenses or to charge a lesser offense than the evidence warrants because such decisions may narrow the sanctions which may be subsequently imposed on a convicted offender. The availability of a private prosecution would mean that the victim could initiate a criminal action in order to obtain restitution and retribution even when the public prosecutor decides not to charge or not to charge the full range of possible offenses.

The availability of private prosecution could also benefit victims by providing a remedy for prosecutorial charging decisions that are the product of bias against certain classes of victims. A review of the existing literature indicates that factors related to the characteristics of the victim and the nature of the victimization influence prosecutorial charging decisions and that prosecutors

116. On the basis of an observational study of the New York County District Attorney's Office, one researcher found that victim characteristics such as gender, race, occupation, appearance, and life style were significant factors in prosecutorial screening of felony arrests. The influence of victim characteristics was not attributed to "outright prosecutorial bias." Rather it was attributed to stereotypical judgment by prosecutors about whether juries and judges would find the victim credible and sympathetic. Starks, The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office, 16 LAW & Soc'y REV. 225, 228-38 (1981-82). Other studies have also found a relationship between victim characteristics and prosecutorial charging decisions. See F. MILLER, supra note 113, at 174-76 (race of victim may be a factor); K. WILLIAMS, supra note 106, at 15-19 (victim characteristics such as alcohol abuse and gender are significant in prosecutorial screening decisions); Paternoster, Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina, 74 J. CRIM. L. & CRIMINOLOGY 754, 767-85 (1983) (The decision of a prosecutor to seek the death penalty in a homicide case in North Carolina is significantly related to the race of the victim with the probability of the prosecutor's seeking the death penalty being greater in cases of black offenders who kill white victims than in cases of black offenders who kill black victims. This differential treatment by race cannot be accounted for by the type of homicide committed or other possible aggravating factors). See also McDonald, Criminal Justice and the Victim, in CRIMINAL JUSTICE AND THE VICTIM, supra note 1, at 42 ("[T]he appearance, social class, character and other attributes of the victim are part of that vast body of extralegal factors which determine the quality of justice that is dispensed . . . the victim").

At least one study indicates that prosecutorial charging decisions are influenced by the prosecutor's evaluation of the victim's responsibility for the crime—whether the victim provoked or precipitated the crime. K. WILLIAMS, supra note 106, at 13-15. Along similar lines, studies indicate that a criminal case is more
are more responsive to requests for prosecution from victims involved in certain types of crimes than in other types of crimes.\(^\text{117}\) While the exercise of prosecutorial charging discretion in a manner that reflects bias against certain classes of victims may not be an abuse of discretion or even irrational, it is questionable when the evidence would permit prosecution and the victim has requested prosecution.\(^\text{118}\)

The right to bring a private prosecution, however, might prove to be of only symbolic value to many victims. Victims who desire to bring a private prosecution generally would need to obtain counsel to institute and conduct the prosecution on their behalf—the cost of retaining counsel might be a significant economic barrier to many of these victims, particularly those of limited financial means. It would be possible to create systems for furnishing counsel to indigent victims for the purpose of bringing a private prosecution just as systems have been created to provide counsel to indigent defendants, although it is somewhat doubtful that resources necessary to do this would be forthcoming. Nonetheless the existence of an opportunity for a victim to bring offenders before the criminal courts could still serve as a useful safeguard and safety valve if the prosecutor was unwilling to take action.

b. Public Prosecution and the Potential Defendant's Interests

From the potential defendant's perspective, the impact of au-

likely to be pursued if the victim and the offender were strangers than if they had some kind of prior relationship. See Felony Arrests, supra note 113, at 136; K. Williams, supra note 106, at 21-24. Cf. McIntyre, Study of Judicial Dominance of the Charging Process, 59 J. CHIM. L. CRIMINOLOGY & POLICE SCI. 463, 477 (1968).

117. The research literature indicates that the public prosecutor is more responsive to victim requests for prosecutions when the case is perceived as involving a serious crime than when the case is perceived as involving a non-serious crime. See F. Miller, supra note 113, at 297-337; Hall, supra note 113, at 948-53.

118. In cases where the evidence would permit prosecution and the victim wishes prosecution, prosecutorial charging decisions influenced by factors pertaining to the characteristics of the victim are highly problematic. For example, to the extent that the victim's socio-economic status influences these decisions directly or indirectly, the specter of "class based" justice for victims is raised. McDonald, supra note 10, at 306. If the evidence would permit prosecution and the victim wishes to prosecute, prosecutorial charging decisions influenced by the nature of the victimization such as the victim's responsibility for the crime and the existence of a prior relationship between victim and offender are also problematic. Prosecutorial charging decisions based on judgments concerning the victim's responsibility for the crime are likely to be quite subjective and, therefore, perhaps erroneous. In addition, there is growing recognition that individuals are entitled to be protected from crimes committed by spouses, lovers, friends, or neighbors, as well as crimes committed by strangers. Similarly, if the evidence would permit prosecution and the victim wishes prosecution, negative prosecutorial charging decisions are problematic when based upon a judgment by the prosecutor that the offense is minor since an offense which is minor to the prosecutor may be serious to the victim.
Authorizing victim-initiated prosecution would undoubtedly be seen as detrimental. There were abuses historically associated with private prosecutions, and it can be anticipated that objections would be made to the revival of private prosecutions on the ground that they might be abused.

One possible abuse of the private prosecution would be the bringing by the victim of a malicious and unfounded prosecution. The existence of a civil remedy for malicious private prosecutions might act as a deterrent to such prosecutions. In most states, public prosecutors are immune from malicious prosecution suits, but if private prosecutions were to be authorized, immunity from malicious prosecution suits would not have to be extended to victims functioning as private prosecutors. An additional deterrent might be the assignment of trial costs and defense counsel fees against the private prosecutor who brings a malicious prosecution.

Another possible abuse of the private prosecution would be the practice of compounding and other comparable practices. A victim might use the threat of instituting a criminal proceeding as leverage to exact a financial settlement or some other consideration from a potential defendant. Conversely, a potential defendant might pay the victim or might threaten the victim in order to induce the victim not to prosecute. There are currently statutes in almost all states prohibiting compounding and similar practices, but the revival of private prosecutions might well produce a growth in these practices necessitating their more vigorous enforcement.

From the standpoint of the potential defendant's interests, however, the chief apprehension about private prosecutions brought by victims is that they would reduce the impartiality and fairness of the charging process. This apprehension arises from an image of the victim as an overly vindictive individual and an image of the prosecutor as a disinterested, objective individual—images

119. See supra notes 45-56 and accompanying text.
120. See Private Prosecution, supra note 112, at 232-33. See also Annot. 118 A.L.R. 1450 (1939).
121. See Private Prosecution, supra note 112, at 233.
123. In passing upon the legality of private prosecutors, courts have expressed concern about the vindictiveness of victims and a corresponding faith in the objec-

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that do not always correspond to reality. Moreover, it is not necessarily appropriate to apply the same standards and norms to victims' decisions to prosecute and to public prosecutors' decisions to prosecute. Public prosecutors represent the interests of the state and have the responsibility of seeing that justice is done, while victims simply represent their own individual interests. Once the proposition is accepted that victims may have restitutive and retributive interests as arising from the crime deserving of vindication through a criminal prosecution of the offender, differences in the handling of criminal cases deriving from differences in the interests of victims are inevitable. The troublesome aspect of this position is that a victim's desire to prosecute may be related not to restitutive and retributive interests arising from the crime but rather to motives extraneous to these interests.

124. On the one hand, there is evidence that contradicts the perception that victims are invariably unduly vindictive. For example, one study of rape victims found that victims in the sample were more concerned with how they were treated than what happened to their offenders and concluded that "though victims want something done to the defendant, they are not a bloodthirsty lot." D. Kelly, supra note 94, at 24-29. Another relevant study is the evaluation of a Dade County pretrial settlement program where victims participated in pretrial settlement conferences which likewise found that victims did not demand the severest possible punishment of defendants. See infra note 152 and accompanying text.

On the other hand, observers of the criminal justice system have reported that public prosecutors are not always objective and unbiased. As one commentator has declared:

"The prosecutor is not merely a representative of public justice. He is an official administering a bureaucracy that serves a variety of objectives—investigative, adjudicative, administrative, and political. However high-minded he may be in exercising his function, his roles as advocate and administrator make it difficult for him to be genuinely neutral and to weigh impartially the facts and law and equities bearing on the many decisions he must make." Goldstein, supra note 19, at 555. See also Vorenb erg, supra note 113, at 1553, 1557-58.

The courts have similarly recognized that public prosecutors are not always objective and unbiased. Thus, the use by prosecutors of their charging discretion to enhance charges against a defendant in retaliation for a defendant's exercise of a constitutional or statutory right has been characterized as vindictiveness and held to be a violation of federal constitutional due process guarantees. See, e.g., Blackledge v. Perry, 417 U.S. 21, 25-29 (1974). For an examination of the formulation and application of the federal constitutional prohibition against prosecutorial vindictiveness in charging decisions, see Schwartz, The Limits of Prosecutorial Vindictiveness, 69 I.A. L. Rev. 127 (1983).
c. Private Prosecution, the Interests of the State, and the Public Prosecutor's Charging Discretion

From the perspective of the state's interests, a determination and evaluation of the impact of allowing victims to bring private prosecutions involves a consideration primarily of its impact upon the authority of the public prosecutor who acts as the state's representative in deciding whether to initiate a criminal action. Since the basis for and effect of negative prosecutorial charging decisions with respect to the state's interests vary, the impact of authorizing private prosecutions by victims may vary depending upon the type of decision involved. Negative prosecutorial charging decisions may be grouped in a variety of categories for purposes of illustrating this potential variation in the impact of victim initiated private prosecutions.

One category might consist of negative prosecutorial decisions that reflect judgments about the prosecutorial merit of the case. A prosecutor sometimes decides not to charge an offense because the alleged facts do not constitute a crime, or the admissible evidence is insufficient either to establish probable cause or to support a conviction. It is unclear to what degree victim-initiated prosecutions would hinder the prosecutor's ability to screen out "weak" cases. Private prosecutions brought by the victim would be subject to grand jury and preliminary hearing requirements and would have to meet the same evidentiary standards as a prosecution brought by a public prosecutor. Nevertheless, a victim who usually would not be a lawyer and has a direct interest in the case would probably be more inclined to institute a criminal action in a weak case than a public prosecutor. Hence, the frequency of weak cases might increase with private prosecution.

Another category might consist of negative prosecutorial charg-

125. For a description of the prosecutorial charging process which produces decisions in this category, see F. MILLER, supra note 113, at 11-19, 21-43; P. GREENWOOD, supra note 11, at 94-96; Neuberger, supra note 113, at 502-03; Rabin, supra note 113, at 1061-64. Accepted standards of professional conduct require prosecutors to screen cases for prosecutorial merit in order to avoid commencing a criminal prosecution when the charges are not supported by probable cause and when the admissible evidence is not sufficient to support a conviction. See ABA PROSECUTION STANDARDS, supra note 93, Standard 3.9(a) and commentary, at 7-8. See also Jacoby, supra note 113, at 82-83, 86; Vorenberg, supra note 113, at 1547-48.

126. One observer reports that the English system of private prosecution under which the police and citizen rather than a public prosecutor institute many criminal proceedings does not screen out unnecessary or unfounded criminal actions as well as the American system of public prosecution. Kaufman, Criminal Procedure
ing decisions that reflect the prosecutor's judgment that non-prosecution or something less than full prosecution is consistent with the purposes of the criminal law and the goals of the criminal sanctioning process. For example, prosecutors sometimes decide not to charge or not to charge fully because of undue harm to the suspect and the availability of other effective alternatives. In these kinds of cases, restoration of private prosecution would permit victims to overturn prosecutorial charging decisions which were in fact consistent with, or at least not contrary to, the interests of the state. Even if the prosecutor's decision, however, is in the interest of the state, it may be contrary to the interests of the victim, and such cases would raise the fundamental question of which interests should prevail in the event of such a conflict.

Still another category might consist of negative prosecutorial charging decisions that are based upon administrative considerations. For example, prosecutors frequently make negative prosecutorial decisions in order to conserve scarce prosecutorial resources and control crowded court dockets. The victim-initiated prosecution could be regarded as a needed and desirable check on prosecutorial charging discretion, insofar as it leads to decisions based upon administrative considerations which neither promote the victim's interests nor serve the purposes of the criminal law and the goals of the criminal sanctioning process. Overburdened prosecutors' offices and criminal courts, however, constitute a very real problem. On the one hand, victim-initiated private prosecutions might substantially further the strain on the

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127. For a description of the prosecutorial charging process which produces decisions in this category, see F. MILLER, supra note 113, at 186-90, 207-52; Rabin, supra note 113, at 1036-61; see also Jacoby, supra note 113, at 84-85; LaFave, supra note 113, at 534-55; Vorenberg, supra note 113, at 1551-52.

128. Professor Goldstein has described the administrative concerns, especially case pressures, that lead to negative prosecutorial charging decisions as follows:

When he functions as an administrator, the prosecutor's concerns may also focus less on justice in the particular case than on using his resources and the court's time effectively. The rape case may be reduced to indecent assault and the street robbery to larceny; multiple burglary offenders may be charged with only one offense; and many offenses are not prosecuted at all because they fall into the "nuisance" category—the cases of battered wives and battered children and battered sweethearts, neighborhood disputes, bad checks, and consumer frauds. Prosecutors regard themselves as authorized to pursue their own administrative course concerning their case loads, their policy preferences as to the relative importance of the crime charged, the correctional dispositions to be sought, and the extent to which they should trade immunity from prosecution for information to be used in other cases.

Goldstein, supra note 19, at 535. See Rabin, supra note 113, at 1037-52. See also Jacoby, supra note 113, at 83-84; LaFave, supra note 113, at 533-34; Vorenberg, supra note 113, at 1548-49.
criminal courts by increasing the number of criminal cases that must be processed, depending upon the frequency with which criminal actions would be instituted by victims. On the other hand, if victims were authorized to bring and conduct criminal prosecutions, public prosecutors might be able to conserve their scarce resources for cases that cannot, would not, or should not be privately prosecuted.

Yet another category might consist of negative prosecutorial charging decisions that constitute abuses of discretion or are otherwise inequitable. This category would encompass decisions which are the product of corruption, political or personal favoritism, laxness, and clearly impermissible criteria such as the potential defendant’s race or sex, and this category would also encompass decisions that produce unequal treatment of similarly situated potential defendants because of inconsistent exercise of prosecutorial charging discretion. A concomitant of the broad and largely uncontrolled discretionary power of prosecutors in making charging decisions is that this discretion will be exercised in a manner that constitutes an abuse of discretion or is otherwise inequitable. Given this risk, it is conceivable that the victim-initiated prosecution could provide a useful and needed check on prosecutorial charging discretion. It is also conceivable that

129. As Professor Davis has stated:

Theoretically possible is a system of enforcement in only a fraction of the cases in which enforcement would be appropriate, with discretionary selections made in such a way that all the cases prosecuted are more deserving of prosecution than any of the cases not prosecuted.

The degree of probability of such an achievement is, I think, the same as the degree of probability that all public administrators will act with 100 percent integrity, will never be influenced by political considerations, will never tend to favor their friends, will never take into account their own advantage or disadvantage in exercising discretionary power, will always eschew ethically doubtful positions, will always subordinate their own social values to those adopted by the legislative body, and will make every decision on a strictly rational basis.


130. There is an extensive literature dealing with the need for and desirability of various kinds of mechanisms for regulating prosecutorial changing discretion in order to reduce the danger of exercises of discretion that constitute abuse or are inequitable. See, e.g., National Advisory Commission on Criminal Justice Standards and Goals, Report on Courts 10-21, 24 (1973); P. Greenwood, supra note 113, at 116-19; Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 4; LaFave, supra note 113, at 535-39; Vorenberg, supra note 113, at 1360-1572; cf. F. Miller, supra note 113, at 93-245.
victim-initiated private prosecution would do little or nothing to reduce this risk.

The preceding categories of negative prosecutorial charging decisions are admittedly somewhat arbitrary; an individual decision may fall within more than one of these categories; and these categories by no means exhaust the possibilities for categorization of decisions. The broad and largely uncontrolled discretionary power of the public prosecutor to make discretionary decisions with respect to the initiation of criminal actions is obviously a complex subject and the need for and desirability of such discretion has been much debated. Suffice it to say that generalizations about the impact of victim-initiated private prosecutions—what their impact would be and whether their impact would be beneficial or detrimental in terms of the interests of the state—are hazardous. What is clear is that in view of the well established control by the prosecutor over the initiation of criminal actions, the widespread revival of private prosecutions by victims without the consent or approval of the public prosecutor would require a fundamental reorientation and restructuring of the public prosecution function. As a practical matter, for this reason alone, the recognition of a right on the part of a victim to bring a criminal prosecution would seem unlikely when the prosecutor has decided not to prosecute and objects to private prosecution.

2. Modified Private Prosecution

It must be stressed at this point that private prosecution could be revived in a modified form with various limitations. Private prosecutions by victims need not be authorized in all criminal cases. Its use could be confined to cases involving certain types of offenses which victims are likely to want prosecuted but which public prosecutors are likely to be reluctant to prosecute, being the best candidates for private prosecution.\footnote{131. For a discussion of other frequently mentioned reasons for negative prosecutorial charging decisions, see F. Miller, supra note 113, at 173-85, 253-59; LaFave, supra note 113, at 533-35; Vorenberg, supra note 113, at 1551-53.}

\footnote{132. As Goldstein has pointed out:
There are some obvious categories of cases in which, under current conditions, private enforcement may be more likely to occur than public enforcement. These include the crimes among friends and neighbors who assault and steal from each other, the crimes committed by business people who cheat and defraud their customers and clients, the crimes of strict liability involving health and safety, and public torts. There are institutional candidates for private prosecution as well: retail stores in shoplifting cases; banks in embezzlement cases; public health and safety agencies assuming the role of proxy victims under regulatory statutes; public interest groups, trade association, and labor unions serving as proxy victims and attending to the criminal law enacted out of concern for their constituents.}
Private prosecution by victims on a unilateral basis also need not be authorized. Its use could be conditioned on some type of prior approval or authorization. One alternative is to make notification or approval by the public prosecutor a prerequisite for a private prosecution. This alternative would allow a victim to institute a criminal proceeding where the prosecutor had no basic objection to prosecution, but would leave unresolved genuine conflicts between victims and prosecutors as to whether a prosecution should be undertaken.

Another alternative is to make negative prosecutorial charging decisions subject to judicial review when sought by the victim. This alternative has the advantage of providing a judicial evaluation, which is presumably neutral and detached, of the prosecutor’s decision not to prosecute or not to prosecute fully contrary to the expressed wishes of the victim. Traditionally, however, the judiciary has been very reluctant to review prosecutorial charging decisions.

Goldstein, supra note 19, at 559.

133. Professor Goldstein, who is the most forceful advocate of an approach which would condition the bringing of a private prosecution on the consent or approval of the public prosecutor, has stated:

A system combining private prosecution with some degree of public control can easily be imagined. It might, for example, permit the private prosecutor to invoke the criminal law by filing a complaint before a magistrate, with notice to the district attorney so that he may serve a “screening and centralizing” function even as he delegates prosecution to others. If there is probable cause, the prosecution would continue unless the prosecutor intervened and sought to dismiss the case or to prosecute it himself. His decision to prosecute would be unreviewable and his motion to dismiss a private prosecution would prevail if he had rationally persuasive grounds for dismissal. In time, the prosecutor would probably develop criteria for the classes of cases he would allow routinely to be brought by private parties, as well as those he would take over or move to dismiss. In such a system, it would be essential to provide flexible remedies as alternatives to imprisonment, not only to reduce the strain on public resources but also because the key to minor criminal cases of the sort most appropriate for private prosecution is often found in “civil” remedies, mediation, and arbitration.

Goldstein, supra note 19, at 560.

134. See Gifford, supra note 113, at 716-17; Vorenberg, supra note 113, at 1568.

135. Among the current barriers to full judicial review of negative prosecutorial charging decisions at the request of the victim is the separation of powers doctrine. Federal courts have interpreted this doctrine as requiring judicial deference to prosecutorial charging decisions. See, e.g., Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

Another current barrier to full judicial review of negative prosecutorial charging decisions at the request of the victim are standing requirements as currently in-
Still another alternative, and the one that is most appealing, is to establish a mechanism whereby the victim could challenge a negative prosecutorial charging decision by directly petitioning a grand jury to initiate a prosecution. Under this approach, if a victim asked the grand jury to initiate a prosecution, the public prosecutor would be forced to articulate his or her reasons for refusing to prosecute, and the grand jury could then assess their validity in light of the victim's desire for prosecution. One of the grand jury's historic functions is to investigate criminal cases and to bring to trial individuals justly accused of a crime. There is also some precedent for and experience with victims presenting a charge or complaint directly to the grand jury. In passing upon

interpreted and applied. An especially troublesome decision in this regard is Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973), in which the United States Supreme Court stated that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." For a critique of this decision, see Gifford, supra note 113, at 712-14; Goldstein, supra note 19, at 550-52.

Still another current barrier to full judicial review of negative prosecutorial charging decisions at the request of the victim is the requirements associated with mandamus actions, the victim's chief procedural vehicle for obtaining such review. It is often said that the mandamus remedy is available only to compel a public official to perform a ministerial or mandatory act, and courts have refused to issue writs of mandamus ordering public prosecutors to prosecute on the ground that the prosecutorial charging decision is discretionary. See, e.g., Pugach v. Klein, 193 F. Supp. 650 (S.D.N.Y. 1961); Talaferro v. Locke, 182 Cal. App. 2d 752, 6 Cal. Rptr. 813 (1960). In some jurisdictions a writ of mandamus may be issued if the public prosecutor's failure to prosecute is an "abuse of discretion," but such abuse is not easy to establish. See, e.g., Brack v. Wells, 184 Md. 86, 90, 40 A.2d 319, 321 (1944); Ackerman v. Houston, 4 S. Ariz. 293, 43 P.2d 194 (1935). For a fuller discussion of mandamus requirements see F. Miller, supra note 113, at 331-34; Gifford, supra note 113, at 714-16. See also Comment, The Confrontation of the Legislative and Executive Branches: An Examination of the Constitutional Balance of Powers and the Role of the Attorney General, 11 Pepperdine L. Rev. 331 (1984). Among the practical barriers to full judicial review of negative prosecutorial charging decisions at the request of the victim is the difficulty of formulating judicial standards for weighing the myriad factors that can enter into a prosecutor's charging decision. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 472 U.S. 141, 275, 380 (2d Cir. 1972); Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967). There is also the difficulty of ascertaining the prosecutor's reasons for and motives in making a charging decision. See Gifford, supra note 113, at 683. Professor Vorenberg has urged that public prosecutors develop guidelines for making charging decisions and has suggested that the existence of such guidelines might make the courts more willing to review these decisions. Vorenberg, supra note 113, at 1569.


137. At common law citizens had the right to communicate directly with the grand jury to present a complaint or charge. See United States v. Smyth, 104 F. Supp. 383, 289 (N.D. Cal. 1952); Brack v. Wells, 184 Md. 86, 93, 40 A.2d 319, 322 (1944). In some jurisdictions, such a right still exists. See, e.g., Brack v. Wells, 184
a victim's request for the initiation of a criminal prosecution over the objection of the prosecutor, the grand jury would not be able to rely on the investigative assistance of the prosecutor's office as it normally does in a criminal case, but provision could be made for the appointment of special independent prosecutors or investigators to assist the grand jury.138

3. Notification of Victims Concerning Prosecutorial Charging Decisions

Even if victims do not have the right to initiate a criminal action or to obtain review of a negative prosecutorial charging decision, they can and should at a minimum be informed of prosecutorial charging decisions pertaining to their case. There is in fact a developing consensus that victims should be informed of prosecutorial charging decisions.139 Legislation requiring victim notification is being considered in several states, and victim notification is a major component of victim/witness assistance programs.140

B. Pre-Trial Stage: Guilty Plea Negotiations

Just as the crime victim usually has no formal role in the initiation of a criminal action, the victim usually has no formal role...
with respect to decision-making during the pre-trial stage. A large proportion of all criminal actions—between 85 and 90 percent in many jurisdictions—are disposed of at this stage by guilty plea. Many guilty pleas are the product of plea negotiation or bargaining between prosecutor and defense counsel. The prosecutor is free to decide whether to plea bargain and has considerable discretion in negotiating a guilty plea. The normal pattern is for the prosecutor to agree to drop or reduce particular charges or to make sentencing recommendations in exchange for the defendant’s agreement to plead guilty to a particular charge. The most common explanation for the frequency with which the prosecutor engages in plea bargaining with defense counsel is that heavy criminal court caseloads combined with the scarcity of prosecutorial resources necessitate the disposition of cases without trial through guilty pleas. Yet studies indicate that the mainte-

141. The commonly accepted figure with respect to criminal action concluded by guilty pleas has been 90 percent. See, e.g., President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967) [hereinafter cited as President’s Commission Task Force Report]. A study of the guilty plea process in 20 states found that the cases disposed of by guilty plea varied a great deal from jurisdiction to jurisdiction. The mode, however, for all jurisdictions combined was between 85 and 90 percent. H. Miller, J. Cramer, & W. McDonald, Plea Bargaining in the United States 16-24 (1978) [hereinafter cited as Miller Study].


144. See M. Heumann, supra note 142, at 24-25. The literature on plea bargaining has generally accepted plea bargaining as a necessary product of case pressure. See, e.g., J. Bond, Plea Bargaining and Guilty Pleas 1-6 (2d ed. 1982); President’s Commission Task Force Report, supra note 142, at 10.

Some of the United States Supreme Court decisions dealing with guilty pleas accept case pressure as a justification for plea bargaining. See Blackledge v. Allison, 431 U.S. 63, 71 (1977) (“Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered they can benefit all concerned. . . . Judges and prosecutors conserve vital and scarce resources”). Santobello v. New York, 404 U.S. 257, 260 (1971) (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every
Vice President of the Council of Accountancy, American Institute of CPAs

It is important to note that the role of the victim in plea negotiations is often overlooked. Victims rarely play a formal role in plea negotiations and have largely been excluded from these negotiations. Similarly, victims rarely play a formal role in the judicial hearing at which the judge decides whether to accept a tendered guilty plea by the defendant. There is relatively little empirical research about the informal influence of victim attitudes and wishes on the prosecutor's discretionary plea bargaining decisions and the judge's acceptance of negotiated pleas. Model standards and goals respecting negotiated guilty pleas do not contemplate a role for the victim in the plea negotiation process and commentaries on the plea negotiations have largely overlooked the role of the victim.

The outcome of the majority of criminal prosecutions that end in a guilty plea is effectively determined by guilty plea negotiations between prosecutor and defense counsel as to the offense or offenses to which the defendant will plead and the sentence which the prosecutor will recommend to the court—a recommendation which the court usually follows. Accordingly, terms of a
negotiated guilty plea have a bearing upon the victim's ability to obtain the desired restitution or retribution, and a case can be made for giving victims the right to have some input into and control over the plea negotiation process so that they can protect those interests.\(^{150}\)

Victim participation in the plea negotiation process can be achieved through affording the victim the right to actually be present at and take part in the negotiations between prosecutor and defense counsel. It can also be achieved by affording the victim the right to consult with or submit a statement to the prosecutor as to the impact of the crime and his or her views as to any proposed guilty plea agreement. There is resistance to victim participation in plea negotiation.\(^{151}\) One concern is that victim participation would result in fewer cases being plea bargained based upon a fear that victims will be overly vindictive and will object to charging and sentencing concessions by the prosecutor in exchange for a plea of guilty by the defendant. This is of concern to defendants because it could mean that more defendants will go to trial, be convicted, and receive heavier sentences; it is of concern to prosecutors primarily because they place so much reliance on negotiated guilty pleas for more efficient case processing. Another concern is that the victim who is actually present at and takes part in plea negotiations between the prosecutor and defense counsel will be disruptive.

There is an evaluation of at least one program designed to increase victim participation in the plea negotiation process by permitting victims to attend pre-trial settlement conferences which indicates that these concerns may be exaggerated. According to the evaluation of this program, the victim participants did not make insistent demands for severe punishment of the defendants; they did not prove to be obstreperous; and no significant differences in settlement or trial rate between test and control cases were identified.\(^{152}\) While this type of program must be further

150. As one observer has pointed out:

[Plea] . . . bargains generally produce sentences that are significantly less than could be received under the law. If the victim is interested in retribution, he may be frustrated by the imposition of a low sentence without explanation of the reasons for leniency or the opportunity to participate meaningfully in the process of reaching a disposition. If the victim is not interested in retribution, there is little other satisfaction to be gained. Victims seldom get an apology, seldom are reconciled with the offender and seldom receive restitution.

DuBow and Becker, Patterns of Criminal Advocacy, in Criminal Justice and the Victim, supra note 1, at 150 (citations omitted).

151. See W. Kerstetter & A. Heinz, supra note 100, at 15-16, 126. See also Goldstein, supra note 19, at 557-58.

replicated and evaluated before any definite conclusions can be drawn about the effect of victim participation in the plea negotiation process, preliminary data suggests that programs to increase victim participation in plea negotiations can be successful.

Even when, however, the victim has an opportunity to participate in the plea negotiation process, the terms of the plea agreement eventually arrived at may be contrary to the wishes and interests of the victim unless the victim has the power to veto the agreement. In the absence of such veto power, victim input into the judicial decision with respect to acceptance of the guilty pleas would seem necessary to ensure that the victim's wishes and interests are considered.153 Input could take the form of an oral statement by the victim at the judicial hearing at which the negotiated guilty plea is offered by the defendant, and input could also take the form of submission of a written statement to the court by the victim informing the court of the impact of the crime on the victim and the victim's views as to the terms of the negotiated plea agreement.154

Here again, if there is no mechanism for some victim input into and control of the plea negotiation process, the victim at a minimum should have the right to be notified of decisions. There does, in fact, seem to be general agreement that victims should be notified of the outcome of the plea negotiation process, and such notification is increasingly being statutorily or administratively required.155

should be noted, however, that many victims did not attend the pre-trial settlement conferences and their role "seems to have been basically that of observers with a limited and structured input." Id. at 128-29. See also supra note 100.

153. As a matter of federal constitutional law, a guilty plea must be voluntary and intelligent to be valid. See, e.g., Brady v. United States, 397 U.S. 742 (1970); Kercheval v. United States, 274 U.S. 220 (1927). In accepting a guilty plea federal court judges must follow the procedures of Rule 11 of the Federal Rules of Criminal Procedure which are designed to insure that the plea is voluntary, intelligent, and accurate. While state court judges need not follow federal plea taking procedures, state procedures must satisfy federal constitutional requirements. See, e.g., Henderson v. Morgan, 426 U.S. 637 (1976); Boykin v. Alabama, 395 U.S. 238 (1969). There is a debate over whether trial court judges should review guilty pleas on grounds other than their compliance with federal constitutional requirements. Compare A. Goldstein, supra note 143, with Uviller, Reassessing the Role of the Trial Judge in Verdictless Dispositions of Criminal Cases, 81 Mich. L. Rev. 1166 (1983).

154. See, e.g., IND. CODE ANN. §§ 35-4.1-4-1, 35-5-6-1.5-35-5-6-2 (West 1978). See also ABA VICTIM/WITNESS LEGISLATION, supra note 12, at 46-47; PRESIDENT'S TASK FORCE REPORT, supra note 1, at 63-64.

155. See, e.g., MAINE REV. STAT. ANN. § 15-812 (West Supp. 1982); ABA Vic-
C. Trial Stage

Although the limitation of the crime victim's role in a criminal proceeding to that of a witness has meant the exclusion of the victim from a formal role in the initiation of criminal proceedings and from decision-making at the pre-trial stage, there are a number of states where a victim is permitted to retain an attorney to function as a private prosecutor at trial.\textsuperscript{156} In many jurisdic-

tions the right of the victim to employ a private prosecutor is conditioned upon the approval of the public prosecutor or trial court.\textsuperscript{157}

While relatively little is known about the actual prevalence of this practice in jurisdictions where it is permissible, it may be more prevalent than is commonly assumed.\textsuperscript{158} Many of the judicial decisions dealing with private prosecution involve homicide cases where an attorney has been employed to act as a private prosecutor by the victim’s family or cases where an attorney has been hired to prosecute some other type of serious offense.\textsuperscript{159} There is some evidence, however, that the use of private prosecutors is particularly common in trial courts with limited criminal or quasi-criminal jurisdiction.\textsuperscript{160}

The activities of private prosecutors during trial range from simply advising the public prosecutor to conducting the prosecution without the presence of a public prosecutor.\textsuperscript{161} One frequent limitation imposed upon the activities of private prosecutors at trial is the requirement that the public prosecutor must maintain

\begin{footnotesize}

\textsuperscript{158} A 1955 survey indicates that private attorneys regularly served as prosecutors in criminal trials in lower courts in 28 states. \textit{Private Prosecution, supra} note 112, at 221. \textit{See also Criminal Justice and the Victim, supra} note 1, at 35; F. Miller, \textit{supra} note 113, at 331 n.152.


\textsuperscript{160} \textit{See Private Prosecution, supra} note 112, at 221.

\textsuperscript{161} See, e.g., State v. Atkins, 261 S.E.2d 55 (W. Va. 1979) (private prosecutor examined witnesses to a greater extent than public prosecutor); Ryals v. State, 434 P.2d 488 (Okla. Crim. App. 1967) (private prosecutor made opening statement, presented the state’s case in chief and rebuttal and cross-examined defense witnesses); Goehring v. Commonwealth, 370 S.W.2d 822 (Ky. Cr. App. 1963) (private counsel employed by victim’s family sat at prosecution counsel table and advised public prosecutor); People v. Van Sickle, 13 N.Y.2d 61, 242 N.Y.S.2d 34 (1963) (prosecution conducted by complaining witness without presence of district attorney or his assistant).
\end{footnotesize}
control of and supervise the prosecution, but this requirement often seems to be loosely interpreted.

Retaining counsel to act as a private prosecutor at trial is a way for the victim to protect his or her restitutive and retributive interests because it helps to insure that the defendant will be prosecuted in a manner consistent with these interests. The primary motivation of victims who employ an attorney to function as a private prosecutor is probably to secure vigorous prosecution of the defendant. Victims may avail themselves of the option of hiring an attorney to serve as a private prosecutor when the public prosecutor is unable or unwilling to allocate the resources necessary for successful prosecution, or if they lack confidence in the commitment of the public prosecutor, or if they lack confidence in his or her expertise.

Participation in the trial by an attorney hired by the victim to act as a private prosecutor is frequently objected to on the ground that it is prejudicial to the right of the defendant to a fair and impartial trial. Since the private prosecutor has been retained and is being paid by the victim who wants to secure a conviction, it is contended that there is a danger that the private prosecutor may be overzealous; it is also contended that there is a danger that the private prosecutor, when faced with a conflict between securing the conviction that the victim wants and protecting the defendant's rights, will opt for the former rather than the latter. The standard response to this contention is that the defendant's rights are adequately protected because counsel retained by the victim must observe the same legal principles and rules that the public prosecutor must observe and a judgment of conviction is subject to reversal due to error on the part of victim's counsel.


163. See infra note 167; Private Prosecution, supra note 112, at 220.

164. See, e.g., Flege v. State, 93 Neb. 610, 613, 142 N.W. 276, 277 (1913) ("It is impossible to conceive of an attorney, after having served [the victim's brother] as he had and for the purpose for which he had been employed, to enter upon the trial with the single purpose of impartially seeking to know the truth, protecting the rights of the defendant, and seeing that they were maintained, if need be, at all hazards."); Biemel v. State, 71 Wis. 444, 449, 37 N.W. 244, 247-48 (1888) ("Criminal cases are not likely to be [fairly conducted] if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction.") See also Comment, supra note 28, at 773-80, 797-94; Private Prosecution, supra note 112, at 1173.

165. See, e.g., State v. Kent, 4 N.D. 577, 586, 2 N.W. 631, 634 (1895) ("It is the zeal of counsel in the court room alone of which the accused can complain . . . . And if such zeal in the court room, on the trial, does not result in error, what conceivable difference can it make whether such assistance was employed by the public or by private persons? . . . The manner of conducting the case in the court room cannot
ants are also protected by the requirements previously alluded to: that counsel retained by the victim be under the "control" or "supervision" of the public prosecutor, albeit this protection may be more illusory than real if it is loosely interpreted.\textsuperscript{166}

The effect of participation in the trial by a private prosecutor upon the trial and the public prosecutor's performance of his or her duties depends on a number of variables. On the one hand, it could hinder the public prosecutor's effective and efficient presentation of the state's case and unduly complicate and prolong the trial. On the other hand, it could serve to augment limited prosecutorial resources which could be especially helpful in cases involving non-serious offenses to which the public prosecutor is reluctant to devote staff and other resources.

Another approach to participation in the trial by counsel retained by the victim, quite distinct from that of affording a victim a general right to retain counsel to serve as a private prosecutor, is to give victims with a special need for counsel the right to have such representation. This approach has its advocates,\textsuperscript{167} and legislation adopting such an approach has been proposed in several states and enacted in at least one state.\textsuperscript{168} A strong argument can be made for allowing the victim to be represented by counsel in cases where the defense alleges that the victim provoked or precipitated the victimization and in cases where the defense challenges the victim's character and veracity. In these cases, victims have at stake not only interests of a restitutive and retributive nature but also the interests of preventing damage to their reputations and invasions of their privacy, being protected from defense harassment and intimidation, and minimizing their psychological trauma.\textsuperscript{169} Presumably the role of counsel in such cases would have to be tailored to the specific representation needs of the victim which gave rise to the right to be represented in the first place.

work legal prejudice to the accused, without resulting in error for which the conviction will be set aside."). See also Private Prosecution, supra note 112, at 220-21.\textsuperscript{166} See supra note 163 and accompanying text.

See, e.g., D. Kelly, supra note 91, at 4.\textsuperscript{167} See, e.g., D. Kelly, supra note 91, at 4.

BUREAU OF CRIMINAL JUSTICE STATISTICS BULLETIN, supra note 6, at 3; see also ABA VICTIM/WITNESS LEGISLATION, supra note 12, at 43-45.\textsuperscript{168} See supra notes 88-91 and accompanying text.\textsuperscript{169}
D. Dispositional Stage: Sentencing

The dispositional stage of the criminal court proceeding is a crucial one for the crime victim in terms of the victim's interest in restitution and retribution. The sentence imposed by the court on the convicted offender is determinative of whether the victim will receive restitution and, if granted, how much restitution the victim will receive. The sentence imposed by the court is also determinative of whether the victim's retributive needs and desires will be satisfied. Given these interests, victims may want to convey to the sentencing court their wishes regarding the sentencing. In the event the victim's wishes do not prevail, there may still be some value to the victim of having had the opportunity to have "one's say in the matter." 170

The right of victims to participate in the sentencing process need not rest solely on the recognition that the victims have restitutive and retributive interests that give them a stake in this process. Victim participation can also be supported on the ground that the victim has information relevant to an informed sentencing decision. Statutory sentencing schemes may expressly mandate or permit that factors relating to the victim be taken into account in fashioning a dispositional order. In some states, such schemes set forth presumptive sentences for particular offenses and specify aggravating or mitigating circumstances which the court may consider in imposing a harsher or more lenient sentence than the presumptive sentence. These statutorily defined aggravating or mitigating factors may include factors such as the offender's treatment of the victim during the commission of the crime, the victim's provocation of or consent to the crime, and the harm to the victim resulting from the crime. 171 In jurisdictions

170. See McDonald, supra note 68, at 107.
171. See, e.g., Ill. Ann. Stat. ch. 38, §§ 1005-5-3.1(1), (3), & (6), § 1005-5-4.2(1) (Smith-Hurd 1982) (factors to be considered in mitigation of sentence of imprisonment include whether "the defendant's criminal conduct neither caused nor threatened serious physical harm to another," "the defendant acted under a strong provocation," "the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained." Factors to be considered in aggravation of sentence imprisonment include whether "the defendant's conduct caused or threatened serious harm."); Ind. Code Ann. § 35-38-1-7(a)(2), (b)(5) & (6), (c)(1), (3), (5) & (9) (Burns Supp. 1983) (court may enhance sentence because of aggravating factors related to the offense, including the "victim of the crime was 65 years of age or older" and "the victim of the crime was mentally or physically infirm." Mitigating factors include "the crime neither caused nor threatened serious harm to persons or property," "the victim of the crime induced or facilitated the offense," "the person acted under strong provocation," "the person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained."). See also, Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 19-29, 42-47 (1976) [hereinafter cited as Fair and Certain Punishment].
where presumptive sentencing legislation has not been enacted, judges still sometimes consider factors relating to the victim as aggravating or mitigating factors in the exercise of their discretionary power to impose sentences.\textsuperscript{172} Furthermore, as has already been discussed, many sentencing statutes now provide for victim restitution—which has become an increasingly popular sentencing alternative—and the terms of a restitutive sentence should turn upon the injuries, damages, and losses suffered by the victim.\textsuperscript{173} Some of the information relating to the victim relevant to an informed decision by the sentencing court may have come out at trial. However, when a victim testifies at trial, the focus is the defendant's innocence or guilt, rather than the appropriate sentence for the defendant in the event of conviction.

One of the primary vehicles for providing the sentencing court with information relevant to the sentencing decision is the pre-sentence report usually prepared by the probation agency. In the last several years, the inclusion of statements concerning the impact of the crime upon the victim in the pre-sentence report has been widely advocated.\textsuperscript{174} A number of states now have statutes mandating or permitting the inclusion of "victim impact statements" in pre-sentence reports\textsuperscript{175} and the Federal Victim and

\textsuperscript{172} See Fair and Certain Punishment, supra note 171, at 42-43.
\textsuperscript{173} See supra notes 60-65 and accompanying text.
\textsuperscript{174} See, e.g., ABA Guidelines, supra note 13, at 2, 12-13; President's Task Force Report, supra note 1, at 18, 33.
\textsuperscript{175} States expressly providing for victim impact statements in pre-sentence investigation include the following: Arizona: Ariz. Rev. Stat. Ann. § 12-253 (West Supp. 1983) (in pre-sentence investigation probation officer shall inquire into impact of crime upon victim and immediate family); California: Cal. Penal Code. § 1203(h) (West Supp. 1983) (pre-sentence report must include comments of victim in felony cases although court can waive this requirement if victim has testified at trial); Connecticut: Conn. Gen. Stat. § 54-91a(c) (1983) (the pre-sentence investigator "shall" inquire into "the attitude of the complainant or victim, or of the immediate family" in cases of homicide); Illinois: Ill. Stat. Ann. ch. 38 § 1005-3-2(3) (1981) (mandatory victim impact statement); Indiana: Ind. Code Ann. § 35-4, 1-4-10 (West 1978) (pre-sentence report must include any written statements submitted to the prosecutor or probation officer by victim concerning the sentence); Iowa: Iowa Code Ann. § 910.3(5) (West Supp. 1983) (mandatory statement of pecuniary damage to victim part of pre-sentence report); Kansas: Kan. Stat. Ann. § 21-4604(2) (1981) (the pre-sentence investigator "shall" inquire into "the attitude of the complainant or victim"); Louisiana: La. Code Crim. Proc. art. 875(B) (West Supp. 1983) (court "shall" require victim impact statement); Maryland: Md. Code Ann., art. 41 § 124(2) (Michie Supp. 1983) (the pre-sentence report "shall" include a victim impact statement in felony cases if the felony caused "physical, psychological or economic injury" to the victim and in misdemeanor cases if misdemeanor caused "serious physical injury or death" to victim); Minnesota: Minn.
Witness Protection Act specifically requires federal pre-sentence reports to contain victim impact information.\textsuperscript{176} There are also some jurisdictions in which information regarding the impact of the crime upon the victim and the victim's attitude toward the sentence is included in the pre-sentence report, even without express statutory authorization.\textsuperscript{177} There is considerable variation from jurisdiction to jurisdiction and even within jurisdictions as to the definition of victim for the purpose of the victim impact statement, the type of cases in which statements are utilized, the content of the statements, and the method of preparing statements.\textsuperscript{178}

Another vehicle for victim participation in the dispositional decision-making process is the sentencing hearing. The victim's characterization as a witness rather than as a party to the action

\textsuperscript{176} STAT. ANN. § 609.115 (West Supp. 1983) (court may order pre-sentence report concerning “harm caused” by crime in misdemeanor, gross misdemeanor or felony cases); Montana: MONT. CODE ANN. § 46-18-112 (1981) (when investigation is required, probation officer shall inquire into the harm to victim and his immediate family); Nevada: NEV. REV. STAT. § 176.136(3) (1980) (mandatory victim impact statement); New Hampshire: N.H. REV. STAT. ANN. § 504:2 (Equity Supp. 1979) (pre-sentence report must contain summary of an interview “with the victim, if a natural person or member or members of his family”); New Jersey: N.J. STAT. ANN. § 2C:44-6(b) (West 1982) (victim has right to have impact statement included in pre-sentence report); New York: N.Y. CRIM. PROC. LAW § 390.30(3) (McKinney Supp. 1982) (pre-sentence report is to include victim impact statement “when it appears that such information would be relevant to the recommendation or court disposition”); Ohio: OHIO REV. CODE ANN. § 2947.051 (Anderson, 1983 Supp.) (victim impact statement required before sentencing if offender caused, threatened or created risks of physical injury to victim); Oklahoma: OKLA. STAT. ANN. tit. 22, § 982 (West Supp. 1982) (statement of victim concerning offense and amount of loss shall be included in pre-sentence report in felony cases); Virginia: VA. CODE § 19.2-299-1 (1983) (pre-sentence report may, in discretion of court, include victim impact statement if court determines defendant caused significant injury to victim).

\textsuperscript{177} See also UNIFORM LAW COMMISSIONERS, MODEL SENTENCING AND CORRECTIONS ACT § 3-204 (1978) (the pre-sentence report must set forth information “relating to any aggravating or mitigating factors,” facts “to assist the court in imposing ... restitution,” and “any statement relating to statement submitted by the victim of the offense”).

\textsuperscript{178} 18 U.S.C. § 3580 (Supp. 1984) (court in determining whether to order restitution shall consider loss sustained by victim as result of the offense and may order probation service to obtain such information concerning such loss). See also FED. R. CRIM. P. 32(c)(2) (pre-sentence report shall include information concerning any harm done or loss suffered by victim and any other information that may aid the court, including victim's restitution needs).

\textsuperscript{177} See ABA GUIDELINES, supra note 13, at 13. See also D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 109-10 (2d ed. 1969) (“The court will want to consider the complainant's attitude,” and “to have that individual's attitude defined in the report.”) But see Hall, supra note 113, at 956 n.134 (“Articles dealing with pre-sentence investigations ignore altogether the victim's attitude as a component of the report”); R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 17 n.8, 33 (1969) (containing only two brief references to the role of the victim in sentencing).

\textsuperscript{178} See supra note 174.
has generally meant that the victim has no right of allocution at the sentencing hearing and must depend upon the prosecution to present his or her views. Only a few states extend the right of allocution to the victim at the sentencing hearing.  

Concerns about allowing the victims to participate in the sentencing hearing are similar to concerns about victim participation in decision-making at earlier stages of the proceeding and center chiefly around the apprehension that the impartiality and fairness of the sentencing process would suffer. More specifically, it can be argued that it is unnecessary for victims to appear at sentencing hearings because the prosecutor can and will present any information relating to the victim which is relevant to the sentencing decision; that the victims who would be likely to appear at sentencing hearings would be overly vindictive; and that judges would be moved by the presentations of victims to abandon their objectivity in making sentencing decisions to the disadvantage of convicted offenders. This argument obviously rests upon assumptions about the behavior of these actors that have not really been tested and which may or may not be true.

179. States expressly permitting victim to be present and heard at sentencing hearing include the following: Alabama: Ala. Code § 15-18-7 (1982) ("[W]hen a defendant is convicted of a criminal activity or conduct which has resulted in pecuniary damages or loss to a victim, the court shall hold a [restitution] hearing" and permit "the victim or victims, or their representatives . . . to be present and be heard upon the issue of restitution"); California: Cal. Penal Code § 1203(h) (West Supp. 1983) (victim has right of allocation sentencing of felony offenders, but sentencing court has discretion with respect to presentation by victim if victim has testified at trial); Connecticut: Conn. Gen. Stat. Ann. § 54-91c (1983) (victim has right to make or submit statement at sentencing of offenders convicted of Class A, B, or C felonies); Florida: Fla. Stat. Ann. § 921.143(1) (West Supp. 1983) (victim has right to appear and to make verbal or written statement under oath at sentencing hearing of offender who has pleaded guilty or nolo contendere); Maine: Me. Rev. Stat. Ann. tit. 17-A, § 1257(2) (West Supp. 1983) (if victim is present in the courtroom at time of sentencing, victim upon request shall have the right to address the court).

180. See supra notes 123-24, 151, 164-66 and accompanying text. See ABA Guidelines, supra note 13, at 14; President's Task Force Report, supra note 1, at 77.

181. The response of the President's Task Force on Victims of Crime to objections as to allowing the victim to be present and heard at the sentencing hearing was as follows:

The . . . argument is that participation by victims at sentencing will place improper pressure on judges. The duty of a judge is to dispense justice, and the passing of judgment is a difficult task. The difficulty of the task should not be relieved, however, by discharging it unfairly. Hearing from the defendant and his family and looking into the faces of his children while passing sentence is not easy, but no one could responsibly suggest
Moreover, when information related to the victim which might influence the court's sentence is furnished to the court, it becomes important to the defense to have access to and the opportunity to rebut this information. Such access and opportunity would seem especially important to the defense in cases where the victim seeks restitution and makes certain claims about injuries, damages, and losses for purposes of restitution. At the present time such information is transmitted to the court primarily through the pre-sentence report and the defendant may have only limited access to this report and may not be able to confront and cross-examine the victim directly as to the accuracy of the information. If, however, the victim is present at and participates in the sentencing hearing, there will be full disclosure of the victim's claims and views as to the appropriate sentence and the defense counsel can refute these claims and respond to these views. Although it is unclear whether and to what degree federal due process guarantees apply to the dispositional process, victim participation in the hearing may forestall potential constitutional challenges to the process by the defendant.

E. The Expansion of the Victim's Role and Characterization of the Victim as a Party

As the foregoing indicates, the crime victim's formal role in the criminal proceeding could be expanded so as to give the victim a variety of rights to participate in the proceeding at various stages. These rights could range at one end of the spectrum from some victim control over the decision-making process at various stages that the defendant be denied his right to be heard or suffer a sentence imposed in secret in order to spare the judge. The victim, no less than the defendant, has a real and personal interest in seeing the imposition of a just penalty. The goal of victim participation is not to pressure justice, but to aid in its attainment. The judge cannot take a balanced view if his information is acquired from only one side. The prosecutor can begin to present the other side, but he was not personally affected by the crime or its aftermath, and may not be fully aware of the price the victim has paid. It is as unfair to require that the victim depend solely on the intercession of the prosecutor as it would be to require that the defendant rely solely on his counsel.


183. See, e.g., United States v. Welden, 568 F. Supp. 516 (N.D. Ala. 1983) (the provisions of the Victim and Witness Protection Act requiring a defendant convicted of a federal crime to pay restitution to the victim were violative of the due process clause of the fifth amendment. The court struck down the Act because of the lack of evidentiary safeguards and the failure to recognize defense counsel's right to prepare for a trial on the merits of the damages issue at the sentencing hearing.).
to simple notification of the victim of the status of the case at various stages at the other end of the spectrum. In between these two extremes there could be varying degrees of victim input into the decision-making process at various stages.

Expansion of the victim's role in the criminal proceeding raises the issue of whether the current characterization of the victim as a non-party witness is suitable. If the victim's role is expanded substantially enough to give the victim real input into and even some control over the decision-making process, the victim's position vis-a-vis the criminal proceeding begins to resemble that normally associated with party status.\(^{184}\) It should be noted that there can be different types of parties with varying attributes, playing different roles in terms of the nature and extent of their participation in a proceeding. Thus, the characterization of the victim as a party would not necessarily mean that the victim would have the same or comparable rights to the state or the defendant at all stages of the proceedings.\(^{185}\)

Characterization of the victim as a party to the criminal proceeding would signal a basic reorientation of the criminal justice system toward the goal of providing redress to the victim and vindicating their interests in restitution and retribution. As long as the victim's role is defined as that of simply a witness rather than a party to the criminal proceeding, it is likely that participation in criminal proceedings by victims will be seen as a privilege rather than an entitlement. Thus one of the benefits which can be anticipated to flow from characterizing the victim as a party is a change in the attitude and behavior of actors in the criminal justice system—prosecutors, defense attorneys, and judges.

If victims are given a larger role in criminal proceedings and characterized as parties to the proceeding, a related but nonetheless distinct issue is how to determine who is a victim for purposes of participation in the criminal proceeding.\(^{186}\) Should

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\(^{184}\) One of the few advocates of expansion of the role of the victim who has dealt with giving the victim party status is Professor Goldstein. Goldstein, supra note 19, at 557.

\(^{185}\) See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE 393-449, 511-16 (2d ed. 1965); Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 HARV. L. REV. 721 (1968).

\(^{186}\) See Hall, supra note 113, at 934. Legislatures and courts have struggled with an analogous problem, namely, how to define victim for the purpose of compensation to victims by the state. See, e.g., People v. Grago, 24 Misc. 2d 739, 204 N.Y.S.2d 774 (1960); State v. Green, 29 N.C. App. 574, 225 S.E.2d 170 (1976); State v.
participation be confined to those who have suffered direct harm and damages as a result of the crime? Should the victim's family be included? Who, if anyone, should be regarded as the victim of an offense against public orders and morals? Or regulatory crimes? Or white collar crimes?

V. THE ROLE OF THE CRIME VICTIM UNDER OTHER LEGAL SYSTEMS

Some foreign criminal justice systems define the formal role of the victim in a criminal action much more broadly than the American criminal justice system, and a study of foreign systems holds out the prospect of providing models for fashioning an expanded role for the crime victim in the American system.

Turning first to the English criminal justice system, with which the American system shares a common law heritage, England has retained private prosecution with private citizens, including victims, having the right to commence criminal actions. The bulk of criminal prosecutions are still private prosecutions, albeit the term private prosecutions is something of a misnomer as applied to many of these prosecutions. Most private prosecutions are brought by the police ostensibly acting in their private capacity, and it has been observed that the victim is usually content to report a suspected criminal matter to the police and leave to them the conduct of any criminal proceedings.

The private prosecution is more restricted now than formerly. The Director of Public Prosecutions, created in 1879 and reorganized in 1905, has considerable authority with respect to both public and private criminal prosecutions. The Director prosecutes any case punishable by death, any case where his participation is ordered by the Home Secretary, any case referred to him by other government departments if he sees fit to do so, and any case which appears to him to be sufficiently important or difficult to require his intervention. The Director's approval is also a prerequisite to private prosecutions for certain designated offenses, and it is within his discretion to intervene in and take over private

Stalheim, 275 Or. App. 683, 552 P.2d 829 (1976). See also Harland, supra note 8, at 78-80.
188. See R.M. Jackson, supra note 33, at 215-19.
189. R.M. Jackson, supra note 33, at 214; Devlin, supra note 196, at 20.

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prosecution. The Attorney General has the additional power to halt the prosecution of private prosecutions involving indictable offenses by entering a *nolle prosequi*. While various commissions and committees have called for the restructuring of the system of private prosecution and have advocated that an independent public official handle the majority of prosecutions currently brought and conducted by the police, they have generally recommended the retention of the true private prosecution—those brought by victims and other private citizens. For the most part, the initiation of a crime action by a private citizen seems to be viewed as an important constitutional guarantee against abuse of prosecutorial discretion by public officials.

Interestingly enough, the Scottish system of prosecution has developed along somewhat different lines than the English system. Prosecutorial power is centralized and concentrated in the Lord Advocate, his deputies, and the procurators fiscal. The victim still has the right of private prosecution but in an attenuated form. The victim may institute a private prosecution with the concurrence of the public prosecutor, and if the public prosecutor refuses to concur, the victim may apply to the High Court to allow the prosecution.

Continental criminal justice systems also appear to furnish a contrast to the American system in their protection of victim interests. The role of the victim under the French system is especially noteworthy. The crime victim can bring a civil action for damages, called the *action civile*; a victim who brings such a civil action can intervene in the related criminal action brought by the public prosecutor; and, the victim, through his or her counsel, can play a very active role in prosecuting the defendant and asserting his or her own right to civil damages. Furthermore, by bringing

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194. See Williams, *supra* note 187, at 599.
the civil action in the criminal courts, the victim can obligate the public prosecutor to begin a criminal action despite the fact that the prosecutor does not wish to do so. A 1981 law made it possible for the victim to intervene as a civil party in the pending criminal proceeding simply through a registered letter containing any pertinent documents and by allowing the court to charge the criminal defendant with expenses otherwise chargeable to the intervening civil party. A significant number of victims seek relief by intervening as a civil party in criminal proceedings, rather than by instituting separate civil proceedings.

Other continental systems also provide some protection to the interests of victims. For example, in Austria, a crime victim may file a "subsidiary charge" if the prosecutor does not prosecute; in Denmark the victim must be notified if a prosecution is abandoned and may appeal the prosecutor's decision to a superior prosecutor and in West Germany victims cannot directly initiate a criminal action but they can seek a mandamus type of order compelling a prosecutor to press charges.

Foreign criminal justice systems would seem to demonstrate that the narrow formal role assigned to crime victims in the American criminal justice system is not their only possible role. A caveat is that the available literature largely describes the formal structure of foreign systems as opposed to actual practices, and more studies of an empirical nature are necessary before truly meaningful comparisons can be made between foreign systems and the American system. It must also be borne in mind that the American criminal justice system differs substantively and procedurally from foreign criminal justice systems, and that the American system reflects political, economic, and social conditions that differ from those in other countries. Consequently, the

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199. Pugh & Pugh, supra note 197, at 1319.
200. Id. at 1319.
201. Volkman-Schluck, supra note 198, at 19.
 adaptability of features of foreign systems to the American system may be limited.

VI. ALTERNATIVES TO THE CRIMINAL ACTION AND VICTIM INPUT AND CONTROL

Before undertaking a fundamental restructuring of the role of the crime victim in a criminal proceeding, the use of alternatives to criminal prosecution to meet victim needs and desires merits exploration. Since a criminal case can be seen as a dispute to be resolved between the victim and the offender, mediation and arbitration present a possible alternative to the criminal action. In mediation, the disputing parties voluntarily agree to submit their dispute to a neutral third party who assists them in resolving the dispute; arbitration differs from mediation in that the neutral third party "is authorized to make a determination which is binding and enforceable in the courts."

In the early 1970's, proposals began to appear for using mediation and arbitration as alternatives to criminal prosecution. Interest in this approach has intensified in recent years as a result of the perception that the courts were ill-equipped to handle criminal cases arising out of inter-personal disputes and as a result of overburdened criminal court dockets. Today, there are a number of mediation and arbitration programs throughout the country which handle disputes that could be processed as criminal cases. Evaluations of these programs have been generally favorable. Among the advantages these programs offer to criminal victims is direct involvement in the disposition of their case and an increased likelihood of satisfaction with the outcome. Thus far, these programs have confined themselves largely to handling the less serious criminal-type inter-personal disputes,

204. VERA, supra note 106, at 1.
205. Id. at 2-3; see also Greacen, Arbitration: A Tool for Criminal Cases?, 2 BARRISTER 10 (Winter 1975).
207. VERA, supra note 106, at 12-13, 39-57.
between disputants who have a prior and usually an ongoing relationship. These are, of course, precisely the kind of cases that prosecutors are least likely to pursue. It is unclear whether mediation and arbitration might be successfully utilized for more serious criminal cases.

The expansion of mediation and arbitration as alternatives to criminal prosecution might well alleviate some of the problems victims presently face in dealing with the criminal court process, and the success of these programs suggests the need to investigate more fully such alternatives to criminal prosecution in the context of assisting victims.

VII. CONCLUSION

There is a growing recognition that crime victims have identifiable interests of sufficient legitimacy and significance to justify expanding their role in criminal proceedings beyond that of non-party witnesses. Their role could be expanded through the extension to them of a variety of participatory rights at various stages of the criminal proceeding in order to give them real input into and perhaps even some control over criminal proceedings. In recent years, reforms aimed at extending such rights to victims have been proposed and implemented.

Substantial expansion of the formal role of the victim in a criminal proceeding, though justifiable, does raise a host of complicated issues and problems. While time and space constraints have precluded an exhaustive analysis of these issues and problems in this article, it is to be hoped that the article will provide an analytical framework for consideration of reforms to increase victim participation in criminal proceedings.

Given the many unanswered questions at the present time about the impact of expanding the victim's formal role in a criminal proceeding, it may well be advisable to establish and carefully evaluate a number of small scale projects and programs designed to increase the participation of victims in criminal proceedings before a wholesale restructuring of the system is undertaken. Finally, efforts to increase victim participation in criminal proceedings should not divert attention from other needed reforms in the criminal justice system which would increase its overall effectiveness and efficiency and, which, by so doing, would lead to an improved position for and treatment of victims.


209. See VERA, supra note 106.