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Dana Pugach

Michal Tamir

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Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements

Dana Pugach and Michal Tamir***

I. INTRODUCTION

Victims' limited ability to compel public prosecution or to influence the terms of plea bargains are undoubtedly among the factors contributing to the entrenched position of plea bargains.¹ The 2004 Crime Victims' Rights Act (CVRA)² has given crime victims "the right to participate in the system."³ Specifically, it has conferred standing onto victims and granted victims the right to express their opinion about plea bargains in court.⁴ Further, the CVRA allows victims to file for a nondiscretionary mandamus writ when their rights have been revoked.⁵ Filing this writ could lead to voiding a plea or a sentence, albeit not to a retrial. How could such a potentially explosive provision – which has been at the core of victims' rights advocacy and scholarship – go under the radar of the vast scholarship analyzing the current situation of plea agreements? This article explores the importance of victims' participation in plea bargains, analyzes

* Associate Professor, Ph.D.; LL.M.; LL.B., Ono Academic College, Israel.

** Associate Professor, LL.D.; LL.M.; LL.B., The Academic Center of Law and Science, Israel.

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1. Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. OF COMP. L. 717, 717 n.2 *2006) (mentioning the statutes giving victims the right to participate in plea negotiations).

2. Crime Victims' Rights Act, Pub. L. No. 108-405, Title I, § 102(a), 118 Stat. 2261 (codified as amended at 18 U.S.C. § 3771 (Supp. I 2006)) [hereinafter CVRA].

3. 150 CONG. REC. S4237, S4263 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein), <https://www.congress.gov/crec/2004/04/22/CREC-2004-04-22-senate.pdf>.

4. 18 U.S.C. § 3771(a)(4) (2006).

5. The statute, the constitutional amendment efforts that preceded it, and a review of state constitutions, are discussed in Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. REV. 255, 350–54 (2005); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 4 UTAH L. REV. 861, 865–70 (2007).

the obstacles to its fulfillment, and suggests a way to overcome at least some of its major hurdles.

In recent years, the criminal justice system has changed dramatically in numerous respects. First, plea agreements have grown to become the rule in the criminal justice system (CJS), rather than trials.⁶ Ultimately, the courts have started to realize the importance of regulating pleas, in as much as defendants' rights were concerned.⁷ Second, victims' rights have been recognized and enshrined in a growing body of legislation, from state constitutions to federal laws, including far-reaching participation rights in pleabargaining.⁸ Due to the dominance of plea agreements in the criminal justice process, the importance of victims' rights in plea agreements has become pivotal. The more prevalent plea agreements are, the more relevant they are to the victims' lives, rights, and the fulfillment of those rights.

While victims' rights scholarship has emphasized this right, the ample literature and case law regarding plea agreements have largely ignored the victims' situation in plea agreements. This is true for both before the enactment of the 2004 CVRA and after it.⁹ Pleas have become more visible, but the victims still remain hidden. Despite criticism directed at the control of prosecutors' and defendants' control over the process, victims' involvement has seldom been discussed as a remedy. Notable examples of referring to victims' rights under a general assessment of the CJS include Fletcher's seminal book from 1995¹⁰ and Bibas' more recent call to include victims in the process.¹¹

Furthermore, Supreme Court decisions that started shaping plea agreements have focused on defendant's rights, but in doing so, they

6. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485-86 n. 13 (2010). Statistics of the change between 1945 and 2010: *Sourcebook of criminal justice statistics Online*, Table 5.22.2010, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>; Mike Work, *Creating Constitutional Procedure: Frye, Lafler, and Plea Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 458 (2014); for a comparative brief review, see Oren Gazal-Ayal & Limor Riza, *Economic Analysis of Plea-Bargaining and Prosecution*, CRIMINAL LAW AND ECONOMICS (N. Garoupa ed., Edward Elgar Pub.), June 29, 2009, at 148-49; In 1995, Fletcher commented that 90 percent of the cases were disposed of consensually, without trial.

7. For history and analysis see, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011).

8. For more information on the ascendance of victims' interests, see Douglas E. Beloof & Paul G. Cassell, *The Crime Victims' Right to Attend the Trial: The Reascendent National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005).

9. See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412 (2003) (criticizing Bibas' stance).

10. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 189 (Addison Wesley Pub., 1995).

11. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 152-153 (Oxford U. Press, 1st ed., 2012) (discussing the benefits of including victims in plea agreement negotiations in general terms).

ignored victims and their statutory rights.¹² It may be presumed, then, that the potentially revolutionary statutory victims' rights have not been exercised by many victims, and that the right to file for mandamus has not proved to be the anticipated effective means of ensuring compliance it was expected to be.¹³

This article identifies the common ground between two bodies of legal thinking — the vast literature analyzing and criticizing plea agreements and the research concerning victims' rights. The article begins by offering justifications for victims' rights participation in plea agreements, which can be based on intrinsic as well as instrumental arguments. These justifications are broadly classified into two categories: the benefit of participation to the victim and the benefit to the society and the CJS. Consequently, victims' participation will be advanced in this article as a remedy for many of the ills identified by the critics of plea agreements. Although such strong justifications may well lead to a call for a major legal change, which reflects a strong governmental duty to victims, this article stays within the bounds of the current legal situation.¹⁴ The article continues by suggesting solutions to the possible structural reasons for the failure of this right to be materialized.

The methodology embodied in this article utilizes nudge theory, which involves choice architecture, and has rarely been applied to criminal law. Behavioral psychology literature recognizes that the framework in which an individual confronts a decision can significantly influence her decision. Nudge theory fits within this framework. A nudge is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing people's freedom of choice.¹⁵ We claim that the vast discretion allocated to the repeat players in the CJS, on the one hand, and the time constraints that make the players resort to the default decisions, on the other hand — make the nudge theory particularly suitable to the framework of plea bargains. The nudges require decision makers to make choices instead of resorting to a familiar default option.¹⁶ Nudge theory may be of particular importance when actors have yet to internalize changes (victims' rights, in our case), and continue to resort to their default actions. Thus, changing the default rule may contribute to a more careful execution of duties. In accordance with this theory, we suggest a nudge toolbox — a toolbox that includes

12. Work, *supra* note 6, at 484-86; Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 151 (2012) (reviewing Supreme Court decisions).

13. See Beloof, *supra* note 5, at 350-54 (2005) (terming the right "cutting edge").

14. Some of the more profound proposals will be mentioned here. *E.g.*, Cassell, *supra* note 5.

15. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 8 (Yale University Press, eds., 2008).

16. *Id.* at 74.

organizational and regulatory nudge solutions. This toolbox will affect all the relevant participants in the CJS. The advantage to this is that the suggestions leave the prosecutor's and the judge's discretion intact, while at the same time producing a nudge not to go directly to the default decision (i.e., swift sealing of plea agreements). The possible results of these proposals are far reaching and include an effect on the earlier stages of the criminal process that is in line with the current criticism of the plea agreements machinery.

Chapter 1 presents the normative and practical background to the victims' place in plea agreement. Chapter 2 elaborates on the victims' rights to participate in plea agreements. In this regard it discusses two categories of justifications: (1) benefits to the victim, and (2) benefit to the CJS and to society. Chapter 3 provides and argues for a new framework to address these concerns. The chapter begins by presenting some of the previous suggestions for how to best structure victims' role in plea agreements. Second, the chapter presents nudge theory and its compatibility to plea bargains. Lastly, the chapter introduces the idea of creating a nudge toolbox in order to nudge CJS participants into allowing victims' participation in plea agreements. Chapter 4 translates the nudge theory into a practical toolbox. Our basic suggestions are first, a rule that ensures that the process is fully documented by the prosecutor; and second, a default rule to which a judge will deliver a decision only after reviewing this document. These proposals are designed to induce greater deliberation by CJS participants, which would in turn lead to a genuine discussion, without abolishing their discretion and freedom of choice. The chapter considers and discusses a few possible counterarguments. Chapter 5 provides concluding remarks.

II. VICTIMS' PLACE IN CJS – NORMATIVE AND PRACTICAL BACKGROUND

At the base of victims' rights rests a new reading of the relationship between the victim and the state.¹⁷ It says that while people have entrusted the state with the power to investigate, prosecute and punish, this monopoly does not entail the complete erosion of the private harm. On the contrary, it is the state's duty to uphold human rights, including those of the victim.¹⁸ This new view of the adversary system turns the bipolar criminal process into a more complicated, often three-sided process that includes the victim.

17. Liliya Abramchayev, *A Social Contract Argument for the State's Duty to Protect from Private Violence*, 18 ST. JOHN'S J. OF C.R. & ECON. DEV. 849, 853, 863 (2004); Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, The Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 52 (2010).

18. MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS*, Ch. 4 (N.Y. U. Press 2002).

Both state and federal legislation have recognized the victims' legitimate interest in plea agreements. Different mechanisms of victims' participation have been installed in different states and in the Federal system. The victims' right to participate in plea bargains includes two components: the right to confer with the prosecutor during the plea bargaining and the right to address the court before the entering of the plea.¹⁹ O'Hear considered the duty of a prosecutor to consult with the victim a more meaningful victim participation than would be available through a right to speak at the plea hearing alone, as the right to express a view during a plea hearing would be too latent to be effective.²⁰ However, presently, it is not at all clear that a right to confer would lead to a genuine discussion.²¹

Statutory victims' rights of participation in pleas vary widely from state to state. The preliminary right to confer with the prosecutor, for example, could either be discretionary or mandatory,²² and may include notification only,²³ or a general right to confer.²⁴ However, the rights may be broadly divided into five distinct modes of participation beyond the right to be informed: a right to confer with the prosecutor, a mandatory consultation requirement, a right to address the court (in person or in writing), and the federal right to appeal for a writ of mandamus where these rights have been breached.²⁵ Several states have even set the rights as constitutional.²⁶ Importantly, the prosecution's discretion remains intact in all cases, as it is not required to defer to the victims' wishes. Generally, few procedural guidelines regarding the prosecutor's responsibilities to confer with the victim are included in these types of state laws, leaving their implementation largely at the discretion of the prosecutor.²⁷ In addition, most states provide no consequences for noncompliance with such laws;

19. For variations on the prosecutor's duty to consult the victim see: BELOOF, CASSELL, TWIST, *infra* note 56, at 422.

20. Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQUETTE L. REV. 323, 324 (2007).

21. ANDREW SANDERS, RICHARD YOUNG & MANDY BURTON, *CRIMINAL JUSTICE*, 739 (Oxford U. Press, 4th ed. 2010).

22. As proposed in the 1992 Model Victims of Crime Act, National Conference of Commissioner on Uniform State Law, § 203 (1992), http://www.uniformlaws.org/shared/docs/victims%20of%20crime/uvca_final_92.pdf; www.Americanbar.org/groups/criminal_Justice/policy/index_aba_Criminal_Justice_policies_by_meeting.html (announcing the adoption of the model law by the American Bar Association (ABA), 108C (CJS).).

23. *See, e.g.*, MINN. STAT. § 611A.03 (2000); KAN. STAT. ANN. §§ 22-3436, 74-7333 (2000).

24. *See, e.g.*, WIS. STAT. § 971.095 (2000).

25. For a full review of laws, *see* OVC Archive, OVC.COM, (Nov. 2002) https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html#go4.

26. BELOOF, et al., *infra* note 56, at 422.

27. OVC Archive, OVC.COM, (Nov. 2002) https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html#go4.

crime victims are still frequently left out of the plea agreement process.²⁸ As implementation of victims' rights in plea bargains changes among the different states, this article concentrates on the federal rights.²⁹

In the federal Crime Victims' Rights Act (CVRA), Congress has explicitly provided victims' rights accompanied by standing.³⁰ Victims, as participants, albeit not parties, have the rights to receive notice and "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."³¹ The court "shall ensure that the crime victim is afforded the rights described in subsection (a)" and shall make every effort to "permit the fullest attendance possible by the victim . . ."³² Prosecution and other department of justice agencies "shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)."³³ Moreover, the victim may submit, and thus become a party to, a motion for relief and writ of mandamus, enforcing his rights in appellate court when his rights are denied by the trial court.³⁴ In certain cases, the victim may make a motion to re-open a plea or a sentence.³⁵ This right is not a right to veto the plea or that the prosecution should defer to her wishes.³⁶ However, that victims should be granted an opportunity to express their views, without an opportunity to challenge any court decision, goes further than previous scholarly suggestions.³⁷ Theoretically, the victims' right to appeal for a mandamus could have presented a significant opportunity for judicial review. Expectations of victims' rights supporters have focused on the enforceability of the right, embodied in the resurrected writ of mandamus, as a remedy for rights violations.³⁸

For various reasons, some victims may not be interested in participating in the criminal process. Yet, other victims may be satisfied with their participation and the fulfillment of their rights. However, the current normative composition does not seem to be optimal for those victims who do not materialize their rights for lack of information or resources, or because CJS professionals still seem to turn to their default action of reaching pleas and sealing them without the victims' input. It

28. *Id.*

29. For an early review of victims' rights in plea bargains and different state models, see Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 301 (1987).

30. S. 2329, 108th Cong. (2d. Sess. 2004) (enacted).

31. CVRA, 18 U.S.C. § 3771(a)(4) (2006).

32. *Id.* § 3771(b)(1).

33. *Id.* § 3771(c). For a narrow reading of this provision, see *United States v. McVeigh*, 958 F. Supp. 512 (D. Colo. 1997).

34. 18 U.S.C § 3771(d)(3).

35. *Id.* § 3771(d)(5).

36. Courts have stressed that the CVRA does not transfer discretion to the victims. See e.g., *United States v. Thetford*, 935 F.Supp.2d 1280 (N.D. Ala. 2013).

37. Welling, *supra* note 29, at 355.

38. Beloof, *supra* note 5, at 262, 343.

may, of course, reflect the possibility that not all authorities have internalized the changes that stem from victims' rights. The often unrepresented lay victim would normally assume that the prosecutor would notify the court their her view.³⁹ Economic analysis of rights can also explain why most victims would find vindicating the right extremely difficult. The cost of vindicating the right would be prohibitively expensive for most victims who would have to hire an attorney to work alongside the prosecution and the defense attorney.⁴⁰ This theory explains why at least some of the cases where victims sought mandamus involved either the prospect of high restitution, or victims who had the means to petition, which may include corporations or multiple victims.⁴¹

Judges may also view victims' rights as an unnecessary obstacle. Judge Posner recently observed that allowing victims to intervene in criminal cases in the district court:

. . . would be a recipe for chaos. Imagine plea bargaining in which intervening crime victims argue for a different bargain from that struck between the government and the defendant, or trials at which victims' lawyers present witnesses and cross-examine the defendant's witnesses or participate in the sentencing hearing in order to persuade the judge to impose a harsher sentence than suggested by the prosecutor.⁴²

Moreover, the lack of sufficient scholarly writings discussing the CVRA, as well as the few published cases that have reached the courts of appeal, demonstrate the little influence the CVRA provisions relevant to victims' rights in plea bargains have had. This problem is the heart of this article, due to the importance of victims' participation in plea agreements, which will be discussed in the next chapter.

39. Cassell, *supra* note 5, at 889.

40. The prosecution and the defense both have a litigation-cost advantage over the victim. Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313 (2012).

41. Most of the published petitions for mandamus published in the last five years comply with this observation. *See, e.g., In re Her Majesty the Queen in Right Of Canada. v. U.S. District Court*, 785 F.3d 1273 (9th Cir. 2015); *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234 (11th Cir. 2014); *In re Stake Center Locating, Inc. v. U.S. District Court*, 731 F.3d 949 (9th Cir. 2013); *United States v. Citgo Ref. & Chemicals Co.*, 893 F. Supp. 2d 848 (S.D. Tex. 2012); *United States v. BP Products N. Am.*, 610 F. Supp. 2d 655 (S.D. Tex. 2009); *United States v. Arctic Glacier International, Inc.*, http://www.appliedantitrust.com/03_criminal/restitution/arctic_sdo_hio_vr_baron_objections2_1_2010.pdf. The petition for writ of mandamus was denied; *See* [https://www.courtlistener.com/opinion/2978860/united-states-v-arctic-glacier-international/?q=cites%3A\(1231213\)](https://www.courtlistener.com/opinion/2978860/united-states-v-arctic-glacier-international/?q=cites%3A(1231213)).

42. *United States v. Laraneta*, 700 F.3d 983, 985–86 (7th Cir. 2013).

III. THE IMPORTANCE OF VICTIMS' PARTICIPATION IN PLEA AGREEMENTS

The many justifications of victims' involvement in plea agreements can be based on either intrinsic or instrumental arguments, and may be broadly classified into two categories: the benefit of participation to the victim, and the benefit to the CJS and society.

A. THE BENEFITS TO THE VICTIMS

The effect of a plea agreement on the particular victim is almost self-explanatory. Plea agreements are essentially either a dismissal or reduction of charges, with a presumably more lenient sentence than the defendant might have expected without the agreement. All these may be major changes for a victim who may expect adherence to charges that reflect reality as she see it, followed by a certain standard of sentencing. Nothing could be farther from this expectation than a non-prosecution agreement with an alleged perpetrator.⁴³ A victim is likely to be interested in the finer points of indictment and sentence, not only in the simplistic bipolarization of acquittal versus conviction. For example, for a victim of multiple sexual offenses, certain charges may be more meaningful than others that may be dropped, and restitution may be more important than long term imprisonment. It was recently recognized by the Third Circuit Court of Appeal that the interests of a victim and the government in a restitution determination are not sufficiently similar for a finding of privity" for purposes of collateral estoppel.⁴⁴ Furthermore, a plea agreement may have far reaching civil consequences for a victim who wishes to pursue damages, or where criminal proceedings may affect family court decisions.⁴⁵ Hence, victims' advocates have stressed the importance of participation in plea agreements since the rise of modern victims' rights advocacy.⁴⁶

Varied justifications support victims' participation in all key proceedings, including plea bargains, in order to advance victims' needs and interests.⁴⁷ As Cassell and Tribe wrote: "[t]hese are the very kinds of

43. A victim's status has been recognized under the CVRA in this situation: *Doe v. United States*, 950 F. Supp. 2d 1262 (S.D. Fla. 2012). Courts have also recognized victims' CVRA rights where prosecutions have not yet started. *Does v. United States*, 817 F. Supp. 2d 1337 (S.D. Fla. 2011).

44. *Doe v. Hasketh*, 828 F.3d 159 (3d Cir. 2016) (It was consequently found that the victim could file for civil damages. The victim was not a party to prior criminal sentencing proceeding, and had limited opportunity to influence process. Her participation in restitution process was limited to conferring with government, providing information to probation officer as to extent of her losses, or providing testimony to sentencing court if sentencing court determined that testimony was warranted.).

45. *Id.*

46. William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649 (1976); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 557 (1982).

47. The question whether rights should be limited to victims of serious offences is

rights with which our Constitution is typically and properly concerned — rights of individuals to participate in all those government processes that strongly affect their lives.”⁴⁸ Due to the vast potential of plea agreements to affect the victims’ wellbeing, victim participation is doubly justified. In turn, however, exclusion of the victim may lead to what is known as “secondary victimization,” that is, the harm caused to the victim by the CJS’s lack of respect and consideration.⁴⁹ As early as 1977, Christie portrayed victims as “double losers,” by “losing” to the offender and by “losing” to a system that denies their rights of participation, which robs them of “their” conflict.⁵⁰ Thus, it is not surprising that research has indicated the harmful effect on victims who had been excluded from plea bargains.⁵¹ The participation of the victim in the plea agreement has an ability to restore the dignity of the victim, while protecting her against unjust manipulation or secondary victimization.⁵² Indeed, the right to be heard on pleas has been connected to the CVRA’s open ended requirement that victims “be treated with fairness and with respect for the victim’s dignity and privacy.”⁵³ A right of participation conveys vindication and moral recognition not only of the damage but also of the victim’s emotional needs, which is of particular importance where retributivism is upheld.⁵⁴ Thus, listening to the victim means hearing her authentic concerns without pre-guising her stance. Indeed, not all victims would necessarily push for a harsh sentence.⁵⁵

beyond the scope of this article. “Implementation of this section is particularly important in serious cases: all felonies, crimes of violence, and other cases where a victim’s wellbeing is an on-going concern.” As proposed in the 1992 MODEL UNIFORM VICTIMS OF CRIME ACT, S. 203. http://www.uniformlaws.org/shared/docs/victims%20of%20crime/uvca_final_92.pdf; www.Americanbar.org/groups/criminal_Justice/policy/index_aba_Criminal_Justice_policies_by_meeting.html.

48. Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, reprinted in DOUGLAS E. BELLOG, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 776–78 (2d ed. 2006).

49. Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, UTAH L. REV. 289, 295–297 (1999).

50. Nils Christie, *Conflicts as Property*, 17 BRITISH J. OF CRIMINOLOGY 1, 3 (1977).

51. Edna Erez, Peter R. Ibarra & Daniel M. Downs, *Victim Welfare and Participation Reforms in the United States: A Therapeutic Jurisprudence Perspective*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 15 (Edna Erez, Michael Kildhling & Jo-Anne Wemmers eds., 2011).

52. FLETCHER, *supra* note 10, at 189, 192.

53. 18 U.S.C. § 3771(a)(8) (2006); Cassell, *supra* note 5, at 886–91.

54. FLETCHER, *supra* note 10, at 197. For a rejection of the notion of “private vengeance” as a factor, and the link between legitimate victims’ emotions and retribution, see Stephanos Bibas, *Criminal (In)justice and Democracy in America*, 126 HARV. L. REV. F. 134, 140 (2013); Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 MICH. J. GENDER & L. 423 (2012). For a brief presentation of the debate about retributivism between classical economic analysis of law and social analysis, see Mark D. White, *Retributivist Justice and Dignity*, in LAW AND SOCIAL ECONOMICS, ESSAYS IN ETHICAL VALUES FOR THEORY, PRACTICE AND POLICY, 77, 78–85 (Mark D. White ed., 2014).

55. Dancig-Rosenberg & Pugach, *supra* note 54.

A closely related line of justifications points to the participation's possible contribution to a victims' recovery.⁵⁶ Theoretic support of this assumption may be found in therapeutic jurisprudence theory, which identified the legal process as a potentially therapeutic agent for its audiences. A major tenet of this theory has been the need to hear the victim. Hearing the victim is a vindicating, empowering act, which restores a sense of control after it has been damaged by the offense.⁵⁷ Recently, positive victimology has also stressed the positive effect the participatory legal process may have for crime victims, while identifying exclusion as a negative factor.⁵⁸ Participation could lead to greater victim satisfaction within the criminal justice system.⁵⁹ Procedural justice writers have identified transparency, clear criteria, and participation as factors affecting the parties' satisfaction with the legal process.⁶⁰ Procedural justice theory may explain the finding that victims' involvement in pleas does not necessarily complicate or prolong the process.⁶¹ Moreover, as early research found, the vast majority of involved victims accepted the sentence agreement.⁶² It may be, of course, that victims who are consulted are simply more informed about the process and its probable outcomes, including the legal reasons for the bargain, so their expectations are more realistic.⁶³ These findings also resonate with a view of plea bargains as a form of Alternative Dispute Resolution (ADR), as mediation or a dialogue.⁶⁴ If plea bargains are viewed as a "privatization" of criminal

56. DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 423 (3d. ed., 2010).

57. DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (1996); Edna Erez, Michael Kildhling & Jo-Anne Wemmers, *Therapeutic Jurisprudence and Victim Participation in Justice: An Introduction*, in *THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES* ix (Edna Erez, Michael Kildhling & Jo-Anne Wemmers eds., 2011).

58. Hadar Dancig-Rosenberg & Dana Pugach, *Between Secondary Victimization and Positive Victimology: The Case of Crime Victims' Right of Privacy*, in *POSITIVE CRIMINOLOGY* 292–306 (Natti Ronel & Dana Segev eds., 2015).

59. Model Uniform Victims of Crime Act, *supra* note 47, at 14 (§ 203 cmt.).

60. Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307 (2006). Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 444 (2008); Giannini, *supra* note 17, at 85–103.

61. Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 213 (Bruce J. Winick & John Q. LaFond eds., 2003).

62. Karen Gorbach Rebrovich, *Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFF. L. REV. 693 (1976-1977). *See also*, Wayne A. Krestetter & Anne M. Heinz, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349, 365 (1979).

63. BELOOF, et. al., *supra* note 56.

64. For an analysis of plea bargains as a "privatized" ADR, see Gabriel Hallevy, *The Defense Attorney as Mediator in Plea Bargains*, 9 PEPP. DISP. RESOL. L.J. 495, 499 (2009); Rinat Kitai-Sangero, *Plea Bargaining as Dialogue*, 49 AKRON L. REV. 63 (2016). While Hallevy and Kitai-Sangero pointed at the benefits of plea bargains as resolution for defendants, the same would apply to victims if they will be better included, considered, and

justice, or as ADR with little judicial control, there is a strong justification to include all those who have stakes in the result, including the victims.

Victims' participation may also be justified by the theory of sentencing. There is a wide agreement that the victim has a particular stake at sentencing, following not only from her own interest, but from the principle of linking the appropriate sentence to the level of harm, which is often the victims' private information.⁶⁵ This principle has been reflected not only in the CVRA but also in the Federal Rules of Criminal Procedure, as amended in 2008. It provided that "[b]efore imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard."⁶⁶ Furthermore, it is reflected in state constitutions and statutory schemes, which contain the victims' right to have input in sentencing proceedings.⁶⁷ In *Payne v. Tennessee*, the Court recognized crime victims as unique individual human beings whose particularized harm could be the legitimate subject of victim impact statements.⁶⁸ Moreover, three concurring Justices — Scalia, O'Connor and Kennedy — acknowledged the ascendance of crime victims' interests in America.⁶⁹ Another judicial acknowledgment of victims' interest in sentencing may be found in *Calderon v. Thompson*, where the Court observed that to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the powerful and legitimate interests in punishing the guilty, an interest shared by the State and victims of crime alike."⁷⁰ Defendants' claims of victims' statements as prejudicial rather than relevant have been rejected.⁷¹ In fact, many victims avail themselves of their right to submit a victim impact statement.⁷²

their dignity will be respected.

65. Nuno Garoupa, *An Economic Analysis of Criminal Law* § 4.4 (2003), <http://www.ppge.ufrgs.br/giacomo/arquivos/diremp/garoupa-2004.pdf>. For a different opinion, see FLETCHER, *supra* note 10, at 247–48 (contending that a victim's opinion in relation to sentencing is not to be taken into consideration in determining the proper level of punishment, as punishment does not respond to a particular wrong as measured by the victim. Nevertheless, arguing that the victim's power should be reallocated from sentencing to pleabargaining).

66. FED. R. CRIM. P. 32(h)(i)(4)(B).

67. Beloof, *supra* note 49, at 328–29 (App. A. Collecting rights from state jurisdictions). Victim Impact Statements have become prevalent. A separate question is whether a victim can express a view about the befitting sentence. For the debate, see Annette van der Merwe & Ann Skelton, *Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis*, 35 OXFORD J. OF LEGAL STUD. 355, 357–59 (2015); Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. OF CRIM. L. 611 (2009).

68. *Payne v. Tennessee*, 501 U.S. 808, 809 (1991).

69. For more information on the ascendance of victims' interests, see Beloof & Cassell, *supra* note 8.

70. *Calderon v. Thompson*, 523 U.S. 538, at 556 (1998) (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J. concurring)).

71. See *United States v. McVeigh*, 153 F.3d 1166, 1219 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999) (citing *Bonin v. Vasquez*, 807 F. Supp. 589, 613 (C.D. Cal. 1992), *aff'd*, 59 F.3d 815 (9th Cir. 1995)) ("The devastating effects that the deaths of the victims had on their families and loved ones is 'certainly part and parcel of the

The link between plea agreements and sentencing is obvious.⁷³ Any plea, whether a charge or sentencing bargain, is likely to offer the defendant concessions. Pleas are one place where the state's interest in timely punishment may be different than that of the victim, which leads to the importance of recognizing the separate interests. Victims' interests may be "profoundly injured" not only when execution of the sentence is significantly delayed, but when the charge or the sentence is significantly different to the anticipated one, and the victim is not informed about the reasons for it or able to express her view. When a predetermined sentence is being agreed upon through the plea — it essentially turns the plea agreement into a sentencing proceeding less transparent and participatory than the one taking place in the courtroom. Thus, recognition of the legitimacy of victims' interest in sentencing adds yet another justification to victims' involvement in pleas.⁷⁴ For example, a victim should be able to express her monetary concerns where restitution may be an option.⁷⁵ Not allowing the victim to express her view about the plea will impair her right to address the court at sentencing.⁷⁶ Not only that, she will also not be able to appeal the sentence as she was not a party to the criminal proceedings, a fact that may lead to either frustration or lengthy and costly civil proceedings which could have been avoided.⁷⁷

One could argue, that there is a notable difference between sentencing and plea agreements. A sentence is delivered after the defendant has been found guilty. That is, the victim has been judicially recognized as a victim. In contrast, a plea agreement is a preliminary process, whereby the victim is still an alleged victim; therefore, her rights should be defined more cautiously. Recognizing a victim's stake in sentencing is easier than recognizing participation in earlier stages, as it follows a conviction and the presumption that innocence no longer applies.⁷⁸ However, if victims' participation is left to that late stage of the criminal trial, it may be too late,

circumstances' of the crime properly presented to the jury at the penalty phase of trial.”).

72. Wayne A. Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 FED. SENT'G REP. 5, 9 (2006). For a victim's fight to submit victim impact statements, see, *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 848 (S.D. Tex. 2012).

73. See BELOOF, CASSELL & TWIST, *supra* note 56, at 423 (contending that the right to express a view in plea bargaining is implicit in the right for an input in sentencing).

74. Cassell, *supra* note 5, at 938–41.

75. BELOOF, CASSELL & TWIST, *supra* note 56, at 423. Restitution is the one component of the sentence that reflects mostly the victim's interests. With its growing importance, an early victim's involvement in a plea may reflect it and lead to a more balanced plea. It may also contribute to greater defendant's realism and prevent cases such as *California v. Ramirez*, where the defendant, on appeal, was afforded an opportunity to withdraw from a plea and although restitution was not part of the plea, it was imposed by the court. *California v. Ramirez*, No. C068462, 2012 WL 1919481, at *2 (Cal. Ct. App. May. 29, 2012). Unsurprisingly, restitution is very much the only victims' rights issue that has been decided by the Supreme Court. See *Paroline v. United States*, 701 F. 3d 749.

76. *People v. Stringham*, 206 Cal. App. 3d 184, 196–97 (1988).

77. *Doe v. Hasketh*, 828 F.3d at 159.

78. *Dancig-Rosenberg & Pugach*, *supra* note 54, at 425, 428–42 (2012).

considering the deciding role of the plea agreement. Clearly, the power that could make a difference in the life of victims lies at the beginning of the process, before an agreement has been accepted and sealed.⁷⁹ Allowing the victim to express her view in relation to sentencing, only after a plea has been accepted, will deplete victims' rights of much of its contents. In this case, the victim's view will have to refer to the fictitious reality often portrayed in the charge bargain or an agreed upon lenient sentence. A late objection may be met by the possible obstacle of double jeopardy. The immediateness of the mandamus allows for it.⁸⁰ In addition, it has been argued that a trial outcome could better approximate the level of harm than a settlement between the criminal and the prosecutor.⁸¹ Victims' involvement may contribute to this approximation, if it affects the negotiations between prosecution and defendant.

B. THE BENEFITS TO CJS AND TO SOCIETY

Victims' participation in plea bargaining may also be beneficial to the CJS and even to society. The effect of victims' participation might be an answer to some criticism against plea bargains. In the years that have passed since Justice White's remarks in *Brady v. United States* where he praised plea bargains as serving everybody's interests, criticism has grown in line with pleas' dominance over the criminal process.⁸² Much of the criticism emanates from leaving what Bibas called "the shadow of the trial", and looking into the realities of plea bargains.⁸³ However, little attention has been drawn to the possible effect of victims' participation in plea agreements as a safeguard against some of the shortcomings of this procedure.

In line with the Procedural Justice Theory, victims' participation may enhance perception of the fairness of an official decision, an issue often raised in relation to defendants.⁸⁴ In turn, this perception may contribute to the public view of the legitimacy of the CJS as a whole, spreading from the victim to the public. Ultimately, it might even have an effect on cooperation and compliance.⁸⁵ As plea bargains already suffer from public distrust, undermining the CJS's legitimacy is a point of particular

79. FLETCHER, *supra* note 52, at 248.

80. For analysis and cases, see Beloof *supra* note 5, at 309–16.

81. Garoupa, *supra* note 65.

82. 397 U.S. 742, 752 (1970); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033 (2006).

83. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004). See also Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Law*, 154 U. PA. L. REV. 79, 87–97, 134–37 (2005) (speaking about the coercion inherent in plea agreements and the prosecution's discretion that lead to distortion of justice).

84. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 772, 793, 804 (2006).

85. MODEL UNIFORM VICTIMS OF CRIME ACT, *supra* note 47, at 14 (§ 203 cmt.).

importance.⁸⁶ Dissatisfied victims, those who feel betrayed and neglected by the CJS, who suffer “secondary victimization,” have been known to turn to the media to voice their concerns/plead their case.⁸⁷ This, in turn, might lead to a greater loss of public trust in the CJS flowing from the secrecy of the bargain. Furthermore, a frustrated victim conveys to the public a strong message about the immorality in the justice system. If morality is an issue, and we believe it is, victims should be heard meaningfully heard.⁸⁸

At the very basic level, in many cases, the victim has the potential to supply information. It has been claimed that a prosecutorial approach to plea agreements is based on seeing the system as a whole and trying to maximize resources in order to further purposes, including deterrence.⁸⁹ The victim brings the angle that focuses on the details of the particular case. She may thus illuminate points that may have escaped the prosecutor. Another possible benefactor of the victim's involvement may then be the defendant, whose resistance may be penetrated after hearing the victim's point of view.⁹⁰ As the court held in *U.S. v. B.P. Products*, “[i]t is also true . . . that resourceful input from victims and their attorneys could facilitate the reaching of an agreement.”⁹¹

However, the victim's contribution might be even more meaningful. In a system controlled by the prosecution, and to a point the defense counsel, the victim's review of the agreement may be crucial as a welcomed contribution. Furthermore, it has been pointed that judges typically lack sufficient information to make an informed decision about the defendant's guilt.⁹² As victims sometimes claim, the prosecution and the defense hold the evidentiary materials and present a selective set of the facts.⁹³ Information may be deliberately withheld by prosecution and defense, both of whom are interested in a prompt resolution.⁹⁴ The basic adversarial

86. Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590, 590–91 (2004). BELOOF, et al., *supra* note 56, at 423.

87. Wright, *supra* note 83, at 80–81.

88. Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1429 (2003). Beloof, *supra* note 5.

89. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. OF LEGAL STUDIES 289 (1983). Easterbrook justified prosecutorial discretion by economic analysis as a means of allowing prosecutors to maximize deterrence under limited resources.

90. A similar idea was suggested by Bibas who regarded eading of the trial as a morality play, conveying moral messages. See Bibas, *supra* note 88, at 1431 (2003).

91. *United States v. Kaufman*, Slip Copy, 2008 WL 3142561 (D. New London) <http://lawweb.colorado.edu/profiles/syllabi/gorsuch/United%20States%20v.%20Kaufman.p%20cket.pdf>; BP, *supra* note 41. (finding that there was a pre-charge conferral right and that it had been violated, but a remedy was not granted).

92. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2122 (1998).

93. See Victims' Objections to Plea Agreement and Request that it be Rejected in *United States v. Arctic Glacier Int'l, Inc.*, *supra* note 41.

94. A question that is not within the scope of the current article is whether the victim should have a right to review the evidentiary material prior to expressing a view about a plea so that the victim may give an informed opinion. For a discussion of information

presumption that the contest between the parties leads to the truth could very well be revoked.⁹⁵ As Sanders, Young, and Burton stated, “the search for truth (whoever’s version that may be) is subordinated to other priorities; thus the system is exclusionary to both the defendant and the victim.”⁹⁶ The victim may offer the judge another source of information and a different perspective before the plea is sealed. This aspect is particularly important in a system where the judge has no direct access to relevant information.⁹⁷ That is not to say that the judge should accept any victim’s statement. However, it may lead the judge to require further information from the prosecution before sealing the plea, leading the judge to not automatically resort to the default option of accepting the plea. Perhaps it could lead to a shift, even if only slightly, towards accuracy and away from dishonest pleas.⁹⁸ If there is a public interest in the truth, victims’ participation may contribute to getting closer to the truth.

The victim may possibly be taking upon herself the crucial feature of defense attorneys in the adversarial system, according to Schulhofer, to “sow doubt” about all aspects of the legal system.⁹⁹ The prosecution will then face the need to defend the bargain, not just present it to the judge. In this, our view adds to those scholars who have claimed that judges should take a more active role in plea bargains as a means of minimizing their ills, often argued from an economic analysis point of view.¹⁰⁰ It also fits with the view of judges’ participation as a form of mediation.¹⁰¹ It has even been suggested that, in certain cases, it is the public that has a special interest in knowing facts, beyond the “monosyllabic guilty plea.”¹⁰²

It means that the vast criticism directed at the prosecutions almost unhindered discretion is very important to this argument.¹⁰³ This discretion

asymmetry, see Bibas, *supra* note 83, at 2494–95. For a review of disclosure in the context of pleas, see Bibas, *supra* note 7, at 1133–35.

95. For the debate about the “truth finding” capability of the adversary system, see Gary Goodpaster, On the Theory of American Adversary Criminal Trial, 78 J. CRIM. L. & CRIMINOLOGY 118, 121–24 (1987).

96. SANDERS, YOUNG & BURTON, *supra* note 21, at 743.

97. Usually, the factual basis is supplied by the prosecution, sometimes even when the defendant denies it. Ross, *supra* note 1, at 721. In certain cases, for example sexual offences cases, the victim may have more information than in others, such as homicide cases, where family members are not always witnesses.

98. For accuracy as a neglected value in a plea bargains driven system, see Bibas, *supra* note 90, at 1426.

99. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1104 (1984).

100. See Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006) (supporting a partial ban where a judge could forbid a plea in weaker cases); Bibas, *supra* note 83, at 2542.

101. Gazal-Ayal & Riza, *supra* note 6, at 165.

102. Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 576 (1996).

103. Strengthened by the lack of compulsory prosecution, an issue beyond the scope of the current article. For a brief comparative review of prosecution’s discretion, see Gazal-Ayal & Riza, *supra* note 6, at 145, 146–47.

is strengthened by the fact that, under the current regime, when presented with a plea, the judge does not take part in the bargaining.¹⁰⁴ The judge may look at the factual basis of the plea, and whether the defendant entered it knowingly and voluntarily, but not more than that.¹⁰⁵ Federal trial courts' judges have a broad discretion to accept or reject a negotiated plea bargain.¹⁰⁶ However, even looking at the factual basis may be a considerable task, when lacking information. This situation is strengthened by the fact that judges, too, may be interested in quick settlements rather than long trials.¹⁰⁷ Hence, pleas are usually accepted. Pleas are agreed to far away from public scrutiny, without transparency and the advantages of a public hearing, where their justification in court is minimal. Criticism has been directed from defendants' point of view as well, as the defendant has the option to go to trial. However, that is a risk, considering that, if found guilty, he may be sentenced more harshly.¹⁰⁸ Even worse, this discretion put an enormous burden on the appellant, should she decide to appeal.¹⁰⁹

This kind of discretionary justice may be seen as 'opportunism' and the idea offends the rule of law.¹¹⁰ Furthermore, the lack of structural oversight means that prosecutors perform a quasi-judicial role unreviewed, de facto abolishing the separation of powers. As Barkow put it, "the potential for arbitrary enforcement is high" with more potential for harming rights in criminal law than in administrative law.¹¹¹ In the criminal process, the prosecution's power is the most threatening, Barkow's argument emphasizes the need to rethink the prosecution's discretion in pleas.¹¹² Barkow has asserted this from a point of view stressing defendant's rights, but it can easily be applied to victims' rights as well. Perhaps, even more poignantly, due to the weaker position of victims in the process. To this argument we may add Mashaw's proposal that administrative decisions

104. Albert Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

105. FED. R. CRIM. P. 11(a)(1)-(3); Barkow, *supra* note 82, at 1026; Santobello v. New York, 404 U.S. 257, 260 (1971).

106. FED. R. CRIM. P. It has been decided that the rule does not contravene a judge's discretion to reject a plea, nor does it define the criteria for acceptance or rejection. *US v. Bean*, 564 F.2d 700 (5th Cir. 1977).

107. Gazal-Ayal & Riza, *supra* note 6, at 165. An early research found that in the English CJS, too, defendants were pressurized to plead guilty: JOHN BALDWIN & MICHAEL MCCONVILLE, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* 45, 103 (1977).

108. Barkow, *supra* note 82 at 1027.

109. *United States v. Armstrong*, 517 U.S. 456, 458, 464 (1996).

110. FLETCHER, *supra* note 10, at 191.

111. Barkow, *supra* note 82, at 1027. For the advantages of applying administrative rules on the CJS, see also Michal Tamir, *Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review*, 12 TEX. J. ON CIV. LIBR. & CIV. RTS. 43-99 (2006) (demonstrating by the test case of selective enforcement and racial profiling).

112. A bigger problem may be posed by a prosecutorial decision not to press charges, but that is beyond the scope of the current article.

should be assessed by their impact on the participants, not only by their “reasonableness.”¹¹³ Mashaw’s dignitary theory, when applied to victims, would mean that prosecution’s use of its discretion should be criticized when it harms the victim’s interest unjustifiably.

Another aspect of plea bargains that may benefit from victims’ involvement is the agency problem of elected and nonelected prosecutors — the misrepresentation of public interests.¹¹⁴ Fletcher argues that the undefined “interest of the state” is exaggerate and that it is often reduced to the prosecution’s immediate needs or even the prosecutor’s personal political needs.¹¹⁵ As prosecutors’ private and political interests may affect their position in plea agreements, victims’ interests may sometimes align closer with those of the public.¹¹⁶ As when considering the agreement, the judge should act in the public’s interest. Victims’ participation — as another form of checks and balances — may contribute to a greater adherence to public interest. Along the same lines, O’Hear argued that victim participation in plea bargaining might actually advance, rather than undermine, public interests in crime control and just punishment.¹¹⁷ We may add that the victim may have a particular interest in the accuracy of the outcome, in that justice should be done with the person who harmed him. If a plea bargain is necessary, it should be conducted fairly and, with the due consideration of the victims whose complaint initiates the process.¹¹⁸

In sum victims’ participation, which may be regarded as a major departure from the adversarial system, may actually help to restore many of the adversarial system’s advantages, forsaken under a plea bargains regime. Furthermore, victim’s participation may add transparency to an otherwise opaque process.

IV. NEW FRAMEWORK FOR VICTIM’S PARTICIPATION

In the last two chapters, we analyzed the overall importance of victims’ participation in plea bargains, the existing normative framework and the gap between the seemingly progressive legislation and its surprisingly small impact on the legal arena. Next, we turn to a brief review of some

113. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981). The right of due process is at the center of Mashaw’s argument. The question whether victims enjoy such right is beyond the scope of this article, but should be mentioned here as a point for future discussion.

114. Stephen J. Schulhofer, *The Trouble With Trials: The Trouble With Us*, 105 YALE L.J. 825 (1995). See also Gazal-Ayal & Riza, *supra* note 6, at 152, 158 (stressing that much of the relevant economic literature has concentrated on tools to control potential deviations of prosecutors from the public interest).

115. FLETCHER, *supra* note 10, at 192.

116. Bibas, *supra* note 83, at 2470–86. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 UNI. OF PENN. REV. 101, 138 (2009).

117. O’Hear, *supra* note 20, at 323.

118. FLETCHER, *supra* note 10, at 191.

suggested solutions that have been offered in literature, and suggest a new framework for victims' participation.

A. PROPOSED SOLUTIONS TO THE LACKING VICTIMS' PARTICIPATION

Several suggestions have been made as to how best to structure the victim's role in plea agreements, mostly before the 2004 CVRA. For example, a very early proposal suggested private prosecution as a remedy for prosecutorial inaction.¹¹⁹ This is mainly relevant in cases where the prosecution fails to bring charges. Such proposals are less than tempting, considering the many benefits of the state-run criminal process. Among them is the undue burden that may be inflicted on a victim who has to conduct her own process.¹²⁰ A solution should then be found within the CJS. O'Hear suggested mandatory consultation and prosecutorial guidelines as a victims' rights measure.¹²¹ It seems that the most radical proposal has been Fletcher's, who supported giving victims the right to veto a plea agreement as a full party to the proceedings.¹²² This suggestion may trigger the common concern when victims' rights are discussed, blurring the line between "private vengeance" and public interest.¹²³ The idea of victims' right to veto a plea agreement has been opposed, as the prosecution should be free to act 'in the interest of the state.'¹²⁴ Furthermore, it could lead to pressure on the victim.

We suggest a different framework intended to bring a simpler solution. In this framework, we use nudge theory, which strikes a delicate balance between private and public regulation by paternalistically nudging people through a choice-architecture that does not eliminate or reduce freedom of choice.¹²⁵ Nudge theory is supposed to suggest simple solutions to the complicated problem of the lacking cooperation of the crime victims in the plea agreements, while not compromising the freedom of choice of the other actors in the criminal procedure.

119. *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955).

120. The same rationale will lead to a dismissal of alternative proceedings as a replacement to the criminal process, a solution to the CJS's failures: Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 PEPP. L. REV. 63, 97-107 (1984).

121. O'Hear, *supra* note 20, at 323.

122. FLETCHER, *supra* note 10, at 193, 247.

123. Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1606-07 (1996).

124. ABA, Model law, *op.cit.* comment. *Supra* note 59; Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1606-07 (1996); *State of Oregon v. McDonnell*, 794 P.2d 780 (Or. 1990).

125. Jin-Won Jung, *Nudging Websites: A Proposal for a Hybrid Regulatory Scheme to Enforce Online Copyright* 8 ISJLP 149, 153 (2012).

B. NUDGE THEORY AND ITS COMPATIBILITY TO PLEA BARGAINS

According to the Behavioral Law and Economics field of research, analysis of law should be linked with what we have learned about human behavior and choice.¹²⁶ Thus, the task is to explore how “real people” differ from *homo economicus*, namely from the notion that people think or choose unfailingly well (hereinafter: “Econs”). People can be said to display bounded rationality, bounded willpower and bounded self-interest that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information.¹²⁷ It is now well established that people make decisions on the basis of heuristic devices or rules of thumb that can lead to systematic errors, and that people display various biases and aversions that can lead to inaccurate perceptions.¹²⁸ Thus, the understanding of “real people” behavior should have a bearing on law.

Nudge theory goes within this framework. A nudge is any factor that significantly alters the behavior of humans, even though Econs would ignore it. Econs respond primarily to incentives. Humans respond to incentives too, but they are also influenced by nudges.¹²⁹ The false assumption of the theorists of nudge challenge, is that people make choices that are in their best interest or at the very least are better than the choices that would be made by someone else. Hence, nudge theory involves choice architecture and claim that a certain degree of paternalism should be acceptable even to those who embrace freedom of choice most.¹³⁰ Thus, a nudge is any aspect of choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives.¹³¹

Behavioral economists generally focus on the mean, not the end. Their goal is to create choice architecture that will make it more likely that people will promote their own ends as they themselves understand them.¹³² Moreover, behavioral economists generally favor soft rather than hard paternalism (a jail sentence and a fine count as hard paternalism, whereas a disclosure policy, a warning and a default rule count as soft paternalism).¹³³ Thus, nudges generally fall in the categories of means paternalism and soft

126. Cass R. Sunstein, *Introduction* in BEHAVIORAL LAW AND ECONOMICS (ed. by Cass R. Sunstein, 2000) 1, 2.

127. Christine Jolls, Cass R. Sunstein and Richard H. Thaler, *A Behavioral Approach to Law and Economics* in BEHAVIORAL LAW AND ECONOMICS (ed. by Cass R. Sunstein, 2000) 11, 14.

128. Sunstein, *supra* note 126, at 3.

129. RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE – IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2009) 8.

130. *Id.* at 11.

131. *Id.* at 6.

132. CASS R. SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* (Yale University Press, 2012) 19.

133. *Id.* at 20.

paternalism.¹³⁴ However, paternalistic interventions are better understood in terms of a continuum from hardest to softest, with the points marked in accordance to the magnitude of the costs imposed on choosers by choice architects.¹³⁵

People need nudges for decisions that are difficult, for which they do not get prompt feedback, and when they have trouble translating aspects of the situation into terms that they can easily understand.¹³⁶ While required choice is sometimes the best way to go, people would much prefer to have a good default, especially when choice is complicated, difficult and complex.¹³⁷ In circumstances with high decision costs, possible choice fatigue, or a low probability of undesirable consequences, research suggests that decision makers are likely to choose a default option that allows them to devote minimal energy to their decisions.¹³⁸

Plea agreements are the paradigm case of complicated decisions, in which the decision makers suffer from time constraints and tend to choose the default option. The repetitive actors in the game are the prosecutors and the judges. The prosecutors have many cases to deal with and they tend to make the plea agreements in order to facilitate the need to administer the trial and the case evidence. The judge needs to decide quickly and tends to choose the default option of approving the agreement, which allows her to devote minimum energy to the decision. The victim, for whom the case is the “only case,” is forgotten. Not only is this an infringement upon her rights, but she also does not have the chance to challenge the process and add some questions to the equation. As Michael O’Hear stressed,

by this point in the criminal process, the plea agreement has already gained considerable momentum, and even when the victims raise significant concerns, the judge may be quite reluctant to reject the agreement, which would require everyone to expand more effort on a case that otherwise appeared ripe for prompt solution.¹³⁹

Choice architecture can help induce greater deliberation by actors and is especially important for changing routine behaviors. Deliberation can facilitate a critical thought that gives actors a pause before engaging in habitual behaviors and can thereby alter actors’ perspectives on how particular tasks should be performed. Such deliberation can be prompted by nudges that require actors to make choices instead of resorting to a familiar default option. Creating nudges that force actors to make choices

134. SUNSTEIN, *supra* note 132, at 20.

135. *Id.* at 56–57.

136. THALER & SUNSTEIN, *supra* note 129, at 74.

137. *Id.* at 88–89.

138. Michael P. Kenstowicz, *The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law* 82 U. CHI. L. REV. 1411, 1446 (2015).

139. O’Hear, *supra* note 20, at 324.

is particularly significant when an actor intends to deviate from routine behaviors but experiences significant time constraints.¹⁴⁰

Law meets nudging in two sets of circumstances. The first circumstance is when private entities nudge their customers, employees or donors into desired behavior (buying more, walking more, giving more money.) The second circumstance occurs when public entities themselves seek to nudge citizens into certain behavior. This typically requires legislation, regulation, or authorization.¹⁴¹

The current state of affair does not offer an accommodating climate for victims' participation.¹⁴² However, as explained, the value of victims' participation in the process is not only in their ability to express their interests. A great value lies in the chance to induce greater deliberation by CJS's professionals and a deviation from routine behavior, i.e., a prompt acceptance of plea agreements. Equally important, it can also offer a meaningful safeguard on the prosecutorial discretion. In other words, CJS professionals should be nudged into including victims in the proceedings, and victims should be nudged to fulfill their rights. Hence, we continue with suggesting a nudge toolbox intended to make the repeated participants in the CJS take into account the victim's opinion in plea-bargains.

V. NUDGE TOOLBOX

An optimal nudge toolbox will address the prosecutors, the judge and the victim. The toolbox will not amend the contents of the statutory victims' rights in plea agreements, but is aimed at effecting the way those rights are administered by structuring the discretion of the other participants in the CJS in accordance to the principles outlined in the previous chapter. The nudge toolbox will impose some seemingly minor duties on the CJS's participants, which will not diminish their discretion, but instead induce greater deliberation. In that, the toolbox will be a mechanism of architecture of human behavior in order to subtly shift the parties towards a better inclusion of victims in the process. The following suggestions do not require an amendment of the CVRA, but they highlight the importance of amending the Federal Rules of Criminal Procedure.¹⁴³

140. THALER & SUNSTEIN, *supra* note 129, at 88–89.

141. Anne-Lisse Sibony & Alberto Alemanno, *The Emergence of Behavioral Policy-Making: A European Perspective* in *NUDGE AND THE LAW: A EUROPEAN PERSPECTIVE* 1, 10–11 (Alberto Alemanno and Anne-Lisse Sibony ed., 2015).

142. O'Hear, *supra* note 20.

143. Two previous amendments have referred to victims, in a roundabout way: The 1974 amendment that justified pleas as they “may protect the innocent victim of a crime against the trauma of direct and cross-examination,” and the 1985 amendment providing that the defendant be notified of the courts' power to order restitution. FED. R. CRIM. P. 11. In this our suggestion follows early meaningful calls to amend the rules, notably that of Cassell. *See* Cassell, *supra* note 5.

The CVRA provides a broad framework for victims' participation, allowing the victim 'to be heard' without regulating the details of this right. It does not elaborate on the right to confer with the prosecutor or the right to be heard in court. In addition, it requires the prosecutor to make the 'best efforts to see that crime victims are notified of, and accorded, the rights,' which is yet another requirement set in vague terms.¹⁴⁴ Thus, it may be claimed that the CVRA provides standards that are general in nature, and rules that are needed to make the rights operative.¹⁴⁵ Kaplow found that

[T]he central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct. If conduct will be frequent, the additional costs of designing rules — which are borne once — are likely to be exceeded by the savings realized each time the rule is applied.”¹⁴⁶

Hence, since plea agreements dominate the CJS – rules are needed to provide and assure victims' participation.

As mentioned above, the federal rules were slightly amended in 2008 to require judges to provide victims present in court the opportunity to be heard during sentencing.¹⁴⁷ However, the CVRA Subcommittee of the Criminal Rules Advisory Committee, rejected these suggestions, (notably Cassell's), to meaningful amendments of victims' rights related rules.¹⁴⁸ Cassell argued that the Advisory Committee should broaden its vision of the proper role for crime victims and recommended far more expansive victim protections in order to comply with the CVRA.¹⁴⁹ Such amendments would have also affected victims' rights in plea bargains. The Subcommittee's reluctance emanated from its decision that “they should be somewhat conservative in their approach and not create rights beyond those provided by the Act.”¹⁵⁰ The price of this conservatism is that there are articulable provisions in law without the preconditions to enforce them. Thus, the CVRA provisions become much less meaningful than they could be, and victims' interests are not reflected as well as they should be.

144. CVRA, 18 U.S.C. § 3771(a)(4) (2006).

145. For the distinction between standards and rules, see H.L.A. HART, *THE CONCEPT OF LAW* 121–137 (1961); Ronald M. Dworkin, *The Model of Rules*, 3609 *FACULTY SCHOLARSHIP SERIES* 14–46 (1967); Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823, 846–47 (1972).

146. Louis Kaplow, *Rules Versus Standards: An Economic Analysis* 42 *DUKE L.J.* 557, 621 (1992).

147. See FED. R. CRIM. P. 32(h)(i)(4)(B).

148. Advisory Committee on Criminal Rules Minutes (Oct. 24 & 25, 2005, Santa Rosa, California) at www.uscourts.gov/file/14793/download.

149. Cassell, *supra* note 5, at 886–91.

150. Advisory Committee on Criminal Rules Minutes, *supra* note 148.

The advantage of a nudge toolbox is that it will not confine the prosecutor's discretion, since it keeps the current boundaries of the discretion intact.¹⁵¹ As Kahan explained, "norms stick when lawmakers try to change them with 'hard shoves' but yield when lawmakers apply 'gentle nudges.'"¹⁵² The tools will nudge the prosecutor to approach the victim, inform her and give her a meaningful opportunity to express her view prior to sealing the plea. Not only will it make the fulfillment of the right to confer and express a view more precise, it will also ascertain that the provisions are enforced.

Our basic suggestions are first, a rule that ensures that the process is fully documented;¹⁵³ and secondly, a default rule according to which a judge will deliver a decision only after reviewing this document.¹⁵⁴

As for the prosecution, right from the very early stages of plea negotiations, documenting all contact with the victim in writing will necessitate a significant degree of attention and consideration. As Kellogg stressed, writing is a special form of thinking, the making of meaning.¹⁵⁵ Kellogg even regarded "thinking and writing as twins of mental life."¹⁵⁶ The prosecutor will have to record her communication with the victim, and will, eventually, file a certification of compliance to the court. This document will include answers to five questions:

1. Is it a "victim offense"?
2. Have the best efforts been made to inform the victim about the plea agreement and her right to express a view?
3. Has the victim been heard prior to the sealing of the plea agreement? If not — why?
4. If the victim expressed her view — what was it?¹⁵⁷
5. Has the victim's view been taken into consideration when deciding the plea agreement?

151. The purpose of confining discretion is to keep discretionary power within designated boundaries. See KENNETH C. DAVIS, *DISCRETIONARY JUSTICE – A PRELIMINARY INQUIRY* 97 (1971).

152. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem* 67 U. CHI. L. REV. 607, 608 (2000).

153. Cf. Kenstowicz, *supra* note 138, at 1443 (suggesting in relation to conditions of release from prison, to omit standard conditions from form AO-245B, in order to nudge sentencing judges to actively consider and rewrite the standard conditions imposed on particular defendants).

154. Default rules are a tool of choice in behavioral toolbox. See Sibony & Alemanno, *supra* note 141, at 14. For an overview of default rules as tools, see Eric J. Johnson & Daniel G. Goldstein, *Decisions by Default*, in *THE BEHAVIORAL FOUNDATIONS OF POLICY* 417, 417–18 (Eldar Shafir ed., 2013).

155. RONALD T. KELLOGG, *THE PSYCHOLOGY OF WRITING* 3 (1999).

156. *Id.* at 13.

157. In several states, the court is required to accept the prosecution's certification that it conferred with the victim or that an effort was made, before the plea may be accepted. However, it does not necessarily include the content of the victim's view. See Bloof, et al., *supra* note 56, at 423.

Thus, the prosecutor will be less likely to resort to the easy option of reaching a quick plea bargain. The simple task of filing a form will lead to a more deliberate process. Moreover, it is likely not only to promote the victims' participation at the later stages, but the victims' view will tend to affect the preliminary plea bargains negotiations.

The implementation of victims' rights at the initial stage of negotiations is of particular importance. It may be claimed, as O'Hear did, that expressing a victim's view in court may be too late, as the plea has already gathered momentum.¹⁵⁸ O'Hear rightly contended that the judge might be quite reluctant to reject the agreement, even where the victim raises significant reservations. The defendant, too, is likely to take it into consideration when negotiating the plea, as well as the prosecution. Coupled with the mentioned research that found that victims' involvement in pleas led to greater levels of victims' satisfaction, we argue that meaningful victims' rights will eventually lead to more balanced pleas by taking into consideration victims' as well as defendants' interests, so that it would not necessarily lead to more contentions in court.¹⁵⁹

The need to file the document will ensure, in effect, that the prosecutor shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations.¹⁶⁰ Thus, it helps to implement not only a victim's right to be heard at plea proceedings, but also the vaguely defined right to "confer with the attorney for the government" and to be "treated with fairness." As the overwhelming majority of federal criminal cases are resolved by a plea, a conference between the victim and the prosecutor regarding the plea will be critical in most cases. Many state laws that direct prosecutors to consult with victims have recognized this.¹⁶¹

As for the victim, she is more likely to know about her rights when approached by the prosecutor, thus the suggestion advances the implementation of the victims' right to be heard regarding a plea. If she so chooses, she may be heard. If she is not interested, it would not be for lack of means, representation or any other immaterial factor.

The judge, in her turn, according to the new default rule we suggest, will need to consider the prosecutors' certificate of compliance before deciding about sealing the agreement. Thus, the default rule is that agreement is not approved without knowing the opinion of the victim. The

158. O'Hear, *supra* note 20, at 324.

159. Some research has found that a considerable number of victims who have been involved in plea bargains had been satisfied with the outcome. Rebrovich, *supra* note 62.

160. Cassell, *supra* note 5, at 888.

161. *E.g.*, OHIO REV. CODE ANN. § 2930.06 (2013) ("If the prosecutor fails to confer with the victim at any of those times, the court, if informed of the failure, shall note on the record the failure and the prosecutor's reasons for the failure"); ARIZ. REV. STAT. § 13-4419 (2016).

suggestion conforms with Cassell's proposition that prosecutors and victims' attorneys should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement.¹⁶² It also follows the logic behind Cassell's proposition that the court should address any victim present when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea.¹⁶³ The suggested toolbox is also in line with defendants' rights advocates who call to forbid guilty pleas at first appearance, thus allowing the defendants, as well as the victim, time to react.¹⁶⁴

Our proposal for a judiciously used court certification can achieve the same goals by using "softer" means. It, too, will eliminate the uncertainty that emanates from the fact that many victims lack the assistance of counsel, and thus ensures that the victim's right to be heard is vindicated. As the experience in several states shows, "[c]ourt certification of compliance efforts provides a system of checks and balances that can help preserve victims' consultation rights without placing undue burden on the criminal justice process."¹⁶⁵ It will put into effect the implicit obligation of the CVRA that the prosecutors will communicate a victim's objection to the court.¹⁶⁶

Furthermore, as in the case of the prosecutors, it will presumably nudge the judges into allocating the victim's view a more thorough consideration in her decisions. As we explained, one of the basic current problems in pleabargains is that judges do not possess any information beyond that which is given to them when the plea is presented. Our proposal makes it more likely that the judge, retaining her full discretion, will be exposed to the victim's viewpoint and the questions that might arise.¹⁶⁷

One might argue that the proposed solution is too soft and may leave intact the situation whereby the prosecution presents the court with a selective version of the truth, aimed at promoting the plea agreement. In a sense it can be compared to the critique of another nudge tool — disclosure requirements. These are meant to inform, not displace, people's

162. Cassell, *supra* note 5, at 889.

163. Cassell, at 886-91.

164. Bibas, *supra* note 7, at 1155. A similar point, from defendants' point of view, was made by Work in relation to "exploding offers." See Work, *supra* note 6, at 486.

165. OVC Archive, https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/2.html#go4. *E.g.*, ARIZ. REV. STAT. § 13-4423 (2000). ME. REV. STAT. ANN. tit. 17-A, § 1173 (2000).

166. See *State v. Casey*, 44 P.3d 756 (2002) (holding that the prosecutor was obliged, as an officer of the court, to inform the court about the victim's wish to be heard in opposition to a plea).

167. *United States v. BP Products North America Inc.*, 610 F. Supp. 2d 655, 727 (2009) ("The purpose of the conferral right is not to give the victims a right to approve or disapprove a proposed plea in advance or to participate in the plea negotiations. The purpose of the reasonable right to confer is for victims to provide information to the government, obtain information from the government, and to form and express their views to the government and court.").

understanding of which choices will promote their welfare. As Sunstein pointed out, the complexities are first, a selective disclosure of information will often affect the understanding; and second, the framing of information matters.¹⁶⁸ However, the suggested nudge toolbox is likely to diminish the extent of the existing problem. Our suggestion is also in line with Work's analysis that accountability and institutional design are more promising reforms than external regulation of the prosecution.¹⁶⁹ If lessons can be learned from the different realms that nudge tools have been used in — we can be cautiously optimistic.¹⁷⁰

However, we should be aware of the fact that some nudges are ineffective, or at least less effective than expected. In a recent article,¹⁷¹ Sunstein identifies two reasons why this might be so: strong contrary preferences on the part of the chooser, who will therefore opt out, and counter-nudges in the form of compensating behavior on the part of those whose interests are at stake.¹⁷² The CJS system has a strong preference to seal agreements. There is also a risk that the default rule will influence the desired conduct (judges will demand the documents), but it will also produce a compensating behavior, in that judges will easily approve the agreements because the victims have been heard. This compensation will nullify the overall effect.¹⁷³

Since architecture of human behavior may be unpredictable, a solution should be evidence based. Therefore, the proposal should be the subject of a pilot program, and be assessed and reviewed. Sunstein offers three answers to nudge failure: doing nothing, trying a different kind of nudge, or undertaking a more aggressive approach, or going beyond a nudge.¹⁷⁴ Indeed, when third-party effects are involved, in our case the victims, the ineffectiveness of nudges provides a good reason to consider stronger measures.¹⁷⁵ In any case, if the pilot of the nudge toolbox does not work, at least we will gain important knowledge about the participants' behavior, enabling a new consideration.

168. CASS R. SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* 85 (2012).

169. Work, *supra* note 6, at 158.

170. See, e.g., Karsten Schmidt et al., *Nudging Smoke In Airports: A Case Study in Nudging as A Method*, INUDGEYOU, <http://inudgeyou.com/wp-content/uploads/2016/08/Nudging-Smoke-in-Airports.pdf>; DAVID HALPERN, *INSIDE THE NUDGE UNIT* (2015) (describing seemingly small and subtle solutions that have led to huge improvements across tax, healthcare, pensions, employment, crime reduction, energy conservation, and economic growth).

171. Cass. R. Sunstein, *Nudge that Fail* (preliminary draft July 18, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809658.

172. *Id.* at 2.

173. *Cf. d.* at 19.

174. *Id.* at 4.

175. *Id.* at 20.

VI. CONCLUSION

Currently the federal law (CVRA) provides victims with meaningful rights of participation. The proposals made in this article are meant to bridge the gap between these seemingly sufficient rights and a reality in which victims might still be marginalized. This gap may be explained by the prosecution's vast discretion and dominance in the process. At the same time, victims are powerless to enforce their rights to participate, and this powerlessness eliminates the potential for true confrontation.

An example of the importance of involving victims in plea agreements, have recently been given in a Utah child abuse case. A judge refused to accept a plea where the victims' parents had not been allocated the right to confer with the prosecutor and a very lenient plea had been struck behind their back.¹⁷⁶ Judge Randall Skanchy rejected the agreement after the mothers of the three children voiced their objections to the deal and described the injuries their children had suffered. One of the mothers voiced frustration with the prosecutors and praised the judge's decision: "I think he actually listened to us", she said, "we haven't gotten questions answered from day one, we've just been passed off."¹⁷⁷ Another mother said that in light of the injury to her daughter and the others, she did not believe the plea deal was strong enough, but she would have supported a plea deal with sufficient consequences and an admission of guilt.¹⁷⁸

This story demonstrates the core issues analyzed in this article. Despite the existence of statutory victims' rights, and the importance of victims' involvement in pleas for the victims, for the CJS and for society — victims are still not always perceived as rightful participants. The mothers' complaints exemplify the secondary victimization caused by their exclusion from the process. The judge's acceptance of their reservations and the resulting rejection of the plea demonstrates the value of information and the results of the lack of it. The rejection of the plea emphasizes that defendants do not have a legitimate right in the lower sentence offered by a plea, when it is an unduly favorable bargain, resting on partial information.¹⁷⁹ Perhaps most importantly though, the mother's heartfelt statement shows that victims do not necessarily oppose plea agreements. They only want to take part in the process and voice their concerns.

As a solution, we turn to nudge theory, which has almost never been used in criminal law, but is particularly advantageous for the discussed issue. Nudge theory involves choice architecture and claims that a certain

176. See McKenzie Romero, *Judge Rejects No-Jail Plea Deal for Day Care Operator Charged with Abusing 3 Toddlers*, DESERT NEWS (June 14, 2016, 7:30 PM), <http://m.deseretnews.com/article/865656220/Judge-rejects-no-jail-plea-deal-for-day-care-operator-charged-with-abusing-3-toddlers.html?pg=all>.

177. *Id.*

178. *Id.*

179. Welling, *supra* note 29, at 312.

degree of paternalism should be acceptable even to those who most embrace freedom of choice. Thus, a nudge is any aspect of choice architecture that alters people's behavior in a predictable way without forbidding any options or abolishing their discretion. Choice architecture can help to induce greater deliberation by actors and is especially important for changing routine behaviors. We argue that deliberation can facilitate a critical thought by the prosecutors and the judges, and can alter their perspectives on how plea bargains should be performed, from the initial negotiations to the court.

For that reason, we suggested the development of a nudge toolbox that will nudge the prosecutor to approach the victim, inform her, and give her a meaningful opportunity to express her view prior to sealing the plea. The main rules we suggested ensure that the process is fully documented and that a decision is made only following the presentation of this document. The rules do not alter the prosecutor's discretion but structures its administration. Recording all contact with the victim will necessitate a significant degree of attention and consideration, and will diminish the tendency to resort to the default option of sealing quick agreements. The judge too operates in circumstances, where she is likely to resort to the default option of a swift approval of agreements. These circumstances include the case load and the need to deliver decisions in due time. Being presented with structured information regarding the victim's view will lead the judge to a more deliberate decision, without limiting her discretion.

This apparently simple and minor change, has a potential to make major contribution towards the implementation of the broadly defined CVRA rights and to the inclusion of victims in plea agreements. Furthermore, it will answer some of the strongest critiques of plea bargains by making the process more transparent. This will not necessarily lead to fewer plea agreements, but it will hopefully lead to more balanced ones, reflecting all the relevant interests. The prosecution and the defendant will have an interest in reaching an agreement that will not be rejected by the court. Thus, victim input may contribute to what may be seen as a fairer conclusion of the plea agreement.