

THE ASCENDING ROLE OF CRIME VICTIMS IN PLEA-BARGAINING AND BEYOND

*Elizabeth N. Jones**

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* Associate Professor of Law, Western State College of Law, University of Miami School of Law, J.D.; University of California, Los Angeles, B.A. The Author gratefully acknowledges and thanks Professor Edith R. Warkentine, Research Librarians Lesley Chan and Scott Frey, and student research assistant Kylie Starr for their generous advice and assistance.

ABSTRACT

This Article looks to the nationwide trend of promoting a victims' rights agenda alongside three recent United States Supreme Court opinions affirming defendants' rights during various stages of the plea-bargaining process, in an attempt to harmonize these seemingly anomalous rights. The three Supreme Court decisions focusing on defendants' rights in the plea-bargaining context highlight the need to consider victims' rights in that same milieu and to further guarantee victims the right to meaningful participation in all aspects of a criminal prosecution. Particularly as the constitutional rights of victims become further defined and embedded into the criminal justice system, ensuring a proper role for the crime victim is of timely and crucial concern. Though crime victims' rights (or lack thereof) are demonstrated through the critical stage of plea-bargaining, this phase of the criminal justice process can be considered a vehicle for the larger platform of victims' rights in general. It sets the stage for the broader query as to whether and when victims of crime, like their assailants, will finally be granted a full panoply of constitutional rights.

I. INTRODUCTION

Victims of crime have a unique role to play in the prosecution of their assailants. Accidental participants in the legal process, victims have been historically marginalized. Their lives are on hold during the criminal process, captured and ranked second to the rights of the person or people who forever transformed them from civilian to victim. Decades ago, various ad hoc social movements emerged with an eye toward personalizing crime victims, but before these coalitions, the criminal justice system treated a crime victim as just another piece of evidence, a potential witness for the prosecution at trial, but not much more.¹

Recent years have seen crime victims evolving from passive casualties, to potential evidence providers, to participatory stakeholders. Many states have already afforded crime victims some sort of statutory rights.² More recently, a

¹ See generally Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157 (1992) (discussing the traditional victim's role as a mere "complainant" who brought information about criminal activity to the attention of the police). The author points out that "[s]ince crime was conceptualized as an event that threatened and offended the entire community, and was prosecuted by the state on behalf of an abstraction (i.e. 'the People'), the real flesh-and-blood victim was treated like just another piece of evidence, a mere exhibit to be discarded after the trial." *Id.* at 158.

² See generally Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987); DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE*, 421-22 (3d ed. 2010).

handful of states have supplemented general constitutional rights for crime victims with statutes containing specific rights.³ And an even smaller group of states have passed constitutional amendments designed to guarantee victims specific constitutional rights throughout the criminal justice process.⁴ The effort toward guaranteeing victims of crime their own constitutional rights at every phase of the criminal justice process gains slow, but constant, forward movement.

Acknowledgment of victims and their families in the courtroom is becoming more common across the country, in small- and high-profile cases alike. One case that received nationwide attention was the 2012 mysterious disappearance of sixteen-year-old Skylar Neese in Monongalia County, West Virginia. Skylar's two best friends ultimately pled guilty to her murder after conducting a yearlong façade of concern and bewilderment as to Skylar's whereabouts.⁵ At the girls' sentencing hearings, statutory authority permitted Skylar's family to speak.⁶ "I know with my heart Skylar fought that night for

³ See e.g., ALA. CODE § 15-23-71 (2014) (Plea Agreement); ALA. CODE § 15-23-76 (Right to be present and heard at court proceedings); ALASKA STAT. § 12.61.010 (2014) (Rights of crime victims); ALASKA STAT. § 12.55.011 (2014) (Victim and community involvement in sentencing); COLO. REV. STAT. § 24-4.1-302.5 (2014) (Rights afforded to victims); FLA. STAT. § 960.001 (2014) (Guidelines for fair treatment of victims and witnesses in the criminal justice and juvenile justice systems); IND. CODE § 35-40-5-5 (2014) (Right to be heard at sentencing or release); LA. REV. STAT. ANN. § 46:1844 (2014) (Basic rights for victims and witnesses); MD. CODE ANN. CRIM. PROC. § 11-403 (West 2014) (Right of victim or victim's representative to address court during sentencing or disposition hearing); MICH. COMP. LAWS § 780.756 (2014) (Post-arraignment notice; duties of prosecuting attorney; duties of victim); MICH. COMP. LAWS § 780.763 (2014) (Notice of defendant's conviction and of victim's right to participate in sentencing investigation and proceedings); MISS. CODE ANN. § 99-43-27 (2014) (Plea bargaining; victim's rights); MISS. CODE ANN. § 99-43-37 (2014) (Right of victim to be present and heard at court proceedings); N.J. STAT. ANN. § 52:4B-36 (West 2014) (Rights of crime victims and witnesses or adjudication of alleged juvenile offender); OHIO REV. CODE ANN. § 2930.12 (West 2014) (Notice of acquittal or conviction of defendant or adjudication of alleged juvenile offender or disposition of alleged juvenile offender); OHIO REV. CODE ANN. § 2930.14 (West 2014) (Statement by victim prior to sentencing of defendant); R.I. GEN. LAWS § 12-28-4.1 (2014) (Right to address court regarding plea negotiations); TENN. CODE ANN. § 40-38-103 (2014) (Victims; additional rights); VA. CODE ANN. § 19.2-11.01 (2014) (Crime victim and witness rights).

⁴ This Article addresses individual states and their constitutional amendments. The Crime Victims' Rights Act (CVRA) of 2004 is federal legislation designed to strengthen the rights of federal crime victims throughout criminal justice proceedings. See generally, Nicholas C. Harbist & Dina L. Relles, *The Crime Victims' Rights Act: How to Make the New Victims' Rights Legislation with Teeth More Than Just Food for Thought*, 2008 N.J. LAW. MAG., June 2008, at 48.

⁵ Tara Kinsell, *Rachel Shoaf Gets 30 Years for Murder of Skylar Neese*, OBSERVER-REPORTER (Washington, Pa.), (Feb. 26, 2014), <http://www.observer-reporter.com/article/20140226/NEWS02/140229483/1003#.VBdhQWd0zcs>.

⁶ W. VA. CODE § 61-11A-2(b) (2014) (stating that "[p]rior to the imposition of sentence upon a defendant who has . . . pleaded guilty or nolo contendere to a felony, . . . the court shall

her life and now she's gone. Your Honor, I'm here to fight for her as she did to stay alive."⁷

The court conferred with the Neese family before accepting Miss Shoaf's guilty plea to a reduced charge of second-degree murder. David Neese, Skylar's father, implored the court to sentence the girls to the maximum penalty permitted. "[Defendant] Rachel Shoaf murdered my daughter in cold blood. Skylar would not be where she was if it wasn't for Rachel Shoaf. She should not be given any leniency. . . ."⁸ Miss Shoaf received a sentence of 30 years in state prison, and was ordered to pay restitution for Skylar's funeral expenses. Her accomplice, Shelia Eddy, pled guilty to one count of first-degree murder and was sentenced to "life with mercy."⁹

Three recent United States Supreme Court decisions focused on defendants' rights in the plea-bargaining context and highlight the need to consider victims' rights in that same milieu, and to further guarantee victims the right to meaningful participation in all aspects of a criminal prosecution. Particularly, as the constitutional rights of victims become further defined and embedded into the criminal justice system, ensuring a proper role for the crime victim becomes an even more important and timely concern.

Assuring constitutional rights for crime victims, including the right to participate in the plea-bargaining phase of the criminal proceedings, serves to legitimize—and even empower—victims as active participants in the criminal process. When people become victims, they are helpless, both during the act itself and all through its aftermath. The alteration of their lives is damaging and permanent—or at least it may feel that way from the victims' perspectives. Possessing guaranteed constitutional rights throughout the process of bringing their assailants to justice gives a measure of power back to these victims, allowing them to shed this wounded label. Active participation also helps to ensure understanding of the assorted procedural aspects inherent in the criminal justice system. A vested interest in, and knowledge of, this system can now manifest through participation at various stages of a defendant's case. If victims at least attempt to comprehend the complexities of the judicial system, they can more readily accept the inevitable delays and compromises while continuing the healing process. Participation also encourages victims to be more

permit the victim of the crime to appear before the court to make an oral statement for the record if the victim notifies the court of his or her desire to make such a statement . . .").

⁷ Kim Freda, *Monongalia County Teen Sentenced for Involvement in Skylar Neese's Murder*, WTRF.COM, (Feb. 26, 2014), <http://www.wtrf.com/story/24828113/monongalia-county-teen-sentenced-for-involvement-in-skylar-neeses-murder>.

⁸ *Id.*

⁹ See Crimesider Staff, *West Virginia Teen Sentenced to Life in Skylar Neese's Murder*, CBSNEWS.COM, (Jan. 27, 2014), <http://www.cbsnews.com/news/west-virgina-teen-sentenced-to-life-in-skylar-neeses-murder/>.

forthcoming with the police, prosecution, and probation department regarding valuable information and advice that only they can provide.

This appreciation of, and ability to assist, the criminal justice system is particularly poignant for victims at the plea-bargaining stage. Victims may view plea bargains as a mixed blessing. On one hand, a plea bargain may deprive victims of the possibility of seeing their assailants suffer the maximum possible punishment as allowed by law. Victims often want to testify at trial, thus providing their factual recitation as to the events that brought them into the criminal system. Perhaps they simply want to speak at the sentencing hearing, so that the judge more fully understands their position. On the other hand, plea bargains often provide a necessary sense of closure to crime victims; by avoiding the requirement of testifying at trial and thus enduring inevitably numerous continuances and postponements, victims often encourage and endorse the practice of plea-bargaining. Furthermore, with expanded rights, a victim now may maintain some influence throughout the criminal proceedings. Many criminal cases are circumstantial in nature; often it is only the defendant and the victim who know what truly happened at the scene of the crime. Now victims can speak with their own voices (or that of a family member or representative) during the plea-bargaining process, thus effectively being heard, and taking center stage in the legal arena.¹⁰

But it is not the spotlight that victims seek to steal from defendants. Nor do they seek a singular focus on their rights to the exclusion of the defendant. Establishing victims' rights is not intended to and should not derogate defendants' rights. Rather, victims' constitutional rights are independent of defendants' constitutional rights.¹¹ Thoughtful exploration of defendants' rights will reveal that there is room for victims' rights to be developed in tandem with defendants' rights.

In an attempt to harmonize these seemingly anomalous rights, this Article looks to the nationwide trend of promoting a victims' rights agenda alongside three recent United States Supreme Court opinions affirming defendants' rights during various stages of the plea-bargaining process. First, this Article reviews these Supreme Court decisions, which affirmed a defendant's constitutional right to effective counsel during this critical stage in

¹⁰ See BELOOF ET AL., *supra* note 2, at 716–17. (“The victim’s interests in participating in the plea-bargaining process are many. The fact that they are consulted and listened to provides them with respect and an acknowledgment that they are the harmed individual. This in turn may contribute to the psychological healing of the victim. The victim may have financial interests in the form of restitution or compensatory fine which need to be discussed with the prosecutor The victim may have a particular view of what . . . sentence [is] appropriate under the circumstances Similarly, because judges act in the public interest when they decide to accept or reject a plea bargain, the victim is an additional source of information for the court.”)

¹¹ It is true that crime victims have suffered injuries that were inflicted by the defendant, which obviates completely overlapping interests. Nevertheless, there is room for constitutional rights for both defendants and victims.

the criminal justice process. In 2010, *Padilla v. Kentucky*¹² held that noncitizen defendants have a Sixth Amendment right to be advised of any clear immigration consequences of a guilty plea. Two years later, *Lafler v. Cooper*¹³ stated that a defendant must be notified of the maximum possible punishment when rejecting a plea offer in favor of proceeding to trial. *Missouri v. Frye*¹⁴ mandated that a defense attorney must make all plea offers known to the defendant. The Supreme Court's focus on defendants' rights during this stage of the criminal justice process is understandable given the heavy reliance on the process of plea-bargaining in modern criminal justice. Indeed, Justice Antonin Scalia has remarked that now "a whole new field" has opened in constitutional criminal procedure.¹⁵ An examination of the emerging constitutional rights of crime victims is therefore timely, necessary, and appropriate.

This constitutional case law confirms the importance of plea-bargaining to the criminal justice process and affirms the rights of defendants to effective lawyering during the plea-bargaining stage. Justice Anthony Kennedy noted in *Frye* that plea bargaining has "become . . . central to the administration of the criminal justice system . . ."¹⁶ And in *Lafler*, Justice Kennedy again observed that "criminal justice today is for the most part a system of pleas, not a system of trials."¹⁷ Indeed, 95% of all adjudicated criminal cases result in a guilty plea to the court rather than a trial.¹⁸ The cases of *Padilla*, *Lafler*, and *Frye* seem to suggest the Court's willingness to concede that the plea-bargaining phase is indeed a customary, and critical, one.¹⁹

Justice Scalia's withering dissent in both *Frye* and *Lafler* may also support the broadening of victims' rights into the plea-bargaining arena. His dissents punctuated the dissonance between a criminal defendant's Sixth Amendment constitutional right to effective lawyering and "other aspects" of this critical stage.²⁰ Justice Scalia discounted the idea that plea-bargaining is a constitutional right, and lamented the majority's inclination to create it as such.

¹² 559 U.S. 356 (2010).

¹³ 132 S. Ct. 1376 (2012).

¹⁴ 132 S. Ct. 1399 (2012).

¹⁵ *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting).

¹⁶ *Frye*, 132 S. Ct. at 1407.

¹⁷ *Lafler*, 132 S. Ct. at 1389.

¹⁸ *Frye*, 132 S. Ct. at 1407 (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (last visited Oct. 9, 2014)) (stating that 94% of all state convictions and 97% of all federal convictions in 2010 resulted in a plea bargain).

¹⁹ See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (holding that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel").

²⁰ *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

His apprehension that additional areas of the law might increasingly be designated as falling within “constitutional” parameters, if true, would indicate the need for even more guidance by the Supreme Court.

The Majority was concerned with the preservation of the defendants’ constitutional rights, as they define them, in all stages of a criminal prosecution. Neither Justice Scalia nor the Majority, however, have addressed the very real constitutional rights possessed by crime victims. A nationwide recognition that plea-bargaining is both widely used and a critical part of the criminal process provides fertile foundation for crime victims to assert their newly established constitutional rights in this arena and in others throughout the criminal justice process.

Next, this Article examines the current state of victims’ rights granted via constitutional amendment. It questions whether these amendments exist simply to appease victims, or whether these newly established constitutional rights are intended to substantively sanction victims’ active participation during the plea-bargaining stage. States may offer assurances that victims may now play a meaningful role in the cases stemming from their victimization; this Article details the status of crime victims during the critical pre-trial phase of plea-bargaining.

Currently, seven states grant specific constitutional rights to crime victims to participate in plea-bargaining in some manner. While it is clear that now both defendants and victims possess constitutional rights during the plea-bargaining process, the extent to which victims may participate in the process is much less certain. The breadth and scope of the process of the formation of a plea bargain is great. Considerations such as which charges to file, how many crimes to include in the charging document, which charges to consider dropping in favor of an amicable plea deal, and the type and range of sentencing options are traditionally matters for the prosecutorial agency. Often the court itself gets involved in negotiating between the prosecution and the defense. Indeed, the plea-bargaining process is a collaborative and intricate one, and recognizing yet another dance partner might further complicate the legal choreography.²¹ The exact language of each state’s victims’ rights amendments fail to reveal any bright line rules. Likewise, case law provides spotty assurance of crime victims’ roles throughout the criminal justice process.

This Article then investigates whether a state’s mandate to provide victims with meaningful voices in the criminal justice process conflicts with the rights afforded to defendants during the practice of plea bargaining. With such recent concern over the defendants’ rights at plea-bargaining, victims must be reassured that their constitutional rights will not be overlooked. And this

²¹ See Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 155 (2012) (commenting on Justice Stevens’ observations in *Lafler* and *Frye* that “[t]he real world of plea bargaining is dynamic, sensitive to context, and frequently off the record”).

assurance must extend into all areas of the criminal proceedings. Though the plea-bargaining stage has been deemed a “critical” one, it is still but one spoke in the larger wheel of the criminal justice system.

Finally, this Article examines the impact of victim participation in the criminal justice process on increasingly scarce judicial resources. It suggests simple, cost-effective procedures to ease the strain, if any, of accommodating crime victims’ rights while preserving defendants’ constitutional rights. It is also important to note that crime victims’ rights (or lack thereof) are emerging in the plea-bargaining process, yet plea-bargaining should be used as a vehicle for the larger platform of victims’ rights in general. It sets the stage for the broader query as to whether and when victims of crime, like their assailants, will finally be granted a full panoply of constitutional rights.

II. CONTINUING CONCERN FOR THE PROTECTION OF DEFENDANTS’ CONSTITUTIONAL RIGHTS

All I want is to be treated like a common criminal.

– Anonymous Crime Victim²²

A series of United States Supreme Court cases has illuminated the importance of the plea bargain in criminal cases. These cases center on the constitutional rights of the defendant during the plea-bargaining process. The hallmark of this process provides the defendant with an opportunity to negotiate away constitutional guarantees basic to a criminal case in order to secure a more favorable outcome. Though plea-bargaining has its detractors, it remains a crucial part of the criminal justice system.

Plea-bargaining has been credited with bringing fast resolutions to cases, avoiding costly jury trials, easing the strain of overcrowded court dockets, and saving much needed governmental resources.²³ Plea bargains secure a measure of finality to cases, while allowing defendants more certainty in their cases and a more measured sense of control over their fate.²⁴

Critics of plea-bargaining express concern that often defendants are pressured into giving up their constitutionally guaranteed rights in exchange for a hasty deal. Prosecutors and the court generally dictate the terms of the plea bargain, with defendants left with very little to actually negotiate. Mandatory

²² NAT’L VICTIMS’ CONSTITUTIONAL AMENDMENT NETWORK, VICTIMS’ RIGHTS EDUCATION PROJECT: TALKING POINTS 13 (2004), available at <http://www.nvcap.org/vrep/NVCANVREP TalkingPoints.pdf>.

²³ ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE ADJUDICATION 815 (2013).

²⁴ *Id.*

sentencing guidelines often limit the boundaries in which negotiated plea deals can be made.

Regardless of opinion on the matter, plea-bargaining is so common that it is almost uncommon to find a criminal case in which plea-bargaining does not occur; indeed, Justice Kennedy noted that “plea-bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system.”²⁵ In 2006, nine out of ten felony convictions in larger urban counties resulted from plea bargains as opposed to jury trials.²⁶ The three recent Supreme Court cases appear to lead to a new construct of what is acceptable constitutional plea-bargaining procedure. Focused exclusively on the rights of a defendant to effective lawyering during the plea-bargaining phase of litigation, the Court pronounced acceptable plea-bargaining protocol with regard to relaying effects of deportation,²⁷ plea offers,²⁸ and maximum possible sentences.²⁹

A. *Padilla v. Kentucky*

Whether defense counsel should be held accountable for advisements made during plea-bargaining formed the basic query for the United States Supreme Court in *Padilla v. Kentucky*.³⁰ In this case, Jose Padilla was charged with the transportation of marijuana.³¹ Mr. Padilla was a native of Honduras but had lived in the United States for over 40 years.³² He faced deportation proceedings as a result of his guilty plea to this charge. Mr. Padilla’s lawyer advised him that he “did not have to worry about immigration status since he had been in the country so long.”³³ Relying on this legal advice, Mr. Padilla pled guilty to the drug distribution charge, and was then subjected to “virtually mandatory” deportation.³⁴

The Supreme Court of Kentucky rejected Mr. Padilla’s post-conviction proceeding on the ground that incorrect advice about deportation consequences was merely a “collateral” consequence” of pleading guilty, and not protected

²⁵ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (quoting *Lafler*, 132 S. Ct. at 1388); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

²⁶ See generally MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* (4th ed. 2011).

²⁷ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²⁸ *Frye*, 132 S. Ct. at 1399.

²⁹ *Lafler*, 132 S. Ct. 1376.

³⁰ *Padilla*, 559 U.S. at 359–60.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 359.

³⁴ *Id.*

by the Sixth Amendment.³⁵ The United States Supreme Court disagreed. It noted that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”³⁶ Accordingly, defense counsel was required to accurately inform clients of any deportation risks associated with a plea of guilty.³⁷ Mr. Padilla’s guilty plea, which was based on a negotiated offer, was set aside, an attendant result of defense counsel’s flawed deportation information. This faulty advice violated Mr. Padilla’s Sixth Amendment right to competent representation.³⁸

Justice Scalia dissented in *Padilla*. True to his originalist roots, he began by asserting that,

criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.³⁹

Justice Scalia’s argument centered around the principle that the text of the Constitution does not contain specific provisions allowing for the extension of the right to competent counsel “beyond those matters germane to the criminal prosecution at hand.”⁴⁰ He focused on the fact that the majority had now “constitutionalized” the area of plea-bargaining, and as such prohibited legislatures from creating more “targeted” solutions to this vast area of the law.⁴¹

B. *Missouri v. Frye*

The companion cases of *Lafler v. Cooper* and *Missouri v. Frye* were decided on the same day, and involved negotiated plea bargains by criminal defendants.⁴² In both cases, defense counsel provided incompetent legal advice

³⁵ *Id.* at 359–60 (quoting *Commonwealth v. Padilla*, 253 S.W.3d. 482, 485 (Ky. 2008)).

³⁶ *Id.* at 373.

³⁷ *Id.* at 374.

³⁸ *Id.*

³⁹ *Id.* at 388.

⁴⁰ *Id.* at 390.

⁴¹ *Id.* at 392 (noting that if the subject of plea bargaining had not been constitutionalized by the Majority, “legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant’s attention, and what warnings must be given”).

⁴² See generally Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673 (2013); Rishi Batra, *Lafler and Frye: A New Constitutional*

to their clients.⁴³ Justice Kennedy wrote the majority opinions for both decisions,⁴⁴ with Justice Scalia offering up a rather scathing dissent for both cases.⁴⁵ Both cases solidify the plea-bargaining process as a critical one in criminal prosecutions.⁴⁶ The Majority in both decisions extended constitutional protections to criminal defendants at that stage of the prosecution.⁴⁷ Justice Scalia's dissent in both cases pointed out that only constitutionally mandated areas deserve judicial protections, rejecting the Majority conclusion that the plea bargain is such a constitutionally mandated area.⁴⁸

Standard for Negotiation, 14 CARDOZO J. CONFLICT RESOL. 309 (2013); Bibas, *Incompetent Plea Bargaining*, *supra* note 21; Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595 (2013); Sean Michael Fitzgerald, *Losing Sight of the Forest for the Trees: The Supreme Court's Misapplication of Sixth Amendment Strickland Analysis in Missouri v. Frye and Lafler v. Cooper*, 21 AM. U. J. GENDER SOC. POL'Y & L. 681 (2013); Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice"?*, 51 DUQ. L. REV. 735 (2013); Casey Scott McKay, *Constitutional Law-the Plea-Bargaining Process-Mr. Counsel, Please Bargain Effectively for Your Client's Sixth Amendment Rights, Otherwise the Trial Court Will Be Forced to Reoffer the Plea Deal and Then Exercise Discretion in Resentencing*, 82 MISS. L.J. 731, 739 (2013); Wesley MacNeil Oliver, *The Indirect Potential of Lafler and Frye*, 51 DUQ. L. REV. 633 (2013); Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (2012); Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25 (2012), <http://www.yalelawjournal.org/forum/frye-and-lafler-bearers-of-mixed-messages>; Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013).

⁴³ *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (noting the Missouri Court of Appeal's finding that "Frye's counsel's performance was deficient because the 'record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window'" (citing *Frye v. State*, 311 S.W.3d 350, 356 (Mo. 2011)); *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (noting that trial counsel's "deficient performance" was conceded to by the parties).

⁴⁴ *Frye*, 132 S. Ct. at 1404; *Lafler*, 132 S. Ct. at 1382.

⁴⁵ *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting); *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting).

⁴⁶ *Lafler*, 132 S. Ct. at 1388 (referencing *Missouri v. Frye* in stating, "[a]s explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences").

⁴⁷ *Frye*, 132 S. Ct. at 1408 (holding that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); *Lafler*, 132 S. Ct. at 1391 (applying the standards for ineffective assistance of counsel to the situation at bar where a defendant rejects a plea bargain and instead proceeds to trial).

⁴⁸ *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting) (noting that trial counsel's mistake "did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place"); *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting) (noting that the Majority opinion established a "new rule of law" in upholding the constitutional right to effective plea bargains).

In *Missouri v. Frye*, Galin Frye was charged with driving on a revoked license with multiple priors for the same offense.⁴⁹ The maximum punishment for this crime was four years in state prison, but Mr. Frye's attorney received two written plea-bargain offers from the prosecutor for his client.⁵⁰ Both plea bargains involved substantially less incarceration than the maximum possible sentence, and both offers came with an expiration date.⁵¹ Mr. Frye's attorney did not relay either of these offers to his client, and they did in fact expire.⁵² Before a preliminary hearing on the matter and after the offers were no longer valid, Mr. Frye was again arrested for driving on a revoked license.⁵³ The judge sentenced Mr. Frye to three years in state prison.⁵⁴

Mr. Frye contended that he would have accepted one of the plea offers had he been made aware of its existence in a timely manner.⁵⁵ However, a Missouri state court rejected Mr. Frye's post-conviction motion to set aside his sentence.⁵⁶ The Missouri Court of Appeals reversed the state court, holding that Mr. Frye had received incompetent assistance of counsel in violation of the Sixth Amendment.⁵⁷

The United States Supreme Court agreed with the Court of Appeals. It held that Mr. Frye's defense counsel failed to "communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence" as required by the Sixth Amendment.⁵⁸ The Court remanded the case back to the Missouri Court of Appeals to determine whether Mr. Frye could show that this failure in fact prejudiced his case.⁵⁹

Were that the end of it, *Frye* would merely mark the further definition of defense counsel's responsibility in delivering formal offers to settle a criminal case. Defense counsel has always maintained the duty to perform his or her duties competently. This decision specified that plea bargains fall under the rubric of "the duty and responsibilities of defense counsel in the plea bargaining process."⁶⁰

It is Justice Kennedy's detailed recognition of the prevalence and importance of the plea-bargaining process to the criminal justice system that

⁴⁹ *Frye*, 132 S. Ct. at 1404.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1405.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1408.

⁵⁹ *Id.* at 1411.

⁶⁰ *Id.* at 1408.

makes this case (and its companion, *Lafler v. Cooper*) so important. The Court noted the “simple reality” that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”⁶¹ The criminal justice system is “a system of pleas, not a system of trials.”⁶² And Justice Scalia’s dissent recognized the fact that the reason criminal defendants receive such long sentences after being found guilty at trial is because these longer sentences “exist on the books largely for bargaining purposes” and not as an indicator of what prosecutors truly think are a fair punishment.⁶³ Plea-bargaining is thus pivotal to the effective, and just, functioning of this criminal system, requiring some regulation of defense attorneys’ responsibilities in this area.

In Justice Scalia’s dissent, he characterized the failure of Mr. Frye’s defense attorney to communicate the plea offer as merely a “mistake [that] did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place.”⁶⁴ Justice Scalia noted that the Sixth Amendment right to counsel was not implicated, and it was therefore gratuitous for the majority to rule on this issue.⁶⁵ He did, however, agree with the majority that “[t]he plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained.”⁶⁶

C. *Lafler v. Cooper*

In *Lafler v. Cooper*, Mr. Anthony Cooper was charged with assault with intent to commit murder, along with other crimes.⁶⁷ Though the prosecution engaged in the plea-bargaining process and twice offered to dismiss two of the charges with a lesser sentence of 51 to 85 months imprisonment attached to the remaining two charges, Mr. Cooper rejected these offers to settle the case before trial.⁶⁸ He did so based on his defense counsel’s recommendation and advice that he would win at trial, as the victim was shot

⁶¹ *Id.* at 1407.

⁶² *Id.* (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012)).

⁶³ *Id.* (Scalia, J., dissenting) (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is.”) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) (alteration in original)).

⁶⁴ *Id.* at 1412.

⁶⁵ *See id.* at 1413–14.

⁶⁶ *Id.*

⁶⁷ *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012). Mr. Cooper was additionally charged with possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and a habitual offender charge. *Id.*

⁶⁸ *Id.*

below the waist, and that therefore Mr. Cooper could not be convicted of the crime of assault with intent to commit murder.⁶⁹ Mr. Cooper subsequently went to trial and lost, and was sentenced to the mandatory minimum of 185 to 360 months imprisonment.⁷⁰

A Michigan state court and the Michigan Court of Appeals rejected Mr. Cooper's ineffective assistance of counsel claim.⁷¹ However, a federal district court and the Sixth Circuit Court of Appeals ruled that Mr. Cooper indeed had a viable federal habeas corpus petition, and ruled that the Michigan state court must remedy the outcome by reinstating the original offers for Mr. Cooper's benefit.⁷²

The United States Supreme Court granted certiorari. It held that the right to effective assistance of counsel did in fact extend not only to guilty pleas, but also specifically to the plea-bargaining process.⁷³ Justice Kennedy stated that a defendant who elects to go to trial "instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."⁷⁴ It is more than a fair trial that determines the fairness of the pre-trial process; "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea-bargaining plays in securing convictions and determining sentences."⁷⁵ Justice Kennedy cited to *Missouri v. Frye* for statistics reflecting the central role of plea-bargaining in the criminal justice process.⁷⁶ Therefore, the Court held that the Sixth Amendment extends to "all critical stages of a criminal prosecution, of which plea-bargaining is one."⁷⁷

Justice Scalia's dissent criticized "plea-bargaining law" as a new "boutique" of "constitutional jurisprudence."⁷⁸ He foresaw additional stakeholders now subject to constitutional scrutiny—not only defense attorneys and their plea-bargaining efficacy, but also the prosecutor's behavior as well.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1391. The Court noted that this sentence was three and one-half times more severe than the one Mr. Cooper would have received had he availed himself of the plea-bargained offer prior to trial. *Id.*

⁷¹ *Id.* at 1383.

⁷² *Id.* at 1383–84.

⁷³ *Id.* at 1384.

⁷⁴ *Id.* at 1386.

⁷⁵ *Id.* at 1388.

⁷⁶ *Id.* (noting as *Frye* did that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas").

⁷⁷ See Covey, *supra* note 42, at 607.

⁷⁸ *Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting). Justice Scalia specifically noted that "Today's decision . . . opens a whole new boutique of constitutional jurisprudence ("plea-bargaining law") without even specifying the remedies the boutique offers." *Id.*

A main complaint of Justice Scalia in all three opinions seems to be that the elevation of negotiated pleas to deserve constitutional protections evolved as a result of judicial invention, rather than constitutional mandate.⁷⁹ Justice Scalia's focus on the importance of constitutionalized text must not be overlooked. To Justice Scalia, the Majority overstepped its historical boundaries in taking on the advice of counsel regarding deportation consequences rather than limiting effective counsel to that involving the right to a fair trial.⁸⁰ He criticized the Majority for finding that an attorney's "allegedly incompetent advice regarding a plea offer caused [the defendant] to receive a full and fair trial" where no constitutional right to effective plea-bargaining existed.⁸¹ And Justice Scalia complained that a defendant who pled guilty "without the benefit of a deal" and subsequently "acknowledged the correctness of [the] conviction" was not entitled to a remedy for "an opportunity to accept a plea bargain to which [he] had no entitlement in the first place."⁸² Consequently, for Justice Scalia, if a right is not literally within the wording of the Constitution, then it should not be subject to regulation by the Supreme Court. Though this reasoning appears to eliminate the ability to assure fair practices in plea-bargaining, it benefits those with black letter constitutional safeguards.

Hence, the significance of affording victims of crime constitutionally guaranteed rights is emphatically revealed. Statutory rights may suggest some level of validation, but only the Constitution can assure that these rights ascend to the highest possible level. Justice Scalia all but confirms the magnitude of constitutional rights for crime victims through his comments in the foregoing cases.

Another concern raised by Justice Alito was that precious resources would be wasted if the Court entertained areas of the law not deserving of constitutional scrutiny.⁸³ It is hard to completely disagree with such comment, especially in times of economic austerity. The impact—if any—of assuring crime victims constitutional rights throughout the criminal justice process is discussed in Part III.A of this Article.

Defendants have long been the beneficiaries of constitutional rights. The attention paid to the cases of *Padilla*, *Lafler*, and *Frye* further attests to the consequence of such rights. Drawing parallels between these cases and the emerging rights of crime victims in no way diminishes the rights of defendants.

⁷⁹ *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting) (commenting on the "judicially invented right to effective plea bargaining" resulting from *Padilla v. Kentucky*, and carrying over to *Lafler*); *Missouri v. Frye*, 132 S. Ct. 1399, 1413 (2012) (Scalia, J., dissenting) (discussing the "serious difficulties" created by the "constitutionalization of the plea bargaining process").

⁸⁰ See *Padilla v. Kentucky*, 559 U.S. 356, 389–91 (2010).

⁸¹ See *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

⁸² See *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting).

⁸³ *Lafler*, 132 S. Ct. at 1399 (Alito, J., dissenting).

If anything, proper emphasis on crime victims will ensure a truly just criminal system. However, the rights of victims as they relate to the criminal justice system have yet to be clearly and consistently elucidated.

III. INCREASING AWARENESS OF THE NEED FOR VICTIMS' RIGHTS UNDER STATE LAW

The system must no longer step over the body of a victim to read the criminal his rights.

– Brooks Douglass⁸⁴

The movement⁸⁵ toward recognizing crime victims and vesting them with constitutional rights throughout the criminal justice process is expanding.⁸⁶ Victims are emerging from the shadows with acceptance by society. The sight of victims waiting in courtroom hallways for the opportunity to speak at a sentencing hearing, perhaps being comforted by a staff member from the court's victim/witness office, has now become quite commonplace. This conventional "right" manifesting at the culmination of a defendant's criminal case is even more impactful if, rather than waiting until the end of the case, it can be utilized during critical stages of the litigation, specifically during plea-bargaining. And this right garners more respect and becomes further entrenched in the legal system if granted by constitutional amendment. The challenge is to assure crime victims the right to meaningfully participate in every stage of a criminal prosecution via their newly created constitutional rights, while preserving defendants' well-established constitutional rights.

It is true that the past several years have demonstrated an increased tolerance of crime victims as worthy participants during the prosecution of their

⁸⁴ Lawyer, former Oklahoma state senator, and crime victim. This statement has been attributed to Mr. Douglass in numerous speeches and testimonials. *See, e.g.*, Brook Douglass, National Victims' Constitutional Amendment Passage, Testimony to House Judiciary Committee's Subcommittee on the Constitution (Apr. 26, 2012), available at http://www.nvcap.org/legis/112/120426_Douglass.pdf ("I fully support every right that the accused has guaranteed to them under the constitution of the United States. But what we have now is a system that literally steps over the body of the victim to read the criminal those rights. This is unjust. We have forgotten the reason we bring offenders to justice in the first place and for whom we do it."); *Video: Heaven's Rain*, MDEVAAN.COM (Nov. 3, 2012), <http://www.mdevaan.com/video-heavens-rain/> (In this article, Brooks Douglass states that "the system must no longer 'step over the body of a victim to read the criminal his rights.'").

⁸⁵ *See* Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 840 n.4 (1997) (citing Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 517 (1982)).

⁸⁶ *See* Welling, *supra* note 2; BELOOF ET AL., *supra* note 2, at 421–22.

assailants.⁸⁷ But this acknowledgment still does not come close to the reception that defendants receive from society. Arguably, juxtaposing the rights of criminal defendants and the rights of the people they victimize is an unfair comparison. Criminal defendants enjoy constitutional rights in all 50 states per the United States Constitution, for the misdemeanors and felonies that they have been alleged to commit. Their cases are defendant-centric, from arrest to trial and on through parole. Courts appoint attorneys for defendants unable to afford legal representation.⁸⁸ Those facing criminal charges are perfunctorily treated with the utmost seriousness and respect, with great care taken to observe any and all legal requests made. Even the media revels in the spotlight of defendants, from minute by minute online coverage of courtroom spectacles to the vast array of crime dramas available on television. As a result, most laypeople are well versed in defendants' rights, whether secured by case law or constitution.

Long before states even thought to vest their constituents with constitutional liberties, the criminal justice process essentially excluded victims from any participation. Various theories abound as to why victims were categorically shut out from legal proceedings that would not exist but for their personal misfortune. Looking back, the formation of the current American criminal justice system began with private prosecutions for criminal acts, with victims of crime vested with the ability to initiate criminal proceedings.⁸⁹ The move to a public system of prosecution shifted the focus from the victim as an individual to the victim as society as a whole, thus producing a move away from victim participation.⁹⁰ Victims as stakeholders have never fully recovered.

Whether the reason was phrased as a mere practicality,⁹¹ or cloaked under the auspices of protecting defendants' rights,⁹² the end result was the same: victim exclusion from the criminal justice process was the norm. The advent and growth of victims' rights movements across the country has transformed victims, and provided the catalyst for change throughout the criminal justice system. Nowhere can this be seen more than with states that have opted to amend their constitutions to confer various inalienable rights to crime victims.

⁸⁷ See, e.g., Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 484 (2008) (concluding that debate should focus on the expanded role of victims in prosecution, not whether victims should have a role at all).

⁸⁸ U.S. CONST. amend. VI.

⁸⁹ See Cellini, *supra* note 85, at 844.

⁹⁰ See *id.* at 846 (stating that "[t]he victim's position in the American justice system was radically altered as the purpose of a criminal trial became solely to vindicate the harm done to society, not harm to the individual").

⁹¹ BELOOF ET AL., *supra* note 2, at 12.

⁹² *Id.* at 15.

Many states have amended their constitutions to afford some form of victims' rights within their jurisdictions.⁹³ Some states have constitutional amendments granting crime victims general, non-specific rights, and then follow these amendments up with statutes containing very specific rights for victims. And some states have both a general constitutional amendment, followed (often years later) by a more specific constitutional amendment granting detailed rights to crime victims.⁹⁴ In states where specific rights are afforded to crime victims, those granted via constitutional amendment suggest the greatest commitment to these victims. Though rights granted by statutory initiative are certainly preferable to no rights at all, if a conflict were to arise between a defendant's constitutional rights and a victim's statutory rights, the constitutionally secured rights of the defendant would trump every time.⁹⁵ Thus, this Article will concentrate on the states with constitutional amendments granting detailed rights to crime victims at various stages from arrest to parole.⁹⁶

The types of rights granted to victims are varied in nature. At their core, they can be divided into rights that protect victims, and rights that empower victims. Rights that protect victims encompass the right to notice of the defendant's whereabouts. These include arrest information, court dates, and parole or probation hearings. Crime victims and their families often live in fear that they will encounter their assailants on the street, while the criminal case is ongoing.⁹⁷ If they possessed the right to be informed of the status of the

⁹³ There are states with statutory law granting rights to crime victims. This Article focuses only on the states that have enacted some type of constitutional amendment granting rights to crime victims.

⁹⁴ For example, California enacted the more general Victims' Bill of Rights in 1982, *see, e.g.*, Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881, 881 (1992), and then granted more expansive rights to crime victims in 2008 with the passage of the Victims' Bill of Rights Act of 2008, more commonly referred to as Marsy's Law, *see, e.g.*, Note, *2008 California Criminal Law Ballot Initiatives*, 14 BERKELEY J. CRIM. L. 173, 176–90 (2009).

⁹⁵ *See generally* 16 AM. JUR. 2d *Constitutional Law* § 2 (2014) (distinction between constitutions and statutes); 16 C.J.S. *Constitutional Law* § 5 (2014) (conformance of statutory and common law to constitution).

⁹⁶ Thirty-three states have enacted constitutional amendments containing specific rights of crime victims. They are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *See infra* note 100.

⁹⁷ *See, e.g.*, Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2281 n.157 (2014). The family of California's Victims' Bill of Rights namesake, Marsy Nicholas, literally ran into her killer at a local supermarket soon after he was released on bail; this shocking confrontation in part was what inspired her brother, Broadcom founder Henry Nicholas, to advocate on behalf of crime victims and their families. *See, e.g.*, Frank Mickadeit,

criminal case against the defendant, such as whether the defendant has been released from jail or when the next court date is calendared, they would be armed with the ability to be prepared for such random encounters in public. They can make informed choices with such information.

Rights that empower victims comprise the ability of victims to have knowledge of, and participation in, the criminal procedural process. These rights also give dignity back to the victims. Any psychological wounds inflicted by the criminal act may heal with the ability to participate in the court process.⁹⁸ These rights allow victims to obtain discovery, to talk with the probation department about the defendant's case, to attend certain court dates, and to appropriate restitution for injuries. Crime victims are often the best eyewitnesses to the event in question. If afforded the ability to see the police report on their case, they can then assist both law enforcement and the prosecutor with possible inconsistencies in the case. If permitted to be inside the courtroom, they can "alert prosecutors to misrepresentations in the testimony of other witnesses."⁹⁹ Further, an accurate understanding of the way the criminal justice system operates can alleviate anxious feelings of unpredictability toward the system.

Another significant right permits victims to consult with the prosecutor on their case. This right to confer with the agency charged with prosecuting the defendant has taken different forms in different states. Victims are often granted statutory authority to speak with the prosecuting agency at some point during the defendant's court case, usually at sentencing. Of the 33 states with constitutional amendments for crime victims, 26 permit victims to be heard, or to somehow become involved, in the criminal justice process at some point.¹⁰⁰ Seven states guarantee the right of victims to actually participate in the plea-bargaining process in some manner.¹⁰¹ This expansion of victims' rights into

On Victims' Day, Henry Nicholas Recalls Sister, ORANGE COUNTY REG. (Apr. 20, 2010), <http://www.oregister.com/articles/nicholas-245053-marsy-victims.html>.

⁹⁸ BELOOF ET AL., *supra* note 2, at 716.

⁹⁹ *Id.*

¹⁰⁰ See ALA. CONST., art. I, § 6; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. 2, § 2; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16(a); CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. I, § 25; MD. CONST. art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26(a); MO. CONST. art. I, § 32; MONT. CONST. art. II, § 28; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10(a); OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8(a); WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9.

¹⁰¹ The seven states with constitutional amendments that mention the right of crime victims to be heard during a proceeding involving the plea-bargaining process are: Arizona, California, Connecticut, Idaho, Missouri, Oregon, and South Carolina.

the plea-bargaining arena signals the willingness of states to permit crime victims to participate to a fuller extent in the justice process. Before the enactment of victims' constitutional rights, victims were considered mere spectators in the process. Their contributions consisted simply of watching the criminal proceedings—most of which they more than likely did not understand—and waiting for an outcome. The frustrations and indignities of being trivialized have now given way to the inclusion of victims at perhaps the most important stage of the criminal proceedings, that of the plea bargain.

However, the exact language used by each of the seven states is still rather vague, and none of the seven states' constitutional amendments clarify at what stage during the plea-bargaining process a victim may exercise his or her constitutional rights. This specificity is crucial. The United States Supreme Court has determined that the plea-bargaining stage of the criminal justice process is indeed a "critical" one.¹⁰² It affects 95% of all of the criminal caseload in the country.¹⁰³ If the right to be "heard" during plea-bargaining is now bestowed upon victims, it follows that it should be bestowed at a point that matters.

The ability of a crime victim to address the court (and the defendant) post plea-bargaining, once the sentence has been predetermined, is better than nothing. It can act as a cathartic coping mechanism for the victim. It may satisfy their need to talk about the series of events that happened to them and of which they usually had little, or no, control. But if the victim is actually allowed to contribute during the actual plea-bargaining process, meaningful input can occur. The victim then has the power to affect the plea bargain itself. To the extent that a plea bargain affects the amount of incarceration facing a defendant, any sentencing differential between the plea bargain and the maximum exposure allowed by law most certainly could be influenced by the victim.¹⁰⁴ The seven states permitting victims to be "heard" during the plea-bargaining stage appear to grant this right without clear instructions as to how

¹⁰² See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (holding that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel").

¹⁰³ See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2014) (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> (last visited Sept. 15, 2014)) (stating that 94% of all state convictions and 97% of all federal convictions in 2010 resulted in a plea bargain).

¹⁰⁴ It is important to note that some victims disfavor the practice of plea-bargaining. With little to no participation in the negotiated sentence and only sporadic "rights" to engage in the process at all, victims often feel the most marginalized at this critical stage of the criminal justice process. Chemerinsky and Levenson note that "[p]lea bargaining can be particularly frustrating for victims. They are ordinarily not direct participants in the process and must stand by as defendants plead guilty to crimes that do not reflect the seriousness of the offense or receive sentences less severe than what the victims believe they deserved." CHEMERINSKY, *supra* note 23, at 817.

this right should be implemented. If the victims' rights movement is meant to merely appease crime victims, rather than empower them, then clarity is not needed. Cynicism aside, it becomes apparent that statutes and constitutional amendments must be more precise and provide more guidance to ensure that the voices of crime victims are heard as intended.

Seven states have imbued crime victims with the right to participate in plea-bargaining procedures via constitutional amendment. Yet the exact point at which victims may be heard by the prosecution, or the court, is not mentioned by any of the states' constitutional amendments, nor is it addressed in case law. The provisions all vary in verbiage and specificity. A closer look at each state is warranted.

A. *Evaluating the Seven States with Constitutional Language Permitting Victims to Participate in the Plea-Bargaining Process*

1. Arizona

Arizona's constitutional amendment, passed by 58% of the voters in 1990,¹⁰⁵ guarantees that a crime victim has a right "to be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing."¹⁰⁶ Arizona also has a statute in its criminal code, referenced within this amendment, which directly addresses victims' rights during plea negotiation proceedings.¹⁰⁷ It was enacted to implement the constitutional amendment referenced above, and it specifies that a victim may be present and heard at any proceeding in which a "negotiated plea" is presented to the court.¹⁰⁸ Further, the court cannot accept a plea agreement unless there is sufficient evidence that the prosecutor has made efforts to speak with the victim, and has advised the victim of their right to be present and heard at that

¹⁰⁵ *State Victims' Rights Amendments: Arizona*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/states/arizona.htm> (last visited Oct. 10, 2014).

¹⁰⁶ ARIZ. CONST., art. 2, § 2.1(A)(4).

¹⁰⁷ ARIZ. REV. STAT. ANN. § 13-4423 (2014) states:

(A) On request of the victim, the victim has the right to be present and be heard at any proceeding in which a negotiated plea for the person accused of committing the criminal offense against the victim will be presented to the court. (B) The court shall not accept a plea agreement unless: (1) The prosecuting attorney advises the court that before requesting the negotiated plea reasonable efforts were made to confer with the victim . . . (2) Reasonable efforts are made to give the victim notice of the plea proceeding . . . and to inform the victim that the victim has the right to be present and, if present, to be heard. (3) The prosecuting attorney advises the court that to the best of the prosecutor's knowledge notice requirements of this chapter have been complied with and the prosecutor informs the court of the victim's position, if known, regarding the negotiated plea.

¹⁰⁸ *Id.*

proceeding.¹⁰⁹ If the prosecutor knows how the victim feels about the proposed plea agreement, it must be made known to the court prior to the acceptance of the plea agreement by the court.¹¹⁰

Arizona's statute directly requires a prosecutor to seek out crime victims prior to the acceptance of a negotiated plea bargain, thus prioritizing victims during this important stage of the criminal proceeding. However, it is worth noting that this right comes in the form of a statute referenced within the state's constitutional amendment, and not within the amendment itself. It is thus unclear whether the citizens of Arizona feel that a victim's right to be heard during the plea bargaining stage is somehow subservient to, or less deserving of protection, than the other rights enumerated in Arizona's actual constitutional amendment.

In 2005, an Arizona appellate court decided *State ex rel. Thomas v. Foreman*.¹¹¹ In this case, the trial court initially held the Arizona statute giving crime victims and their representatives the right to present victim impact evidence at a sentencing hearing unconstitutional, because it did not allow for the defendant to cross examine the victim.¹¹² The appellate court reversed the trial court's ruling. It clarified that the confrontation clause of the Sixth Amendment does not provide the constitutional right to pretrial discovery in a criminal case.¹¹³ Therefore, though crime victims are not required to disclose victim impact statements to the defendant, "Arizona courts have consistently held that a criminal defendant has no vested or substantive right to a [particular discovery method]" and thus the defendant was not deprived of his constitutional rights.¹¹⁴

Finally, Arizona's constitutional rights for crime victims may be more specific than in most other states, but they still do not guarantee victims the right to affect the plea bargain itself by being able to be "heard" either as the plea is being created, or before the plea is officially offered to the defendant. Crime victims have the right to be heard "at any proceedings involving" a negotiated plea; further specificity might lead to more meaningful participation by Arizona crime victims.

Arizona's adoption of the Victims' Bill of Rights does appear to have bestowed some sense of comfort to crime victims and their families. Unfortunately, these rights came too late for some victims, such as Rich and Nancy Wilson. Their nine-year-old daughter was abducted in Flagstaff,

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 118 P.3d 1117 (Ariz. Ct. App. 2005).

¹¹² *Id.* at 1120.

¹¹³ *Id.* at 1121.

¹¹⁴ *Id.* (alteration in original).

Arizona, and murdered.¹¹⁵ When this occurred in 1988, constitutional rights for crime victims did not exist in the state of Arizona. “We were told we could not be in the courtroom, that the trial could take years, and the defendants would be interviewing us. We left devastated, feeling like we did something wrong. We realized the system was broken,” they recounted.¹¹⁶

In spite of these constitutional strides, disparities have been noted between the law on the books and the law as a practicality. For example, academics in the state of Arizona have publicly commented that Arizona crime victims are not always provided with notice of the initial court appearances for their assailants.¹¹⁷ It appears that this right meant to protect crime victims may be in words only; a mere appeasement to the crime victims movement. If this is true, then it is unclear whether significant impact has been established for victims of crime in Arizona.

2. California

California has long led the nation in recognizing crime victims and in granting them constitutional rights.¹¹⁸ A voter initiative in 1982 led to the enactment of rather generalized rights for victims through the Victims’ Bill of Rights.¹¹⁹ More recently, in November of 2008, California voters affirmed the passage of the Victims’ Bill of Rights Act of 2008, also known as Marsy’s Law.¹²⁰ Marsy’s Law has been codified under California’s Penal Code¹²¹ and was added as an amendment to the California Constitution.¹²²

¹¹⁵ Amanda Lee Myers, *Man Who Killed 9-Year-Old Girl in 1988 Is Executed*, USA TODAY (June 30, 2011), http://usatoday30.usatoday.com/news/nation/states/arizona/2011-06-30-996037664_x.htm.

¹¹⁶ Mara Knaub, *Parents of Slain Girl Campaigned for Victims’ Rights*, YUMA SUN (Apr. 26, 2012, 12:00 AM), http://www.yumasun.com/parents-of-slain-girl-campaigned-for-victims-rights/article_3c621f5f-1553-5f6b-a2d4-b269bbe3e387.html.

¹¹⁷ See Steven J. Twist & Daniel Seiden, *The Proposed Victims’ Rights Amendment: A Brief Point/Counterpoint*, 5 PHOENIX L. REV. 341, 347 (2012), (“In Arizona, most crime victims still are not given notice of initial appearances, despite the fact that for some the chance to see a judge before a release decision is made may be a matter of life or death. This is true even though the right to notice has been a command of the Arizona Constitution for almost twenty-two years.”).

¹¹⁸ In 1965 California became the first state to protect crime victims by creating a victim compensation program. See CAL. GOV’T. CODE §§ 13959–74 (2014); see Cellini, *supra* note 80.

¹¹⁹ CAL. PENAL CODE § 1191.1 (West 2014).

¹²⁰ Marsy’s Law was named after Marsy Nicholas, a University of California, Santa Barbara student who was stalked and then violently murdered in 1983. Dr. Henry Nicholas, Marsy’s brother and co-founder of Broadcom, was instrumental in fighting to insure this legislation passed. Michael L. Fell & Elizabeth N. Jones, *Understanding and Utilizing Marsy’s Law*, ORANGE COUNTY LAWYER, Nov. 2013, at 24.

¹²¹ CAL. PENAL CODE § 679.026 (West 2014).

¹²² CAL. CONST. art. I, § 28.

Article 1, section 28(b) details the 17 constitutional rights afforded to crime victims. With regard to the plea-bargaining process, section (b)(8) states that crime victims have the right “to be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, *plea*, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.”¹²³ However, the timing of a victim’s right to be “heard” is not specified. Arguably, if a victim is only “heard” post-*plea*, then the victim is not really helping to see that the defendant is “sufficiently punished in both the manner and length of the sentences imposed by the courts” as set forth in the first part of the amendment.¹²⁴ Ideally, crime victims in California would have the opportunity to meet with the prosecutor both before and during the plea bargain formation. Since it is the prosecutor’s job to consider an appropriate plea offer, input from the actual crime victim could prove helpful in determining, among other issues, length of sentence, type of incarceration (if any), and restitution.

An additional hurdle for victims to overcome in California is the need to specifically request this right to be heard at proceedings involving pleas. The phrase “upon request” appears throughout the amendment, and requires crime victims to actively call for their constitutional right to “be heard . . . at any proceeding . . . involving a plea . . .”¹²⁵ It also appears in other states’ amendments.¹²⁶ However, once this request is made, crime victims may immediately assert their rights throughout the criminal proceedings.¹²⁷

Though no case law has been generated regarding California’s 2008 constitutional amendment, there has been some regarding the preceding initiative of victims’ rights legislation. In *People v. Jones*, a California appellate court was called upon to decide whether the state’s Victims’ Bill of Rights encompassed statements at a sentencing hearing made by child victims regarding the crime, the person responsible, and restitution.¹²⁸ In this case, an eight-year-old child was repeatedly sexually assaulted by her biological

¹²³ *Id.* § (b)(8) (emphasis added).

¹²⁴ *Id.* § (a)(5).

¹²⁵ *Id.* § (b)(8).

¹²⁶ See, e.g., ALASKA CONST. art. I, § 24 (“[C]rime victims . . . shall have the following rights . . . the right to be allowed to be heard, upon request, at sentencing . . .”); IDAHO CONST. art. I, § 22 (“[A] crime victim . . . has the following rights: (6) To be heard, upon request, at all criminal justice proceedings . . .”); MD. CONST. art. 47(b) (“[A] victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding . . .”); MO. CONST. art. I, § 32 (“Crime victims . . . shall have the following rights, as defined by law: (2) Upon request of the victim, the right to be informed of and heard at guilty pleas . . .”).

¹²⁷ *Victim Rights: Notification & Participation*, ST. OF CAL. – DEP’T OF JUST. – OFF. OF THE ATT’Y GEN., <http://oag.ca.gov/victimservices/rights> (last visited Oct. 10, 2014) (listing instructions and contact information for victims to avail themselves of their rights).

¹²⁸ 10 Cal. App. 4th 1566 (1992).

father.¹²⁹ The father was eventually arrested and ultimately convicted under Penal Code § 288.5, continuous sexual abuse of a child.¹³⁰ Several special allegations and sentencing enhancements were also found to be true.¹³¹ At the sentencing hearing, the girl, who was now nine years old, presented a victim impact statement in which she told the court that she recommended that her father, the defendant, be sentenced to a 21-year state prison term “so that he wouldn’t be able to hurt other little girls.”¹³² He was then sentenced to the upper term of 16 years in state prison, and appealed his sentence in part based on the claim that the victim’s “recommendation” was impermissible under the current statute because her statement did not fall under an allowable category of viewpoints that may be expressed at a sentencing hearing.¹³³

The court evaluated California Penal Code § 1191.1, which allowed for victims to make a statement “concerning the crime, the person responsible, and the need for restitution.”¹³⁴ The court recognized that this code section was enacted as a result of California’s Victims’ Bill of Rights initiative, and that its purpose was to “expand the rights of victims, not to restrict the scope of judicial inquiry into sentencing alternatives.”¹³⁵ The court interpreted the victim’s statement did in fact fall within the permissible categories of victim impact statements because it was “simply a summary of [her] views about the crime and defendant, i.e., that it was a very serious crime, and one which defendant might well repeat, if not incarcerated. . . .”¹³⁶

3. Connecticut

While Connecticut does not specify the right to participate in the offering of a plea bargain, it does use detailed language regarding the plea-bargaining process. Its constitutional amendment, passed by 79% of the voters in 1996,¹³⁷ provides that crime victims may voice their opposition to, or approval of, a plea bargain “entered into by the accused” and may speak to the court prior to the acceptance of the plea.¹³⁸ At first glance, this language seems

¹²⁹ *Id.* at 1569.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1576.

¹³³ *Id.* at 1569.

¹³⁴ *Id.* at 1574.

¹³⁵ *Id.* at 1575.

¹³⁶ *Id.* at 1576.

¹³⁷ *State Victims’ Rights Amendments: Connecticut*, NAT’L VICTIMS’ CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/states/connecticut.htm> (last visited Oct. 10, 2014).

¹³⁸ CONN. CONST. art. XXIX(b)(7) states that victims have the right “. . . to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to

to connote a rather passive role by the victim. It is merely a comment on an already-offered plea bargain. However, it is possible that the judge might change her mind after hearing the victim speak. In fact, case law has suggested that the right of crime victims to meaningfully participate in the plea bargaining phase of the criminal justice system is in fact taken very seriously by the Connecticut courts.¹³⁹

For example, in the 2010 case of *State v. Thomas*, defendant Dereck Thomas was charged with multiple counts of sexual assault upon a child.¹⁴⁰ At first, the 15-year-old victim told the prosecutor that she favored a more lenient sentence for the defendant, and so the prosecutor asked for five years of state prison.¹⁴¹ The judge indicated that the court would accept a plea bargain giving the defendant five years in prison, which would be suspended after only one year was served, followed by ten years of probation.¹⁴² However, between the initial plea negotiations and the sentencing, the young victim changed her mind, instead recommending to the probation department that the defendant should be incarcerated for 100 years.¹⁴³ The judge allowed the victim to appear in court and to testify pursuant to Connecticut's victims' rights amendment. Upon hearing her testimony, the judge refused to honor the initial lenient plea agreement, and instead vacated the defendant's plea and set the matter for trial.¹⁴⁴ The court emphasized that "in accordance with the victims' rights amendment of our state constitution, the court must provide an opportunity for the victim to meaningfully participate in the defendant's sentencing . . . when the victim chooses to make a statement, acceptance of a guilty plea must be contingent upon hearing from the victim in order to provide the victim with a meaningful right to participate in the plea-bargaining process."¹⁴⁵

The court bolstered its authority to support the "meaningful right" of crime victims to be heard during plea-bargaining by referencing the state legislature's "clear intent" to provide such guarantees to victims of crime as

the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused." *Id.* § (b)(8) also allows for "the right to make a statement to the court at sentencing."

¹³⁹ See, e.g., *State v. Thomas*, 995 A.2d 65, 75 (Conn. 2010) ("[W]hen the victim chooses to make a statement, acceptance of a guilty plea must be contingent upon hearing from the victim in order to provide the victim with a meaningful right to participate in the plea bargaining process.").

¹⁴⁰ *Id.* at 68; see also Rich Meehan, *Victims Can Weigh in on Plea Bargains*, CTNEWS.COM (May 20, 2010), <http://blog.ctnews.com/meehan/2010/05/20/victims-can-weigh-in-on-plea-bargains/>.

¹⁴¹ *Thomas*, 995 A.2d at 68.

¹⁴² *Id.*

¹⁴³ *Id.* at 69. The victim's initial request for a 100-year sentence was followed by her subsequent recommendation of a ten-year state prison term for the defendant. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 75.

demonstrated through the legislative history of Connecticut's victims' rights amendment.¹⁴⁶ Specifically, the court noted that during legislative debate over the amendment, a representative commented that "[this amendment] would provide victims a 'true role in the process' and that it would address the recurring concern among . . . crime victims advocating for the adoption of the amendment that they should no longer be excluded from the plea-bargaining process."¹⁴⁷ Further, another representative commented that "adoption of the amendment would '[e]nsure that at the stage where a plea bargain is put on the record . . . a victim has a meaningful right to be heard.'"¹⁴⁸

4. Idaho

Idaho's victims' rights amendment was passed by 79% of the voters in 1994.¹⁴⁹ In 2006, a victim's right "to be heard" was evaluated in the case of *State v. Leon*.¹⁵⁰ In that case, a man murdered his estranged wife and pled guilty to first-degree murder.¹⁵¹ At the sentencing hearing, the victim's mother was allowed to show the court a four and a half minute DVD video, containing both a montage of still photos of the victim and her family set to music and video images with audio accompaniment.¹⁵² The defendant objected to the video, claiming that it was not a legally permissible way for the victim's family to "be heard" through a victim impact statement because the video was not actually a "statement."¹⁵³ The Court of Appeals of Idaho acknowledged that Idaho's constitutional amendment granting victims' rights did not specifically define what it means to be "heard."¹⁵⁴

Accordingly, the court analyzed the history of victims' rights legislation in Idaho. The court compared Idaho's original broad statute with that of the more detailed 1994 constitutional amendment. The statute allowed

¹⁴⁶ *Id.* at 75 n.11.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *State Victims' Rights Amendments: Idaho*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/states/idaho.htm> (last visited Oct. 10, 2014). IDAHO CONST. art. I, § 22(6) states that crime victims have the right "to be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result."

¹⁵⁰ 132 P.3d 462 (Idaho 2006).

¹⁵¹ *Id.* at 464. Defendant Abel Ramirez Leon pled guilty to first degree murder in exchange for avoiding the death penalty by entering an "Alford plea" in which he was permitted to plead guilty to the crime but avoid an actual admission of guilty by acknowledging that the State "possesses sufficient evidence to support a conviction if the defendant were to go to trial." *Id.* at 464 n.1.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

victims the opportunity “to address under oath, the court at sentencing,” which was commonly referred to as the right to make a “victim impact statement.” However, the subsequent constitutional amendment granted victims the broader right “to be heard,” which the court interpreted as providing “something different than providing victims the opportunity to make a sworn statement at sentencing.” Here, the court found that the video presentation was in fact a permissible way for the victim’s family to “be heard.”

5. Missouri

Missouri’s victims’ rights amendment was passed by 84% of the voters in 1992.¹⁵⁵ Though crime victims are granted the constitutional right to be “heard” at guilty pleas, there is no further definition of this term, nor is there any case law helping to define this term. In a 1999 case, a Missouri Court of Appeals ruled that a crime victim’s statement at sentencing is considered a mere “collateral” consequence of a guilty plea, rather than a direct consequence.¹⁵⁶ Accordingly, the defendant’s attorney was not required to inform his client of the right of a crime victim to be “heard” at sentencing pursuant to a guilty plea, since it was only a collateral consequence of the plea.¹⁵⁷ In this case, the defendant pled guilty to two separate charges, with the understanding that the prosecutor would not request that the defendant be sentenced to consecutive terms in prison.¹⁵⁸ At sentencing, the victim’s family member recommended that the defendant’s terms run consecutively, and without the possibility of parole.¹⁵⁹ The defendant objected, claiming that the prosecutor had breached his agreement to “stand silent” and not request a consecutive prison term and that his attorney should have notified him that the prosecutor could, in effect, indirectly request consecutive terms via the victim’s statement.¹⁶⁰ The court clarified that victim impact statements are not imputed to the State and, as such, did not violate the prosecutor’s promise to “stand silent” on the issue of sentencing in this case.¹⁶¹

¹⁵⁵ *State Victims’ Rights Amendments: Missouri*, NAT’L VICTIMS’ CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/states/missouri.htm> (last visited Oct. 10, 2014). MO. CONST. art. I, § 32.1(2) provides that crime victims have the right “[u]pon request . . . to be informed of and heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless in the determination of the court the interests of justice require otherwise.”

¹⁵⁶ *Weston v. State*, 2 S.W.3d 111, 112 (Mo. Ct. App. 1999).

¹⁵⁷ *Id.* at 115.

¹⁵⁸ *Id.* at 113.

¹⁵⁹ *Id.* at 114.

¹⁶⁰ *Id.* at 114–15.

¹⁶¹ *Id.* at 115.

6. Oregon

Oregon's victims' rights amendment was passed in 1999 by 58% of the voters.¹⁶² In 2011, the Oregon Supreme Court vacated a defendant's sentence and remanded the case back to the lower court for re-sentencing when a defendant accepted a plea bargain and subsequently entered a guilty plea without the victim being present. In *State v. Barrett*, defendant Ivey Wayne Barrett was arrested and charged with stalking his estranged wife.¹⁶³ His wife, the victim, met with a victim advocate at the prosecutor's office, where the victim followed the correct procedures in requesting that she be present in court when the defendant was to be sentenced.¹⁶⁴ The victim knew that the defendant had an upcoming court date, but was advised by the victim advocate that she did not need to be present in court on that date, as it was not scheduled for a plea or sentencing.¹⁶⁵ However, the defendant did end up accepting a negotiated plea on the date that the victim was advised not to attend court,¹⁶⁶ when the victim found out, she filed a claim under Oregon's victims' rights statute, declaring that her rights as a victim had been violated.¹⁶⁷ The trial court agreed that the victim's rights had been violated, but declined to vacate the defendant's sentence.¹⁶⁸ The Oregon Supreme Court disagreed. It vacated the defendant's sentence and sent the case back to the trial court for re-sentencing so that the victim could assert her constitutionally guaranteed rights per the Oregon constitutional amendment.¹⁶⁹ Though the victim's absence from the court was accidental in nature, the Oregon Court honored the state's victims' rights amendment in spirit and in letter.

¹⁶² *State Victims' Rights Amendments: Oregon*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/states/oregon.htm> (last visited Oct. 10, 2014). OR. CONST. art. I, § 42(1)(a) states the following:

The right to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition.

The Constitution also states that victims have "[t]he right to be consulted, upon request, regarding plea negotiations involving any violent felony." *Id.* § 42(1)(f).

¹⁶³ 255 P.3d 472, 475 (Or. 2011).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 476.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 482.

7. South Carolina

South Carolina's victims' rights amendment, passed by 90% of the voters in 1996,¹⁷⁰ remains vague as to the role of the victim in the plea-bargaining process. Victims are guaranteed the right to be "heard" at proceedings "involving" a plea.¹⁷¹ Its meaningful application within the criminal justice system also remains vague. In 2012, Defendant Samuel McCauley's ten year prison sentence for reckless homicide and felony DUI (driving under the influence charge) was unilaterally cut in half by a South Carolina circuit court judge.¹⁷² Per the South Carolina Rules of Criminal Procedure, the judge was not obligated to hold a proceeding at which to rule on the defendant's plea for a sentence reduction. Because the judge opted to subvert the proceeding, and reduce the sentence without a hearing, the victims' family was without recourse per South Carolina's victims' rights amendment.

The defendant's attorney, in defending the reduced sentence for his client, stated, "The Victims' Bill of Rights requires only that a victim has the right to be present at criminal proceedings where the defendant has a right to be present."¹⁷³ And since this statement accurately reflects South Carolina law, the victims' family was not permitted to be present nor to be heard when the judge's decision was rendered.

B. Assessing the Efficacy of Victims' Rights Amendments

Meaningful rights for crime victims are still a distant axiomatic truth. Amendments that confer the right to participate in the plea-bargaining phase of criminal proceedings may appear incontrovertible, new constitutional amendments that bestow the right to participate in the plea-bargaining phase of the proceedings sound virtuous, but prove illusory when tested in court. Rights that can be asserted only "upon request" may deter otherwise rightful victims from participating in the system.¹⁷⁴ The right to comment on a plea already negotiated between the defendant and the prosecution signals a passive, benign

¹⁷⁰ *State Victims' Rights Amendments: South Carolina*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, <http://www.nvcap.org/states/southcarolina.htm> (last visited Oct. 10, 2014).

¹⁷¹ S.C. CONST. art. I, § 24(A)(5) states that victims have the right to "be heard at any proceeding involving a post-arrest release decision, a plea or sentencing."

¹⁷² Ray Rivera, *Reduced Sentence Still Stands for Man Convicted in Fatal DUI*, LIVE 5 WCSC (Aug. 1, 2013, 2:41 PM), <http://www.live5news.com/story/23010452/mccauley-ruling>.

¹⁷³ *Id.*

¹⁷⁴ See CAL. CONST. art. I, § 28(b)(8); ARIZ. REV. STAT. ANN. § 13-4423(a) (2014). *But see* ARIZ. REV. STAT. ANN. §§ 13-4423(b)(1), (2) (requiring the prosecution to make "reasonable efforts" to confer with the victim, to provide notice of the plea-bargain, to be present, and if present to be heard).

role in the proceedings.¹⁷⁵ And vague terms and phrases must be clarified for rights to maintain consequential import.¹⁷⁶ The current amendments may allow victims to participate to some extent, but these limitations and ambiguities may simply provide an appeasement in text only. For crime victims to possess influential rights, the language of these rights must provide precision, clarity, and transparency.

For a victim's rights to be meaningful, they must also transcend the plea-bargaining stage and expand into other areas of the proceedings. Plea-bargaining has now been deemed a "critical" right by the Supreme Court, but it by no means is the only stage at which victims can provide input of consequence. Throughout the criminal justice proceedings, victims must be allowed to not only be present, but also to be allowed the opportunity to be heard. Though some victims may not choose to participate in the process, it nonetheless is vital that the chance to do so be presented to them.

When defendants are first brought to court and bail is set, victims should be able to address the court regarding their feelings as to the amount of the bail and any restrictions as to the defendants discharge from jail. For example, these limitations could include such conditions as a "no contact," or "stay away," order between the defendant and the victim and the victim's family. Though bail schedules are statutory and some bail amount is usually required, knowing the parameters of a defendant's release may soothe victims' nerves and provide some measure of certainty as to the whereabouts of their assailant. Even more importantly, knowledge of this information may alert victims to seek help if defendants violate their terms of release.

Throughout the proceedings, victims should be allowed to voice their opinions as to trial continuances. Such delays are an inevitable part of the criminal process; nonetheless, it is important for judges to be aware of the impact that trial continuances have upon the victims and their families.¹⁷⁷ Some victims may be required to travel long distances in order to attend court hearings. Absences from work, school, and family obligations are also costs that victims bear in order to assert their constitutional rights to be present and heard at court proceedings. It is important for the various stakeholders in the criminal case, including the prosecutor and the judge, to be aware of these

¹⁷⁵ See CONN. CONST. art. I, § 8(b)(7).

¹⁷⁶ For example, what does the right to be "heard" encompass?

¹⁷⁷ See Paloma Esquivel, *Relatives of Seal Beach Shooting Victims Want Trial to Start Soon*, L.A. TIMES (Aug. 30, 2013), <http://articles.latimes.com/2013/aug/30/local/la-me-0831-seal-beach-shooting-20130831>. Here, family members of shooting victims opposed another continuance requested by the defense. *Id.* One family representative told the judge, "[t]he agony you are putting us through with delay after delay after delay, you don't understand." *Id.* Another family member stated, "[o]ur lives are forever changed, and every time we come here we sit five feet away, fifteen feet away, from a monster." *Id.*

inconveniences and, where practical, to reign in the number of times a case is postponed.

The sentencing hearing is perhaps the most recognized time at which the victims may speak. For victims' rights to have an influence on the sentencing of a defendant, it follows that a victim's statement be made before the final sentencing decision of the court. Both cathartic for the victim and instructive to the court, victim impact statements acknowledge the victim's role in the criminal case. The victim is aggrieved, harmed, forever changed; the conclusion of the criminal case by no means signifies the end of the impact on the victim. Sentencing may offer some closure but it does not always make the victim complete again. If crime victims' sentencing statements fall on previously determined judgments, the result is an attempt merely to placate. For the court to fully appreciate a victim's story, that story must be told ahead of the pronouncement of the defendant's sentence.

The passing of constitutional amendments favoring the rights of crime victims is but the first step in the shifting paradigm of criminal proceedings. These rights must proliferate throughout all of the states, and be clarified within the text of the amendments themselves. They must also manifest without special assertion by the victim. Such changes will go a long way toward the realization of true rights for crime victims.

IV. HARMONIZING THE RIGHTS OF CRIME VICTIMS AND DEFENDANTS

[A]dvocating rights for victims does not mean lessening rights for the offender. It is a question of balance, and it is a question of justice.

– Paul Laxalt¹⁷⁸

The constitutional rights of criminal defendants have long been recognized and protected. The rights of crime victims are only more recently becoming recognized, and are protected to a lesser extent. Other than length of existence, a significant difference is that victims must initially request certain rights before being allowed to assert them in court.¹⁷⁹ Guaranteeing rights without additional obstacle will in no way take away from the rights of criminal defendants. Moreover, paying closer attention to and further refining victims' rights does not limit defendants' rights. Obviously, the interests of crime victim and assailant are often in conflict, but the importance of protecting both of their rights under the Constitution is absolutely congruent.

¹⁷⁸ NATIONAL VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK, VICTIMS' RIGHTS EDUCATION PROJECT: TALKING POINTS KIT (Feb. 27, 2004), available at <http://www.nvcap.org/vrep/NVCANVREPTalkingPoints.pdf>.

¹⁷⁹ See, e.g., CAL. CONST. art. I, § 28(b)(8); ARIZ. REV. STAT. ANN. § 13-4423(a).

A. *Protecting Victims' Rights While Preserving Defendants' Rights*

The numerous rights of criminal defendants are entrenched in the United States Constitution. From arrest and interrogation through arraignment and *in limine* motions, defendants' rights are the focus of all criminal proceedings pertaining to the criminal act. Defendants have the right to be brought to court within a specified period and to be made aware of the charges against them.¹⁸⁰ When defendants are interrogated, law enforcement must read them specific rights to ensure that they understand the implications of speaking to the police as well as their right to consult with an attorney throughout the proceedings.¹⁸¹ As the three recent Supreme Court cases demonstrate, defendants have the right to be told of the consequences of any plea negotiation on their immigration status,¹⁸² the right to be made aware of any offered plea bargains,¹⁸³ and the right to know of the maximum possible punishment for their crimes.¹⁸⁴ Defendants may rightfully face their accusers in court, be present at a jury trial,¹⁸⁵ and choose whether to testify in their own defense.¹⁸⁶ They have the right to be present and to speak at their sentencing hearings,¹⁸⁷ and to a sentence devoid of cruel and unusual punishment.¹⁸⁸ Finally, defendants have the right to appeal guilty verdicts¹⁸⁹ and to attend parole hearings.¹⁹⁰

¹⁸⁰ U.S. CONST. amend. VI.

¹⁸¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁸² *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹⁸³ *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

¹⁸⁴ *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

¹⁸⁵ U.S. CONST. amend. VI.

¹⁸⁶ See *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (stating that the right to choose to testify in one's own defense comes under the Compulsory Process Clause of the Sixth Amendment).

¹⁸⁷ FED. R. CRIM. P. 32 (i)(4)(A).

¹⁸⁸ U.S. CONST. amend. VIII.

¹⁸⁹ Appeals are quite common in the American criminal justice system, but the Supreme Court has never held that they are constitutionally required; the Constitution does not specify the granting of a certain number of appeals to each convicted criminal. In *McKane v. Durston* (1894), the Supreme Court stated that a "review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law." Even in the face of this decision, every state and the federal government has rules providing a certain number of appeals.

Beyond Conviction and Sentencing, SAGEPUB.COM, available at http://www.sagepub.com/upm-data/43887_8.pdf (last visited Oct. 10, 2014).

¹⁹⁰ For example, in *Ughbanks v. Armstrong*, the Court "held that parole is not a constitutional right but instead is a 'present' from government to the prisoner." *Probation and Parole*, JUSTIA US LAW, <http://law.justia.com/constitution/us/amendment-14/65-probation-and-parole.html> (last visited Oct. 10, 2014) (citing *Ughbanks v. Armstrong*, 208 U.S. 481 (1908)). Likewise, in *Escoe*

In contrast, states inconsistently provide crime victims with various types of constitutional rights, if they allow for crime victims' rights at all. Most state constitutional amendments use broad language that guarantees crime victims the right either to be "present" or to be "heard" at court appearances in which a defendant has the right to be present. The language of these amendments varies greatly. Some amendments allow victims to be present "at all crucial stages" of criminal proceedings.¹⁹¹ Others specify the right to be informed of, and to be present at, "all public hearings" of the criminal justice process.¹⁹² Still others identify all stages of "pre-conviction and post-conviction proceedings."¹⁹³ Though textual uniformity might provide more consistent outcomes, the states with victims' rights amendments do all appear to allow for victims' voices at hearings in which their assailants also enjoy the right to be present.

However, the rights to be present and to be heard are often tempered by requirements that victims must first "request" that their constitutional rights attach.¹⁹⁴ Some states include language such as "if practicable" before permitting victims to attend various proceedings. In addition, other states limit the rights of crime victims to be heard depending upon what type of crime was inflicted upon them by the defendant.¹⁹⁵

v. Zerbst, "the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process." *Id.* (citing *Escoe v. Zerbst*, 295 U.S. 490 (1935)). Additionally, "[t]hen-Judge Burger in *Hyser v. Reed*, . . . reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee." *Id.* (citing *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963)).

¹⁹¹ See, e.g., ALA. CONST. art. I, § 6.01(a) (stating that "Crime victims . . . are entitled to the right . . . to be heard when authorized, at all crucial stages of criminal proceedings"); COLO. CONST. art. II, § 16(a) (stating that "a victim of a criminal act . . . shall have the right to be heard . . . at all critical stages of the criminal justice process").

¹⁹² Query whether this is really an addition to victims' rights at all, as criminal proceedings are generally open to the public, and victims are certainly members of the public.

¹⁹³ See, e.g., LA. CONST. art. I, § 25 (stating that "a victim of crime shall have the right to reasonable notice and to be present and heard during all critical stages of pre-conviction or post-conviction proceedings . . .").

¹⁹⁴ See, e.g., CAL. CONST. art. I, § 28(b)(6)–(8), (11)–(12) (requiring that each right asserted by victims be allowed only "upon request" by the victim or a representative of the victim); IDAHO CONST. art. I, § 22(6) (requiring the right to be "heard at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant" to be contingent "upon request" by the victim); MD. CONST. art. 47(b) (allowing victims to be "notified of, to attend, and to be heard at a criminal justice proceeding" if this right is made "upon request and if practicable").

¹⁹⁵ See, e.g., N.M. CONST. amend. art. II, § 24(A) ("A victim of arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual conduct of a minor, homicide by

Imposing contingencies before rights attach takes away from the significance of these rights. Victims, or their representatives, may not know that they must speak up in order to assert their constitutional rights. Some may be too intimidated to do so. Victims are not granted the right to an attorney, and without such legal representation, victims find it difficult to navigate the criminal justice process alone. It is also worth noting that the rights of the defendant contain no such limitations. It is unclear why so many states opted to set such harsh boundaries on the rights constitutionally bestowed to victims.

Once an assailant is arrested, victims' rights commence. It is important to note that none of the rights of crime victims conflict with nor supersede those of defendants. For example, victims may have the right to be present at the various proceedings of the defendant, but these hearings are open to the public anyway. Victims' rights to be heard are simply that—victims have the right to state their feelings and opinions as to various happenings in their assailants' case.¹⁹⁶ This is no different from the right of the prosecutor to advocate for a particular result. There are no requirements that the court give more weight to a victim's voice than that of a defendant.

Certainly the interests of defendants and their victims are separate and distinct. Defendants want no or low bail so as to be free from incarceration, and victims want a higher bail to ensure the defendants' return to court. Defendants may be willing to post bail, but do not want further limitations placed on their freedom; victims may want conditions of release imposed on defendants, or for a GPS tracking device to monitor defendants' out-of-custody movements. Defendants want a plea deal with minimal penal consequences; victims want the charges to adequately reflect the crimes committed. Victim impact statements are often not beneficial to defendants, but they do not infringe on constitutional rights. Just as defendants have the right to present mitigating evidence and testimony before sentencing, so too may victims present aggravating evidence. These competing interests are to be expected given the proceedings, but they do not indicate any stifling of defendants' rights.

Acknowledgment that any constitutional right the crime victim may possess will not infringe or take away from any of the defendants' constitutional rights will go a long way toward legitimizing crime victims as worthy of participation throughout the criminal proceedings. Such recognition is vital to guarantee that victims of crime are not "re-victimized" by a criminal justice system centered solely on the defendant.

vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim's representative shall have the following rights . . .").

¹⁹⁶ Perhaps a more precise description would be to refer to the case as the victim's case, precipitated by the defendant's conduct.

B. Accommodating Rights with Limited Judicial Resources

Court systems are overworked and understaffed, and have been for some time.¹⁹⁷ Judicial budgets are limited and have seen finances slashed over the years.¹⁹⁸ The criminal justice system in particular relies on expediency, and it too has been hard hit by shrinking revenue and limited staff. Incarcerated defendants have limited time frames in which their cases must be heard by the court, thus presenting exigencies absent in civil calendars.¹⁹⁹ Time waivers have enabled criminal prosecutions to continue past mandatory time limits, which unfortunately has created long delays and made cases with multiple trial dates a common occurrence.²⁰⁰ In light of these troubled economic times, it is important to examine the financial impact—if any—of encouraging further involvement in the criminal justice process by victims.

Meaningful involvement of crime victims in the prosecution of their assailants may have some impact on judicial resources. Victim participation in proceedings necessarily increases the time, however slight, involved in resolving cases. It requires subordinate judicial officers, such as probation workers and victim-witness coordinators, to meet with victims, explain their rights and responsibilities, and record their testimonials. Court time must be spent allowing victims to address the court with regard to continuances, negotiated offers, and sentencing. All of these events contribute to higher court costs in the form of more time expended and fewer cases heard by the court.

The financial costs of allowing victims to participate during the plea-bargaining process in particular are minimal. Separate hearings are not

¹⁹⁷ See, e.g., *Justice Barker Says Judges Overworked, Courts Underfunded*, CHATTANOOGAN (July 22, 2004), <http://www.chattanooga.com/2004/7/22/53208/Justice-Barker-Says-Judges-Overworked.aspx>.

¹⁹⁸ See, e.g., Maura Dolan, *New California Budget Fails to Ease Court Woes, Chief Justice Says*, L.A. TIMES (June 20, 2014), <http://www.latimes.com/local/lanow/la-me-chief-justice-budget-20140620-story.html>.

¹⁹⁹ All states have adopted statutes to address a defendant's federal constitutional right to a speedy trial. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that state procedure may vary but all must provide incarcerated defendants a non-adversarial probable cause review within a reasonable time period "either before or promptly after arrest").

²⁰⁰ See, e.g., William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html?pagewanted=all&_r=0 (stating that in New York City, "[t]he number of felony cases citywide that exceed the courts' own guidelines for excessive delay—180 days in most felony cases—has more than doubled since 2000, even as the total number of felony cases has dropped by nearly a quarter"); Greg Bluestein, *State Budget Cuts Clog Criminal Justice System*, NBC NEWS, Oct. 26, 2011, http://www.nbcnews.com/id/45049812/ns/us_news-crime_and_courts/t/state-budget-cuts-clog-criminal-justice-system/#.VA0KdUJqvzI (noting that the "National District Attorneys Association estimates that hundreds of millions of dollars in criminal justice funding and scores of positions have been cut amid the economic downturn, hampering the ability of authorities to investigate and prosecute cases").

required, as victims merely have the right to be present at each appearance at which the defendant also has a right to be present. Discussing procedures with probation departments and conferring with prosecutors appear to be negligible costs associated with victim contribution.

One area that may impose a burden of civil responsibilities onto criminal courts is that of restitution. Where financial losses are identifiable, victims are entitled to a restitution hearing at the conclusion of the criminal proceeding. States vary as to possible restitution verdicts, ranging from mere out-of-pocket expenses to general damages. Since fault has already been determined in the form of a guilty plea or verdict, issues as to liability do not exist. Rather, victims have the right to a restitution hearing to determine financial losses payable by the defendant, and defendants then have the right to challenge the restitution amount set by the court. Tantamount to a civil trial, these restitution hearings certainly consume court time involved in resolving cases, as well as resources expended in conducting the hearings.

To some extent, the costs of constitutional rights are ones that the judicial system is prepared to bear. Victims of crime may be newly accepted participatory stakeholders, but their rights are no less substantial than those of traditional parties.

V. CONCLUSION

Victims of crime deserve the constitutional right to meaningfully participate in the prosecution of their assailants. These rights should extend to all stages of the case, and not be tempered by unfounded concerns of inequity. Interpreting vague legislation and overly broad constitutional language as encompassing, rather than as limiting, crime victims in their pursuit of justice promotes a fairer and more balanced criminal justice system.

The United States Supreme Court's decisions in *Padilla*,²⁰¹ *Frye*,²⁰² and *Lafler*²⁰³ provide the opportunity for re-examination of the progress (or lack thereof) victims have made in securing constitutional rights to be present and heard whenever the defendants in their case are permitted to be present and heard. Recognition of plea-bargaining as a critical phase of the process serves as a reminder of the important role that crime victims ought to play in ensuring just results from these negotiated sentences. The significance of guaranteeing these rights in constitutional form is made even clearer by the weight given to the importance of black letter safeguards by Justice Scalia in his dissents.

Finally, moving beyond plea-bargaining and ensuring constitutional rights for victims throughout their journey in the criminal justice system is imperative. Our system of resolving criminal cases must strive to include crime

²⁰¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

²⁰² *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

²⁰³ *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

victims at every juncture, and to provide every opportunity for victims to seek justice.