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David A. Starkweather
Indiana University School of Law

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DAVID A. STARKWEATHER*

INTRODUCTION

One evening, Karen found herself alone in the restroom of a public health building.[1] Occupied with thoughts of the day's business, she could never have imagined the horrible event that was about to take place. Karen was raped at knifepoint in the restroom.

Police arrested a suspect, and Karen positively identified him as the man who had raped her. He was only seventeen. Because he was a juvenile, he was eligible for a reduced sentence. The suspect had been in and out of trouble almost all of his seventeen years and presently had several burglary charges pending. As part of a plea bargain, the youth pleaded guilty to one count of burglary, and the rape charge was dropped. Karen was never consulted about the plea or even notified that the prosecutor was considering a plea agreement.

Karen was horrified to discover that her case had been dismissed. In her mind, the criminal justice system had failed. *She* was raped. *She* was the one who was going to have to live with the memory of that night. The offender never received what he deserved.

She then urged her friends and community to write the prosecutor demanding that charges be refiled. Bowing to the public pressure, the prosecutor reinstated the charges and brought the suspect back into court.

The system, however, repeated itself. Again, the prosecutor reached a plea agreement without Karen having been notified or consulted. The suspect pleaded guilty as a youthful offender and received a lenient sentence under the youthful offender statute. Karen was again horrified. She believed that the suspect should have received an adult sentence and that the criminal system had neglected her interests.

Cases like this have led jurisdictions to recognize the plight of a crime victim. Many now have programs aimed at aiding a crime victim after his

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* J.D. Candidate, 1992, Indiana University School of Law at Bloomington; B.A., 1989, Wheaton College, Illinois.

1. This story is based on a report told to Daniel Van Ness and reprinted in his book. D. VAN NESS, CRIME AND ITS VICTIMS 23-24 (1986).

or her victimization.[2] It has been suggested, however, that "victims' rights" programs have been motivated by victims' desire for revenge or retaliation rather than by the moral aspect of retribution.[3] Victim participation in the plea bargain process can be justified, however, not by a victim's desire for retaliation but by a theory of punishment that recognizes a formal role for a victim in the criminal process system. This theory is called the "just deserts" theory of retribution.[4] This Note proposes that, under a just deserts theory, a victim has interests in the criminal process other than revenge or retaliation and that victim participation in plea bargaining best protects these interests without unduly burdening other parties involved in the plea bargaining process.

The purpose of this Note is to analyze a victim's right to participate in the criminal process, specifically plea bargaining, under a moral or a just deserts theory of retribution. To date, no one has analyzed whether a victim should be given a participatory role in the plea bargain process under this definition of retribution. Part I of this Note will examine the concept of just deserts retribution and a victim's relevance to this theory. Part II will briefly review the present process of plea bargaining. Part III will examine what interests, under the just deserts theory, a victim has in plea bargaining. In Part IV, this Note will discuss the relevance of victim participation with regard to the traditional plea bargain parties. Finally, this Note will suggest some ways that the plea bargain process can better accommodate a victim in a retributive criminal justice system.

I. RETRIBUTION

Over the last two decades the retribution theory of punishment has been rediscovered. Due mainly to the inability of other theories, such as rehabilitation and deterrence, to effectuate a reduction in crime, philosophers and scholars have reexamined retribution as a viable justification for punishment.[5]

Even though retribution is considered to be the oldest theory of punishment,[6] there has not been universal agreement as to its definition. Tradi-

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2. *See, e.g.*, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified in scattered sections of 18 U.S.C. (1988)); Bill of Rights for Victims and Witnesses of Violent Crime Act, ILL. ANN. STAT. ch. 38, §§ 1401-1408 (Smith-Hurd 1991); Victim's and Witness's Bill of Rights, S.C. CODE ANN. §§ 16-3-1510 to -1560 (Law. Co-op. 1990).

3. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 994 (1985).

4. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 247 (1989).

5. C.S. LEWIS, *The Humanitarian Theory of Punishment*, in GOD IN THE DOCK 287 (1970); J. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW (1979); *see* A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

6. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 24 (1972).

tionally, however, the underlying notion of retribution is that "criminal behavior constitute[s] a violation of the moral or natural order . . . and, having offended that order, require[s] payment of some kind."[7] Therefore, a criminal is punished because he or she "deserves" it. This justification for punishment is appropriately called the principle of "just deserts."[8]

The concept of just deserts seeks to preserve human dignity through punishment. It asserts that a person is a rational individual with the free will to make a moral choice whether or not to engage in conduct known to be prohibited. Retribution under a just deserts principle treats a defendant as a dignified human being by responding to his or her conduct in a way that respects his or her choice to engage in wrongful behavior.[9] This concept differs radically from the utilitarian theories of rehabilitation and deterrence.[10]

What is the "moral order" that the retributionists seek to restore? Moral order is the existence of "right" relationships among individuals and between

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7. Jensen, *A Christian Defense of Retribution,* 7 CHRISTIAN LEGAL SOC'Y Q. 11, 11 (1986).

8. *See id.*

9. A. VON HIRSCH, *supra* note 5, at 125.

10. Under the utilitarian theories of rehabilitation and deterrence, an individual loses his or her human dignity once he or she has been arrested. The reason is that both rehabilitation and deterrence remove desert from the concept of punishment. C.S. LEWIS, *supra* note 5, at 288. But the concept of desert is the only means of connecting punishment and justice. *Id.*

Rehabilitation and deterrence theories are concerned only with whether the punishment cures and whether it deters, respectively. Neither is concerned with "what is just." "We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds." *Id.*

Under a rehabilitation theory, the purpose of punishment is to "cure" an offender. Because crime is seen as a disease instead of a moral choice, a cure is needed to rid an offender of the disease. *Id.* One must remember, however, that the "cure" is compulsory. *Id.* An offender has no choice whether he or she wants to be cured. The compulsory cure, in fact, has no limits. An individual is to be "treated" until he is "cured." *Id.* at 290.

Under a deterrence model, an offender is punished to make him or her an example to others. An offender is not treated as a dignified human being, but rather as a means to an end. By excluding the concept of desert, an offender is treated merely as an object. "Why, in Heaven's name, am I to be sacrificed to the good of society in this way?—unless I *deserve* it." *Id.* at 291 (emphasis added).

Where the justification of punishment is its deterrent effect, it is not even necessary that an individual punished be guilty. Deterrence will be effective as long as the public understands that if they act like the individual being punished, they will be punished similarly. *Id.* "The punishment of an innocent, that is, an undeserving, man is wicked only if we grant the traditional view that righteous punishment means deserved punishment." *Id.*

Retributionists do not claim that the goals of rehabilitation and deterrence are excluded from or even contrary to a retributive theory but that they are merely secondary. Jensen, *supra* note 7, at 12. As C.S. Lewis stated: "I am ready to make both the protection of society and the 'cure' of the criminal as important as you please in punishment, but only on a certain condition; namely that the initial act of thus interfering with a man's liberty be justified on grounds of desert." C.S. LEWIS, *On Punishment: A Reply to Criticism,* in GOD IN THE DOCK 295, 298 (1970) [hereinafter C.S. LEWIS, *On Punishment*].

an individual and the community.[11] The "right" relationships are governed by a higher authority[12] whether it be God,[13] natural law,[14] or social contract.[15] In other words, the "moral order" is the ideal state in which the community should function. Therefore, under this definition of retribution, crime is

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11. D. VAN NESS, *supra* note 1, at 117-21. A good example of this type of retributive justice system is the ancient Hebrew system of pure retributive justice that could be described as *shalom*. *Shalom* meant more than absence of conflict; the term described completeness, fulfillment, wholeness—the existence of right relationships among individuals, the community, and God. *Id.* at 120. Crime was thought to break the *shalom*. Therefore, the ancient Hebrew justice system aimed to restore "right" relationships. *Id.*

Based on retribution, the Hebrew justice system gave the world the concept of *lex talionis* (eye for eye, tooth for tooth). *See Exodus* 21:24; *Leviticus* 24:20; *Deuteronomy* 19:21. However, the Hebrew system was not based on revenge or retaliation. If that were the case, most criminal sanctions would have called for mutilation of some sort—literally, an eye for an eye. This was not the case. Under the Hebrew system, restitution was the primary form of criminal sanction. *Id.* at 117-21. In fact, in the entire Hebrew law (not including the capital offenses of murder, rape, adultery, and kidnapping) only one crime called for mutilation. J. WALVOORD & R. ZUCK, THE BIBLE KNOWLEDGE COMMENTARY: AN EXPOSITION OF THE SCRIPTURES BY DALLAS SEMINARY FACULTY: OLD TESTAMENT 307 (1985). That law read: "If two men are fighting and the wife of one of them comes to rescue her husband from his assailant, and she reaches out and seizes him by his private parts, you shall cut off her hand. Show her no pity." *Deuteronomy* 25:11-12 (New International).

12. Some commentators have rejected retribution because of its reliance on a "higher authority":

> "[W]hat justification could there be for rules requiring that those who break them should be made to suffer?" except perhaps in theological terms. *For appeals to authority apart,* we can justify rules and institutions only by showing that they yield advantages. Consequently, retributivist answers to the problem can be shown, on analysis, to be . . . utilitarian reasons in disguise.

S.I. BENN & R.S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE (1959), *quoted in* T. HONDRICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 28 (1969) (emphasis added). These commentators reject retributivism in favor of a utilitarian theory of punishment because it is not governed by a "higher authority." However, they fail to recognize that even the utilitarian theory must be based on some type of appeal to higher authority.

Utility is considered to be what will make the community, as a whole, happier. C.S. LEWIS, *On Punishment, supra* note 10, at 296. Are utilitarians ready to pursue their goal, community happiness, at all costs, or is there some point where the utilitarian will not act, no matter how much it will increase community happiness? Utilitarian theory is based on the concept of relativism. Jensen, *supra* note 7, at 13. Relativism posits that no imaginable act is good or bad in itself. *Id.* Presumably, however, even a utilitarian would not advocate rape. A utilitarian might argue that rape will never add to community happiness, thus it is always bad. Yet, relativism holds that rape may at some point become useful. If rape is thought to be "bad" under all circumstances, relativism is abandoned and some "eternal" standard measures the act of rape.

Once it is admitted that there is at least one act that is always "bad" or that there is at least one thing community members ought not do, the utilitarian position is lost. C.S. LEWIS, *On Punishment, supra* note 10, at 296. One is then judging "utility" by some other standard, not by community happiness but rather by higher authority, "whether we call it Conscience, or Practical Reason, or Law of Nature," or whatever. *Id.* Therefore, even utilitarians must appeal to a higher authority.

13. D. VAN NESS, *supra* note 1.

14. C.S. LEWIS, *On Punishment, supra* note 10, at 296.

15. Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems,* 11 PEPPERDINE L. REV. 117, 142 (1984).

conduct that disturbs the "right" relationships within the community: relationships between offender and victim, offender and community, and victim and community.[16]

Since crime is defined as the violation or disturbance of the "right" relationships in the community, the goal of the retributive theory of justice is to reconcile these relationships. Reconciliation is accomplished by making an offender "pay" for the disturbance his or her conduct has caused.

A criminal "deserves" to be punished because he or she has violated the "moral order," but what punishment does he or she "deserve?" A core tenet within the just desert theory of retribution is proportionality.[17]

> If one asks how severely a wrongdoer deserves to be punished, a familiar principle comes to mind: *Severity of punishment should be commensurate with the seriousness of the wrong.* Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved—severe sanctions for minor wrongs or vice versa.[18]

Because the goal of retributive justice is to restore the relationships that have been broken, a defendant must be punished only to the extent necessary to restore the relationships. In other words, the level of punishment must be proportional to the seriousness of the crime.

The seriousness of a defendant's conduct is expressed as a function of the harm caused by the conduct and the degree of a defendant's responsibility for the crime.[19] Harm is composed of many components, such as physical and psychological harm to victims and economic and emotional costs to society.[20] The incorporation of harm into the calculus of just punishment should seem intuitive; thus, proportionality would require a murderer to receive a more severe punishment than a petty thief.[21]

In a retributive framework, incorporating harm into the punishment calculus also makes sense philosophically. Recognition of harm emphasizes that crime does not merely violate a rule or code; it also affects both victims and society. Including harm in the calculus preserves human dignity because doing so not only recognizes the consequence of an offender's free will, but also considers the offense as an injury to another person.[22] "The 'just

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16. D. VAN NESS, *supra* note 1.

17. A. VON HIRSCH, *supra* note 5, at 66; Henderson, *supra* note 3, at 991; Hoffmann, *supra* note 4, at 248.

18. A. VON HIRSCH, *supra* note 5, at 66 (emphasis in original).

19. R. NOZICK, PHILOSOPHICAL EXPLANATIONS 363-66 (1981). For a discussion of the problems associated with using harm as a component in the punishment calculus, see G. FLETCHER, A CRIME OF SELF-DEFENSE 63-83 (1988); Henderson, *supra* note 3, at 999-1001.

20. *See* Henderson, *supra* note 3, at 953-64. These components of harm are explicitly recognized in the Federal Victim and Witness Protection Act. Pub. L. No. 97-291, 96 Stat. 1248 (1982).

21. Henderson, *supra* note 3, at 1000.

22. *See* D. VAN NESS, *supra* note 1, at 138.

deserts' model of justice specifically views the concern for victims in the criminal justice process as an integral part of [proportionality]."[23]

Once the level of seriousness of harm has been ascertained, it must be placed on a punishment scale to determine a proportional punishment. However, determining a proportional punishment is not as exact a science as the calculus of just punishment would lead one to believe. "This is because the basic retributive concept of 'desert' and the notion of individual responsibility on which it depends involve not merely objective facts and circumstances that can be observed and proven, but also a set of beliefs about the extent of 'free will' in a fundamentally deterministic world."[24]

II. THE PLEA BARGAINING PROCESS

Traditionally, crime victims have not had a formal role in the plea bargaining process.[25] Plea negotiations are conducted between a prosecutor and a defendant, excluding a victim from the negotiations. A victim is also excluded from participating in the judicial hearing at which a judge decides whether to accept a guilty plea proffered by a defendant.[26]

There are two general classifications of plea bargaining, a sentence bargain and a charge bargain.[27] In a *sentence* bargain, a defendant pleads guilty to the charges in exchange for a prosecutor's recommendation of a lenient sentence or for a specified sentence.[28] A *charge* bargain may take three forms. A defendant may plead guilty to a charge or charges in return for a prosecutor's dismissal of other charges filed, a defendant may plead guilty to a charge or charges in return for a prosecutor's promise not to file other charges, or a defendant may plead guilty to a lesser included offense in return for either a prosecutor's dismissal of the more serious charge or a prosecutor's promise not to file the more serious charge.[29]

Once a prosecutor and a defendant agree on a plea, it is submitted to a judge for acceptance.[30] Acceptance of a plea agreement has traditionally focused only on the interests of the defendant. Before accepting a plea, a judge must determine that the defendant has entered the plea voluntarily[31]

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23. Erez, *Victim Participation in Sentencing: Rhetoric and Reality,* 18 J. CRIM. JUST. 23 (1990).

24. Hoffmann, *supra* note 4, at 251 (noting L. WEINREB, NATURAL LAW AND JUSTICE, 221-23).

25. Gittler, *supra* note 15, at 163-67.

26. *Id.* at 165.

27. Welling, *Victim Participation in Plea Bargains,* 65 WASH. U.L.Q. 301, 312-14 (1987).

28. *Id.* at 312-13.

29. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 766-67 (1985); Henderson, *supra* note 3, at 977 n.197.

30. Welling, *supra* note 27, at 317.

31. Brady v. United States, 397 U.S. 742 (1970).

(not under coercion) and that there is a factual basis for the plea.[32] If a judge is satisfied that these criteria have been met, he or she will normally accept a plea.

III. VICTIM'S INTEREST IN RETRIBUTIVE JUSTICE—RESTITUTION

Under the retributive theory of punishment, which seeks to restore the relationships that have been broken by an offender's conduct,[33] restitution should be a primary criminal sanction. "In accordance with a retributive theory of punishment, restitution aims at restoring the relationship between the offender and the victim by making the offender pay for his crime."[34] Restitution is proportional because it is constructed to "fit the crime" and to "emphasize the wrongfulness of the offense and the defendant's moral responsibility."[35] Some commentators have even gone so far as to argue that restitution is the only appropriate sanction in a retributive theory of punishment.[36]

Commentators who do not recognize a victim's right to participate in the criminal process view restitution as only a civil remedy and not as an appropriate criminal sanction.[37] However, this view is contrary to historical precedent[38] and overlooks the overlapping goals of the criminal and civil

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32. FED. R. CRIM. P. 11(f). Rule 11(f) states: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

For example, in Gilbert v. United States, 466 F.2d 533 (5th Cir. 1972), the defendant pleaded guilty to four counts of interstate transportation of stolen money orders. However, had the judge determined the factual basis for the plea, he would have discovered that there was only one crossing of state lines. Thus, there was only one violation, not four. Because of this error, the defendant was allowed to replead.

33. *See supra* text accompanying notes 11-17.

34. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis,* 97 HARV. L. REV. 931, 939 (1984) [hereinafter *Victim Restitution*].

35. *Id.*

36. C. ABEL & F. MARSH, PUNISHMENT AND RESTITUTION 59-69 (1984).

37. *See, e.g.,* Henderson, *supra* note 3, at 1007 ("As a theoretical matter, the civil courts are the proper forum for victims to claim damages.").

38. D. VAN NESS, *supra* note 1, at 64-67; Gittler, *supra* note 15, at 132-33. Prior to the separation of civil and criminal law, restitution was a common form of criminal sanction. Hebrew, Greek, Roman, and ancient English and Germanic laws all provided for compensation to crime victims. *See* S. SCHAFER, RESTITUTION TO VICTIMS OF CRIME 3-7 (1960). Even after criminal and civil law were divided, restitution continued to be employed as a criminal sanction. Restitution provisions were included in many of the earliest penal codes in the United States, Harland, *Compensating the Victims of Crime,* 14 CRIM. L. BULL. 203, 204 (1978), and the Supreme Court in 1913 allowed restitution as a condition for probation or parole. Bradford v. United States, 228 U.S. 446 (1913). Today, states continue to provide restitution as a criminal sanction. *See e.g.,* ILL. ANN. STAT. ch. 38 § 1005-5-6 (Smith-Hurd 1991); N.Y. PENAL LAW § 60.27 (McKinney 1987).

systems.[39] On a practical level, the distinctions between the criminal and civil law have become increasingly blurred. Limiting restitution to the civil forum fails to recognize the practical problems a victim faces when seeking a civil remedy after criminal sanctions have been imposed.[40]

Most commentators define "restitution" only as financial compensation to a victim.[41] However, limiting the definition of restitution to financial compensation limits a victim's interests to damages that can be quantified in monetary terms. A broad definition of restitution would include compensation for both financial and psychological harm and allow a victim to claim an interest even in unquantifiable injuries. Further, broadening the definition of restitution as a criminal sanction may encourage courts to use nonpecuniary forms of restitution.[42]

The broad definition of a victim's restitutionary interest encompasses both retribution and restitution, which are commonly broken down by commentators as two interests.[43] However, retribution and restitution are not distinct; rather, retribution envelopes restitution. Retribution justifies punishment and provides the goals for which the criminal justice system should aim. Restitution is a criminal sanction used to achieve a retributive goal.

A. Financial Restitution

The function most commonly associated with the term "restitution" is to restore a victim to his or her financial status before the crime. Financial restitution advances the retributionary concept of proportionality by penalizing an offender in precisely the same amount as the harm incurred by a victim. Financial harm will constitute a large percentage of the total harm

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39. *Victim Restitution, supra* note 34, at 935-37. For example, both civil and criminal law attempt to "maximize public safety and promote economic efficiency." *See id.* at 936. Civil law accomplishes these goals through negligence liability and liability for breach of contract. Additionally, civil law remedies such as punitive and treble damages fulfill a deterrent goal. *See id.;* Morris, *Punitive Damages in Tort Cases,* 44 HARV. L. REV. 1173, 1174 (1931); *see, e.g.,* Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (codified at 15 U.S.C. § 12-27; 18 U.S.C. §§ 402, 660, 3285, 3691; 29 U.S.C. §§ 52, 53 (1988 & Supp. I 1989)).

40. *See* Gittler, *supra* note 15, at 138-39.

> Victims may be unaware of the availability of a tort remedy; victims may lack the resources to institute an action and be unable to obtain the assistance of counsel on a contingent fee basis; victims may be unwilling to undergo the inconvenience of bringing suit, especially if the damages are relatively small and the offender is insolvent; and victims, who have already been through a criminal proceeding, may not have the energy and stamina required to become involved in yet another proceeding.

Id.

41. *See, e.g., id.* at 139; Welling, *supra* note 27, at 307.

42. Where "restitution" does not overly emphasize monetary compensation, judges may be more inclined to impose punishments, such as community service, which do not directly compensate the victim for his or her financial loss.

43. *See, e.g.,* Welling, *supra* note 27, at 307-08.

in most nonviolent crimes where emotional and physical harm are minimal. Even in violent crimes, financial loss will contribute to the total harm suffered by a victim and is a necessary component in the punishment calculus.

A victim thus has an interest in having financial restitution imposed as part of a defendant's sentence. However, approximately ninety percent of all criminal cases are disposed of by plea bargain.[44] Because the conviction sets the limits on the potential sentence, a victim would be interested in insuring that the plea agreement provided for his or her financial compensation. In a sentence bargain, a victim would argue that financial compensation be included in the sentence recommendation. In a charge bargain, a victim would press to have a defendant plead to a sufficient number of charges or to a charge that is sufficiently serious to allow full financial restitution.

The argument for a victim's participatory right in plea bargaining has been strengthened by two recent events: the promulgation of the new Federal Sentencing Guidelines[45] and the Supreme Court's decision in *Hughey v. United States*.[46] The Federal Sentencing Guidelines increase the likelihood that a charge bargain will be made, thus increasing a victim's interest in ensuring that the charge or charges pleaded will allow for full restitution. *Hughey* increases a victim's interest in plea bargaining by cutting off a victim's ability to protect his or her restitutionary interests at a later stage in the criminal process.

1. Federal Sentencing Guidelines

The Federal Sentencing Guidelines were the culmination of widespread dissatisfaction with the indeterminate sentencing system.[47] Indeterminate sentencing, based on the rehabilitative model of justice, appeared to produce disparate sentences between similarly situated defendants and resulted in public belief that the sentencing scheme was too lenient to many defendants.[48]

The Federal Sentencing Guidelines reduce the discriminatory and lenient appearance of the sentencing system by reducing the discretion given to

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44. *See* Gittler, *supra* note 15, at 164 (Eighty-five to ninety percent of criminal actions are resolved by guilty pleas, many of which are products of plea bargaining.); *see also* W. LAFAVE & J. ISRAEL, *supra* note 29, at 767 (criminal system is based on premise that 90% will plead guilty).

45. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3586, 3601-3624, 3661-3673; 28 U.S.C. §§ 991-998 (1988 & Supp. I 1989)).

46. 110 S. Ct. 1979 (1990).

47. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines,* 80 J. CRIM. L. & CRIMINOLOGY 883, 883-85 (1990).

48. *Id.* at 883-84.

judges. The Guidelines provide for a limited range of sentencing possibilities for each type of offense.[49] Once a defendant is convicted on a particular charge, the judge must impose a sentence within the prescribed range of sentences. By providing a narrow range of sentence possibilities, a judge's discretion is effectively curtailed.

The Federal Sentencing Guidelines enhance a victim's interest in plea bargaining by increasing a prosecutor's incentive to make a charge bargain which does not reflect the seriousness of the defendant's conduct. By reducing the applicable range of sentences, sentence bargaining becomes less attractive. A defendant understands that a judge may not impose a sentence below the minimum in the applicable range. Thus, a prosecutor's promise to request a lenient sentence loses much of its value. In order to obtain a sentence agreeable to both prosecutor and defendant, either the seriousness of the charge or the number of charges must be reduced. Reducing the seriousness or number of charges directly affects the amount of restitution a victim may receive. Therefore, a victim would have a strong interest in ensuring that the seriousness of the charge or the number of charges pleaded provides suitable compensation.

To illustrate how a charge bargain under the Federal Sentencing Guidelines might work, consider the following example. A defendant is arrested for three bank robberies, two of which were armed robberies. The range of sentences applicable to this defendant exceeds the amount for which the defendant is willing to plead. Therefore, if the prosecutor desires to plead the case away, he must reduce the range of applicable sentences. To do this, the prosecutor can either drop two counts of bank robbery or charge the two armed robberies as unarmed robberies. In either instance, the applicable range of sentences is reduced and a plea bargain can be made.

A prosecutor can circumvent the sentencing guidelines by changing the charges because the Sentencing Commission decided to base the range of applicable sentences not on the consideration of an offender's real offense conduct but on the charges of conviction.[50]

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49. For example, the Guidelines provide for a 121- to 151-month (10 to 12½ years) prison sentence for a first-time offender convicted of trafficking in 10 kilograms of cocaine (Aggravating or mitigating factors may, however, increase or decrease the applicable range.). A judge may not deviate from this range without good reason.

50. Nagel, *supra* note 47, at 925-27. The base offense level is determined solely by the offense(s) of conviction. This base level may then be modified by characteristics of real offense behavior. In other words, real offense behavior determines where in the range the sentence will fall. *Id.* at 926. Therefore, a victim's total monetary loss may be considered in determining the length of an offender's prison sentence, but due process and the *Hughey* case, *infra* notes 53-62 and accompanying text, prohibit a defendant from having to pay restitution for crimes for which he has not been convicted. Therefore, a prosecutor's decision to charge bargain directly affects a victim's ability to receive full restitution. The Federal Sentencing Guidelines increase the likelihood that a charge bargain will be made.

> The Sentencing Commission cannot dictate to a United States Attorney what counts to charge, since that is exclusively an executive decision. For example, if a federal prosecutor chooses to circumvent the guidelines by charging a defendant arrested for distributing 500 grams of cocaine with a phone count—resulting in less than one-fifth the sentence exposure—there is little the Commission can do about it.[51]

While a victim has an interest in seeing that sufficient charges are pleaded so that full restitution may be possible, "a decision to charge only one or to dismiss . . . counts pursuant to a [plea] bargain precludes any consideration of the . . . uncharged or dismissed [counts] in determining a guideline range, unless the plea agreement included a stipulation as to the other [counts]."[52] Therefore, the Federal Sentencing Guidelines undermine a victim's interest by increasing a prosecutor's incentive to reduce the seriousness or number of charges, thus limiting a victim's ability to receive full financial recovery.

2. *Hughey v. United States*

The Supreme Court's decision in *Hughey* strengthens a victim's argument for a participatory role in plea bargaining by limiting his or her ability to receive full financial restitution at sentencing. In *Hughey,* the Supreme Court granted certiorari to resolve a split among appellate circuits regarding a court's ability under the Victim and Witness Protection Act[53] to require an offender to pay restitution for acts that do not constitute an offense for which the offender has been convicted.[54]

Hughey was arrested for and indicted on three counts of theft as a postal employee and three counts of use of unauthorized credit cards.[55] The damages allegedly caused by Hughey were over $147,000.[56] Hughey pleaded

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51. *Id.* at 936 n.277 (citation omitted). Recognizing the problem of prosecutorial discretion under the new sentencing guidelines, Richard Thornburgh, the United States Attorney General at the time, issued a memorandum on this issue to all federal prosecutors in March, 1989. Memorandum from Attorney General Richard Thornburgh, to Federal Prosecutors (Mar. 13, 1989) [hereinafter Thornburgh Memorandum] (discussing plea bargaining under the Sentencing Reform Act of 1984). The memo urged the prosecutors to conform their plea practices to the goals of the sentencing guidelines. The Attorney General's memo stated that the Justice Department's policy regarding bargaining was that "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons." *Id.* at 3. The extent to which the memo has changed the plea practices of prosecutors is yet to be determined.

52. Thornburgh Memorandum, *supra* note 51, at 3.

53. 18 U.S.C. §§ 3579, 3580 (1982 ed. & Supp. IV) (repealed 1984), amended and renumbered as 18 U.S.C. §§ 3663-3664 by Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3586, 3601-3625, 3661-3673; 28 U.S.C. §§ 991-998 (1988 & Supp. I 1989)).

54. *Hughey,* 110 S. Ct. at 1982.

55. *Id.* at 1981.

56. *Id.*

guilty to only one count of unauthorized use of a credit card in return for dismissal of the remaining charges.[57] The government then sought a restitution order for the full amount of the victims' losses, $147,000.[58] Hughey contended that restitution could be ordered only for the amount of losses caused by the one count he pleaded guilty to, losses totalling only $10,412.[59]

The Court agreed with Hughey and held that a restitution award based on the Victim and Witness Protection Act was authorized only for the loss caused by the specific conduct that was the basis for the offense of conviction.[60] In his opinion, Justice Marshall stated that although the goal of the Victim and Witness Protection Act was to ensure that "crime victims receive the fullest possible restitution from criminal wrongdoers"[61] the Act did not protect victims from the "effects of such a [plea] bargaining process."[62]

B. Psychic Restitution

Although the retributive theory of justice dictates, in part, that an offender "pay" a punishment sufficient to restore a victim to his or her status quo ante,[63] financial loss is only part of the loss a victim suffers as a result of crime. A victim will always suffer psychological trauma as well.[64] Therefore, to be consistent with the retributive theory of punishment, the criminal justice system must assist a victim in resolving the psychological harm caused by an offender's conduct. Currently, however, the plea bargaining process alienates a victim and hinders the resolution of his or her psychological trauma.[65]

Commentators usually refer to the victim's interest in psychic restitution as "retributive";[66] they equate the "retributive" interest with a victim's desire for revenge or retaliation.[67] They argue that allowing a victim to retaliate against an offender in a formal setting aids resolution of the event by providing the victim with a cathartic experience.[68] However, a victim's desire for revenge or retaliation undermines the retributive concept of proportionality.[69] For example, "a victim may believe that an auto thief

57. *Id.*
58. *Id.*
59. *Id.* at 1982.
60. *Id.* at 1981.
61. *Id.* at 1985 (citation omitted) (quoting 128 CONG. REC. 27,391 (Oct. 1, 1982) (remarks of Rep. Rodino)).
62. *Id.*
63. *See supra* Part I.
64. *See* Henderson, *supra* note 3, at 953-64 (discussing the psychology of victimization).
65. *Id.* at 979.
66. *See, e.g.*, Welling, *supra* note 27, at 307.
67. *Id.*
68. *Id.* at 307 n.25; Henderson, *supra* note 3, at 979.
69. Henderson, *supra* note 3, at 996.

should be hanged and may muster a variety of moral arguments in support of his position, [but] proportionality requires a rejection of the victim's position."[70]

Psychic restitution is a sanction imposed on a defendant that provides the victim an emotional resolution of the crime experience. However, a sanction based on revenge will not provide true resolution but suppress it. Vengeance will not likely allow a victim to recover psychologically, but its opposite, forgiveness, will enable the victim to be restored emotionally.

> [F]orgiveness is the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequences of the first misdeed, everybody remains bound to the process . . . . In contrast to revenge . . . [f]orgiving . . . is the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it and therefore freeing from its consequences both the one who forgives and the one who is forgiven.[71]

Forgiveness, rather than vengeance, therefore, allows a victim to place the criminal experience behind him or her and restores the relationship between a victim and offender.

The current plea bargaining process does not protect a victim's interest in psychic restitution by facilitating forgiveness. Instead, by placing a premium on obtaining convictions regardless of a victim's psychological harm, the system aggravates the sense of helplessness and the loss of control produced by the crime.[72]

Moreover, a victim who is not consulted or notified about a plea bargain will view the criminal process as an invalidation of his or her experience, especially where charges are dropped or reduced.[73] This invalidation contributes to the denial already taking place within the victim.[74] "[U]ntil the victim acknowledges the actual experience as hers or his alone—that *she* was raped, that *he* was mugged—the victim is virtually powerless to be free from the rapist or the mugger."[75]

Only a plea process that emphasizes an offender's responsibility for his or her criminal act enables a victim to accept what happened and to eventually come to the point of forgiveness.[76] Only then will the relationships between victim and offender and victim and community be restored.

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70. *Id.*
71. H. ARENDT, THE HUMAN CONDITION 240-41 (1958).
72. Erez, *supra* note 23, at 24.
73. Henderson, *supra* note 3, at 981.
74. *Id.* at 961-62.
75. *Id.* at 962 (footnote omitted) (emphasis in original).
76. A plea process that contributes to a victim's denial makes forgiveness impossible. How can a person forgive another when he or she does not believe a wrong was committed? To forgive, a victim must believe that he or she was wronged, then the victim may forgive the wrongdoer. Only a process encouraging recognition of responsibility and discouraging victim denial will lead to forgiveness. *See infra* text accompanying notes 86-87.

One of the "biggest fictions" in the plea bargaining process is the practice of allowing a defendant to plead guilty while at the same time maintaining his or her innocence.[77] This practice, authorized by the Supreme Court in *North Carolina v. Alford*,[78] undermines the retributive theory of punishment.

Alford was arrested and indicted for first-degree murder.[79] The prosecution alleged that Alford had taken a gun from his house with the intent to kill the victim and later returned claiming that he had carried out the killing.[80] Upon the recommendation of his attorney, Alford pleaded guilty to second-degree murder.[81] At the plea hearing, however, Alford testified that he had not committed murder but had pleaded guilty to avoid the risk of the death penalty.[82] On a habeas petition, Alford argued that the trial judge should not have accepted his guilty plea because he had not admitted guilt.[83]

The Supreme Court upheld the plea to second-degree murder despite Alford's protestation of innocence, reasoning that:

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.[84]

Since the premise underlying retributive justice is that an individual may only be punished if he or she "deserves" it, punishment is only justified where an individual is "guilty." The imposition of punishment when the defendant maintains innocence indicates to the defendant that he or she is merely a means to an end: more convictions. An *Alford* plea thus signifies to defendants, victims, and society that "guilt" may be ignored when it is expedient to do so.[85]

Despite a victim's psychic restitutionary interest in the criminal process, it may be argued that victim participation in the plea bargaining process does not contribute significantly to the resolution of a victim's psychological harm. This argument would be based on the fact that a defendant may enter a guilty plea and still maintain his or her innocence. Because forgiveness requires, in part, an acknowledgement of responsibility on the part of an offender,[86] a victim will still be unable to achieve true resolution. Even

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77. Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 621 (1987).
78. 400 U.S. 25 (1970).
79. *Id.* at 26.
80. *Id.* at 28.
81. *Id.* at 27.
82. *Id.* at 28.
83. *See id.* at 27-31.
84. *Id.* at 37.
85. Fine, *supra* note 77, at 620.
86. *See supra* notes 71-76 and accompanying text; *Luke* 17:3-4 (New International). ("If your brother sins, rebuke him, and if he repents, forgive him. If he sins against you seven times in a day, and seven times comes back to you and says 'I repent,' forgive him).")

with a participatory role, a victim would perceive the plea as the product of a system that seeks only convictions and uses a victim merely as a means to an end. This argument is given substance by the Supreme Court's decision in *Alford.*

Allowing a defendant to make his or her way through the criminal justice system without admitting any responsibility for his or her actions increases a victim's sense of alienation. While a victim emotionally denies the event and struggles to come to terms with what has happened to him or her, the government in effect tells a victim that the state, not the victim, was harmed by a defendant's conduct. By agreeing to plead guilty, a defendant admits responsibility to the state but denies any responsibility to a victim. The system's failure to recognize a defendant's obligation to assume responsibility for harm done to a victim thus further invalidates a victim's crime experience.

It may be argued that a defendant's dignity is preserved by respecting his or her decision to accept a sure level of punishment rather than risk a more severe punishment in trying to prove his or her innocence. However, this argument misses the mark by failing to recognize the ultimate goal of retribution: "to permit[] the criminal to atone for his crime and then be reconciled to society."[87] If an offender is allowed to escape recognition of guilt, he or she will never come to the point of "atonement," and the goal of retribution will never be achieved.

Alford does not end the matter, however. A state may still preserve a retributive theory of justice by requiring defendants to admit guilt before a plea may be accepted. The Court in *Alford* only held that it is not constitutionally impermissible to accept a plea without an admission of guilt.[88] A state may, however, require admission of guilt as a prerequisite to the acceptance of a guilty plea.

> Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . . [T]he States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.[89]

IV. Interests and Roles of Traditional Plea Bargain Parties and Victim Participation

A. The Judge

Under a retributive theory of justice, a judge has the responsibility to ensure that the punishment meted out to a defendant is proportional to the

87. Jensen, *supra* note 7, at 14.
88. *Alford,* 400 U.S. at 37-39.
89. *Id.* at 38 n.11 (citation omitted).

seriousness of a defendant's conduct. A judge, therefore, must perform the seriousness calculus (harm × responsibility) and decide where on the punishment scale the crime fits.[90]

In a plea bargain, a judge must decide whether to accept the plea and, if accepted, what punishment the plea merits. Acceptance of a guilty plea requires a judge to determine the voluntariness of the plea and whether there is a factual basis for the plea.[91] The determination of voluntariness focuses exclusively on a defendant and will not be elaborated in this Note.[92] Additional information would, however, aid a judge in determining the factual basis for the plea. Victim participation would also help a judge in working through the punishment calculus by providing more information about a victim's harm.[93]

1. Factual Basis Examination

The purpose of requiring a judge to determine the factual basis for a plea bargain was initially to protect the defendant.[94] A factual basis inquiry provides the court with a better assessment of a defendant's willingness and ability to plead guilty as well as his or her understanding of the charges.[95] The inquiry also provides a more accurate record, reducing the possibility that the plea could be successfully challenged on appeal.[96]

As well as protecting a defendant, a factual basis inquiry also serves a retributive purpose by ensuring that the pleaded charge accurately reflects the nature of a defendant's conduct. Through a factual basis inquiry a judge can make sure that the punishment imposed is one that a defendant "deserves."

Problems matching the factual basis for a plea to a defendant's conduct often occur as a result of a charge bargain. Although many charge bargains result in the reduction of a charge to a lesser, logically included offense, sometimes the charge to which a defendant pleads is not a logical included offense of the actual crime.[97] This type of plea

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90. *See supra* notes 19-24 and accompanying text.

91. *See supra* notes 31-32 and accompanying text.

92. A plea is made "voluntarily" where it is not the result of any unlawful threats or improper promises. Brady v. United States, 397 U.S. 742, 755 (1970); *see generally* W. LAFAVE & J. ISRAEL, *supra* note 29, at 802-03.

93. *See supra* note 19.

94. *Cf.* W. LAFAVE & J. ISRAEL, *supra* note 29, at 808 (Protecting a defendant is the most important function that a factual inquiry serves.).

95. *Id.*

96. *Id.*

97. *Id.; see also* Fine, *supra* note 77, at 620-21.

> One common plea bargain in Wisconsin is to reduce a charge of "operating [a] vehicle without [the] owner's consent," a two-year felony, to "joyriding," a nine-month misdemeanor, *even though* the car may have been damaged and return of the vehicle *un*damaged within twenty-four hours is an element of the misdemeanor charge.

Id. at 620 (footnotes omitted) (emphasis in original).

bargain is made by "fiddling" with the facts of the case.[98] For instance,

> in a jurisdiction with an offense of breaking and entering in the nighttime (a nonprobationable offense with a 15-year maximum) and an offense of breaking and entering in the daytime (a probationable offense with a 5-year maximum), a bargained plea to the latter offense may be tendered although the facts show that the crime occurred at midnight.[99]

In these situations, a defendant does not receive the punishment that is "deserved" for the crime committed.

Participation by a victim would provide a judge with more facts on which to base his or her decision whether to accept a plea. Even though examination of the defendant, the prosecution, and the presentence reports provides facts, recitation of the event by a victim will give a judge a better sense of what actually occurred.

> Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. *A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim.* A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.[100]

A plea should not be accepted when the facts regarding the alleged crime do not support the charge to which a defendant bargained. But even when the facts do support the bargained charge, it does not follow that a plea should automatically be accepted. This was the case in *Alford,* but *Alford* undermines the retributive theory of punishment by excluding a victim's psychic restitutionary interest and by hindering an offender's reconciliation to the community.[101] Even if a factual basis for a plea bargain exists, a plea should not be accepted if it does not provide "just" punishment for an offender's conduct. In other words, if the punishment called for by a plea bargain is too lenient, a judge should reject the plea.

2. Sentence Bargain

Where a plea agreement calls for the granting of sentencing concessions to a defendant, a judge may simply reject the plea if he or she believes

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98. Fine, *supra* note 77, at 621.

99. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1271 (7th ed. 1990) (citation omitted); *see also* People v. Foster, 225 N.E.2d 200, 278 N.Y.S.2d 603 (1967) (The defendant was charged with first-degree murder but pleaded guilty to attempted second-degree manslaughter. While attempted manslaughter is a legal impossibility, conviction was upheld because defendant sought the plea and agreed to it.).

100. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76-77 (1982) (emphasis added) (citation omitted).

101. *See supra* notes 78-85 and accompanying text; *see also* United States v. Gaskins, 485 F.2d 1046 (D.C. Cir. 1973). The court held in *Gaskins* that "it is an abuse of discretion to refuse a guilty plea solely because the defendant does not admit the alleged facts of the crime." *Id.* at 1048. *But see* United States v. Biscoe, 518 F.2d 95 (1st Cir. 1975); United States v. Cox, 923 F.2d 519 (7th Cir. 1991) (declining to follow the reasoning of *Gaskins*).

that the sentence is too lenient. Even if a judge decides to accept a defendant's plea, however, he or she may disregard the plea agreement by imposing a more severe sentence. A judge is given complete discretion as to the appropriateness of a sentence.[102] Therefore, an agreement between prosecutor and defendant regarding the sentence is not binding on a judge.[103]

3. Charge Bargain

Rejection of a charge bargain because it is too lenient on a defendant has been the subject of considerable debate.[104] *United States v. Ammidown*[105] is one of the leading cases in this area and has been criticized for limiting a trial judge's discretion to reject a plea bargain that reduces or drops a charge or charges. In *Ammidown,* the defendant was convicted of first-degree murder for conspiring with another person to kill his wife.[106] The defendant appealed his conviction on the ground that the trial court abused its discretion by rejecting the defendant's plea to second-degree murder.[107] The trial judge rejected the plea because the facts of the case indicated a second-degree murder charge was contrary to the public interest.[108]

The Court of Appeals for the District of Columbia reversed the trial court decision and declared that a trial judge may reject a prosecutor's decision to reduce or drop charges for only three reasons: (1) "fairness to the defense, such as protection against harassment";[109] (2) "fairness to the prosecution interest, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests";[110] and (3) "protection of the sen-

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102. *See* United States v. Jackson, 563 F.2d 1145 (4th Cir. 1977) (judge had complete discretion to reject a sentence bargain).

103. *Id.* A judge may reject a sentence bargain in two ways because there are two types of sentence bargains. These two sentence bargains are set forth in FED. R. CRIM. P. 11(e). The first type, described in Rule 11(e)(1)(B), allows a defendant to plead guilty in return for a prosecutor's promise to recommend a particular sentence or not to oppose defendant's request for a particular sentence. Once a prosecutor fulfills his or her duty to recommend or not to oppose a sentence, the bargain is satisfied. Rule 11(e)(1)(B) makes clear that a plea is not binding on the court. If a judge then rejects a plea and enters a different sentence, a defendant cannot withdraw his or her plea. Rule 11(e)(2).

The second type of plea bargain, described in Rule 11(e)(1)(C), allows a defendant to plead guilty in return for a specific sentence. In this type of plea, a defendant may withdraw his or her plea if a judge does not impose the specific sentence agreed to. Therefore, where a judge accepts a plea but then imposes a sentence different than the one provided for in the agreement, a defendant is allowed to withdraw his or her plea. Rule 11(e)(4).

104. *See generally* Welling, *supra* note 27, at 319-38 (discussing extent of a trial court's power to reject a plea bargain because it is too lenient on a defendant).

105. 497 F.2d 615 (D.C. Cir. 1973).

106. *Id.* at 617-18.

107. *Id.* at 618.

108. *Id.*

109. *Id.* at 622.

110. *Id.*

tencing authority reserved to the judge."[111] The effect of the *Ammidown* decision is that a judge may only reject a charge bargain when "the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it as an abuse of prosecutorial discretion."[112]

Since a judge must be able to reject a plea that is too lenient with respect to an offender's conduct in order to ensure just deserts, the *Ammidown* decision conflicts with a just deserts rationale. This conflict can be resolved either by overruling the *Ammidown* decision or by adding "fairness to a victim" as another factor for which a judge may reject a plea.

Ammidown's status as a leading case is suspect for a number of reasons.[113] First, the case was decided under Rule 48 of the Federal Rules of Criminal Procedure (the dismissal rule) instead of Rule 11 (the rule relating to acceptance of plea bargains).[114] Why the court went to such lengths to circumvent a Rule 11 analysis is not clear. However, it appears that a court may still use a Rule 11 analysis to dispose of a plea that a judge believes is too lenient.

Second, after *Ammidown,* Rule 11 was amended to give trial judges more discretion to reject plea bargains.[115] Further, the weight of other federal[116] and state[117] cases indicates that trial judges have broad discretion to reject plea bargains that are too lenient on a defendant.

Third, *Ammidown* does not reflect the reality of the plea-bargaining process. It makes a distinction between sentence bargains and charge bargains where, in practice, there is none. Especially since the new Federal Sentencing Guidelines, the primary significance of a charge bargain "plainly

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111. *Id.*

112. *Id.*

113. Welling, *supra* note 27, at 331.

114. *Id.* Rule 48 provides, in pertinent part: "The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate." FED. R. CRIM. P. 48(a).

115. Welling, *supra* note 27, at 331. Rule 11(e) states:

> (2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) [dismissal of other charges] or (C) [agreement that specific sentence is appropriate], *the court may accept or reject the agreement* . . . . If the agreement is of the type specified in subdivision (e)(1)(B) [prosecutor's recommendation, or agreement not to oppose defendant's request, for a particular sentence], the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

FED. R. CRIM. P. 11(e)(2) (emphasis added).

116. *See* United States v. Adams, 634 F.2d 830 (5th Cir. 1981); United States v. Bean, 564 F.2d 700 (5th Cir. 1977).

117. *See* People v. Ferguson, 46 Ill. App. 3d 732, 361 N.E.2d 333 (1977); State v. Lematty, 263 N.W.2d 559 (Iowa Ct. App. 1977); City of Akron v. Ragsdale, 61 Ohio App. 2d 107, 399 N.E.2d 119 (1978). *But see* People v. Matulonis, 60 Mich. App. 143, 230 N.W.2d 347 (1975).

lies in its effect on the sentence the defendant will receive."[118] In practice, charge bargains are used to circumvent a judge's authority in sentencing. Tying a court's hands in charge bargain situations implicitly gives a prosecutor authority over sentencing.[119] The *Ammidown* court itself recognized the importance of protecting judicial authority over sentencing by explicitly listing interference with judicial sentencing discretion as an appropriate reason for rejecting a plea.[120]

Even if *Ammidown* cannot be overruled or discredited, it can be reconciled with a just deserts rationale by adding "fairness to a victim" as a fourth factor in determining whether a charge bargain may appropriately be rejected. In *Ammidown*, the court stated that a judge may reject a plea bargain if he or she finds that a prosecutor failed to give consideration to factors that must be given consideration in the "public interest."[121] Because a victim's harm is one component in determining the level of punishment society believes is "deserved,"[122] including fairness to a victim as a factor in the public interest analysis would be appropriate. This would allow a judge to reject a plea bargain where it appears that a prosecutor did not sufficiently consider a victim's interests.

Once a plea agreement has been reached, a victim should be able to present to a judge his or her interpretation of what happened and what harm he or she has suffered. The additional information provided by a victim will enhance the quality of the decision rendered by a judge.

B. The Defendant

Victim participation in plea bargaining does not significantly affect any legitimate interest of a defendant in the criminal justice system. A defendant may have a number of reasons for wanting to avoid trial. For example, a defendant will seek the most lenient sentence, which may be more lenient than he or she "deserves." In order to accomplish this, a defendant will seek to minimize the incriminating information to which a prosecutor and a judge are exposed.[123] He or she may fear that a judge will impose a more severe sentence after hearing all of the details from the victims and witnesses than if a judge were exposed merely to a dispassionate recitation of facts from the lawyers.[124] However, a desire to obtain a sentence that is less than what is "deserved" is not a legitimate reason to exclude victim participation.

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118. W. LAFAVE & J. ISRAEL, *supra* note 29, at 800.
119. *See id.*
120. *Ammidown*, 497 F.2d at 622; *see supra* note 111 and accompanying text.
121. *Ammidown*, 497 F.2d at 622.
122. *See supra* note 20 and accompanying text.
123. Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85, 89 (1988).
124. Fine, *supra* note 77, at 623.

A defendant does have a legitimate interest in avoiding trial in order to obtain the lowest possible sentence in the range of applicable sentences. In these situations, a defendant does not avoid "just" punishment but rather seeks the least severe punishment that society has deemed "just" for his or her crime. Victim participation in the plea process may hamper this interest by increasing the likelihood that a defendant's plea will be rejected.[125] Although victim participation may make acceptance of a plea less likely, a defendant "has no right to have the court assess the plea bargain on less than the total amount of available information."[126]

A defendant also has a legitimate interest in avoiding vindictive conduct on the part of the prosecution.[127] A prosecutor may "raise the stakes" in order to obtain a guilty plea, but under *Bordenkircher v. Hayes,*[128] he or she may not "coerce" a defendant into accepting the plea. However, after *Bordenkircher,* the line between inducement and coercion is difficult to ascertain.

In *Bordenkircher,* the prosecutor "promised" to seek an indictment under the state's recidivist statute if the defendant would not plead guilty.[129] The Court held that this "promise" was not coercive and upheld the defendant's guilty plea.[130] Speaking for the majority, Justice Stewart declared that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation [by the prosecutor] so long as the accused is *free* to accept or reject the prosecution's offer."[131]

It is possible, however, for a prosecutor's offer to be so good that a defendant really is not "free" to reject the offer.[132] By offering excessive inducements, a prosecutor may effectively extort a guilty plea from a defendant. The Supreme Court recognized this possibility when it first examined the legitimacy of plea bargaining in *Brady v. United States.*[133] While approving the practice of plea bargaining, the Court in *Brady* cautioned against "the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty."[134]

Victim participation may help, rather than harm, the defendant's interests by guarding against vindictive prosecutorial conduct.[135] A victim can assist

125. Welling, *supra* note 27, at 312.
126. *Id.*
127. Blackledge v. Perry, 417 U.S. 21 (1974).
128. 434 U.S. 357 (1978).
129. *Id.* at 358.
130. *Id.* at 365.
131. *Id.* at 363 (emphasis added).
132. *See* Fine, *supra* note 77, at 621-23.
133. 397 U.S. 742 (1970).
134. *Id.* at 751 n.8.
135. In cases such as *Bordenkircher,* where the "threat" involves charges unrelated to a defendant's crime, victim participation would be ineffective in protecting a defendant against a prosecutor's vindictive plea practices.

a judge in obtaining all available information regarding the nature of a defendant's conduct. This information will enable a judge to ascertain what charges could be filed against a defendant. Knowledge of the nature of a defendant's conduct and the possible charges will help a judge determine the voluntariness of a plea bargain. If a plea appears to a judge to be unreasonably lenient compared to the nature of a defendant's conduct, a judge would have good reason to believe that a plea was not voluntary and thus could probe further into the circumstances surrounding a plea. This would hold especially true where a defendant pleads guilty while maintaining his or her innocence.[136]

C. *The Prosecutor*

The primary goal of a prosecutor is to "seek justice on behalf of society."[137] On a theoretical level, providing a prosecutor with additional information from a victim would further a prosecutor's ability to seek justice. In a criminal system based on retribution, "justice" is achieved by giving an offender his or her just deserts. Just deserts result when a punishment proportional to the seriousness of the crime is imposed.[138] Proportionality, however, is not an exact science in the sense that one single "absolute" punishment can be identified as "just." Proportionality is a result of society's experience and sense of morality. A proportional punishment is, therefore, defined in "terms . . . the particular society views as appropriate for the crime."[139] Society incorporates a victim's harm into its calculus of "justice." Thus, it follows that a prosecutor must seek to pursue a victim's interest in his or her quest for "justice on behalf of society."

Seeking justice, however, is not a prosecutor's only goal and, on a practical level, a prosecutor's goals often diverge from those of a victim.

> If the prosecutor's duty to achieve justice and not merely convictions is interpreted to include consideration of the victim's interests, then implementing victim participation through the prosecutor is theoretically

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136. This problem may be eliminated by simply not allowing guilty pleas without an admission of guilt. *See supra* notes 78-89 and accompanying text.

Plea bargaining does not encompass situations where the facts merit charge reductions, dismissals, or a lenient sentence. Fine, *supra* note 77, at 616. Plea bargaining exists only when the facts merit a more severe sentence, but the prosecutor lowers the severity of a charge or reduces charges in order to "buy" the defendant's guilty plea. "[I]f a case initially charged as 'first degree murder' is discovered to be, in reality, 'manslaughter,' reducing the charge to 'manslaughter' is *not* plea bargaining but justice." *Id.*

137. Welling, *supra* note 27, at 310; *see also* Henderson, *supra* note 3, at 980-81 n.211 (Under MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979), it is the duty of a prosecutor to seek justice, not just convictions.).

138. *See supra* notes 17-23 and accompanying text.

139. Hoffmann, *supra* note 4, at 249.

> consistent with the prosecutor's current role. However, on a practical level, the prosecutor's interests are often inconsistent with the victim's interests.[140]

One goal often noted by commentators is the swift disposition of cases.[141] This is the primary justification for plea bargaining.[142] Plea bargaining is supposed to facilitate justice by unclogging the courts and reserving judicial resources for cases that most merit trial.[143]

Prosecutors fear that giving victims a participatory role in the plea process will undermine this goal in two ways.[144] First, victim participation will result in fewer plea bargains, thus clogging the court system.[145] Second, allowing victims to participate in plea negotiations will disrupt and slow down the plea process.[146]

Evidence suggests, however, that prosecutors' fears are unwarranted. The claim that fewer pleas will be made is based on the assumption that victims demand only harsher prison sentences. However, research indicates that when victims recommend imprisonment they do so because they are unaware of alternative sentencing solutions such as restitution, community service, or other diversionary dispositions.[147] Also, victim participation does not result in increased sentence severity, delays, or expense.[148] In fact, victim participation may in some instances result in a quicker disposition of the case[149] or even reduced sentences and reduced use of imprisonment.[150] In sum, victim participation does not conflict with the role of the prosecutor in a retributive theory of punishment.

V. PROPOSED CHANGES TO THE PLEA BARGAIN PROCESS

The present plea bargain system does not succeed in achieving retributive goals because a victim's needs are not addressed. To better effectuate a retributive justice system, a number of changes can be made to the plea-bargaining process.

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140. Welling, *supra* note 27, at 347 n.247.
141. *Id.* at 310.
142. *See* W. LAFAVE & J. ISRAEL, *supra* note 29, at 767.
143. *See id.*
144. Welling, *supra* note 27, at 310.
145. *Id.*
146. *Id.*
147. Henderson & Gitchoff, *Using Experts and Victims in the Sentencing Process,* 17 CRIM. L. BULL. 226, 230 (1981).
148. Erez, *supra* note 23, at 25; *see* A. HEINZ & W. KERSTETTER, *Victim Participation in Plea Bargaining: A Field Study,* in PLEA BARGAINING 167 (1980).
149. *Cf.* Heinz & Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining,* 13 LAW & SOC'Y REV. 349, 364-65 (1979) (discussing the results of experimental pretrial conferences attended by the victim and the defendant).
150. A. HEINZ & W. KERSTETTER, *supra* note 148.

A. Plea Negotiations

1. Written Statement

Before a prosecutor makes a plea offer, he or she should be required to give a victim a written statement that clearly defines the proposed offer. The statement should include a description of what charges may legitimately be brought against a defendant and an explanation of why a prosecutor believes the proposed plea is appropriate. The statement should inform a victim of other sentencing options and diversionary dispositions for which a defendant may be eligible. Finally, the statement should provide a victim with the date, place, and time of a defendant's arraignment along with a telephone number where a prosecutor may be reached for questions. Preparing this statement would not unnecessarily burden a prosecutor. The statement would not need to be elaborate and could be produced easily in the course of business.

Once a prosecutor has given a victim the written statement and before he or she has presented the offer to a defendant, he or she should be required to consult with the victim. During the consultation, a prosecutor should describe the proposed plea offer and solicit any recommendations from a victim. Consulting with a victim avoids alienating him or her.[151] A prosecutor must take notice of a victim's concerns and make a good faith effort to address them.

2. Victim-Offender Reconciliation

As discussed in Part I, the just deserts theory of punishment dictates that the relationship between victim and offender be reconciled. The victim wants to find out reasons for the crime and therefore needs to be given the opportunity to ask the defendant questions. He or she needs to express anger to a defendant and discuss how the crime has affected his or her life. The victim must also be given an opportunity to forgive the defendant. In turn, a defendant needs the opportunity to acknowledge that his or her "actions have hurt another person, to ask forgiveness, and to try to make amends."[152] Our present plea bargain system does not facilitate this type of interaction.

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151. If only a written statement were required, a victim would likely view it as mere notification and believe that any concerns voiced would not alter a prosecutor's decision. *See supra* notes 72-75 and accompanying text.

152. D. VAN NESS, *supra* note 1, at 166.

> [C]rime had to be personalized and . . . the antagonists—victim and offender—should be brought together in the search for a reasonable disposition of the case. For government to penalize the offender for violating the law misses the real

Therefore, at some point before a plea agreement is reached, the victim and offender should be given an opportunity to meet. The meeting should be voluntary for both defendant and victim.[153] The purpose of the meeting would be to discuss the defendant's conduct and its effects on the victim and to structure a plea agreement to offer to a judge.

Once a plea agreement has been reached, the victim should not be able to veto it.[154] Prosecutors are given broad discretion in the charging decision.[155] Allowing a victim to veto a plea agreement he or she does not like effectively nullifies the prosecutor's charging discretion. However, this should not end the matter for a victim.

B. Plea Acceptance

When a final plea agreement has been reached, the plea must be submitted to a judge for acceptance. At this time, the victim should be given the right to state in writing or orally his or her recollection of the facts and why he or she does not like the plea agreement.

Granting a victim a right to communicate with a judge enables a victim to ensure that his or her interests are considered at each stage of the plea process. At a plea hearing a victim can try to persuade a judge of the merits of restitution. A victim's participation also allows a judge to receive all available information so that the most "just" disposition can be obtained.

CONCLUSION

Victims have been gaining many new rights in the criminal system. These gains have been attributed mainly to victims' desires for revenge or

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> point: The government, through laws, offers the vehicle to discipline those who impose upon the rights of their neighbors. But when government assumes the role of the wronged . . . then it depersonalizes the incident. The offender wronged a real, live person and only incidentally the faceless society as a whole. . . . Face to face, the victim explains the impact of the criminal act; that there is real personal and property loss.

Callow, *Crime and Consequence: When the Offender Is Forced to Get to Know His Victim Before Sentence,* 20 THE JUDGES' J. 34, 50 (1981).

153. D. VAN NESS, *supra* note 1, at 168. In programs similar to the one proposed in this Note, 68% of victims and offenders met. *Id.* Of those surveyed, 86% were positive about the outcome. *Id.*

154. If a victim and a defendant, with the help of a prosecutor, are successful at negotiating a plea, a victim will not seek to veto it. However, in cases where a prosecutor desires to accept a plea agreement over the objection of a victim, a victim should not have the power to nullify the agreement. The ultimate decision should be left to a prosecutor's discretion.

155. *See, e.g.,* Wayte v. United States, 470 U.S. 598, 607 (1985) (prosecutorial discretion in charging held to be "particularly ill-suited to . . . review"); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973) (discussion of court's reluctance to review charging decisions); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

retaliation. However, victim participation in the plea-bargaining process is appropriate under a just deserts theory of retribution. Victim participation in plea bargaining would protect a victim's interest in both financial and psychic restitution without encroaching on the interests of the traditional plea bargain parties—judge, defendant, and prosecutor.

The present plea bargain system undermines the retributive theory of just deserts by excluding considerations of a victim. The defects in plea bargaining can be cured and reconciled with just deserts retribution by (1) requiring a prosecutor to provide a victim with a written statement setting forth a proposed plea offer and other information relevant to a victim's case, (2) requiring a prosecutor to consult with a victim *before* a plea proposal is made to a defendant, (3) giving a victim and an offender an opportunity for reconciliation, and (4) giving a victim the right to be heard at a plea hearing.