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Hannah Williams[1]

I. INTRODUCTION

Undoubtedly, the history of our criminal justice system has been unkind to victims of crime.[2] This demographic, if acknowledged at all, would historically sit in our nation's courtrooms and watch as the criminal justice system happened to them.[3] Congress fundamentally altered the role of victims in 2015 when it enacted a statute granting victims a plethora of new rights.[4] Victims suddenly could confer with the state's attorney and rely on protections from the government against the accused.[5] Interspersed within victims' newfound rights is the right to be reasonably heard at any plea proceeding and the ability to reopen a plea if the defendant did not plead to the highest offense charged.[6]

This article is not intended to persuade the reader that the history and progress brought by Victims' Rights legislation brings more harm than benefits to the criminal justice system. Society should celebrate any progress that enables a portion of Americans to receive just treatment under the law after periods of historical neglect. For most of our time as a nation, victims have not had their rights specifically laid out in any legal format.[7] The steps taken by activists to make known the rights and desires of the victims of crime help to make a more just criminal system.

This does not mean that further change is not necessary. This article argues that without altering the depth of a victim's rights regarding the plea-bargaining stage of the proceedings, the guilty plea will be further misaligned from the compromise-focused and mutually beneficial nature of alternative dispute resolution (ADR).[8] Statistics show a lopsided adjudication preference with Ninety (90%) of all federal criminal proceedings generally,[9] and

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[1] B.A., Huntington University, 2020; J.D. Candidate, University of Missouri School of Law, 2023; Associate Member, *Missouri Journal of Dispute Resolution*, 2021-2023. I am grateful to Professor Rodney Uphoff for his insight, guidance, and support during the writing of this Note, as well as the *Journal of Dispute Resolution* for its help in the editing process. I want to thank my parents Nate and Amanda Williams for helping me get to a position where I can pursue my Juris Doctorate and add to the discourse of topics I am passionate about.

[2] *See* Jo-Anne Wemmers, *Victims' Experiences in the Criminal Justice System and Their Recovery from Crime*, 19 INT'L REV. VICTIMOLOGY 221, 222 (2013).

[3] *See generally History of Victims' Rights*, NAT'L CRIME VICTIM L. INST., https://law.lclark.edu/centers/national_crime_victim_law_institute/about_ncvli/history_of_victims_rights/ (last visited Feb. 16, 2022).

[4] *See generally* 18 U.S.C.A. § 3771.

[5] *Id.* § 3771(a)(1), (5).

[6] *Id.* § 3771(a)(4), (d)(5)(C).

[7] *See History of Victims' Rights, supra* note 3 (the instigator of the Victims' Rights Movement was the 1982 final report of the President's Task Force for the Victims of Crime).

[8] The rights referenced here are found in § 3771 (a)(4) and (d)(5)(C).

[9] John Gramlich, *Only 2% of Federal Defendants Go to Trial,* PEW RES. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-

Ninety-five (95%) of all criminal proceedings in the state of Missouri and Missouri's federal circuit are disposed of at the plea-bargaining stage.[10] Viewing plea-bargaining through the traditional structure of ADR[11] means that in every federal[12] and state case,[13] an extra non-neutral party is involved who is allowed to voice their opinion in a negotiation that should be between two equally powerful parties.[14] This should cause concern if the non-litigatory option for criminal proceedings is to be of the same nature as its sister option on the civil side. Even though plea-bargaining and traditional ADR negotiation are more mere sisters than twins, both should aim for a fairly negotiated, dually beneficial compromise.

Part II of this note lays out the foundational principles that govern ADR and, more specifically, negotiation. Part III sets forth an understanding of how plea-bargaining works and highlights its characteristics. Part IV walks through the few similarities and troubling differences between the two sister systems. Part V highlights the passions that stormed victim desires to the desks of legislators by discussing the history of the Victims' Rights Movement. Part VI spotlights the obstacles to justice that accompany a decision to allow another party to have a significant role in the plea-bargaining process. The article concludes by suggesting alterations that aim to allow a fair process for defendants while maintaining the rights of the victims.

II. PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION

In its most basic and broad form, the practices of ADR offer non-litigatory options for parties looking to settle disputes.[15] They allow for a more time-efficient and less burdensome[16] use of the court system which should, in turn, benefit those cases that require use of the court system in resolving their dispute.[17] Through its various modes of discussion-based resolutions,[18] ADR benefits the dueling parties by providing a more private, cost-

who-do-are-found-guilty/ (click the hyperlink in the opening paragraph titled "data collected by the federal judiciary" to see the data for this finding).

[10] U.S. SENT'G COMM'N, ANN. REP. FED. SENT'G STAT. (2020). Altogether, the 8th district adjudicated 4578/4694 (97.5%) of criminal defendants via plea bargain; Missouri state courts adjudicated 1590/1622 (98.0%) of criminal defendants via plea bargain: 917/925 (99.1%) in the E.D. & 673/697 (96.6%) in the W.D.

[11] The first Part of this article describes the traditional alternative dispute resolution standards. All specific information required for the reading of this article is provided within.

[12] 18 U.S.C. § 3771(a)(4), (d)(5)(C).

[13] Andrew Nash, *Victims by Definition,* 85 WASH. UNIV. L. REV. 1419, 1425 (2008) (all 50 states have passed victims' rights statutes, and 32 states have amended their constitutions to protect victims' rights).

[14] This analogy again references 18 U.S.C. § 3771 (a)(4) and (d)(5)(C). Both provisions essentially allow a victim to voice their opinion in how plea bargain negotiations and final output are handled.

[15] *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

[16] *See generally Alternative Dispute Resolution,* CORNELL L. SCH., https://www.law.cornell.edu/wex/alternative_dispute_resolution (last updated Nov. 2021).

[17] *See* Edwards, *supra* note 15, at 673.

[18] Mediation: A form of assisted negotiations where the parties hire a neutral third party whose goal is to help the two parties come to an agreement. The goal is to find a mutually acceptable resolution as early as possible

Judicial Arbitration: A similar three-party discussion with one of the parties being neutral to the issue, but the neutral third-party acts as a private judge. This private judge hears the discussions from both sides and makes a determination on the case followed by an award determination. This decision is binding on the parties.

effective, and sometimes more creative final agreement than its adjudicatory counterpart.[19] There is an air of compromise and mutual benefit that is apparent in the world of ADR, exemplified in the practice of negotiation.[20]

The beauty of negotiation is that it is not inherently a legal concept.[21] Laypersons young and old and from all walks of life use negotiation to work out deals and compromises with whom they are in constant contact.[22] Teenagers desiring more freedom negotiate with their parents about curfew hours. Co-workers at a fast-food restaurant negotiate about what it would take to have one of them cover the other's shift for the upcoming weekend. These scenarios occur daily for most people, only differing from negotiation in the legal field by the use of less formal attire and less explicit roles and functions.

Legal negotiation can also be a very simple practice. In its most basic form, it only comprises of two parties, just the attorneys for the parties in conflict, and reaches its conclusion once the parties decide to compromise or not compromise.[23] On the surface, the attorneys for the parties are pushing and pulling to a degree specified by the client to reach common ground and finalize an agreement to which both parties consent.[24] Just below the surface, however, the dynamics of bargaining power and an attorney's proficiency with negotiation tactics are at play.[25]

Another difference between the everyday negotiations we see and the ones that take place between attorneys on behalf of their clients is that there are more concrete procedures and roles in legal negotiation. Where an informal negotiation can happen in almost any context, an ideal negotiation under the principles of ADR requires: (1) the parties in conflict have a mutually acknowledged relationship; (2) there is an identifiable conflict; (3) the parties agree that this conflict is amenable through negotiation; and (4) both sides recognize the other as a legitimate negotiation partner.[26] When those features are present, additional fine-tuning mechanisms should also be present in order to make the negotiation smoother and more

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Med-Arb: A combination of Mediation and Arbitration. The two parties bring their cases before a neutral third-party and that party acts as both the mediator and the arbitrator. If the parties are able to come to a mutually acceptable resolution on some topics, but not others, the med-arbitrator will make a binding decision on any issue not finalized by the parties themselves.

BETTE J. ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE 4–8 (1993).

[19] Stephen D. Marcus, *Goals and Objectives for Alternative Dispute Resolution*, 2 J. PERFORM. CONSTRUCTED FACIL. 2, 5–7 (1988) (other benefits listed: timing/speed, damage control, finality, calming & compromising, having a knowledgeable decision-maker, issue-focused nature, user-friendly, fairness, limited discovery, and it is educational).

[20] ROTH, *supra* note 18 (". . . [ADR] . . . represents a willingness by parties to voluntarily invest time and energy in coming to terms with difficult issues, examining how disagreements arise, and then working together to amicably settle those differences.").

[21] *See generally What are Negotiation Situations?*, PROGRAM ON NEGOT. HARV. L. SCH., https://www.pon.harvard.edu/tag/negotiation-situations/ (last visited Feb. 16, 2022).

[22] *See generally id.*

[23] JAYNE SEMINARE DOCHERTY, THE LITTLE BOOK OF STRATEGIC NEGOTIATION 5 (2005).

[24] John Allison, *How to Approach Settlement Negotiations,* SMART LAW. (Mar. 12, 2019, 12:15 PM), https://www.nationaljurist.com/smartlawyer/how-approach-settlement-negotiations.

[25] *See* STEFAN H. KRIEGER & RICHARD K. NEUMAN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 303 (5th ed. 2015) (the aim of negotiation is to make an agreement on terms as favorable as possible to the attorney's client).

[26] DOCHERTY, *supra* note 23, at 20–21.

successful.[27] Those features include mutually accepted rules of behavior, shared norms of fairness, relative certainty that the parties in conflict have a shared future, and there is either a formal or informal institution that will enforce the agreement.[28] While it may seem that there are quite a few tedious details required for negotiation, the drastic difference in outcomes that follow from either adherence to or abandonment from those details make the tediousness of those details worthwhile.

Another important aspect of negotiation is determining the different negotiation styles employed by negotiating attorneys: "cooperative" versus "competitive." As evident by their respective names, one style tends to work *with* the other side more in reaching a final agreement while the other works *against* the other side and holds their client's position sternly in reaching an agreement.[29] A study[30] conducted in 1999 showed that 54% of "cooperative" negotiators were found to be effective[31] while the same could be said for only 9% of "competitive" negotiators.[32] While it is more understood today that negotiating styles fall more on a spectrum than this stated binary,[33] for the sake of clarity in the comparative analysis, the only acknowledged negotiation styes in this article will be "competitive" and the "cooperative."

III. PLEA BARGAINING

Plea bargaining is the process where, after determining what the defendant is charged with, the prosecutor might offer to lessen the charges or a more lenient sentence if the defendant agrees to plead guilty before the case goes to trial.[34] The most notable aspect of plea bargaining is that it is non-litigatory.[35] In its most simple form, the process and purpose of a criminal trial is to determine whether the defendant is guilty of the filed charges and if so, what the punishment would be for those charges.[36] Accepting a plea bargain and pleading

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[27] *Id.* at 7.

[28] *Id.*

[29] *See* Charles B. Craver, *The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions,* 12 CARDOZO J. CONFLICT RESOL. 101, 104 (2010).

[30] *Id.* at 105 (The surveyor asked attorneys from Milwaukee and Chicago to characterize other attorneys they had recently negotiated with as either "Competitive" or "Cooperative." The surveyor also asked them to indicate whether the attorney they identified was an effective, average, or ineffective negotiator. 64% of the attorneys were characterized as "Cooperative" while 36% were characterized as "Competitive").

[31] *Id.* (finding that 42% were considered average; 4% were considered ineffective).

[32] *Id.* (noting that 38% were considered average; 53% were considered ineffective).

[33] *Id.* at 106. (In this article, the original styles were divided into Cooperative/Problem-Solving and Competitive/Adversarial. Those categories are broken down further into a hybrid style referred to as Competitive/Problem-Solving, where the goal is maximizing the returns for one's client but doing it in a non-adversarial way).

[34] *See How Courts Work: Steps in a Trial – Plea Bargaining,* ABA (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related-_education_network/how_courts_work/pleabargaining/.

[35] For the purposes of this note, the word "non-litigatory" refers to the fact that cases that end in a plea bargain do not go to trial. *See generally* OFF. OF U.S. ATT'YS., *Justice 101: Plea Bargaining,* U.S. DEP'T. OF JUST., https://www.justice.gov/usao/justice-101/pleabargaining (last visited Feb. 16, 2022).

[36] *See generally* OFF. OF U.S. ATT'YS., *Justice 101: Trial*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/trial (last visited Feb. 16, 2022).

guilty to the charges eliminates the need for a trial. [37] The parties get to that point through negotiations between the prosecutor and the defense attorney. [38]

When a defendant agrees to a guilty plea, thus negotiating away certain liberties and freedoms, the State considers this agreement when it recommends a specific punishment to the judge.[39] That assumption should be warranted through the negotiations between the two attorneys, and the following discussion between the defendant and counsel.[40] Both of these important discussions occur before the projected start of the trial.[41] This means that both the prosecutor and the defense attorney have significant work to do in the early stages of the case.[42]

The attorneys for the state and the defense share few similarities when it comes to their roles in the process. The prosecutor, who is not representing an individual client but the state as a whole, must complete a preliminary investigation to determine the relative strengths and weaknesses of their case against a particular defendant.[43] After this analysis of the evidence, the prosecutor has the choice of not filing any charges,[44] dropping the charges and letting the defendant go, or if he or she decides that there is enough evidence that the case could be taken to trial, the prosecutor can conjure up what she believes to be an appropriate plea offer.[45] The defense attorney has a much different, and arguably heavier, role to fulfill. Their main objective is to make sure their client, the defendant, makes the best choice when deciding to either take their case to trial or to plead out.[46] In order to properly advise their client, the attorney should complete a few preparatory tasks. The first, and sometimes the most crucial task, is the initial client interview.[47] During the initial client interview, the attorney can learn valuable information about their client that could be helpful in gaining some leverage in the negotiation process or alternatively, learn something that takes pleading guilty completely off the table.[48] Additionally, part of the role of the defense attorney, in the plea negotiations and possibly at trial, is to humanize their client.[49] That task can seem like a daunting one depending on what the charges are against them, but it becomes even harder when, through a poor interview, the attorney only knows their client as the two-dimensional person who these charges are filed against.

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[37] *See generally Plea Bargaining, supra* note 35.

[38] *See generally id.*

[39] *See* U.S. DEP'T. OF JUST. & WILLIAM F. MCDONALD, GOV. DOC. NO. 7-1985, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 6 (1985).

[40] *See* Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining,* 99 IOWA L. REV. 2103, 2108 (2014).

[41] *See id.* at 2109.

[42] *See id.* At 2108.

[43] *See* U.S. DEPT. OF JUST. & MCDONALD, *supra* note 39, at 46.

[44] Jurisdictionally dependent.

[45] *See* U.S. DEPT. OF JUST. & MCDONALD, *supra* note 39, at 6 (eliminating weak cases or pleading out stronger ones creates less of a burden on the court system).

[46] Joy, *supra* note 40, at 2111.

[47] *See id.* at 2107–09.

[48] *See id.* at 2109 (Defense counsel failed to learn that by accepting a guilty plea, the defendant would be deported).

[49] Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach,* 2 CLINICAL L. REV. 73, 100 (1995).

The leverage aspect noted earlier comes in the form of mitigating circumstances. During the initial client interview, the attorney may learn of important characteristics that could make their client seem more sympathetic to a jury or help their case in some other fashion.[50] Similarly, after conducting this interview, the attorney could have a better idea of the possible lesser offenses that their client could be charged with.[51] Knowing this information gives the defense attorney additional leverage, especially if the case against the defendant is not as strong as the prosecutor may represent it to be.[52]

In conjunction with the client interview, the defense attorney also must conduct a preliminary investigation for reasons similar to the prosecution. He or she needs to determine the strength of the case against their client and learn what some of the weaknesses in the case are so they can attempt to expose those weaknesses in discussions or in trial.[53] The attorney does this through interviews of potential witnesses and thorough analyses of the provided discovery materials, including the forensic evidence gathered in the case.[54]

The defense attorney has the more burdensome of the two roles in this scenario due to a multitude of factors,[55] but significantly because of the potential consequences that could possibly affect their client. In addition to the loss of liberty and freedom that comes with pleading guilty to a crime, the defendant is barred from utilizing certain Constitutional rights. Once a defendant agrees to the plea deal, they waive their Sixth Amendment rights to a jury, to confront and cross-examine witnesses, to call their own witnesses, to testify on their own behalf, and to require the state to prove their guilt beyond a reasonable doubt.[56] While the defendant may be able to petition for post-conviction relief, it is unlikely he or she would be able to raise a direct appeal on their conviction and sentence.[57] There are major risks posed to the defendant no matter the direction the attorney advises them. When liberty is on the line, even the most experienced and resourced defense attorney will feel the pressure of the entire criminal justice system barreling towards their client.[58] A good defense attorney will make sure their client is well-informed and ready to take on a guilty plea, or in the alternative, trial.

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[50] *See* U.S. DEPT. OF JUST. & MCDONALD, *supra* note 39, at 69–70. (Common mitigating factors include: age, sex, race, marital status, social class, political or family connections, demeanor, history of employment, drug use, alcohol use, psychiatric problems, physical health problems, military service, their relationship to the victim, and publicity).

[51] Uphoff, *supra* note 49, at 104.

[52] *Id.* (lesser offense might be a good compromise).

[53] *See* Joy & Uphoff, *supra* note 40, at 2109

[54] *Id.*

[55] Most times, the state has a "head-start" when it comes to preparing its case. For example, sometimes the case may be brought to a defense attorney's attention years after the crime occurred.

[56] Joy & Uphoff, *supra* note 40, at 2106.

[57] *Id.*

[58] *See generally* Jeena Cho, *When Caring Costs You: Lawyers Can Experience Vicarious Trauma from Their Work,* ABA J. (Feb. 1, 2020, 1:15 AM), https://www.abajournal.com/magazine/article/when-caring-costs-you-lawyers-can-experience-vicarious-trauma-from-work ("[P]ublic defenders and criminal defense lawyers are at risk for vicarious trauma because '[they] see a multitude of trauma inflicted on our clients and their families by the criminal punishment bureaucracy.'").

IV. SIDE-BY-SIDE COMPARISON

This section will be broken down into similarities and differences between negotiation generally and plea bargaining. Importantly, the similarities between the two concepts tend to be on their common structure and procedures, whereas the differences lie in the actuality and reality of their practices. This variance allows the insertion of victims' rights into plea bargaining to tip the scales of justice away from defendants.

A. Similarities

Since negotiation and plea bargaining are both non-litigatory options, they share many outward similarities. They present themselves as the criminal and civil versions of one another, so many of the characteristics observed translate from criminal to civil discussions. One of those characteristics is a familiarity with the type of attorney on the other side.[59]

On the civil side, knowing whether the opposing counsel is a "cooperative" or "competitive" negotiator can help determine how an attorney will prepare. The criminal defense attorney should base their approach to negotiations on what they know about the prosecutor's personality, philosophy, trial ability and negotiating style.[60] These aspects, in both the civil and criminal contexts, can help an attorney predict the likely success of the negotiation or help them foundationally prepare for the possibility of pending litigation.[61]

The "motions" the attorneys take when interacting with their clients and with the opposing counsel during the negotiation are along the same vein.. During both the pre-negotiation and post-negotiation attorney/client discussion, the attorney must speak with candor about the likely outcomes of the case.[62] Because the decision to either accept or deny the negotiated offer is up to the client and not the attorney, the client must be presented with an accurate outlook on the case.[63] For a civil case, this could look like the attorney telling their client what the attorney knows about the opposing counsel and estimating how the negotiation will go. For a criminal case, through their preliminary investigation, the defense attorney might be able to predict a standard offer,[64] what that could mean for their client if the client accepts, and what the outcome might be if the client declines the offer and the case goes to trial.[65]

The alternative to the candor required when talking with a client is "bluffing" when negotiating with opposing counsel. Hiding a case's weaknesses has the obvious effect of making one's case look stronger; it is almost standard practice in civil negotiations.[66]

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[59] Uphoff, *supra* note 49, at 110.

[60] *Id.*

[61] *See id.* at 104. Knowing a prosecutor is eager to dispose of cases prior to trial could give the defense attorney more leverage in negotiations since the prosecutor isn't looking to take the matter to trial. Knowing that a prosecutor is a good trial attorney could make a negotiated plea a more attractive option.

[62] Joy & Uphoff, *supra* note 40, at 2110.

[63] *See id.*

[64] This assumption of a standard offer may come from an understanding of what the state has offered in the past for similar cases and the likelihood of what the judge will accept for their type of case.

[65] Joy & Uphoff, *supra* note 40, at 2110.

[66] *See* KRIEGER & NEUMAN, JR., *supra* note 25, at 347.

Regardless if it is standard practice on the criminal side, most prosecutor's do not disapprove of it, while some "avow their practices to bluffing, concealment, and telling half-truths."[67] As the word "bluffing" indicates, this is done when a prosecutor still attempts to negotiate a guilty plea when they know that their case is either very weak or there is no real case at all.[68]

Just as one can typically tell two sisters are related by the things they do and the way they look, plea-bargaining and civil negotiation draw their similarities from the outward characteristics and motions they present. However, just as mere sisters are different than twins, a deeper look into the true nature of plea bargaining and civil negotiation begins the analysis of their malignment.

B. Differences

The starkest differences between civil and criminal negotiations show up when discussing the reality of the two and how they play out in practice. This section combines many smaller features into one main overarching difference: power differential.

There are a multitude of ways a person can define "power"[69] in the context of a negotiation, but inherent in them all is the fact that when a party lacks power, their ability to achieve a positive outcome is severely diminished.[70] In most civil negotiations, both parties possess certain facts that give them some leverage (power) to move the discussion and the outcome in their favor.[71] This is often not the case in plea negotiations.

As discussed earlier, it is a part of the prosecutor's role to complete a preliminary investigation and determine what they think would be an acceptable sentence for the defendant to receive based on the evidentiary support in conjunction with the defendant's prior criminal record.[72] The defense attorney, though their investigation, can suggest possible lesser offenses or bring mitigating factors to the table. In the end, it is the prosecutor who wields the power to choose what sentence to present to the judge.[73] This power imbalance makes it difficult for both sides to mutually gain to the same degree. [74] In the criminal context, it might be understandable to not have both parties "mutually gain" to the same extent and to

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[67] U.S. DEP'T OF JUST. & MCDONALD, *supra* note 39, at 49.

[68] *See id.*

[69] KRIEGER & NEUMAN, JR., *supra* note 25, at 304 ("Power is the ability to coerce someone to do something he would not otherwise do.") ("[P]ower . . . is coercion without resorting to enforcement of legal rights."); PHYLLIS BECK KRITEK, NEGOTIATING AT AN UNEVEN TABLE: DEVELOPING MORAL COURAGE IN RESOLVING OUR CONFLICTS 47 (2002) ("[Power is p]ossession of control, authority, or influence over others; the ability to act or produce an effect . . .").

[70] *See* KRITEK, *supra* note 69, at 47.

[71] *See generally* KRIEGER & NEUMAN, JR., *supra* note 25, at 317 (During the initial client interview, the attorney learns what the end-goal is for the client and subsequently what facts the client possesses in order to bring about that result).

[72] *See* U.S. DEP'T OF JUST. & MCDONALD, *supra* note 39, at 46.

[73] *See Plea Bargain,* CORNELL L. SCH., https://www.law.cornell.edu/wex/plea_bargain (last visited Feb. 15, 2022).

[74] *See generally* Carrie Menkel-Meadow, *Toward Another View of Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754, 833 (1991).

have an unequal power distribution, but that truth does pull plea-bargaining away from its civil counterpart.[75]

Adding to this different power dynamic is the fact that, for many defendants, they do not get a choice when it comes to who their attorney is.[76] If they qualify for a public defender, they are assigned an attorney by the state.[77] Contrasted with civil negotiations, the parties in conflict get to choose their attorney, so there is a different sense of trust and comfort in the attorney/client relationship.[78] That almost immediate sense of trust and comfort comes much later, if at all, and at a much slower pace in the indigent defendant/public defender context.[79] In addition, when a defendant is being represented by an attorney they did not choose, and their liberty is on the line, the amount of pressure riding on the plea negotiation could be significantly higher than in the civil counterpart.

As alluded to above, for the defendants who are being represented by a public defender, the added pressures of the underfunded public defender's office weigh heavily in plea negotiations. The foundation laid in Part II details the roles and specific tasks of the prosecutor and the defense attorney;[80] however, those roles and tasks embody the ideal plea negotiation.[81] For both prosecutors' offices and public defenders' offices, the caseloads are large, the time is spread thin,[82] and the goal is to get through as many cases as possible. These unfortunate truths create a situation far from the ideal envisioned in Part II, and which pales in comparison to the prepped and confident negotiation on the civil side.

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[75] Phyllis Kritek explains the importance of this difference. In civil negotiations, an "uneven table" (as she calls it) might be inevitable due to negotiating strategies, but allowing it to remain without acknowledgement has serious effects on the legitimacy of the negotiation, specifically: "it keeps persons who are invited to the uneven table from accessing the opportunities presented. . . it limits the potential of the negotiator to succeed. People begin to see conflict resolution as just one more way of sustaining existing power structures." This explanation shows that this "uneven table" that is ever-present in plea-bargaining is incompatible with legitimate civil negotiation. Kritek, *supra* note 69, at 47.

[76] *See generally Indigent Defense,* AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/criminal-law-reform/public-defense-reform/indigent-defense (last visited Nov. 14, 2021) (defendants who cannot afford their own attorney are assigned counsel by the court).

[77] The fact that many public defenders' offices are overburdened with cases and have an overall lack of funding will be discussed later. However, it is important to point out here that the overburdened and undercompensated nature of public defenders adds to the lack of confidence between them and their clients. *See* Uphoff, *supra* note 49, at 80 ("A weary or frantic lawyer scrambling to cope with too many cases hardly inspires confidence in her clients.").

[78] *Cf.* Uphoff, *supra* note 49, at 80 (clients represented by appointed counsel frequently mistrust their attorney, aided by the myths and preconceptions of public defenders).

[79] *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1242 (1975).

[80] One should note that, on the topic of "roles and specific tasks of . . . the defense attorney," some commentators believe "current conceptions of the defense attorney's role are often more romanticized than real." *See id.* at 1180.

[81] *See, e.g.*, David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1734–35 (1993) (discussing a two studies: one completed in Phoenix which showed: 47% of defense attorneys entered plea agreements without interviewing any prosecution witnesses and 30% entered into plea agreements without interviewing any of the witnesses for the defense. Another study was completed in New York which showed: in homicide cases, public defenders conducted pretrial interviews of only 21% of witnesses and only 25% of their clients, and for non-homicide cases, those numbers dropped to 4.2% and 18% respectively).

[82] *See, e.g.*, *id.* at 1735 ("27% of public defenders spend less than 10 minutes with their clients, while 59% of them spend less than half an hour" with their client).

The historic relationship between plea bargaining and civil negotiations already presents significant differences that draw the former away from the principles that make negotiation a worthwhile alternative to adjudication.[83] This is an issue only if the two concepts are considered identical--as twins. As sisters, distinguishment could just be seen as a part of what makes them different. The criminal and civil law systems are not meant to be identical to each other. Prosecutors need to have different powers than defense attorneys because the entity the prosecutors are representing is different than a criminal defendant. A different kind of pressure is normal in criminal cases because the possible outcome is a loss of liberty instead of damages. These differences are not inherently dangerous. But those differences do inherently give less power to the defendant. Because of that, those differences can become dangerous when additional facets are added to the mix, such as victim input. The next section introduces this new facet.

V. VICTIMS' RIGHTS LEGISLATION

A. Historical Background

Americans understand that sweeping change is hard to come by without a substantial movement to show its urgency. The aptly named "Victims' Rights Movement" brought the concerns of crime victims to legislator's discussion tables.[84] The beginning of the movement sought to get financial compensation for victims of crime, but that goal waned when the major contributor of the compensation programs was defunded.[85] Luckily for the movement, the work done in its infancy created a significant amount of public awareness, which kept the movement from folding altogether.[86] The Movement's persistence was noted by then-President Ronald Reagan, which was the necessary momentum to finally passing legislation that addressed their concerns.[87] As with many movements before, the Victims' Rights Movement modeled their approach off of successful movements of the past, hoping to achieve their same success.[88]

The backdrop for the Victims' Rights Movement were four of the most important movements in American history: the Civil Rights,[89] Antiwar,[90] Law and Order,[91] and Women's Movements.[92] Some paved the way to give their hopeful changes any chance at

[83] *See supra* Part IV (B).

[84] *See generally* MARLENE YOUNG & JOHN STEIN, NAT'L ORG. FOR VICTIM ASSISTANCE, THE HISTORY OF THE CRIME VICTIMS' MOVEMENT IN THE UNITED STATES 5-6 (2004), https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pdf/historyofcrime.pdf.

[85] *Id*. at 5.

[86] *Id*.

[87] *Id.* at 6.

[88] *See* Steven Derene et al., *History of the Crime Victims' Movement in the United* States, *in* PARTICIPANT'S TEXT, 2007 NATIONAL VICTIM ASSISTANCE ACADEMY, TRACK 1 II-1, II-7-8 (2007), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.598.3276&rep=rep1&type=pdf.

[89] *See id.* at II-7-8.

[90] *See id.* at II-8-9.

[91] *See id.* at II-10-11.

[92] *See id.* at II-9-10.

being heard on a national level, while others had more of a direct influence on the trajectory of the Victims' Rights Movement.[93]

The initial passions possessed by victims' advocates could be traced back to the period of 1953-1969, known as the "Warren Court Era."[94] During this time in the American judicial system, the Supreme Court took strides to enhance and bolster the Constitutional rights of defendants.[95] Many victims' advocates understood these decisions to throw the criminal justice system out of balance and essentially remove them from the process.[96] Victims observed the outcomes of this era in the Supreme Court and demanded that they should have rights, as parties to the controversy, to be heard throughout the case's progression and notified of hearings pertinent to their case.[97] This anger over being neglected and seeing, in some cases, their abuser or assaulter be granted more leniency sparked the early stages of the Victims' Rights Movement.[98]

Victims' activists saw the various successes of the Civil Rights,[99] Antiwar,[100] and Women's Movements[101] and used them as a blueprint for their own. Many of the victims' advocates were either directly a part of or paid close attention to the Civil Rights Movement and saw how the "American minority" had voice against the actions the government took on their behalf.[102] The young Victims' Movement also compared itself to the Antiwar Movement because both were organically cultivated and questioned the government.[103] While the Antiwar Movement questioned the US's involvement in the Vietnam War, the Victims' Movement questioned the lack of aid and care the government gave to victims.[104]

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[93] *See* Derene et al*., supra* note 88, at II-7-8; *The Warren Court, 1953-1969,* SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/history-of-the-courts/warren-court-1953-1969/ (last visited Sep. 19, 2021).

[94] *Compare* Paul G. Cassell et al, *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges are Filed,* 104 J. OF CRIM. L. & CRIMINOLOGY 59, 63 (2014) *with The Warren Court, 1953-1969*, *supra* note 93.

[95] *The Warren Court, 1953-1969*, *supra* note 93. During this period of time, the Supreme Court held that: ex-servicemen could not be tried by court-martial for alleged service crimes; courts-martial may not try mothers, wives, or children of servicemen for crimes carrying the death penalty; a defendant should not have his right to appeal effectively taken from him for the sole reason that he cannot afford the necessary materials; if a defendant cannot afford an attorney, he will get one appointed to him; evidence gathered by a warrantless search is inadmissible in both state and federal courts. *Id.*

[96] *See* Cassell et al., *supra* note 94, at 63; Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. 835, 841 (2005); Derene et al., *supra* note 88, at II-6-7.

[97] Cassell et al., *supra* note 96, at 841; Derene et al., *supra* note 88, at II-6-7.

[98] *See* Cassell et al., *supra* note 94, at 63.

[99] Derene et al., *supra* note 88, at II-8.

[100] *See* Mark Engler, *Anti-War Movements, from Vietnam to Today,* MORNINGSIDE CTR. FOR TEACHING SOC. RESP. (Dec. 16, 2018), https://www.morningsidecenter.org/teachable-moment/lessons/anti-war-movements-vietnam-today.

[101] *See* Katie Johnson, *Top 10 Women's Movements over the Last 100 Years,* WINSUMMIT BLOG https://www.winsummit.com/blog/top-ten-womens-movements-over-the-last-100-years (last visited on Sep. 19, 2021); *see* Derene et al., *supra* note 88.

[102] *See* Cassell et al., *supra* note 94; Derene, *supra* note 88.

[103] *See* Derene et al., *supra* note 88.

[104] *See id.*, at 8, 11.

The phase of the Women's Movement set after the decision of *Roe v. Wade*[105] showed the leaders of the Victims' Rights Movement how victims[106] could ban together to bring their grievances to those in authority.[107] That concept went hand-in-hand with the beginning of the Law-and-Order Movement.[108] The Law and Order Movement sought to increase the rights of United States citizens in relation to criminal defendants.[109] While the Law-and-Order Movement adjusted well to the Women's Movement, it generally held an opposing view to that of the Victims' Rights activists.[110] Victims' activists responded by urging for the creation of victim and witness assistance programs that could be accessible at prosecutor's offices.[111] Near the end of the Law-and-Order Movement, then-President Reagan created the Task Force for Victims of Crime.[112] The Task Force issued a final report, concluding that in our current system, victims are suffering from a lack of protection from our justice system and changes need to be made.[113]

B. Subsequent Legislation

The same year the Presidential Task Force issued its final report, Congress passed the Victim and Witness Protection Act,[114] marking the first legislative action produced by the Victims' Rights Movement.[115] Over the next 15 years, Congress passed an additional five pieces of legislation with the goals of continuing to protect the rights of crime victims.[116] The

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[105] 419 U.S. 113 (1973).

[106] These were victims of rape and sexual assault in the context of the Women's Movement.

[107] *See* Derene et al., *supra* note 88, at 8.

[108] *See id.*

[109] *See id.* at 10.

[110] *See id.* ("Law and order supporters believed that … victims, once victimized, should be self-sufficient and not dependent on the government for assistance.").

[111] *See id.*

[112] LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, 114 (1982), https://www.ojp.gov/pdffiles1/ovc/87299.pdf.

[113] *Id.* ("[T]he [criminal justice] system has deprived the innocent, the honest, and the helpless of its protection . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be addressed.").

[114] An Act to Provide Additional Protections and Assistance to Victims and Witnesses in Federal Cases, Pub. L. No. 97-291, 96 Stat. 1248. This act demonstrates that the legislature understood that the services set out for victims who wished to be part of the justice process (such as transportation, child-care services, safe places to wait away from the victim, continued loss of property for trial purposes) and sought to "enhance and protect" the role of the victim. It amended a rule of criminal procedure to allow for a "victim impact statement" and set out specific protections from intimidation.

[115] *See* Cassell et al., *supra* note 94, at 843.

[116] (1) Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170. This act set out various rights for crime victims throughout the trial process. This act was later codified in Title 42 (Public Health and Welfare) of the U.S.C. instead of Title 18 (Crimes and Criminal Procedure).

(2) Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4820. The relation this act had to victims' rights was that it changed the date on the Victims of Crime Act of 1984 from "1990" to "1991". This legislation was also codified in Title 42 instead of Title 18.

(3) Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. This act set up a "crime victims' fund" and amended the Victims of Crime Act. This act was also not codified in Title 18.

1980s and 1990s legislation gave guidance to prosecutors about how victims should be treated during the process of a criminal trial.[117] While the legislation was a catalyst for change at the state level,[118] none of the acts were codified in Title 18 of the U.S. Code, essentially keeping them from the view of judges and attorneys at the federal level.[119]

The Victims' Rights Movement still felt it had work to do to overcome some of the shortcomings that surfaced with the prior legislation.[120] Their goal was to get an amendment passed in the U.S. Constitution.[121] After a lengthy process that ultimately led to the amendment not getting passed,[122] activists turned their time and attention to enacting a fully comprehensible federal statute: The Crime Victims' Rights Act.[123]

The shortcomings that plagued the ancestors of the Crime Victims' Rights Act were notified and corrected. Codified in Title 18, federal prosecutors will come face to face with the Act when determining how to treat the victims.[124] The Act's passage ensured other important facets of the Victims' Rights Movement such as stated remedies and funding for victims' services.[125]

The portion of the Act relevant to this article is as follows:

> A crime victim has the following rights: … the right to be reasonably heard at any public proceeding in the district court involving . . . plea . . .[126] the right to be informed in a timely manner of any plea bargain . . .[127] A victim may make a motion to re-open a plea . . . if . . . in the case of a plea, the accused has not pled to the highest offense charged.[128]
>
> Crime Victims' Rights 18 U.S.C. § 3771(a)(4), (9) & (d)(5)(C) (2015).

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(4) Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No 104-132, 110 Stat. 1214. Along with deterring terrorism, this act sought to seek justice for victims by providing for an effective death penalty. This act was not codified in Title 18.

(5) Victim Rights Clarification Act of 1997, Pub. L. No. 105-6, 111 Stat. 12. This act amended a provision in the criminal code to allow crime victims to attend and observe trial. While this amendment was codified in Title 18, it is still characterized as "proposed legislation."

117 *See* Cassell et al., *supra* note 94, at 844.

118 Nash, *supra* note 13.

119 Cassel et al., *supra* note 94, at 845.

120 *See id*.

121 *Id.* at 848. The proposed amendment was intended to "restore, preserve, and protect … the practice of victim participation in the administration of criminal justice." *Id.* Its core principles were: (1) the right to notice of proceedings, (2) the right to be present at the proceedings, (3) the right to be heard, (4) the right to notice of the defendant's release or escape, (5) the right to restitution, (6) the right to a speedy trial, and (7) the right to reasonable protection. *See id.*

122 *See id.* at 849–50.

123 *See id.* at 850.

124 *See id.*

125 *See* Cassell et al., *supra* note 94.

126 Crime victims' rights, 18 U.S.C. § 3771(a)(4).

127 *Id.* § 3771(a)(9).

128 *Id.* § 3771(d)(5)(C).

It is worth noting that these provisions, and the corresponding provisions in the Missouri statute and constitutional amendment, do not give the victim a veto power.[129] The victim is not granted the right to have the final say in determining what plea should be offered or accepted.[130] However, these provisions allow the crime victim to still have an influential role in the plea process.[131] Simply put, the victim is no longer a passive observer of the litigation; they are now an active player in the game. The next section of this article proposes that these rights should be modified to make plea negotiations a more balanced procedure between the victim and defendant in alignment with the principles of ADR.

VI. ANALYSIS

The provisions in the Crime Victims' Rights Act,[132] Missouri state statute,[133] and state constitutional amendment[134] that give conferring and suggesting power to victims are the only parts of their respective sections deserving of critique. Provisions which allow for a party to flex their rights at the expense of the defendant should not be adopted without further questioning. There should be a middle ground. Understanding why the legislature originally did not allow for a veto power could aid in the search for that middle ground.

A. Rationale for the Limitation of the Victim's Power

The criminal justice system does not want to give too much power to private actors.[135] There is almost unanimous agreement that allowing a private party to have a veto power in plea negotiations would put private interests before public interests.[136] Whether the reason is to make sure the defendant gets the sentence the victim thinks they deserve,[137] or because the victim wants their day in court,[138] the private desires of the victim are not desires society should choose to herald above public necessities.[139]

This understanding of *why* legislators set victims power limitations where they did could give insight into what might be a feasible alteration to the statute. If legislators knew

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[129] *See generally Victim Input Into Plea Agreements, Legal Series Bulletin #7,* OFF. FOR VICTIMS OF CRIME (Nov. 2002), https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html.

[130] *See id.*

[131] *See id.*

[132] 18 U.S.C. § 3771 (a)(4), (d)(5)(C).

[133] Rights of Victims and Witnesses—Written Notification, Requirements, MO. REV. STAT. § 595.209.1(4) (2016) ("The following rights shall automatically be afforded to victims of dangerous felonies: For victims, the right to confer with . . . the prosecutor . . . regarding guilty pleas. . .").

[134] MO. CONST. art. I, § 32, cl. 2. (Crime victims, as defined by law, shall have the following rights, as defined by law: Upon request of the victim, the right to be . . . heard at guilty pleas . . .).

[135] *See generally* Nita Mazumder, *Defining Public Interest Law,* UNIV. OF MICH.: UNIV. CAREER CTR., https://careercenter.umich.edu/article/defining-public-interest-law (last visited Nov. 14, 2021).

[136] *See* Michael O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines,* 91 MARQ. L. REV. 323, 323 (2007).

[137] The fact that the victim is not truly a party to these negotiations or to the case itself makes this an even more important limit on their rights. The Prosecutor represents the state as a whole, not the victim as an individual.

[138] *See, e.g.*, Robin L. Barton, *The Role of Victims in Plea Bargaining,* THE CRIME REP. (Mar 5. 2012), https://thecrimereport.org/2012/03/05/2012-03-the-role-of-victims-in-plea-bargaining/.

[139] *See id.*

they did not want to grant an excess of power to private citizens, then appealing to that virtue in an attempt to restructure the statute could lead to success. The fact that victims lack power to steer the negotiations does not negate the effect their conferring and suggesting powers have on the practice of plea bargaining.[140]

B. Effects on Plea Bargaining

As noted in section IV of this article, even though plea bargaining is essentially the criminal-law version of ADR's negotiation, there are some key differences that distinguish the former from the latter.[141] The distinguishing factors are exacerbated when combined with the rights the legislation discussed in this article grants to victims. This section combines all the distinguishing factors into two overarching problematic effects: added complexity and assumed causation.

a. Added Complexity

Adding an extra party to a negotiation makes for a much more complex situation.[142] In civil negotiations, the party's best alternative to a negotiated agreement (BATNA)[143] and suggested offers must be reanalyzed far more often when additional parties are added to the mix.[144] This complexity exacerbates the already troublesome and significant power differentials inherent in plea bargaining.[145]

Literature suggests that the circumstances of civil negotiation, which are less influenced by differences in power than criminal negotiations,[146] can be affected in this way; it follows that the effects on the criminal side would be much more substantial. A clear example of this is seen on the face of the noted victims' rights provisions.[147] When a victim confers in plea agreements,[148] he/she enters the sphere of influence of the prosecutor, even though they are not granted an explicit veto power. Through conferring, the prosecutor should obtain the views of the victim regarding the proposed plea.[149] Being able to express their views on the proposed plea while being in the sphere of influence of the prosecutor allows for the already present power dynamic to be exploited even further.

Suppose the prosecutor learns, through their mandatory conference with the victim, that the victim is resentful towards the defendant and desires the prosecutor to be cutthroat

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[140] *See generally* Nash, *supra* note 13, at 1436–37. (suggesting that the goal of the Victims' Rights Movement was to make the criminal justice system morally responsive to victims).

[141] *See supra* Part IV (B).

[142] *See What is a Multiparty Negotiation?,* HARV. L. SCH. PROGRAM ON NEGOT., https://www.pon.harvard.edu/tag/multiparty-negotiation/ (last visited Nov. 14, 2021).

[143] This is essentially a party's bottom line. Negotiations might get to a point where one side would rather take their BATNA (go to trial, for example) instead of continuing to negotiate.

[144] *See* HARV. L. SCH. PROGRAM ON NEGOT., *supra* note 142.

[145] *Id.*

[146] *See supra* Part IV Section B.

[147] 18 U.S.C. § 3771(a)(4), (d)(5)(C); MO REV. STAT. § 595.209; MO CONST. art. I, § 32, cl. 2.

[148] 18 U.S.C. § 3771(d)(5)(C); MO. REV. STAT. § 595.209.1(4); MO. CONST. art. I, § 32, cl. 2.

[149] *See* OFF. FOR VICTIMS OF CRIME, *supra* note 129.

and merciless in their prosecution of the defendant. Even though the prosecutor is representing the state, and not expressly the victim, it is not unreasonable for the prosecutor to subconsciously factor the victim's desires into their proposal to the defendant. The victim is a third person indirectly influencing the plea discussion's most powerful party.

Consequentially, that exploitation puts the defendant's substantive due process rights at risk.[150] Both the Fifth[151] and Fourteenth Amendments[152] grant the right to due process[153] to every U.S. citizen. Much is written about the effects of plea bargaining on a defendant's procedural due process,[154] but it is the protection from the government that is in danger here. Injecting a third party into the negotiating dynamics of a plea consideration deprives a defendant their substantive due process rights. [155] When the government passes a law that allows for such a power differential, the courts should have the freedom to limit the effect of its enforcement on due process grounds.[156]

b. Assumed Causation

The definition of "victim" in the statute establishes that a person becomes a "crime victim" when the fact finder decides a defendant commits a federal offense.[157] Stating the defendant victimized a person is improper until adjudicating the defendant as guilty through a trial or plea.[158] That is not to say definitively that the complaining witness has not been victimized by someone. It is just improper to say, at this stage of the proceedings, that specifically it was the defendant who victimized them. This sentiment is becoming more common as some judges are ordering the word not be used during the trail when the issue is brought up during pretrial hearings.[159]

A response to this might be that the word "victim" is a legal status term that denotes the type of involvement that person is able to have in the litigation.[160] While the term "victim"

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[150] *See generally Constitutional Due Process,* PRICE BENOWTIZ: MD. CRIM. DEF. LAW., https://maryland-criminallawyer.com/constitutional-due-process/ (last visited Nov. 14, 2021).

[151] U.S. CONST. amend. V, cl. 4.

[152] *Id.* amend. XIV, § 1.

[153] BENOWITZ, *supra* note 150 ("Procedural Due Process refers to the process used to try and convict defendants accused of crimes . . . [S]ubstantive Due Process is a principle allowing courts to prevent government interference with fundamental rights.").

[154] *See*, *e.g.*, Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism,* 57 WM. & MARY L. REV. 1505, 1516 (2016).

[155] *See generally* U.S. CONST. amends. V, cl. 4, XIV, § 1.

[156] *Cf.* BENOWITZ, *supra* note 150.

[157] 18 U.S.C. § 3771(e)(2)(A) ("The term 'crime victim' means a person directly and proximately harmed as a result of the commission of a federal offense . . .").

[158] *See Use of the Term "Victim" in Criminal Proceedings,* NAT. CRIME VICTIM L. INST. NEWS, 2009 (updated 2014), at 1 ("While 'victim' is a legal status that does not have any relationship to a defendant's guilt or innocence, courts are often hesitant to permit the use of the term 'victim' during trial. This hesitancy stems from a concern that the term 'victim' conclusively states a crime has occurred; and, therefore, that its use is prejudicial, and violates a defendant's constitutional due process right to a fair trial.").

[159] Dale Harris, *A Judge's View: Avoiding the term "victim" helps ensure fair trials,* DULUTH NEWS TRIB. (Nov. 2, 2021, 9:00 AM), https://www.duluthnewstribune.com/opinion/columns/a-judges-view-avoiding-the-term-victim-helps-ensure-fair-trials.

[160] *Id.*

is understood to be a legal status term, thus granting them specific rights, the qualifications required to be deemed a "victim" are not met at the plea-bargaining stage. The person must have been harmed "as a result of the commission of a federal offense."[161] Until the defendant is either found guilty by a jury[162] or accepts a plea of guilty, the defendant is deemed innocent of any crime they are charged with.[163] Considering a person to be a "victim" at this stage of the proceedings questions this pillar of our justice system.[164]

It also might be true to say that acceptance of a plea deal always assumes causation. In the acceptance of a plea bargain, the defendant typically pleads guilty[165] without having the prosecutor show evidence to a jury that would prove causation. However, the assumption of causation in that scenario occurs at the time of acceptance. When the process of configuring a plea allows conferring and suggesting power, the court assumes causation prior to the declaring of guilt. Allowing this takes fundamental rights away from the defendant and gives those rights to a party who has not yet met the qualifications of their legal status.

The noted powers granted to victims through legislation passed on behalf of the effort of the Victims' Rights Movement deepen the already muddy waters of plea bargaining. The practice of plea bargaining is already distinct from the traditional ADR method, and those distinctions are magnified when influenced by a handful of those rights granted to victims.[166] If one of the goals of plea bargaining is to utilize a successful dispute resolution tactic found in civil cases, the current method distances it from the negotiation model. Finding the solution that still emphasizes the necessary rights for victims without removing the fundamental rights granted to criminal defendants, what one might say is the middle ground, is crucial to the protection of both parties.

c. Suggested Alterations

The most direct, but also most intrusive alteration would be to eliminate the provisions in the statute that allow victims of crime to have a substantial part in the plea-bargaining process.[167] Limiting the victims to notification, reasonable protection, timely information, and resolution of their case until there is a causal link associated between their victimization and the defendant would, essentially, extinguish every issue raised in this article. Put differently, not allowing a victim a role in the plea-bargaining process removes the

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[161] 18 U.S.C. § 3771(e)(2)(A).

[162] Or judge if a bench trial.

[163] *See* Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining,* 57 WM. & MARY L. REV. 1343, 1373 (2016) ("[The defendant] does have a legal and moral right to a factually reliable adjudication of guilt.").

[164] *See* Michelle Mark & Jake Epstein, *Judge in Kyle Rittenhouse case explains why he wouldn't let prosecutors call the men who the teenager shot "victims,"* INSIDER (Nov. 17, 2021, 11:33 AM), https://www.insider.com/kyle-rittenhouse-judge-explains-why-proseuctors-couldnt-say-victims-2021-11.

[165] *See, e.g.*, Micah Schwartzbach, *What Does Pleading "No Contest" Mean?* NOLO, https://www.nolo.com/legal-encyclopedia/what-pleading-guilty-contest.html (last visited Nov 14, 2021).

[166] *See supra* Part IV (B).

[167] MO. CONST. art. 1 § 32, cl. 2; 18 U.S.C. § 3771(a)(4), (d)(5)(C); MO. REV. STAT. § 595.209.

added complexity present in three-party discussions[168] and decreases the chances for a premature inference of guilt.[169]

Additionally, analyzing the added complexity and the assumed causation accompanying the provisions creates an argument that directly conflicts with the rationale for not allowing victims' a veto power.[170] Allowing a victim to have a say in the plea-bargaining process still puts the desires of private actors above the desires of the public at large. The alleged legislative intent of the federal statute[171] suggests that regardless of its enactment, society still supports the idea that public interests are the driving force of the criminal system, not private ones. If that was the reason victims were not given limitless power to begin with, the argument for alteration has a likelihood of success.

The difficulty with this alteration, other than the ones inherent in changing a statute, is that this option restricts victims. An ideal solution would be able to empower victims without removing defendant protections. While this is not an ideal solution, it is the most imminently feasible one. The other suggestions involve expansive criminal justice reform, which is a slow-moving process. Altering a statute is not greased lightning but contrasting statutory edits with the sweeping change of reform, it is a process that could get to the middle ground the fastest.

As this article discusses, the imbalance between the two attorneys creates a major problematic difference between civil negotiation and criminal plea bargaining. Without a change in the imbalance, the road to a fair shake between victims and defendants remains bumpy and difficult. Increasing the resources allocated to both parties to aid them in the completion of their preparatory tasks while decreasing the number of criminalized offenses in general pair well in addressing this issue. Solutions directed at the broader issue of our criminal justice system also indirectly affect the plea-bargaining issues raised in this article.

Although toeing the line of being overbroad, the benefits of this change cannot be overstated. In the United States today, there are more than 4,500 different criminal offenses a person could commit, ranging from violent offenses to petty drug crimes, all the way down to unintentional actions.[172] This is one of the key factors that leads to Missouri public defenders having an average caseload of 240 cases per defender.[173]

When an attorney is responsible for the representation of 240 defendants, it is hard to fathom that they can prepare for plea negotiations to the same extent as a civil attorney. If our society can make a turn and shrink the number of criminalized offenses, public defenders will see a decrease in their caseload, and thus be better able to prepare for an important plea negotiation. How does this affect Victims' Rights legislation? By lowering the number of cases held by a defense attorney, the pressures that are amplified by the addition of the victim to the negotiation process decrease. With less of a burden caused by the enormous caseload,

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[168] *See supra* Part VI (B)(a).

[169] *See supra* Part VI (B)(b).

[170] *See supra* Part VI (A).

[171] *See supra* Part VI (A).

[172] *Overcriminalization,* THE HERITAGE FOUND., https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization (last visited Nov 25, 2021).

[173] John Yang & Frank Carlson, *Missouri Public Defenders are Overloaded With Hundreds of Cases While Defendants Wait in Jail,* PBS NEWS HOUR (May 2, 2018, 6:35 PM), https://www.pbs.org/newshour/show/missouri-public-defenders-are-overloaded-with-hundreds-of-cases-while-defendants-wait-in-jail.

the defendant can retain more protection while not taking away any of the rights recently granted to the victim.[174]

Similarly, the issues attached to the conferring and suggesting power of the victim can be neutralized through reforming the cash-bail system. Low-income defendants can wait in jail cells for weeks or months in anticipation of their trial if they cannot afford to pay the bail amount set by the judge.[175] In addition to the other injustices wrought by the current cash bail system, the pressure to accept a plea deal increases when the defendant has already been incarcerated during the waiting period.[176] Accepting a moderate prison sentence with the possibility of parole does not sound like the worst possible outcome for the defendant when they have already been separated from their loved ones for an indefinite period of time because the defendant cannot afford bail. In fact, accepting that plea deal might sound like the best option for getting out of confinement, no matter if the defendant knows they're innocent.[177]

Reforming the cash bail system to make it so that more defendants would be able to spend the time waiting for their trial with their families neutralizes the issues attached to Victims' Rights Legislation because defendants would have a more realistic choice against accepting a plea bargain. The mental turmoil a defendant goes through while sitting in a jail cell because they cannot afford to buy their freedom[178] is another factor that adds to the power differential analyzed throughout this article.[179] Giving more rights and dignity to the defendant and granting more acknowledgment to the notion of their presumed innocence while not limiting the rights offered to victims would be a win-win for both persons.

VII. CONCLUSION

Our nation is filled with groups who were forced to interact with a criminal justice system not designed to work for them. Victims are one of those groups, and those groups deserve reform. Reform tends to be born of passion. While that characteristic of reform is beneficial for starting the change, it can subsequently push reform away from the central area

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[174] In addition, the victim will benefit from a shorter turnaround time for trial. If public defenders have a smaller caseload, that would generally mean that less cases will clog up the court system at any given time. The process of expediting the trial process shrinks the amount of time a victim or witness would need to essentially "put their life on hold" in order to participate and prepare for trial.

[175] *See* Vanessa Taylor, *How the Cash Bail System Criminalizes Poverty and Amplifies Inequality,* MIC (Mar. 3. 2021), https://www.mic.com/impact/what-is-cash-bail-why-is-it-so-problematic-64100036.

[176] *See generally id.* (explaining many of the other substantive issues that accompany the current cash bail system).

[177] *See id.* (describing how some people may take plea deals they might not otherwise accept just so they can go home).

[178] *Id.* ("Essentially, cash bail is the concept of buying a person's freedom[.]").

[179] *See supra* Part IV (B).

of compromise, likely making its result either polarizing[180] or detrimental to another societal group.

Even though the steps taken by the Victims' Rights Movement fall into the latter category, all hope is not lost. The majority of the benefits granted to victims through this movement were conceived through an impressive combination of passionate advocacy and a landing spot in the middle ground. There is no reason to think that future adjustments to this legislation or to the criminal justice system would not allow victims and criminal defendants to exercise their rights without being in direct conflict with each other. In the land where we declare to have "liberty and justice for all," that should not just be allowed, it should be expected.

[180] *See generally*, Randy Petersen, *Why is it so Hard to Reform Criminal Justice?*, RIGHT ON CRIME (May 10, 2019), https://rightoncrime.com/2019/05/why-is-it-so-hard-to-reform-criminal-justice/. This is tied specifically to policing reform. Either side of the political spectrum carries different ideals on what the police should and should not have the power to do. No matter what either side proposes, due to the polarized nature of our pollical system, the other side will likely object to the idea.