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*289 THE THIRD MODEL OF CRIMINAL PROCESS: THE VICTIM PARTICIPATION MODEL

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I. Introduction

It is time to face the fact that the law now acknowledges the importance of victim participation in the criminal process. Thirty-one states have chiseled victims' rights into their respective constitutions. [FN1] The federal government and the rest of the states have enacted numerous statutory rights for victims. [FN2] An amendment to the United States Constitution providing civil rights for crime victims has been proposed [FN3] and is the topic of authors in this symposium. There are those who resist acknowledging the existence, genuine nature, and significance of victim participation laws. The state of denial that accompanies such resistance has stood in the way of the future for too long. This is a future in which there is a state of understanding regarding victim participation laws. At the turn of the millennium, continued resistance to such an understanding is analogous to looking at the night sky with blinders on. Now, to navigate the criminal process, one must cast aside the blinders and look at the rest of the sky.

*290 The inclusion of the victim as a participant has shaken conventional assumptions about the criminal process to their foundation. [FN4] One core assumption that has occupied the field of criminal procedure for many years is no longer true. This core assumption is that only two value systems compete with each other in the criminal process. Professor Packer identified and then labeled these two value systems the "Crime Control Model" and the "Due Process Model." [FN5] The Crime Control Model has as its value the efficient suppression of crime. [FN6] The Due Process Model has as its value the primacy of the defendant and the related concept of limiting governmental power. [FN7] Thirty years ago, Professor Packer stated:

> The kind of model we need is one that permits us to recognize explicitly the value choices that underlie the details of the criminal process. In a word, what we need is a normative model or models. It will take more than one model, but it will not take more than two. [FN8]

This last assertion is no longer true. Today, it takes more than two models to recognize explicitly the value choices that underlie the criminal process.

Professor Packer's Crime Control Model and Due Process Model have been modified by some and criticized by others. [FN9] Nevertheless, the models remain useful constellations above the sea of the criminal process. Taken together, the Crime Control Model and the Due Process Model have comprised a dominant two-model universe of

values. [FN10] The models were *291 created by Packer to serve at least four functions. First, the models explicitly recognize "the value choices that underlie the details of the criminal process." [FN11] This recognition provides a "convenient way to talk about the . . . process" that operates between the "competing demands" of the two value systems. [FN12] Second, the models allow us to "detach ourselves from the . . . details" of the process so we can see how the entire system may be able to deal with the various tasks it is expected to accomplish. [FN13] Third, the models assist in understanding the process as dynamic, rather than static. Finally, the models assist in revealing the relationship of criminal process to substantive criminal law. [FN14]

Professor Packer did not anticipate modern laws of formal victim participation, and did not examine historic legal traditions of victim participation that continue to this day. Thus, it is hardly surprising that his two models do not include a conceptual framework in which victim participation in the criminal process can be understood. [FN15] The mere existence of a victim participation value that is external to the two-model concept was not itself a sufficient justification for the creation of a new model. [FN16] For a victim model to be useful, there needed to be a consensus in law that the values underlying the victims' roles are genuine and significant. [FN17] This consensus in law now exists, as reflected in modern laws that create rights of participation for victims of crime in all fifty states and the federal *292 government, and in historic traditions of victim participation that have endured to the present day. [FN18] However, because victim participation does not rest on the values underlying the Crime Control and Due Process Models, the two models cannot facilitate an understanding of victim participation. Laws of victim participation in the criminal process represent a shift in a dominant paradigm of criminal procedure. To reflect this shift, a third model--the Victim Participation Model--is needed to complement, but not to replace, Packer's two models.

In order to promote a thorough understanding of the Victim Participation Model, this Article examines the Model in several different ways. Part II reviews the values underlying the Crime Control, Due Process, and Victim Participation Models. Part III examines three procedural scenarios, cast in the setting of victim participation, to demonstrate that the present reality of the criminal process is better reflected in a three-model concept. Part IV discusses the language of the three-model concept and its differences from the language of the two-model concept. Part V examines the Victim Participation Model in the context of some procedural stages of the criminal process, including reporting crime, investigating crime, the charging process, trial, sentencing, and appeal.

II. The Values Underlying the Three Models

A. The Value Underlying the Crime Control Model

The primary value underlying the Crime Control Model is the efficient suppression of crime. Efficiency is the capacity to process criminal offenders rapidly. Professor Packer provides an image of the Crime Control Model:

The image that comes to mind is an assembly-line conveyor belt which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case . . . the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file. The criminal process, in this model, is seen as a screening process in which

each successive stage . . . involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion. [FN19]

*293 B. The Value Underlying the Due Process Model

Underlying the Due Process Model is the value of the primary importance of the individual defendant and the related concept of limiting governmental power. Again, Professor Packer's image is helpful:

If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process . . . . The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty. It is a little like quality control in industrial technology. . . . The Due Process Model resembles a factory that has to devote a substantial part of its input to quality control. This necessarily cuts down on quantitative output. [FN20]

The value of the primacy of the defendant seeks to assure reliability in determinations of guilt. [FN21]

C. The Value Underlying the Victim Participation Model

The value underlying the Victim Participation Model is implicit in the language of federal and state statutes, and many state constitutions. This language includes three important concepts: fairness to the victim, respect for the victim, and dignity of the victim. Two or more of these concepts appear in the vast majority of state constitutional victims' rights provisions. [FN22] Five states have created constitutional civil rights for victims. [FN23] Twenty states recognize the importance of the victim's dignity on a constitutional level. [FN24] A separate group of ten states have expressly set forth one or more of the concepts of dignity, respect, and fairness in statutory victims' rights provisions. [FN25] The federal statute that grants rights of participation to victims expressly sets forth as important the concepts of dignity, fairness, and respect. [FN26] *294 Generally, these rights are rights to notice and attendance, and the right to speak to the prosecutor and the judge. [FN27] These rights are, by nature, due-process-like rights, [FN28] although other types of rights have been created. [FN29]

The fundamental justification for providing due-process-like rights of participation (and other types of rights) is to prevent the two kinds of harm to which the victim is exposed. The first harm is primary harm, which results from the crime itself. The other harm is secondary harm, which comes from governmental processes and governmental actors within those processes. [FN30] These harms place the concepts of "dignity," "fairness," and "respect" in context, and provide the fundamental basis for victim participation in the criminal process. The primary harm is a basis for victim participation in the same way that harm to an individual, coupled with a legitimate theory of the liability of another, is the basis for standing in other legal contexts. [FN31] The *295 potential for secondary harm provides a significant basis for a victim's civil rights against governmental authority. [FN32] The primacy of the individual victim *296 is the value underlying the Victim Participation Model. This value is derived from the prospect of primary harm, taken together with the concept of minimizing secondary harm (governmental harm) to the victim. The value of primacy of the individual victim underlies rights of participation granted to the victim. [FN33]

The image of the Victim Participation Model is that of victims following their own case down the assembly line. Victims consult informally with police and prosecutor. At formal proceedings, when appropriate and in an appropriate manner, victims may speak and address the court. Victims are heard by the prosecutor and the court before pretrial dispositions are finalized. Victims may speak at sentencing and at release hearings.
The participation of the victim is designed to ensure that the interest of the individual victim in the case is promoted. A core interest of the victim is that the truth be revealed and an appropriate disposition reached. However, there is a significant limit to the victim's role. The victim cannot control the critical decisions made in the factory by grand and petit juries, prosecutors, or judges. [FN34] At critical stages in the factory the victim speaks to governmental actors and decision makers. Depending upon the procedural context, victim participation may indirectly result in greater or lesser efficiency, and victim participation may or may not conflict with the value of the primacy of the individual defendant.
A remarkable feature of victim participation in the criminal process is that participation is, to a great extent, left up to the individual victim's choice. [FN35] The notable exception is that a victim must appear as a witness in *297 those cases in which the State insists on prosecution. If the victim fails to participate (except as a witness) the case does not fail, but is narrowed to a case between the State and the defendant, the two parties who must continue to participate if there is to be a case at all. The luxury of the victim's choice whether to participate is possible because the public prosecutor retains control over critical decisions and retains central responsibility for the prosecution. [FN36] The absence of the victim (except as a witness) does not mean that the State becomes unable to control and pursue the prosecution of the case, but merely limits the ability of the victim to influence the prosecution and disposition of the case.
One of the central features of the concept of secondary harm as it has emerged in participation rights of victims is that secondary harm (harm from governmental processes and governmental actors within the process) may mean different things to different victims. Victim A may choose to exercise all available rights of participation, while Victim B may choose not to exercise any right of participation. Both Victim A and Victim B determine for themselves whether active participation will minimize, or contribute to, secondary harm. This choice, whether to participate, is consistent with the Victim Participation Model value of primacy of the individual victim. Implicit in victim participation laws is the idea that denying the individual victim the choice whether to participate or not participate in the criminal *298 process is unfair to the victim, disrespectful of the victim, and a great affront to the victim's dignity. [FN37]
As a consequence of the victim's legal ability to choose whether to participate, at least two other general observations may be made. First, the public prosecutor will always be necessary where such choice is present, because it remains important to society to prosecute certain crimes regardless of the victim's level of participation. [FN38] Second, unequal procedural treatment of similarly situated criminal defendants is possible because victims are permitted to choose whether or not to informally or formally influence decision makers concerning charging or disposition, [FN39] and because the victim has the choice to assist or resist the position of either, or both, of the parties. One defendant may face a victim who seeks mercy, while another defendant may face a victim who seeks a severe sanction. A third defendant may find that the victim is not participating in

the criminal process except as a witness. Unequal treatment of defendants is perhaps the most compelling reason for denying victims the right to participate, because equal treatment of defendants stands against victim participation at virtually every stage of the criminal process. As a practical matter, however, equality of treatment of defendants has largely failed as an obstacle to laws of victim participation. Ascendant is the victim's choice to participate in the criminal process, descendant is equal treatment among similarly situated defendants. [FN40]

*299 III. The Dynamic Among Values Underlying the Three Models

The Victim Participation Model poses a new challenge to the values underlying both the Crime Control Model and the Due Process Model. Legitimizing the Victim Participation Model means that the territory previously occupied by two central value systems now must accommodate a third value, that of the victim's primacy. [FN41] Because criminal procedure has centrally consisted of both the efficiency value of the Crime Control Model and the value of primacy of the individual defendant underlying the Due Process Model, these familiar values may be challenged when the value of the primacy of the individual victim is added to the territory. The existence of conflict depends upon the procedural context, and in some cases, the choices of the individual victim, the individual defendant, and the public prosecutor.

Because the Victim Participation Model values the primacy of the individual victim, it will inevitably conflict with the value of efficiency underlying the Crime Control Model in some circumstances. In addition, while the Due Process Model and the Victim Participation Model both focus on the primacy of individuals, there are limits to that similarity. For three important reasons, the shared value of primacy of an individual does not result in a shared model. First, the values underlying the Victim Participation and Due Process Models are based on the primacy of two separate individuals: respectively, the individual victim and the individual accused. Second, this conflict of values is accompanied by the potential of revenge from the victim towards the defendant. Third, while the victim has experienced primary harm and may experience secondary harm, the defendant faces harm from the criminal process and formal punishment. Because of these differences, the value of primacy of the defendant may conflict with the value of primacy of the victim.

To illustrate conflicts and similarities among the three value systems, it is helpful to explore examples that illustrate the dynamic among the values underlying the three models. This Part examines the interplay of values underlying the three models: first, in the procedural choice to allow a victim *300 to informally influence the decision not to charge; second, in the procedural choice to allow a victim the right to a speedy trial; third, in the procedural choice to allow mandatory minimum sentences to trump a victim's influence over sentencing.

A. The Interplay of Values Underlying the Victim's Influence on the Decision Whether to Charge

The first example, reflecting a reality predating modern victim laws, shows the distinction between the value of efficiency and the value of victim primacy. It is well known that adult rape victims have virtually complete control over the decision whether to charge the alleged perpetrator with a crime. [FN42] Suppose, hypothetically, that a

female victim of an acquaintance rape goes to the hospital with a black eye and a broken nose. The victim's account and the forensic evidence reveal that a rape has occurred. Despite encouragement to prosecute from the detective, the victim advocate, and the deputy district attorney, the victim ultimately expresses a personal preference not to proceed with charging. Respecting this preference, the deputy district attorney does not charge a readily identifiable rape suspect.

Rape is a serious crime of violence. The community and the individual victim are safer with the rapist in prison. Nonetheless, in sex crimes against adults, the charging decision is, as a practical matter, almost always left up to the victim. However misguided the victim may be perceived to be, she essentially controls the choice. Even when the reasons for her choice may not be respected, her choice is respected because she is the victim. The Victim Participation Model readily explains why this is so. The rape charge is not pursued because of respect for the victim's dignity and privacy, and, relatedly, because of an understanding about secondary harm generally and specifically, the victim's desire not to be abused by the process.

In this example, values underlying the Victim Participation Model completely dominate over the value of efficiency. The Crime Control Model demands the swift suppression of crime, a goal that would be best achieved by charging and prosecuting the defendant, and, if found guilty, imposing upon the defendant a substantial period of incarceration. The Crime Control Model is simply incapable of explaining this deference to the victim. Furthermore, the Due Process Model value of the primacy of the defendant is completely ignored in the decision not to charge when that decision is made because of the victim's wishes. In other words, the dominant value at play in this example cannot be comprehended using the two-model concept. *301 The Victim Participation Model value of primacy of the individual victim is needed to make sense of the prosecutor's decision not to pursue the charge. [FN43]

B. The Interplay of Values Underlying the Victim's Right to a Speedy Trial

The second procedural example involves the victim's right to a speedy trial. Victims have speedy trial rights in many jurisdictions. [FN44] However, unlike the defendant, the victim is typically not put at an advantage by delay, nor held centrally responsible for preparing the case for trial. Speedy trials are efficient. [FN45] As a result, the values underlying the Victim Participation Model and the Crime Control Model may both support a speedy trial. Nonetheless, the values underlying the shared interest in a speedy trial are significantly different. In the Crime Control Model a speedy trial is desirable for the sake of efficiency itself. In the Victim Participation Model a speedy trial is desirable because it minimizes secondary harm to the victim, and because the victim suffered the primary harm. The difference between the value of primacy of the victim and the value of efficiency is revealed by the fact that a victim may choose not to assert their speedy trial right, an option that (assuming the victim can effectively testify) the value of efficiency does not support. For example, victims who are severely traumatized by a crime may want time to heal before testifying. Such healing may not be essential to effective testimony and, in fact, an emotional witness may be much more persuasive to a jury than a rational witness.

The defendant seeks delay to prepare adequately for trial or to obtain an advantage. When

a victim does not assert a speedy trial right, the victim's interest in delay supports the defendant's interest in delay. Still, the values underlying a mutual interest in delay are fundamentally different. The values underlying the victim's choice not to exercise their right to speedy trial are *302 found in the Victim Participation Model. Delay supports the primacy of the victim. The victim's choice not to exercise the speedy trial right is consistent with promoting the value of the primacy of the individual victim.

C. The Interplay of Values in the Conflict Between the Victim Impact Statement and Mandatory Minimum Sentences

The final example involves a shooting between young men, not yet adults but old enough to be tried and sentenced as adults under mandatory minimum sentencing laws. In the example, two friends were playing with a gun, when one of the young men shot the other in the head, killing his friend instantly. These youngsters were the best of friends and their families were close. The teenage boy could credibly have been charged as an adult with a reckless homicide that, upon conviction, would result in mandatory minimum prison time. However, the victim's surviving family spoke with the prosecution, indicating that they did not want prison time for the defendant. Consequently, no homicide charges were brought and a plea to a weapons offense, which carried no mandatory minimum sentence, was the result. It is quite plausible that if these boys were not close friends, and the surviving family wanted it, then the prosecution would have sought a conviction for reckless homicide and the resulting mandatory minimum sentence. Here, it is not the value of the primacy of the defendant, but the value underlying the Victim Participation Model, that makes the difference in the treatment of the defendant. In this example, the value of primacy of the victim is reflected in respect for the family's view on fair and appropriate sanctions for the killing of their child.

Let the facts change to illustrate the conflict between the Victim Participation Model and mandatory minimum sentences. Assume that despite the wishes of the victim's family, the prosecutor pursued and secured a conviction for reckless homicide. A mandatory minimum sentence is inevitable. Because the Victim Participation Model and the Due Process Model have a principal value in common--acknowledgment of the importance of individuals--in some circumstances the models may join together to oppose other values. Thus, the values underlying the Victim Participation Model and the Due Process Model are not always in conflict. Like the surviving family in this example, a victim may seek mercy for the defendant in a victim impact statement at sentencing. Efficiency values underlying mandatory minimum sentencing schemes defy the value of the primacy of the individual defendant that underlies the Due Process Model. This is because mitigation evidence, like that offered by the victim's family, is irrelevant to the mandatory minimum sentencing decision. Less well understood is that a mandatory minimum sentencing scheme conflicts with the value of the *303 primacy of the victim that underlies the Victim Participation Model. This is because mandatory minimum sentencing makes the victim's right to a victim impact statement irrelevant, in the sense that the victim impact statement has no potential for real impact on the decision of the sentencing authority. What would be the result in the altered example of the tragic shooting between the young men? Of course, the victim's family would have the right to make a victim impact statement. However, in the face of a mandatory minimum sentence, the right to an impact statement will have no substance because the court will be powerless to adjust the

sentence downward, and the defendant will be sentenced to a mandatory minimum term in prison. Perhaps, a majority of the public, or even a majority of victims, support mandatory minimums. Nevertheless, mandatory minimum sentences conflict with the primacy of the individual victim. Where mandatory minimums prevail, the separate values of both the primacy of the victim and the primacy of the defendant are suppressed by the value of efficient suppression of crime. While the dominance of the efficiency value explains the result, a real understanding of the values being suppressed cannot be achieved by reference to the two-model concept alone.

IV. The Language of the Three-Model Concept

Because the three-model concept acknowledges the existence, genuine nature, and significance of the value that underlies victim participation, the very use of three models may be seen by some to promote the legitimacy of the Victim Participation Model value of primacy of the individual victim. In defense of the three-model concept, it is the laws of victim participation, and not the model, that have already given legitimacy to victim participation. In proposing a three-model concept, the point is not to advocate for or against particular victim laws, but to provide a model helpful to understanding what has already been, and may in the future be, legitimized by society. Despite this disclaimer, the two-model concept, without the Victim Participation Model, has been a dominant paradigm and its adherents may defend it. A defense of the two-model system involves up to three assumptions: that the value underlying the Victim Participation Model is nonexistent, that it is not genuine, and/or that it is insignificant. To defend the belief that this value does not exist or is not genuine, one must make the assumption that the value of victim primacy, reflected in the language of victim participation laws, is not actually the value being promoted by these laws. Of course, even accepting the existence and genuine nature of the value underlying victim participation, it can still be argued that the value of primacy of the individual victim is not significant enough to warrant the status of legitimacy. To reach the conclusion that the value is not significant enough for legal recognition *304 is to reject the weight of authority provided by statutory and state constitutional civil rights for victims in favor of the view that the primary and secondary harms to the victim are not a sufficient basis for victim participation in the criminal process.

The denial of the existence, genuineness, or significance of the value underlying the Victim Participation Model for the purpose of adhering exclusively to the values of the two-model concept is distinguishable from arguing within the three-model language that a given procedure does not actually promote the value of the primacy of the individual victim. In the three-model language the argument can be made that a procedure purporting to promote the value underlying victim participation does not actually do so. Instead, the procedure may actually involve promoting the values of either efficiency or primacy of the defendant. However, unlike the two-model language, the three-model language suggests the need for a context-specific analysis of values underlying all three models. Because of the overt identification of the value of primacy of the individual victim, the distinct nature of this value, and the inclusion of this value in the conventional analytic framework, the three-model concept is more likely than the two-model concept to be useful in determining when the value of victim primacy actually is or is not being promoted in a particular procedure. Furthermore, the three-model language encompasses the notion that the values of more than one of the models may simultaneously be

promoted by the same procedural choice. In the three-model language the debate becomes a discourse among recognizable values underlying the three models.
On the other hand, in the two-model language there are only two values-- efficiency and primacy of the individual defendant. From the point of view of a proponent of the Due Process Model operating within the two-model language, threats to the value of primacy of the individual defendant necessarily originate from the competing value of efficiency. In the two-model language no other conclusion is possible. In the language of the two-model concept, victim interests are not recognized as independent of efficiency; yet, the values underlying victim participation do not fit within the efficiency value. Thus, in the two-model language, efforts for procedural change that promote the value of primacy of the victim must necessarily be a "deception" from the perspective of a proponent of the Due Process Model because the only other recognized value in the two-model language (other than the value of defendant primacy) is the value of efficiency. Victim primacy is necessarily a "deception" in the two-model language because the value of victim primacy is not encompassed in, and does not "belong" in, the two-model language. In sum, the two-model language operates within such narrow conceptual parameters that there is no room in it for the idea that procedures of victim participation stand on a value of victim primacy distinct *305 from Crime Control Model and Due Process Model values. On the other hand, in the three-model language, the value underlying the Victim Participation Model competes with the values underlying the Crime Control and Due Process Models, sometimes siding with one value system against the other.

V. The Victim Participation Model in Stages of the Criminal Process

In each procedural stage, [FN46] the value of the primacy of the victim involves a reckoning with the value of efficiency and the value of primacy of the defendant. To understand this reckoning further, this Part will examine the operation of the value of the primacy of the victim in selected stages of the criminal process, and the challenge to this value presented by the values of efficiency and the primacy of the defendant. This Part is separated into procedural stages of the criminal process. For each procedural stage discussed there are two distinct sections. In the first of these two sections, the "proper" role of the victim is debated from the three different perspectives of the Victim Participation Model, the Crime Control Model, and the Due Process Model. For example, the victim's proper role at trial is debated, first, from the perspective of an advocate of victim primacy; second, from the perspective of an advocate of the value of efficient suppression of crime; and finally, from the perspective of an advocate of the value of defendant primacy. It is not intended that any of the positions taken in this debate is the "right" or "correct" position. The second section in each procedural stage is a review of the present role of the crime victim in the laws of the criminal process along with the identification of any trends in the law. Neither of these two sections is intended to be comprehensive; rather, this Part is intended to provide an accessible introduction to the debate between competing values in different procedural stages and a brief overview of the state of victim laws in selected procedural stages.

*306 A. Reporting the Crime

1. Reporting and The Victim Participation Model

The individual victim of crime can maintain complete control over the process only by avoiding the criminal process altogether through nonreporting. This is properly a decision for the victim. In the vast majority of cases, the victim possesses a de facto veto power over whether the criminal process will be engaged. Many victims of crime elect to exercise this veto power. [FN47] Exercise of the veto may reflect one or more of the following: the victim's desire to retain privacy; the victim's concern about participating in a system that may do them more harm than good; the inability of the system to effectively solve many crimes (particularly property crimes); the inconvenience to the victim; the victim's lack of participation, control, and influence in the process; or the victim's rejection of the model of retributive justice. [FN48]

The idea that the State is the only entity harmed by crime defies common sense. [FN49] It requires a leap of logic to conclude that only the State, and not the victim, is harmed by crime. [FN50] In the unreported crime, the victim is quite cognizant of the harm. On the other hand, the State is typically unaware of crime unless it is reported. Except in certain kinds of cases, such as homicide, the State will never even know that a crime has been committed. This reveals that while the State may be harmed in some indirect way, the victim is the person directly harmed. As a result, the victim's harm is more significant than the harm to the State.

The use of coercion to force the victim to report, for example, by criminalizing the failure to report in the case of misprision, is unwise because it adds insult to the victim's injury. Such laws threaten the victim's veto power over reporting. In addition, laws criminalizing nonreporting threaten the privacy of victims. Moreover, the victim, not the State, is the party that *307 is directly harmed, and should thus make the ultimate decision whether to report the crime. Nonetheless, noncoercive efforts to induce or encourage the victim to report are appropriate. The victim retains veto power over reporting despite the existence of incentives. The option of reporting may become more viable for the victim in need of the particular inducement offered. Inducements to reporting may include providing resources through social services or victim compensation, allowing the victim formal or informal influence in the process, or protecting the victim's person or privacy. [FN51] These inducements all implicitly acknowledge that the victim is the one harmed and is worthy of respect and fair treatment.

2. Reporting and the Crime Control Model

The nonreporting victim frustrates the value of efficiency that underlies the Crime Control Model. The failure to identify and punish perpetrators is centrally a failure of the value of efficient suppression of crime to become the value exclusively and universally held by victims. Efforts to force the victim to report might be undertaken if it were practical, but the encouraging of reporting is mainly done by providing inducements to the victim. To the extent these inducements do not threaten the Crime Control Model value of efficient suppression of crime, the inducements are tolerated in order to promote reporting and follow-through by the victim.

3. Reporting and the Due Process Model

Any force or inducement to report that threatens the value of primacy of the individual

suspect or the reliability of the process is unwise. Inducements impact the reliability of the crime report itself. For example, the offering of monetary rewards to victims for reporting crime may adversely impact reliability. Furthermore, inducements protecting the privacy or safety of the victim may suppress the value of the primacy of the individual defendant. For example, pretrial detention provides a measure of safety to the victim at the expense of important liberty interests of the defendant. [FN52] Only in a legal environment where the victim neither fears prosecution for *308 misprision or anticipates reward is the actual reporting of a crime likely to be credible.

4. The Situation and the Trend of Reporting Crime

In most jurisdictions the victim who refrains from reporting a crime is acting legally. [FN53] The Victim Participation Model value of primacy of the victim appears, at first blush, to dominate the reporting of crime. Probably, a significant reason for this is the impracticality of imposing controls over the victim's reporting choice. In other words, it is difficult to know to what extent the Victim Participation Model value dominates in the reporting of crime because it is a persuasive value or because little can be done practically to promote the value of efficiency in reporting. However, the fact that victims have significant influence in the decision to charge or not charge a crime suggests that victim autonomy in reporting possesses at least some component of the value of primacy of the victim. In a few jurisdictions, new laws have resurrected the criminalizing of nonreporting, [FN54] but these new laws are not prevalent enough to be a trend. Inducements to reporting--such as crisis counseling, victim compensation, formal and informal participation, and influence in the criminal process--are commonplace. [FN55]

B. Investigating the Crime

1. Investigation and the Victim Participation Model

Assuming that a victim has reported a crime, the victim should be able to obtain an official investigation. The official investigation should be *309 competent and lawful. Additionally, the victim should be kept apprised of the investigation. If the State conducts an unlawful investigation, there should be a remedy other than suppression of evidence. [FN56] The victim is the person harmed by suppression of evidence and should not be denied reliable evidence in support of the quest for truth because the State has acted unlawfully. [FN57] It is outrageous that regulation of governmental actors should occur at the price of harming the victim's opportunity to have the truth determined in the courts. The victim should be allowed to conduct a private investigation. However, because most victims have neither the skill nor the resources to conduct an adequate private investigation, some meaningful procedure should exist to ensure an adequate official investigation where the authorities fail or refuse to conduct one. [FN58] Furthermore, to minimize additional harm to the victim, the investigations of the State and the defense should intrude no more than necessary on the victim. For example, victims should not be interviewed multiple times during the investigation phase. While victims may choose to grant an interview to the defense during this phase, they should have the option of refusing one. Certain investigations should be conducted only with the victim's consent. Physical and psychological evaluations of the victim should not be allowed without the victim's consent. The victim's home and possessions, if not in the hands of the State, are improper items for a court order of inspection. To allow such evaluations and searches is

to condone a re-victimization. Furthermore, such evaluations and searches will result in victim noncooperation with the criminal justice system.

2. Investigation and the Crime Control Model

Under the Crime Control Model, some accommodation to the victim is acceptable as long as it does not create significant inefficiencies. Granting victims their "wish list" of accommodations might negatively impact the efficiency of investigation. For example, granting the victims a procedure to ensure an adequate investigation would be inefficient. Officials are best able *310 to determine which crimes have a reasonable probability of being solved. [FN59] Also, public policy decisions about which crimes to expend resources on are best left to the investigative agency, which reflects the priorities of the many, rather than the few. On the other hand, granting some minor accommodations to the victim, in exchange for the victim's report and follow-through with the case, can enhance the suppression of crime.

Suppression of unlawfully obtained, but relevant, evidence is very inefficient, so the Crime Control Model rejects it. [FN60] However, if left only with a choice between remedies, the remedy of suppression is preferable to remedies involving meaningful discipline of officers or expanded civil liability of police. This is because it is desirable that police aggressively pursue criminals. Retaining aggressive pursuit of criminals by governmental actors who may occasionally overstep the boundaries of law is of greater importance than eliminating the damage to, or termination of, those cases in which individual victims are denied an opportunity for truth finding or appropriate disposition by operation of the exclusionary rule.

3. Investigation and the Due Process Model

Under the Due Process Model, official investigations are preferable to private ones, as officials are more likely to be fair because they are more detached from the victim's harm. Officials trained in the law are less likely to engage in unlawful investigation. [FN61] However, if an official or a private person unlawfully obtains evidence, exclusion should be an available remedy. No other meaningful remedy is available to deter illegal investigations by the victim. [FN62] Police are unlikely to charge the victim who has illegally uncovered incriminating evidence and the suspect is unlikely to persuade a jury to award damages for such a violation. [FN63]

*311 The accommodation of the victim tends to make victims clients of the State. [FN64] This creates the potential for conflict. [FN65] When victims were merely witnesses there was less collaboration between the State and the victim. Collaboration between the victim and the prosecutor may create unreliability because the prosecutor is not making a detached critical analysis of the case. The defense should have the opportunity to interview the victim and conduct any physical or psychological evaluations on the victim during investigation to ensure reliability in truth finding. The home of the victim or any property or possessions of the victim should be open to defense inspection where relevant to the case.

4. The Situation and the Trend of Investigating Crime

While the United States Supreme Court has rolled back exclusionary rule protections, this rollback has occurred where the practical deterrence of police misconduct is not achieved

by the application of the exclusionary rule, [FN66] or where false testimony will otherwise go unchallenged. [FN67] The fact that a victim is denied truth finding and appropriate disposition by application of the exclusionary rule has not been articulated by a majority of the Court as an independent basis for not applying the exclusionary rule. However, the Court has steadfastly refused to apply the exclusionary rule to private information gathering. [FN68] The exceptions to nonapplication of the exclusionary rule to private investigations are: first, the suppression of coerced (and therefore unreliable) confessions obtained by private parties [FN69] and, second, where statutes otherwise support the remedy of exclusion. [FN70]

As a practical matter, there are no meaningful formal procedural mechanisms to challenge the absence or adequacy of an official investigation. *312 [FN71] The most readily available access to an official investigation by a victim is via grand jury investigation, [FN72] and at least one jurisdiction permits a judicial investigation. [FN73] However, many jurisdictions render this alternative problematic by imposing legal hurdles to grand jury access [FN74] or grand jury indictment. [FN75] While victims may conduct their own private investigation, [FN76] the boundaries of private investigation are delineated by laws of civil and criminal liability.

The Victim Participation Model value typically dominates when the defendant seeks discovery via the court from the victim. In most jurisdictions the ability of the defendant to discover from the victim is quite limited. The defendant had no common-law ability to interview the victim, [FN77] and where statutes providing for such procedures have existed, they may have fallen "victim" to victim rights legislation. [FN78] It is difficult to obtain an order for a psychological evaluation of a crime victim or a physical examination of the victim. [FN79] Jurisdictions are split as to whether defendants can conduct an *313 examination of the crime scene if it is the victim's home and if the home is no longer in control of the state. [FN80]

C. The Charging Process

1. The Charging Process and the Victim Participation Model

Victims should have a veto power over whether a charge is brought. Because the victim could have vetoed the criminal charge initially by failing to report, it makes little sense to take away the victim's choice about whether or not to charge the suspect. To do so is to injure the victim for reporting the crime. The victim is in the best position to determine if the victim will be harmed by having to endure the criminal process. Also, assuming that the victim wishes to pursue charges, the victim should be able to determine what charges are appropriate. This is because the State's charging decision may involve bias against the "unworthy" victim. [FN81] Furthermore, the official charging decision often turns on the relationship of these biases to the public prosecutor's institutional goal of winning the case. [FN82] The victim is more likely than the public prosecutor to be free of bias and concerned with principles of justice. On the contrary, the State is preoccupied with winning and a host of other bureaucratic agendas. [FN83] Charging decisions should more accurately be centered upon whether the criminal statute was violated rather than cultural biases, the institutional value of winning, and other policy or resource rationales. To achieve this goal, victims should have unrestricted access to grand juries for the purpose of informing the grand jury of crime. This would assure that marginalized victims have access to the criminal process. [FN84] If the prosecutor remains central to

charging, then a procedure *314 should be available to challenge the prosecutor's decision not to charge. [FN85] If this procedure providing for review of the prosecutor's decision not to charge results in a finding of probable cause, then the suspect should be charged and a special prosecutor appointed to prosecute the case. [FN86]
At the charging stage, victims should be given the choice between a punitive procedural model and a restorative justice procedural model. The victim may wish to choose victim-offender mediation over the retributive model of the formal criminal process [FN87] because restorative justice may lead to greater benefits for the victim. [FN88] In restorative justice models, the victim is a central player in the proceeding, and the emphasis is upon restoring the victim through efforts of the offender. For this reason, the public prosecutor is not a necessary part of the restorative justice process. On the other hand, the victim should be able to choose instead the formal criminal justice system, because it may better satisfy the victim's individual sense of justice. Thus, the choice between the two processes should be left to the victim.

2. The Charging Process and the Crime Control Model
Under the Crime Control Model, the victim should not be able to determine whether charges are brought and, in addition, the victim should not be central to a determination of what charges are appropriate. Efficient suppression of crime mandates that offenders be processed rapidly in the system. Furthermore, the failure to punish crime, already aggravated by the victim's failure to report, is exacerbated if the victim has veto power over charging. It is efficient for the public prosecutor to bring charges by anticipating juror bias. It is efficient to gauge probabilities of winning on criteria other than the burden of proof. It is not efficient to use the system to challenge cultural bias. Where juries would perceive a victim as unworthy (or blameworthy) it is acceptable that this anticipated perception be reflected in the charging decision. A public prosecutor, as a specialist in screening cases, provides greater consistency and efficiency in charging decisions. Furthermore, even if a criminal statute is violated, there may be a myriad of public policy or resource reasons why the offense should not be charged. *315 Because the greater good and the consolidation of power in the public prosecutor is more important than the individual victim, the prosecutor should be able to elect not to prosecute crimes. Victims should have no access, independent of the public prosecutor, to charging procedures because allowing victims such alternatives would undermine the efficient operation of public prosecution.
Restorative justice models may be appropriate, but only in the case of minor crimes where significant punitive sanctions are not available. Suppression of serious crime is more certain with a punitive incarceration model that removes the offender from society. The proper concern is not just about an individual victim, but potential victims as well. The public and the victim are both harmed by the crime, but the public interest is more important than the individual victim's interest. Thus, the prosecutor should choose when mediation is appropriate. Additionally, restorative justice models require a hearing in every case. The victim, offender, and mediator must prepare for, and attend, a mediation event because there is no plea bargaining in restorative justice. Restorative justice is a labor-and time-intensive process, and is inefficient. Finally, it is in the interest of society to morally condemn the perpetrator. [FN89] Restorative justice models diminish the importance of moral condemnation and incarceration, which avoids the important blame

function and undermines a valuable deterrent.

3. The Charging Process and the Due Process Model

Under the Due Process Model, the value of primacy of the individual defendant in relation to governmental power dictates that punishment be minimized to serve rational sentencing purposes. Alternatives to prosecution may minimize punishment and serve the same rational sentencing purposes of deterrence and rehabilitation. The potential punishment is minimized if alternatives to incarceration are available. Restorative justice minimizes the potential for punishment and is a valuable process that may serve to rehabilitate the offender. However, the ability of a defendant to participate in victim-offender mediation should not depend on the whim of the individual victim. [FN90] Rather, a defendant should be able to choose to participate in the restorative justice alternative regardless of the preference of the victim.

*316 On the one hand, the victim should be able to choose not to charge. If the victim views punishment as inappropriate, the State should not be able to override the victim's decision not to charge. Also, giving victims the authority not to bring charges or to reduce the seriousness of the charge does not raise the potential for vindictiveness. On the other hand, allowing the victim to influence the decision to bring a charge or to influence the decision in order to obtain pursuit of the highest charge justified by law is fraught with dangers of revenge. To ensure a fair process, procedures should permit victim mercy to be considered relevant. However, procedures should not allow the victim to argue for a harsh sentence because this gives the appearance of vindictiveness and would infringe on due process. Vindictiveness is inappropriate in the criminal process, while mercy and forgiveness are welcome. [FN91]

The potential for vindictiveness is also the reason why victims should not have independent access to the grand jury. It is in the interest of the individual defendant to have a reduction in the initial charge where the victim is unworthy of a more serious charge, even where the law is more accurately reflected in the more serious charge. When the goal is preserving the primacy of the defendant, cases with unlikely success should not be brought. The potential of jury bias against victims should weigh in only where victim influence or jury bias minimizes potential punishment. However, potential jury bias against the defendant should never result in an enhanced charging decision that could ultimately lead to differential punishment.

4. The Situation and the Trend of the Charging Process

Currently, victims have no formal veto authority in the decision to charge. As a practical matter, however, the victim can have significant informal influence if the victim wishes not to proceed to charging or desires a lesser charge to be brought. [FN92] Generally, but not always, this influence diminishes with the increasing significance of the crime. Yet, even in serious cases, such as homicide, victims may influence the severity of the charge. In a few types of cases, such as domestic violence cases, the victim's choice is not a charging consideration. [FN93]

*317 Studies reveal that prosecutors are biased against certain victims in the charging decision. [FN94] The influence of bias in charging decisions may be moderated by two basic processes that challenge the prosecutor's negative charging decision: grand jury review and judicial review. Judicial review exists in a few jurisdictions, [FN95] while

grand jury review is more widely available, although some jurisdictions require access through the court. [FN96] Defendants and victims alike face the problem of bias in the charging decision. The Due Process Model value of primacy of the defendant and the Victim Participation Model value of primacy of the victim arguably share a common goal of eliminating bias from charging. For defendant and victim, the issue of bias presents a significant and largely unresolved problem. [FN97]

Presently the value of efficiency dominates the charging decision. Prosecutors largely "control" the decision to present charges, and what charges to present, to the indicting authority. However, victims have significant informal influence in the charging process. There is modest experimentation with procedures for judicial review of the prosecutor's decision not to charge. [FN98] Otherwise, where available, grand jury access for the victim, either directly or after judicial screening of the propriety of access, is the procedure available to challenge the prosecutor's decision not to charge.

*318 D. Trial

1. Trial and the Victim Participation Model

Victims should be allowed to attend the trial. [FN99] Attendance for the person harmed is a minimum accommodation. This is because the victim has suffered the primary harm--the harm of the crime--and because the victim suffers secondary harm when the victim is exiled from the case. [FN100] A rule [FN101] that the harmed victim cannot attend the trial is bizarre. No one should be able to exclude the victim from the courtroom. [FN102] Cross-examination of the victim and adequate jury instructions are two ways to assure accurate truth finding. [FN103] No other person or entity has the same stake in the trial as the victim of the crime. [FN104] Denying the significance of the victim's stake by exclusion from trial is offensive to the victim and to principles of fairness.

The fact that the victim is the person harmed entitles the victim to participate in the trial. Furthermore, the participation of the victim contributes to the truth finding function of trial. In serious (if not all) crimes, or where a victim is particularly vulnerable (such as a child [FN105] or mentally impaired person), or where a conflict develops between the victim and the prosecutor, [FN106] the victim should have the right to counsel at trial (and at other stages of the criminal process). The victim's counsel should not be under the *319 control of the public prosecutor. [FN107] Once the crime is charged, representation at trial for victims of serious crimes is justified by the significance of the harm to the victim. Recognition of harm should give the victim standing at trial. The victim and victim's counsel would occupy a third table during the trial with the opportunity to engage in voir dire selection, opening statement, questioning and calling witnesses, objecting to evidence, and closing argument. The victim and victim's attorney would be subject to the same court and evidentiary rules that apply to other parties. These rules sufficiently protect against potential vindictiveness.

2. Trial and the Crime Control Model

The significance of harm to the individual victim pales in comparison to the significance of harm to society. The victim's harm is just not significant enough to give the victim a meaningful role at trial. If the victim is allowed to hire counsel, it should only be for the purpose of assisting the prosecution. The privately funded prosecutor should be under the control of the public prosecutor at all times. Counsel for victims should only act as an

extension of the public prosecutor. The victim's participation in trial is unnecessary and inefficient. It adds another party to the trial process. The public prosecutor and the defendant are capable of uncovering an adequate truth without the victim in the trial. The complete control exercised by the prosecutor would be compromised, resulting in practical problems, like the victim "opening the door" to testimony that the State wished to maintain excluded from the trial. The victim may not be adverse to the defendant, such as in some domestic violence cases. Thus, the victim may be adverse to the prosecution. The victim may attend the proceeding and sit behind the bar. Occasionally, when the assistance of the victim is beneficial to the prosecution, the victim may sit at counsel table. Limiting the victim's role to attendance is appropriate because victim attendance does not significantly interfere with the efficiency of the prosecution. The prosecution alone should be able to exclude the victim from the courtroom. [FN108]

*320 3. Trial and the Due Process Model

Victims have no business at trial, except as witnesses. [FN109] While it may be that, in some limited circumstances, victims would be on the "side" of the defense, in most trials they would be simply a second prosecutor. With "party" status at trial, the victim would have the opportunity to reinforce the prosecutor's case. The protections against duplication of information (such as evidentiary limits on questions "asked and answered") would be compromised. The victim may have a different theory of the case than the prosecutor or defendant. [FN110] This could lead to jury confusion. The trial wouldn't be a fair game because the prosecution would have two "teams" to the defendant's one "team." [FN111] Any incremental benefit to truth finding is overshadowed by the procedural setting that is skewed against the defendant. In addition, victims should not be allowed to attend trial because their observation of the trial enables them to conform their testimony to the testimony of others. Finally, victim participation conflicts with the truth finding function because vindictiveness is likely to enter the process. [FN112]

4. The Situation and the Trend of Trial

Victims do not presently have party status at trial in any jurisdiction in the United States. In most state jurisdictions and in federal court, victims may hire attorneys. These privately funded prosecutors are under the control of the public prosecutor and participate at trial with the prosecutor's permission. *321 Thus, one prerequisite for a victim's attorney to participate is the willingness of the victim's attorney to submit to the control of the public prosecutor. [FN113] Because public prosecutors control participation of privately funded prosecutors, the crime control value of efficiency may limit the victim's ability to meaningfully participate in trial. Currently, only wealthy victims have the ability to obtain counsel. No right to counsel presently exists for indigent victims. [FN114] Although courts have the authority to appoint pro bono counsel for the victim, this has rarely been done. [FN115] So far, thirty states by state supreme court opinion or statute have explicitly reaffirmed the common law allowing victims to have an attorney at trial, who is under the control of the public prosecutor. [FN116] In the jurisdictions where privately funded prosecutors are not allowed, the Crime Control Model value of efficiency and the Due Process Model value of primacy of the defendant have prevailed. [FN117] However, there is no trend in this direction [FN118] and due process standards

are not evolving in the direction of victim exclusion. The trial remains dominated by the values of efficiency and of primacy of the defendant. The victim does not participate as a party at trial. The value of primacy of the victim has made a very limited inroad into the trial process, which is reflected in the ability-- in many jurisdictions--of the victim to attend the trial. [FN119]

E. Sentencing

1. Sentencing and the Victim Participation Model

Because the victim is the person harmed, the victim's opinion about an appropriate sentence and the information supporting the opinion should be permitted at sentencing. It is an infliction of a secondary harm upon the victim to deny the victim the right to articulate at sentencing the extent and *322 the consequences of the primary harm. The victim should be able to present reasons in support of his opinion. These reasons include information about the victim, and the impact of the crime on the victim, the victim's family, and members of the community. Procedural restrictions are sufficient to curtail dangers of revenge. [FN120] If the judge chooses to follow the recommendation of the victim, rather than the parties, it is because the victim's recommendation was more closely aligned with the public interest than was the recommendation of the prosecution or defense. [FN121] The victim's opinion (and supporting rationale) is beneficial to an accurate assessment of what is in the public interest.

2. Sentencing and the Crime Control Model

Despite somewhat longer sentencing hearings due to the victim's participation, a positive effect on efficiency is realized by victim participation in sentencing. Admitting evidence of the particular harm to a victim will likely ensure an appropriate punishment, and thus promote the suppression of crime. Therefore, the admissibility of victim characteristics and victim harm should be allowed. However, victim opinion should not be allowed because the opinion diminishes the importance of, and may conflict with, the public prosecutor's opinion. Public prosecutors, and not victims, are in the best position to recommend what level of mercy or retribution is appropriate. [FN122] As a result, only public prosecutors (and defendants) should be able to express an opinion about sentencing.

*323 3. Sentencing and the Due Process Model

The victim should only be allowed to participate at sentencing when the victim seeks mercy for the defendant. [FN123] This is achieved by allowing the defendant control, as part of the defendant's mitigation evidence, over whether or not the victim speaks. Otherwise, the principle that defendants should be punished equally for violation of the same statute means that victims should not participate at sentencing. [FN124] The random victim factor should not influence a harsher disposition. [FN125] This leads to unequal punishment among otherwise similarly situated convicts. [FN126] Only the nature of the statute violated should be relevant to punishment. [FN127] Furthermore, allowing the victim to speak at sentencing, unless they ask for mercy, gives the appearance of vindictiveness and opens the door for revenge to enter the process. The victim's opinion should not be allowed to intrude on the recommendations of the public prosecutor and the defendant. [FN128] To allow victims to participate in sentencing is to

discard rational sentencing principles. [FN129] The substance of the victim's participation is not necessarily a measure of the views of the community. [FN130]

*324 4. The Situation and the Trend of Sentencing

All jurisdictions now allow victim impact evidence at sentencing in the form of: (1) the particular harm suffered by the victim, and (2) information about the victim as a unique individual. [FN131] A few jurisdictions also allow victim opinion testimony, but it is too soon to say whether the admission of the victim's opinion at sentencing is a trend. [FN132] The effort to limit victim participation in sentencing to evidence of mercy has failed. [FN133] The Due Process Model value of primacy of the defendant has lost influence in sentencing procedures. The Victim Participation Model value of primacy of the victim is significant, but curtailed in the area of victim opinion by Due Process Model and Crime Control Model values. The Crime Control Model value dominates over Due Process Model and Victim Participation Model values when the sentences are derived from mandatory minimums. An early indication is that victim impact statements will be considered as mitigation or aggravation in sentencing decisions subject to sentencing guideline schemes. [FN134]

F. Appeal

1. Appeal and the Victim Participation Model

The victim should be able to challenge on review decisions that ignore, limit, or deny the victim's right to participation. Absent the ability to use writs and appeals, victims' rights are without remedy, and thus, are not rights at all. Victims should also have the ability to bring suit against governmental actors that violate the victim's civil rights. [FN135] Courts should be required, *325 whenever possible, to rule on victim issues in the pretrial stage, thus enabling review. [FN136] Any lower court failure to enforce the rights of the victim should be redressed. This will deter future violations. Furthermore, elaboration and clarification of victim laws will only occur with appellate review.

2. Appeal and the Crime Control Model

It is inefficient to delay criminal trials or sentences while victim issues are decided. Most judges will follow victim laws without the threat of appellate review. Efficiency is more important than providing the individual victim with a remedy with which to enforce their rights. The victim's harm simply is not sufficiently important to merit appellate enforcement procedures. Civil remedies against governmental actors who violate victims' rights are inappropriate. Such a remedy will interfere with and discourage the efficient processing of criminal cases.

3. Appeal and the Due Process Model

Just as the victim has no place in the criminal courtroom, they should have no access to writs or appeals. Speedy trial rationales argue against pretrial enforcement of victims' rights, and double jeopardy rationales should prohibit appeal or writ after trial begins. The victim's remedy, if any, should be a civil suit against the governmental actors who violated the victim's rights. If a judge or prosecutor denies these rights, the remedy should be an ethical complaint to the proper authority. Fairness to the defendant requires that no criminal procedure in which the defendant is involved should be altered to

accommodate remedies for the victim.

*326 4. The Situation and the Trend of Appeal

Absent statutory or constitutional authority, victims do not possess the right to appellate review. [FN137] Some abrogations of victims' rights are capable of review, such as when a statute grants a right to appeal on the issue or, probably, where a victim's constitutional right is abrogated. These constitutional rights exist in many states. Statutes providing appellate review of victim issues are rare. Few appeals have been taken from cases in which a victim's constitutional rights have been abrogated, so it is difficult to determine how such appeals should operate. Even where permitted, a defendant's right to speedy trial, double jeopardy, and due process will likely limit such appeals in certain circumstances.

The victim's general inability to obtain review, or, if obtaining review, the victim's failure to acquire an adequate remedy, creates perhaps the greatest single dysfunction in this emerging area of law. In many, if not most, contexts, the victim has rights without remedies. In the area of appellate review, Crime Control Model values and Due Process Model values have presented a formidable challenge to both meaningful and enforceable victim participation by suppressing the potential of appellate courts to significantly contribute to victim laws.

VI. Conclusion

A three-model concept that includes the Victim Participation Model is the superior method of serving the functions of Packer's models: to explicitly recognize the value choices that underlie the details of the criminal process; to provide a convenient way to talk about the operation of the process; to detach ourselves from the details of the process, so that we can see how the entire system may be able to deal with the various tasks it is expected to accomplish; to assist in understanding the process as dynamic, rather than static; and to assist in revealing the relationship of process to substantive law. The three-model concept, which includes the Victim Participation Model, is more functional than the two-model concept because the law now reflects the significance of genuine values of victim participation, while the two-model concept provides no room for the values of victim participation. Laws of *327 victim participation are not going away; to the contrary, laws of victim participation in criminal procedure are becoming ever more prevalent. The Victim Participation Model provides an opportunity to understand the laws granting victims rights of participation in the criminal process.

*328 Appendix A: The Presence of Values of Fairness, Respect, Dignity, Privacy, Freedom from Abuse, and Due Process in State Constitutions and Federal and State Statutes [FN138]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

[FNa1]. Visiting Professor of Law, Northwestern School of Law, Lewis & Clark College. Professor Beloof has written Victims in Criminal Procedure, a casebook. Thanks to the criminal law faculty at Northwestern School of Law, Lewis & Clark College, Professors

Susan Mandiberg, Arthur La France, and Bill Williamson. Thanks to Professor Paul Cassell for reviewing an early version of this Article. Thanks also to Professors Susan Bandes, Robert Mosteller, and William Pizzi, and Steve Twist, for their comments at the symposium. Thanks to Professor Leslie Sebba of the Hebrew University of Jerusalem, Institute of Criminology, Faculty of Law, for his insightful comments.

[FN1]. See infra Appendix A; Jacqueline V. McDonald, Developments in State Constitutional Law 1993: Victims' Rights, 25 Rutgers L.J. 1066, 1066- 67 (1994) (citing Michigan Supreme Court case that recognized victim's right to participate); Don Siegelman & Courtney W. Tarver, Victims' Rights in State Constitutions, 1 Emerging Issues St. Const. L. 163, 165 n.6 (1988) (tracing rise of victims' rights through state statutes and state constitutions).

[FN2]. See Douglas E. Beloof, Victims in Criminal Procedure 93-194 (1999); National Victim Center, The 1996 Victim's Rights Sourcebook: A Compilation and Comparison of Victim Rights Laws passim (1996) (hereinafter Sourcebook); Siegelman & Tarver, supra note 1, at 167 (identifying 44 state victims' rights statutes).

[FN3]. See S.J. Res. 3, 106th Cong. (1999).

[FN4]. Compare Booth v. Maryland, 482 U.S. 496, 502-07 (1987) (holding that introduction of victim impact statement at sentencing phase of capital murder trial violated Eighth Amendment), with Payne v. Tennessee, 501 U.S. 808, 821-27 (1991) (holding that Eighth Amendment did not erect per se bar prohibiting capital sentencing jury from considering victim impact evidence).

[FN5]. Herbert L. Packer, The Limits of the Criminal Sanction 149-53 (1968) (developing and explaining two possible models of criminal process).

[FN6]. See id. at 158.

[FN7]. See id. at 163, 165.

[FN8]. Id. at 153.

[FN9]. See, e.g., Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 213 (1983) (modifying Packer's models); Mirjän Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 574-77 (1973) (same); John Griffiths, Ideology in Criminal Procedure or a Third Model of the Criminal Process, 79 Yale L.J. 359, 367-91 (1970) (describing alternative family model approach to criminal procedure). It is not the function of this Article to support or detract from these, or other, critiques.

[FN10]. Professor Arenella has recognized the importance of Packer's two models: "Many American scholars have relied on Professor Herbert Packer's crime control and

due process models to identify the competing values served by American criminal procedure." Arenella, supra note 9, at 209.

[FN11]. Packer, supra note 5, at 153.

[FN12]. Id.

[FN13]. Id. at 152.

[FN14]. See id.

[FN15]. See Donald J. Hall, The Role of the Victim in the Prosecution and Disposition of a Criminal Case, 28 Vand. L. Rev. 931 passim (1975) (delineating level and type of victim's involvement in criminal procedure, from violation to eventual conviction and punishment).

[FN16]. Leslie Sebba noted that Packer's models took no account of the victim: "These models illuminate the relationship between the state on the one hand and the defendant on the other, but are of no assistance in determining the role of the victim vis-a-vis the two leading parties in the dramatis personae of the penal process." Leslie Sebba, The Victim's Role in the Penal Process: A Theoretical Orientation, 30 Am. J. Comp. L. 217, 231 (1982). Sebba articulated two models that did incorporate the role of the victim. The first of these models was the Adversary-Retribution Model, in which the State stands back from the confrontation between the victim and the accused. See id. at 231-32. This model existed at early English and American common law when the victim prosecuted the crime and the "state provide(d) the machinery for the victim himself to achieve the desired objectives." Id. at 232. The second model is the Social Defense-Welfare Model, which essentially reflects elimination of victim involvement in the criminal process. See id. at 231. In the Social Defense-Welfare Model, the State stands in the shoes of the victim in prosecuting the offense and also stands in the shoes of the defendant by compensating the victim. See id. at 232 (criticizing piecemeal approach to involving victims in criminal procedure).

[FN17]. The limited role of the victim in 1975 is presented in Hall, supra note 15, passim.

[FN18]. See Beloof, supra note 2, at 7-25 (discussing historical background and providing explanations for including victims in criminal proceedings); Sourcebook, supra note 2, passim.

[FN19]. Packer, supra note 5, at 159-60.

[FN20]. Id. at 163, 165.

[FN21]. See id. at 163-65.

[FN22]. See infra Appendix A (noting that such concepts are explicitly included in 21 of

31 state constitutional victims' rights provisions).

[FN23]. See id.

[FN24]. See id.

[FN25]. See id.

[FN26]. See id.; see also 42 U.S.C. § 10606(b) (1994) (setting out rights of crime victims, including rights to fairness, respect, and dignity, as well as right to be notified of proceedings, right to confer with government attorneys, and right to information about conviction, sentencing, imprisonment, and release of prisoner).

[FN27]. See Sourcebook, supra note 2, at §§ 2, 5, 10 (discussing three different rights of participation).

[FN28]. A few jurisdictions explicitly articulate the due process nature of victim rights of participation. See infra Appendix A (listing Arizona, Colorado, Oklahoma, South Carolina, Tennessee, and Utah).

[FN29]. See id. Generally, these other rights are rights of privacy and protection. See Sourcebook, supra note 2, at §§ 4, 12.

[FN30]. A recent United States Supreme Court case is helpful in understanding both the legitimacy and the significance of the concept of secondary harm. In Calderon v. Thompson, 523 U.S. 538 (1998), a five-to-four majority made the Court's plainest statement to date that victims are injured by governmental processes. The Calderon Court, in the context of a defendant's petition for writ of habeas corpus, implicitly recognized as legitimate the concept of secondary harm to victims. Put another way, victim harm can result from the operation of the criminal process itself. The Court stated: Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," an interest shared by the State and the victims of crime alike.
118 S. Ct. at 1501 (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)) (citation omitted). Significantly, the Court's implicit acknowledgment of and reliance upon secondary harm was made in Calderon absent any legislative directive that secondary harm be considered. Indeed, victims presently have no right to speedy resolution in federal habeas corpus proceedings.

[FN31]. The most direct analogy to primary harm is the rationale of State standing in a criminal proceeding, based on the idea that the State is harmed by the crime. See Prosser & Keeton, Law of Torts 7 (5th ed. 1986). An indirect analogy is provided by the fact that a person physically injured by the illegal actions of another has standing as a party in a civil tort action. See id.; William F. McDonald, Towards a Bicentennial Revolution in

Criminal Justice: The Return of the Victim, 13 Am. Crim. L. Rev. 649, 654-56 (1976) (linking decline of victim's role, in part, to rise of Beccaria's view that State alone is harmed by crime). An extension of the concept of harm as a basis for victim laws of participation is that victim harm is so significant that the State breaches its social contract with citizens by excluding victims from the criminal process. Former United States Senator Mike Mansfield stated: "(T)he modern result has established the combination (in the criminal justice system) of state versus criminal. . . . Such a policy abrogates any social contract that is thought to exist between the citizen and his society." Mike Mansfield, Justice for the Victims of Crime, 9 Hous. L. Rev. 75, 77 (1971) (advocating social compensation programs for victims of crime). One commentator links the rise of victim participation laws to a breach of the social contract. See Richard L. Aynes, Constitutional Considerations: Government Responsibility and the Right Not to be a Victim, 11 Pepp. L. Rev. 63, 69-73 (1984) (discussing government responsibility for victims); see also Kenneth O. Eikenberry, Victims of Crime/Victims of Justice, 34 Wayne L. Rev. 29, 33-36 (1987) (supporting constitutional amendment similar to Bill of Rights so that victims' rights are not forgotten in variations of political climate).

[FN32]. In those state constitutional provisions that have not explicitly identified the government as the entity from which victims need protection, protection from the government is implicit in the placement of these laws within the respective states' bills of rights. Constitutional scholars Ronald Rotunda and John Nowak write:

Almost all of the (federal) constitutional protections of individual rights and liberties restrict only the actions of governmental entities. For example, the Bill of Rights acts as a check only on the actions of the federal government. Moreover, the provisions of the body of the Constitution that protect individual rights are limited expressly in their application to actions of either the federal or state governments.

2 Ronald Rotunda & John Nowak, Treatise on Constitutional Law: Substance & Procedure 352 (2d ed. 1992).

Following the logic of these scholars, victims' rights that are placed in state bills of rights are checks against governmental power even if the enabling language of many provisions does not explicitly say so. This interpretation is supported by the express language of several state constitutional amendments incorporating victims' rights. For example, the Maryland Constitution provides: "A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process." Md. Const. art. 47(a); see also infra Appendix A (listing other state constitutions that recognize dignity and respect for victims).

Professor Laurence Tribe, arguing in support of the proposed amendment to the United States Constitution incorporating victims' rights, has written about the nature of the laws of victim participation as civil liberties:

The rights in question--rights of crime victims not to be victimized yet again through the processes by which government bodies and officials prosecute, punish, and release the accused or convicted offender--are indisputably basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate.

A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary, 105th Cong. 11 (1997) (statement of

Laurence H. Tribe, Professor of Constitutional Law, Harvard University Law School). The concept of protection from governmental harm may adequately explain offender-oriented victims' rights, for example, a constitutional right to restitution from the offender. This is because the procedural denial of potential recompense for loss from the person who inflicted the harm is, in and of itself, perceived as a denial of due process to the victim in the criminal process.

[FN33]. See infra Part V (discussing victim participation in various stages of criminal process).

[FN34]. See East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995) (finding defendant made out prima facie case for additional discovery of whether private prosecutor hired by victim's family had controlled prosecution); Person v. Miller, 854 F.2d 656, 663-64 (4th Cir. 1988) (holding participation by private counsel appropriate so long as it consists of subordinate role to government counsel).

[FN35]. An early, and narrow, view of the justification of victim participation was that victim participation was founded on the idea of resolving the psychological trauma of the victim. Victim participation, the argument goes, may actually increase psychological harm or at least hinder resolution. See Lynne N. Henderson, The Wrongs of Victim's Rights, 37 Stan. L. Rev. 937, 954-55 (1985) (describing possible harms). From the point of view of an advocate of the Victim Participation Model, there are several difficulties with this observation as a basis to exclude victims from the criminal process.
First, as laws of victim participation have since emerged, the actual basis of victims' rights laws is not narrowly circumscribed to the resolution of psychological trauma to the victim. See, e.g., 1991 Ariz. Sess. Laws 229 § 2 (uncodified legislative intent of Arizona Victims' Bill of Rights) (stating that "all crime victims are provided with basic rights of respect, protection, participation, and healing of their ordeals"; this is one of the few victim participation laws to mention resolution of trauma). The resolution of psychological trauma has not emerged as the main measure of the propriety of victim participation, but is only one part of according victims fairness, dignity, and respect.
Second, because the law allows the victim to decide about whether participation in the criminal process will be beneficial or harmful to them, it is paternalistic to exclude all victims from the criminal process because some might be psychologically harmed by inclusion, particularly because victims are free to choose not to participate. The paternalistic view also focuses too narrowly within the broader issue of reduction or resolution of psychological trauma to the victim. The focus is too narrow because the view has no room for the idea that even if victims know they will be traumatized by the criminal process, they may choose to participate anyway. If given a choice, victims who may be psychologically harmed by the criminal process do not necessarily prioritize the avoidance of psychological pain over participation. Crime victims may possess a sense of responsibility to see the truth revealed and an appropriate disposition achieved. This sense of responsibility may manifest itself by victim participation in the process, regardless of any psychological pain that results from the participation. Furthermore, for some victims it may be that the inability to choose to exercise this sense of responsibility will itself result in further trauma or in a delay of resolution of existing trauma.

Third, it seems a rare and peculiar suggestion that the government actually is benefitting individuals via a denial of rights of participation in the legal process.
For a recent review of the adequacy of victims' rights in relation to the victims' emotional and physical needs, see Leslie Sebba, Third Parties: Victims and the Criminal Justice System 68-82 (1996).

[FN36]. See supra note 34 and accompanying text (discussing East, 55 F.3d at 1001, and Person, 854 F.2d at 663-64.

[FN37]. See infra Appendix A (listing state constitutions and statutes that recognize value of treating victims with fairness, respect, and dignity).

[FN38]. See Josephine Gittler, Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems, 11 Pepp. L. Rev. 117, 156 (1984) (recognizing that public prosecutor is practical necessity because crime victims alone cannot adequately fulfill prosecution function).

[FN39]. See Payne v. Tennessee, 501 U.S. 808, 821-27 (1991) (permitting admission of victim impact statement).

[FN40]. Is a new kind of equality emerging? Professor Paul Cassell describes the nature of this equality:
Given that our current system allows almost unlimited mitigation evidence on the part of the defendant, an argument for equal justice requires, if anything, that victim statements be allowed. Equality demands fairness not only between cases, but also within cases. Victims and the public generally perceive great unfairness in a sentencing system with "one side muted."
Paul G. Cassell, Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment, 1999 Utah L. Rev. 479, 494-95 (footnotes omitted).

[FN41]. The challenge is reflected by the view of state agents that victim participation laws intrude on agents' authority, and, by the view of defense attorneys that victim participation laws intrude on the position of defendants. See Robert C. Davis et al., Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment, 75 J. Crim. L. & Criminology 491, 501, 503-04 (1984) (explaining successes and failures of Victim Involvement Project in Brooklyn Criminal Court in New York); Andrew Karmen, Who's Against Victims' Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice, 8 St. Johns J. Legal Comment. 157, 166- 70 (1992) (discussing victims' conflicts with police, defense attorneys, and other criminal justice professionals).

[FN42]. See Hall, supra note 15, at 951.

[FN43]. The Victim Participation Model is not intended to negate or minimize the utility of other existing approaches to explaining criminal procedures. For example, gender-based approaches to explaining procedures do provide insight, as can the reality of

limited resources. Some may rely on a gender-based explanation that the prosecution really does not care about rape. Some may point out that the victim's decision not to proceed (and the prosecutor's decision to respect the victim's wishes) is because of the undue weight given to an inappropriate shame and stigma that accompanies rape. Finally, some may argue that the decision not to charge is at least indirectly related to limited prosecutorial resources.

[FN44]. See Sourcebook, supra note 2, at tbl.2-A. For a debate on the propriety of the victim's right to a speedy trial, compare Cassell, supra note 40, at 500-02, with Robert P. Mosteller, The Unnecessary Victims' Rights Amendment, 1999 Utah L. Rev. 443, 472-74.

[FN45]. See Packer, supra note 5, at 159. Packer notes that in the Crime Control Model "(t)here must() be a premium on speed and finality." Id.

[FN46]. Professor Abraham Goldstein observed that victims might be granted standing in at least a particular procedural stage, even if total standing were not granted. See Abraham S. Goldstein, Defining the Role of the Victim in Criminal Prosecution, 52 Miss. L.J. 515, 552-53 (1982) (citing Trbovich v. United Mine Workers, 404 U.S. 528, 530, 538 (1972)).

[FN47]. See Bureau of Justice Statistics, Criminal Victimization in the United States, 1994, at 83-91& tbls.91-100 (1997) (listing statistics of victims not reporting crimes).

[FN48]. This is not an exhaustive list. See id.

[FN49]. See Juan Cardenas, The Crime Victim in the Prosecutorial Process, 9 Harv. J.L. & Pub. Pol'y 357, 384 (1986) ("It is the crime victim who has been directly injured by the crime committed, not the state. In a very important sense, the crime 'belongs' to the crime victim; therefore, the victim is entitled to expect the legal system to serve his interests . . . consistent with justice and fairness.").

[FN50]. In Linda R.S. v Richard D., 410 U.S. 614, 619 (1973), the Court acknowledged that victims are in fact injured by crime, but have no "judicially cognizable interest in the prosecution or nonprosecution of another." Professor Abraham Goldstein has challenged the Court's ruling as a compounding of an historical misunderstanding. See Goldstein, supra note 46, at 550.

[FN51]. See Robert Elias, The Politics of Victimization: Victims, Victimology and Human Rights 173-77 (1986) (listing possible services and reimbursement options to encourage victims to come forward).

[FN52]. See United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that pretrial detention on basis of future dangerousness was permissible punishment before trial to ensure public safety).

[FN53]. A few states have re-instituted the crime of misprision. See Jack Wenik, Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime, 94 Yale L.J. 1787, 1803-04 (1985) (proposing statute mandating witnesses of felonies report their observations). Statutes in many jurisdictions criminalize the failure of certain classes of people, such as teachers and attorneys, to report child abuse. See Frederica K. Lombard et al., Identifying the Abused Child: A Study of Reporting Practices of Teachers, 63 Det. L. Rev. 657, 658 n.6 (1986) (listing statutes of all 50 states that require certain individuals to report suspected child abuse).

[FN54]. See Wenik, supra note 53, at 1803-04.

[FN55]. See Elias, supra note 51, at 172-91. Some victims' rights laws explicitly acknowledge that a reason for granting victims rights is to induce them to participate. See, e.g., Wash. Rev. Code Ann. § 7.69.010 (West 1992) (recognizing "the civic and moral duty of victims . . . to fully and voluntarily cooperate with law enforcement and prosecutorial agencies"). Thus, some victim participation rights may also serve the value of efficiency, such as through enhanced crime reporting rates. Nevertheless, victim participation rights are individual rights that do not rise and fall on the success or failure of participation as an inducement.

[FN56]. See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 passim (1994) (discussing Fourth Amendment's arbitrary and unfair application in several contexts and advocating change to give Amendment force without excluding evidence of crime).

[FN57]. See id.

[FN58]. Compare David H. Bayley & Egon Bittner, Learning the Skills of Policing, 47 Law & Contemp. Probs. 35, 57 (1984) (describing bias in police discretion), with H. Richard Uviller, The Unworthy Victim: Police Discretion in the Credibility Call, 47 Law & Contemp. Probs. 15, 32-33 (1984) (defending unfettered police discretion).

[FN59]. See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 188-214 (1969) (describing prosecutorial power in United States, contrasting it with other countries, and questioning its current system of checks); Packer, supra note 5, at 160 (stating that Crime Control Model is based on supposition that "screening processes operated by police and prosecutors are reliable indicators of probable guilt").

[FN60]. See Packer, supra note 5, at 199.

[FN61]. See Henderson, supra note 35, at 982-96.

[FN62]. See Burdeau v. McDowell, 256 U.S. 465, 476-77 (1921) (Brandeis, J., dissenting) (noting conflict in allowing citizen to seize evidence that public official cannot); Packer, supra note 5, at 200.

[FN63]. See Burdeau, 256 U.S. at 476-77.

[FN64]. See, e.g., Ariz. R. Crim. Proc. 39 (stating that "(t)he victim shall also have the right to the assistance of the prosecutor in the assertion of the rights enumerated in this rule or otherwise provided for by law").

[FN65]. See infra note 106 and accompanying text (discussing potential conflicts between victims and prosecutors).

[FN66]. See, e.g., 1 Wayne R. LaFave, Search & Seizure, § 1.2(d), at 38-47 (3d ed. 1996) (discussing "good faith" exception to exclusionary rule).

[FN67]. See Harris v. New York, 401 U.S. 222, 225-26 (1971) (holding that "(t)he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense").

[FN68]. See Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding that protection against unlawful searches and seizures applies only to governmental action);1 LaFave, supra note 66, § 1.8 (discussing exclusionary rule and nonpolice searches).

[FN69]. See David M. Nissman & Ed Hagen, Law of Confessions, § 14:2 (2d ed. 1994) (discussing application of Due Process Clause to private citizens).

[FN70]. See, e.g., 1 Clifford S. Fishman & Anne T. McKenna, Wiretapping and Eavesdropping § 7:23-26 (2d ed. 1995) (discussing suppression of private wiretapping).

[FN71]. See Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380-81, 383 (2d Cir. 1973) (disallowing equal-protection-based and civil-rights-based challenges to failure to investigate and charge).

[FN72]. See Peter Davis, Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute, 53 Md. L. Rev. 271, 308-48 (1994) (discussing degrees of victims' access to grand jury).

[FN73]. See State v. Unnamed Defendant, 441 N.W.2d 696, 699-702 (Wis. 1989) (upholding judicial investigation).

[FN74]. See id.; In re New Haven Grand Jury, 604 F. Supp. 453, 457-61 (D. Conn. 1985) (concluding that private prosecutorial communications with grand jury are impermissible).

[FN75]. See United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (requiring signature of U.S. Attorney before "true bills" become formal indictments).

[FN76]. See, e.g., State v. Von Bulow, 475 A.2d 995, 999-1003 (R.I. 1984) (describing

use of private investigator to obtain evidence). For an account of the victims' involvement in the case, see Cardenas, supra note 49, at 372-73.

[FN77]. See Romualdo P. Eclavea, Annotation, Accused's Right to Depose Prospective Witness Before Trial in State Court, 2 A.L.R.4th 704, 711-22 (1980 & Supp. 1998); Gregory G. Sarno, Annotation, Interference by Prosecution with Defense Counsel's Pretrial Interrogation of Witnesses, 90 A.L.R.3d 1231, 1246-47 (1979 & Supp. 1998).

[FN78]. See, e.g., Ariz. Const. art. II, § 2.1(a)(5). This provision grants crime victims the right "to refuse an interview, deposition, or other discovery request by the defendant," id., which eliminates the defendant's ability to interview the victim, pursuant to former Rule 15.3 of the Arizona Rules of Criminal Procedure, which provided for deposition upon motion in the court's discretion of "'any person,'" including the victim, when the person refused a pretrial interview and was not a witness at the preliminary hearing. See State ex rel. Baumert v. Superior Court, 651 P.2d 1196, 1197 (Ariz. 1982) (quoting former Ariz. R. Crim. P. 15.3).

[FN79]. Compare State v. Holms, 374 N.W.2d 457, 459-60 (Minn. Ct. App. 1985) (upholding denial of motions to conduct physical and mental evaluations of victim of sexual abuse), with Turner v. Commonwealth, 767 S.W.2d 557, 559 (Ky. 1989) (holding that gynecological exam of four-year-old sexual abuse victim was justified where finding could potentially exonerate defendant).

[FN80]. See State ex rel. Beach v. Norblad, 781 P.2d 349, 350 (Or. 1989) (granting writ of mandamus vacating trial court's order of defendant's access to victim's home, because victim was not party to case); Henshaw v. Commonwealth, 451 S.E.2d 415, 417 (Va. Ct. App. 1994) (finding no general right to discovery when premises were no longer in control of state).

[FN81]. See Hall, supra note 15, at 946 (suggesting that victim may develop stronger relationship, and therefore more influence, with prosecutor by filing complaint instead of allowing police to file complaint).

[FN82]. See Elizabeth Anne Stanko, The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office, 16 L. & Soc'y Rev. 225, 225, 237 (1981-82) (citing specific case studies).

[FN83]. See Frank Miller, Prosecution: The Decision to Charge a Suspect with a Crime 179-280 (1969) (identifying nonexclusive list of reasons for prosecutorial charging decisions: cost to system, undue harm to suspect, availability of alternative procedures, availability of civil sanctions, and cooperation of suspect with law enforcement goals).

[FN84]. See Davis, supra note 72, at 290-91, 308-09.

[FN85]. See id.; see also State v. Unnamed Defendant, 441 N.W.2d 696, 703-04 (Wis. 1989) (Day, J., concurring) (maintaining that procedure serves as check on prosecutorial

power).

[FN86]. See Commonwealth v. Benz, 565 A.2d 764, 765-68 (Pa. 1989) (upholding judicial review of prosecutor's decision not to charge as constitutional and ordering that police officer be charged with homicide).

[FN87]. See Mark William Baker, Comment, Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System, 72 N.C. L. Rev. 1479, 1480 (1994) (discussing advantages of victim-offender mediation).

[FN88]. See id. at 1495-96, 1500-02.

[FN89]. See Jennifer Gerarda Brown, The Use of Mediation to Resolve Criminal Cases: A Procedural Critique, 43 Emory L.J. 1247, 1291-1301 (1994) (discussing how victim offender mediation fails to provide societal catharsis).

[FN90]. See id. at 1282-84 (discussing need to avoid biased selection criteria in determining which defendants could participate).

[FN91]. See Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. Chi. L. Rev. 361, 395-405 (1996) (making similar argument in context of sentencing).

[FN92]. See Miller, supra note 83, at 173 (1969); Hall, supra note 15, at 950-51.

[FN93]. See Developments in the Law--Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498, 1540 (1993) (discussing "no-drop" policies in prosecuting domestic batterers).

[FN94]. See Stanko, supra note 82, at 225, 237 (citing statistical studies).

[FN95]. See Beloof, supra note 2, at 256-65. Other formal checks on the prosecutor's discretion, all of which are typically unavailable as a practical matter in the vast majority of cases, are: (1) electoral control; (2) Attorney General intervention; (3) mandamus; and (4) appointment of special prosecutors. See id.

[FN96]. See Davis, supra note 72, at 308-48 (discussing degrees of victims' access to grand jury).

[FN97]. See McCleskey v. Kemp, 481 U.S. 279, 286-99 (1987) (holding that black habeas corpus petitioner's statistical evidence that his race and victim's race weighed in imposition of death penalty was insufficient to show denial of equal protection); Steven L. Carter, When Victims Happen to Be Black, 97 Yale L.J. 420, 421-22 (1988).

[FN98]. See, e.g., Sandoval v. Farish, 675 P.2d 300, 302-03 (Colo. 1984) (upholding judicial review of prosecutor's decision); Commonwealth v. Benz, 565 A.2d 764, 765-68 (Pa. 1989) (same); State v. Unnamed Defendant, 441 N.W.2d 696, 699-702 (Wis. 1981)

(same); see also Gittler, supra note 38, at 157-63 (articulating theoretical possibilities of victims' role in charging). For an overview of European procedures for challenging the prosecutor's charging decision, see Matti Joutsen, Listening to the Victim: The Victim's Role in European Criminal Systems, 34 Wayne L. Rev. 95, 102-24 (1987).

[FN99]. See Paul Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment, 1994 Utah L. Rev. 1373, 1388-96 (stating that victims have right to be present at judicial proceedings).

[FN100]. See Cassell, supra note 40, at 496-500.

[FN101]. See Fed. R. Evid. 615 (stating that "(a)t the request of a party the court shall order witnesses excluded, so that they cannot hear the testimony of other witnesses").

[FN102]. See Senate Judiciary Report on S.J. 44, Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims, 105th Cong., Rep. No. 105-409, at 82 (1998) (reporting additional comments of Senator Joseph Biden).

[FN103]. See id.

[FN104]. See George Fletcher, With Justice for Some: Victims' Rights in Criminal Trials 250-51 (1995). Suggesting that victims should have the option of a role at trial, Professor Fletcher states that "it would be better to allow the third voice at trial rather than freeze out the party for whom the proceedings may carry greater positive meaning than for anyone else." Id. at 250.

[FN105]. See Charles L. Hobson, Appointed Counsel to Protect the Child Victim's Rights, 21 Pac. L.J. 691, 693-98 (1990) (advocating counsel for child victims in criminal cases).

[FN106]. For example, under the Arizona Rules of Criminal Procedure, "In any event of any conflict of interest between the state and the wishes of the victim, the prosecutor shall have the responsibility to direct the victim to the appropriate legal referral, legal assistance, or legal aid agency." Ariz. R. Crim. P. 39(c)(3).

[FN107]. The defendant's due process right is the source of limits imposed on the victim's attorney. See Young v. United States ex rel Vuitton et Fils S.A., 481 U.S. 787, 790, 802-09 (1987) (holding that counsel for party benefitting from court order could not be appointed to prosecute violations of court order). However, these due process limits apply when the victim stands in the shoes of the public prosecutor, but arguably do not apply when the victim appears independently of the public prosecutor. See id.

[FN108]. The Utah Rules of Evidence do not "authorize exclusion of (a) victim in a criminal trial or juvenile delinquency proceeding where the prosecutor agrees with the victim's presence." Utah R. Evid. 615 (emphasis added). No other state or federal provision for victim attendance leaves this discretion to the State. See Sourcebook, supra

note 2, § 10 (stating that while victims regard right to attend trial as very important, most states allow victims to be excluded from trial).

[FN109]. See Robert P. Mosteller, Essay, Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation, 85 Geo. L.J. 1691, 1698-1704 (1997) (discussing danger that victims with constitutional right to be present at trial would compromise rights of defendants).

[FN110]. See Lynne Henderson, Whose Justice? Which Victims?, 94 Mich. L. Rev. 1596, 1605 (1996) (reviewing George Fletcher, With Justice for Some: Victims' Rights in Criminal Trials). According to Henderson, "(Q)uestioning by victims could lead to confusion of issues in a trial and would benefit only those victims wealthy enough to hire counsel." Id.

[FN111]. See William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems, 32 Stan. J. Int'l L. 37, 54-59 (1996).. Despite the argument, Pizzi and Perron chronicle that in Germany victims of violent crime possess the ability to participate in trial with their own counsel. Counsel is appointed if the victim is indigent. See id.; see also Alexandra Goy, The Victim-Plaintiff in Criminal Trials and Civil Law Responses to Sexual Violence, 3 Cardozo Women's L.J. 335, 335 (1996) (discussing that in Germany, victims participate directly in prosecutions for certain crimes).

[FN112]. See Henderson, supra note 110, at 1605 (stating that "only vengeance-seeking victims would avail themselves of the process").

[FN113]. See East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1995) (holding that if private prosecutor controlled prosecution, defendant's due process rights were violated); Person v. Miller, 854 F.2d 656, 662-64 (4th Cir. 1988) (holding that mere participation of victims' counsel was not reversible error).

[FN114]. See Beloof, supra note 2, at 359-61.

[FN115]. See State v. Lozano, 616 So. 2d 73, 78 (Fla. Dist. Ct. App. 1993) (reversing lower court and appointing counsel for victims' relatives).

[FN116]. See Robert M. Ireland, Privately Funded Prosecution of Crime in the Nineteenth-Century United States, 39 Am. J. Legal Hist. 43, 55-58 (1995) (discussing states that prohibit privately-funded prosecutions).

[FN117]. See id.

[FN118]. See id.

[FN119]. Sourcebook, supra, note 2, § 10 (stating that 34 states currently grant victims right to attend trial).

[FN120]. See Paul Gewirtz, Victims and Voyeurs at the Criminal Trial, 90 Nw. U. L. Rev. 863, 887-90 (1996) (arguing that in context of sentencing, procedural restrictions appropriately enforced are adequate protections for defendants).

[FN121]. See Randell v. State, 846 P.2d 278, 279-300 (Nev. 1993) (finding trial court "capable of listening to victim's feelings without being subjected to overwhelming influence by the victim"); Davis et al., supra note 41, at 505. The authors state:
Victims' views may not always be identical to those of the community, but they probably are often closer to the public's sentiments than those of courthouse professionals, who have a substantial interest in processing cases in summary fashion and who may tend to become insensitive to the human suffering involved in the "normal crimes" they process. In the vast majority of criminal cases, those that the public never hears about, victims' opinions could add another perspective from which to view incidents brought before the court.
Id.

[FN122]. See Donald J. Hall, Victims' Voices in Criminal Court: The Need for Restraint, 28 Am. Crim. L. Rev. 233, 241-46 (1991) (arguing that victim participation results in disparate sentencing of similarly situated defendants).

[FN123]. See Bandes, supra note 91, at 395-405 (criticizing vengeance motivations in victim impact statements).

[FN124]. See Booth v. Maryland, 482 U.S. 496, 506 n.8 (1986) ("We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.").

[FN125]. See id. at 504-07.

[FN126]. See id.

[FN127]. See id.

[FN128]. See Hall, supra note 122, at 266 & nn.167-68.

[FN129]. See Payne v. Tennessee, 501 U.S. 808, 860-64 (1991) (Stevens, J., dissenting); Robert C. Black, Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing, 39 Am. J. Juris. 225, 237-40 (1994) (suggesting that compensation or victim rehabilitation would serve victims better than providing victims right to participate); Henderson, supra note 35, at 987-1006 (discussing irony of focusing victims' rights on end, rather than beginning of process); Sanford H. Kadish, The Criminal Law and the Luck of the Draw, 84 J. Crim. L. & Criminology 679, 688-90 & n.29 (1994) (discussing Payne Court's linking of blameworthiness to harm to victim).

[FN130]. See Henderson, supra note 35, at 994-99 (discussing retaliatory motives of victim participation in sentencing).

[FN131]. See Sourcebook, supra note 2, § 9 ("As of 1995, every state allows victim impact evidence at sentencing.").

[FN132]. See, e.g., State v. Matteson, 851 P.2d 336, 338-40 (Idaho 1991) (permitting testimony of victim's family at sentencing); Randell v. State, 846 P.2d 278, 280 (Nev. 1993) (permitting victim's opinion at noncapital trial).

[FN133]. See Payne v. Tennessee, 501 U.S. 808, 817-27 (1991) (holding that Eighth Amendment is not per se bar to victim participation).

[FN134]. See State v. Heath, 901 P.2d 29, 34-35, 41-42 (Kan. Ct. App. 1995) (permitting statements of victim's family to mitigate defendant's sentence).

[FN135]. See Knutson v. County of Maricopa ex rel. Romley, 857 P.2d 1299, 1300 (Ariz. Ct. App. 1993) (refusing to allow negligence action for failure to notify victim of change in defendant's plea). However, many victim laws are accompanied by clauses that preclude the possibility of civil rights actions. See, e.g., Ohio Const. art. 1, § 10(a) ("This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding . . . and does not create any cause of action for compensation or damages against the state.").

[FN136]. See Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. Chi. L. Rev. 1, 7- 14 (1990) (suggesting that pretrial rulings give government an opportunity for review without compromising defendants' rights).

[FN137]. See United States v. McVeigh, 106 F.3d 325, 328-32 (10th Cir. 1997). Some states allow for appellate review of a denial of victims' rights. See, e.g., Ariz. Rev. Stat. Ann. § 13-4437(A) (Supp. 1998) ("The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any right or to challenge an order denying any right guaranteed to victims under the victims' bill of rights . . ., any implementing legislation or court rules.").

[FN138]. See Ala. Const. amend. 557; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. art. I, § 8(b); Fla. Const. art. I, § 16b; Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Ind. Const. art. I, § 13(b); Kan. Const. art. XV, § 15; La. Const. art. I, § 25; Md. Const. art. XCVII; Mich. Const. art. I, § 24; Miss. Const. art. III, § 26A; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8(2); N.J. Const. art. I, § 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m; 42 U.S.C. § 10606 (1994); Ala. Code §§ 15-23-60 to-84 (1995); Alaska Stat. § 12.61.010 (Lexis 1998); Ariz. Rev.

Stat. Ann. §§ 13-4401 to-4439 (West Supp. 1998); Ark. Code Ann. §§ 16-90-1101 to-1115 (Michie Supp. 1997); Cal. Penal Code §§ 679, 1102.6 (West 1999 & Supp. 1999); Colo. Rev. Stat. § 24-4.1- 302.5 (1998); Conn. Gen. Stat. Ann. § 54-203 (West. Supp. 1999); Del. Code Ann. §§ 11-9401 to-9419 (1995 & Supp. 1998); Fla. Stat. Ann. § 960.001 (West Supp. 1999); Ga. Code Ann. §§ 17-17-1 to-15 (Michie 1997 & Supp. 1998); Haw. Rev. Stat. Ann. § 801D-1 (Lexis 1999); Idaho Code § 19- 5306 (Michie Supp. 1998); 725 Ill. Comp. Stat. Ann. 120/2 (West 1992); Ind. Code Ann. § 33-14-10-3 (Lexis 1998); Iowa Code Ann. §§ 915.1-.100 (West Supp. 1999); Kan. Stat. Ann. § 74-7333 (Supp. 1998); Ky. Rev. Stat. Ann. § 421.500 (Lexis 1998); La. Rev. Stat. Ann. § 46:1842 (West Supp. 1998); Me. Rev. Stat. Ann. tit. 15, § 6101 (West Supp. 1998); Md. Code Ann. § 27-760 (Lexis Supp. 1998); Mass. Ann. Laws ch. 258B, §§ 1-13 (Lexis 1992 & Supp. 1998); Mich. Comp. Laws Ann. §§ 28.1287(751)- (911) (Lexis 1996 & Supp. 1999); Minn. Stat. Ann. §§ 611A.01-.78 (West 1987 & Supp. 1999); Miss. Code Ann. §§ 99-43-1 to-49 (Supp. 1998); Mo. Ann. Stat. § 595.209 (West Supp. 1999); Mont. Code Ann. §§ 46-24-101 to-213 (1997); Neb. Rev. Stat. Ann. §§ 81-1848 to-1850 (Michie 1995); Nev. Rev. Stat. Ann. §§ 178.569-.5698 (Michie 1997 & Supp. 1997); N.H. Rev. Stat. Ann. § 21-M:8-k (Lexis Supp. 1998); N.J. Stat. Ann. § 52:4B-36 (West Supp. 1999); N.M. Stat. Ann. § 31-26-2 (Michie 1994); N.Y. Exec. Law §§ 640-649 (McKinney 1996); N.C. Gen. Stat. § 15A-825 (1997); N.D. Cent. Code § 12.1-34-02 (1997); Ohio Rev. Code Ann. § 2930.01 (Anderson 1996); Okla. Stat. Ann. tit. 19, § 215.33 (West Supp. 1999); Or. Rev. Stat. § 147.410 (1991); R.I. Gen. Laws § 12-28-2 (1994); S.C. Code Ann. §§ 16-3-1110,-1505 (West Supp. 1998); S.D. Codified Laws §§ 23A-28C-1 to-5 (Lexis 1998); Tenn. Code Ann. § 40-38-102 (Michie 1997); Tex. Crim. P. Code Ann. §§ 56.01, .09 (West Supp. 1999); Utah Code Ann. § 77-37-1 (1995); Vt. Stat. Ann. tit. 13, § 5303 (1998); Va. Code Ann. § 19.2-11.01 (Michie Supp. 1998); Wash. Rev. Code Ann. §§ 7.69.010, .030 (West 1992 & Supp. 1999); W. Va. Code § 61-11A-1 (1992); Wis. Stat. Ann. § 950.01 (West 1996); Wyo. Stat. Ann. § 1-40-203 (Michie 1997).

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