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The Role of the Victim in the Prosecution and Disposition of a Criminal Case

Donald J. Hall

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The Role of the Victim in the Prosecution and Disposition of a Criminal Case

*Donald J. Hall**

TABLE OF CONTENTS

I.	INTRODUCTION	932
II.	THE VICTIM'S ROLE AT VARIOUS STAGES	934
	A. <i>Reporting Crimes</i>	934
	B. <i>Investigating Crimes</i>	937
	C. <i>Influencing the Decision to Arrest</i>	937
	(1) Arrest by Victim	937
	(2) Victim-Police Interactions	938
	(a) Introduction	938
	(b) Victim's "Dirty Hands"	939
	(c) "Relationship" Between Victim and Offender	939
	(d) Victim's Race	941
	(e) Victim's Status	942
	(f) Victim's Motives	942
	(g) Severity of the Crime	943
	(h) Other Considerations	944
	D. <i>Influencing the Bail Decision</i>	944
	E. <i>Influencing the Decision to Prosecute</i>	946
	(1) Victim Bypassing Prosecutor	947
	(2) Victim Participation in the Decision to Charge	948
	(a) The Adamant Victim	948
	(b) The Reluctant Victim	950
	(3) Selection of Charge	952
	(4) Involvement in Plea Bargaining	953

* Associate Professor of Law, Vanderbilt Law School. B.S., Florida State University, 1965; J.D., University of Florida, 1968. The author wishes to express his sincere appreciation to Keith M. Lundin for his valuable research assistance. Appreciation is also due Gerald R. Toner, who participated in the initial phases of this project.

F.	<i>Influencing Post-Conviction Decisions</i>	956
	(1) Sentence	956
	(2) Probation	958
	(3) Parole Release and Clemency	961
III.	EXISTING LEGAL MEANS OF EXERTING INFLUENCE	965
A.	<i>Efforts to Force Prosecution</i>	965
	(1) Mandamus	965
	(a) Party Beneficially Interested	965
	(b) Exercise of Discretion	966
	(c) Specific Uses of Mandamus	967
	(i) Arrest	967
	(ii) Grand Jury	968
	(iii) Prosecution	968
	(2) Removal of Prosecutor	970
B.	<i>Efforts to Block Prosecution</i>	971
C.	<i>Compromise Statutes</i>	972
D.	<i>Private Prosecution</i>	974
	(1) "Control" Issue	976
	(2) Private Prosecutors' Representation of Vic- tims in Civil Actions	977
	(3) Conflicts Between District Attorneys and Vic- tims	978
IV.	COMPARATIVE LAW	978
V.	SUMMARY AND RECOMMENDATIONS	980

I. INTRODUCTION

A theoretical underpinning of the American system of criminal justice is the notion that a criminal misdeed is a wrong against the entire society.¹ Accordingly, the local, state and federal governments, acting as the representatives of society, assume the duty and responsibility of prosecuting the individual wrongdoer. While the individual victim of a crime obviously is the party directly "wronged," society interjects and institutes the formal proceeding to ascertain criminal responsibility and determine the appropriate sanction to be imposed upon the accused. This constitutes a basic distinction between civil and criminal cases; the aggrieved individual is the named litigant in a civil case (the plaintiff); in a criminal case, the government prosecutes the defendant.²

1. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 11 (1972). If society is deemed to be the "victim," the so-called "victimless" crime is a misnomer; see E. SCHUR, CRIMES WITHOUT VICTIMS (1965). It has been reported that ". . . the authorities do not agree among themselves as to which crimes are victimless." E. SCHUR & H. BEDAU, VICTIMLESS CRIMES: TWO SIDES OF A CONTROVERSY 59 (1974).

2. W. LAFAYE & A. SCOTT, *supra* note 1, at 11, 14.

In recent years lawyers, legislators and commentators have evinced a growing interest in the person most directly affected by crime—the victim.³ Perhaps the most widely studied topic in the field of victimology has been the compensation of victims of crime.⁴ Other studies have suggested that in exercising their broad discretion police and prosecutors consider the desires of the victims.⁵ No single research project, however, has undertaken carefully to assess the role that the victim plays in the prosecution and disposition of the criminal case. The purpose of this article is to describe and evaluate the ways in which a victim can influence the course of a criminal case, from investigation and arrest to parole release and clemency. Data concerning the roles that the victim may play in a criminal case have been gathered by the author through personal interviews with participants in the criminal justice system in Nashville, Tennessee. These participants include police officers, defense attorneys, prosecuting attorneys, judges, probation officers, parole board officials, and members of the Governor's staff.

Victims were not interviewed. Were it the purpose of this study to demonstrate the satisfaction or dissatisfaction of victims with the criminal justice system or to describe the victim's perception of his role, the views of victims certainly would have been solicited. The scope of this research is more limited, however, and the victim's perception of the system therefore is largely irrelevant. A victim of an armed robbery may believe that his "tough" attitude influenced the prosecutor to go to trial on the maximum chargeable offense. Similarly, the burglary victim may believe that his expression of leniency was responsible for the district attorney's decision to accept a plea of guilty to criminal trespass. Nevertheless, the individual best qualified to assess the *actual* role that the victim plays in these instances is the prosecutor.

Because of limitations on finances and research personnel, interviews were not conducted outside of the Nashville area. While it is not suggested that Nashville, Tennessee is necessarily representa-

3. One of the earliest studies is H. HENTIG, *THE CRIMINAL AND HIS VICTIM* (1948). Perhaps the most recent is by Greacen, *Arbitration: A Tool for Criminal Cases?*, 2 BARRISTER 10 (Winter 1975).

4. These studies focus on the desirability and feasibility of programs under which state or local governments compensate persons for physical injuries caused by criminal acts of others; see, e.g., Annot., 32 A.L.R.3d 1446 (1970); Lamborn, *Toward a Victim Orientation in Criminal Theory*, 22 RUTGERS L. REV. 733 (1968); Schafer, *The Proper Role of a Victim-Compensation System*, 21 CRIME & DELIN. 45 (1975); Note, *But What About the Victim? The Forsaken Man in American Criminal Law*, 22 U. FLA. L. REV. 1 (1969).

5. W. LAFAVE, *ARREST: THE DECISION TO TAKE THE SUSPECT INTO CUSTODY* 110-11, 137-43 (1965) [hereinafter cited as LAFAVE]; F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 173-78, 283-84 (1969) [hereinafter cited as MILLER].

tive of communities of its size,⁶ it is suggested that the practices revealed herein are not significantly different from practices in other parts of the country. It is clearly desirable, of course, that similar studies be undertaken in other communities.

For purposes of this article, the victim of a criminal act is defined as a nonconsenting individual or group of individuals directly aggrieved by the defendant's conduct. Under this definition of "victim," concert-of-action crimes such as prostitution, gambling, and incest are excluded from consideration.⁷ In a homicide case or in a case in which the victim is physically or mentally incapacitated, the survivor or representative, respectively, represents the individual victim's interest. Therefore, the term "victim" includes survivors or representatives of the individual personally harmed. While the victim's reporting of crimes is included as one facet of the victim's influence, his provocation of criminal attacks upon himself and fraudulent crime reporting by would-be victims are beyond the scope of this article.

This study focuses on a frequently observed situation: the police officer or the prosecutor, each of whom is given broad discretion in the exercise of his responsibilities,⁸ has some evidence of possible criminal involvement but is unsure of how to proceed with the case, if at all. Given this situation, can the adamant victim of the crime persuade the policeman or prosecutor to pursue the arrest or prosecution? If the victim's wishes are taken into account, do any patterns of decision-making surface according to the crime involved or the stage at which the influence is exerted, or related to the victim's status, relationship to the accused, or the victim's age, sex, race, or other characteristic? In deciding how much weight to accord the victim's desires, what criteria are used? These questions also arise when the victim strongly advocates no arrest or prosecution. Similar issues are raised at other stages of the process when judges and correctional personnel are the decision-makers.

II. THE VICTIM'S ROLE AT VARIOUS STAGES

A. *Reporting Crimes*

One of the simplest and most effective ways that a victim can

6. As of January 1, 1975, Metropolitan Nashville had an estimated population of 469,000. RAND-McNALLY COMMERCIAL AND MARKETING GUIDE (1975).

7. Because there is no vocal victim in concert-of-action crimes, it is very difficult for law enforcement officials to apprehend and prosecute perpetrators of these crimes. Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065, 1075-80.

8. See, e.g., *United States v. Bell*, 506 F.2d 207, 222 (D.C. Cir. 1974), in which prosecutorial discretion is described as "exceedingly broad." See also K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

prevent a wrongdoer from being arrested and prosecuted is to fail to report the crime to responsible officials. According to a recent study sponsored by the Law Enforcement Assistance Administration and the Census Bureau, the "real" crime rate for 1972 was five times higher than police figures in Philadelphia, almost three times as high as police figures in Chicago, Detroit, and Los Angeles, and slightly more than twice as high as official counts in New York City.⁹ It should be emphasized that the crimes surveyed in the study were limited to serious offenses: rape, robbery, burglary and assault. It is likely that the statistics would show even a greater disparity between police crime figures and actual crimes if all offenses, whether felony or misdemeanor, were included in the survey.¹⁰ Interviews with Nashville prosecutorial officials disclose a *perceived* disparity similar to that disclosed by the L.E.A.A. statistics, but empirical data is not available.

Why is it that victims of criminal attacks do not report these incidents to the government officials? The Law Enforcement Assistance Administration study revealed that thirty-four percent of those who did not report personal crime said that their decision not to report was based upon lack of proof or their belief that "nothing could be done."¹¹ A slightly lesser percentage of persons did not consider the criminal episode significant enough to report and still fewer reported that they did not want to bother the police, that they were afraid of reprisal from the offender, or that taking action would cause too much personal inconvenience.¹² Another possibility, but a most difficult one to establish by empirical data, is that the offender has agreed to compensate the victim.¹³

Interviews with Nashville police officers and prosecutors revealed no reason to suspect that Nashville differs significantly from the cities surveyed by the L.E.A.A. in either the incidence of or the reasons for nonreporting. In addition to the reasons for nonreporting articulated by the L.E.A.A. study, however, local police officers frequently cited the "dirty-hand syndrome." This syndrome is illus-

9. The Tennessean (Nashville), Apr. 15, 1974, at 1, col. 4.

10. See also a more recent study by LEAA concluding that "only one-third of rapes, robberies, aggravated assaults and burglaries that actually occur" were reported during the first six months of 1973. The Tennessean (Nashville), Dec. 1, 1974, at 12, col. 3. In an earlier study, approximately one-half of the rapes, robberies, assaults, burglaries and larcenies in Dayton and San Jose for the year 1970 were not reported; however, *more than half* of the unreported crimes involved alleged larcenies of *less than \$50*. LEAA, CRIMES AND VICTIMS: A REPORT ON THE DAYTON-SAN JOSE PILOT SURVEY OF VICTIMIZATION 24 (1974).

11. *Supra* note 9.

12. *Id.*

13. See for example 15 AM. JUR. 2d *Compromise and Settlement* §§ 22, 29 (1964) and Annot., 42 A.L.R. 3d 315 (1972), discussing the legality of such agreements and whether they effectively preclude criminal prosecution (they do not).

trated by the victim who is assaulted by a prostitute and for obvious personal reasons decides not to report the incident to the police.¹⁴ Similarly, an individual possessing property obtained under questionable circumstances is reluctant to report the theft of that property to the police for fear of implicating himself in possible criminal wrongdoing.¹⁵ In another case a person was criminally attacked but would not report the incident because to do so would have revealed his whereabouts at that time, with embarrassing consequences to that individual.¹⁶

Reinforcing the L.E.A.A. disclosures, the Davidson County District Attorney said that one reason for nonreporting is the "reputation of police inability to apprehend," and he suggested that only about five percent of the burglaries and one-tenth of one percent of car break-ins are solved.¹⁷ Some police officers felt that many persons, especially those in the lower economic groups, do not report crimes because they distrust the "system."¹⁸ Particularly in rape cases, the distrustful victim may actually fear the prospect of filing a criminal complaint.¹⁹ Another instance of nonreporting, most applicable in less serious felonies, is the "family squabble." Often, the only way these offenses are made known to the police is that witnesses, usually neighbors, complain.²⁰ Perhaps the most troubling of all reasons for nonreporting is reflected by the statement of one officer that persons living in poor, predominately black sections of the city fail to report property crimes because "it is a part of their life."²¹

While the nonreporting of crime is an effective way to prevent the apprehension and prosecution of a suspect, it is not always determinative. Many criminal acts are committed in the presence of witnesses who will report the incident to police.²² Secondly,

14. Interview with Sergeant Luther Summers, July 10, 1974 [hereinafter cited as Summers interview].

15. Interview with Officer Joe Blakely, Aug. 12, 1974 [hereinafter cited as Blakely interview].

16. Summers interview, *supra* note 14.

17. Interview with District Attorney Thomas Shriver, Aug. 9, 1974 [hereinafter cited as Shriver interview].

18. Summers interview, *supra* note 14.

19. Interview with Detective Dianne Vaughn, Aug. 28, 1974 [hereinafter cited as Vaughn interview]. Recent articles dealing with treatment accorded rape victims include Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303 (1974), and Note, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

20. Blakely interview, *supra* note 15.

21. *Id.*

22. In Dayton, Ohio, of 9,300 crimes reported to police in 1970, 2,370 (approximately 25%) were reported by someone other than the victim. A similar percentage (2,930 out of 11,190) was reported in San Jose, California. LEAA 1 CRIMES AND VICTIMS: A REPORT ON THE DAYTON-SAN JOSE PILOT SURVEY OF VICTIMIZATION 122 (1974).

knowledge of previously unreported criminal acts is gained through custodial interrogation carried out for the resolution of other crimes. Lastly, automobile license checks and similar screening devices sometimes reveal previously unreported criminal conduct.

B. Investigating Crimes

Victims occasionally assist in the investigation of crimes in a more substantial way than by simply providing answers to officers' questions. While this role is not frequently observed, it can be a most useful, if not crucial, aid to the prosecutor. In one case, for example, the district attorney's office had been unable to locate a key witness to the crime, and the witness' testimony was deemed critical. Through the efforts of the victim, the witness was found, the testimony was adduced, and a conviction was obtained.²³

C. Influencing the Decision to Arrest

(1) Arrest by Victim

Under the statutes of most states, a private party may, acting in good faith, arrest another without a warrant, (1) for a misdemeanor constituting a "breach of the public peace" and committed in the citizen's presence, or (2) when a felony has been committed and the person making the arrest has reasonable cause to believe that the arrestee committed the felony.²⁴ Slight variations from these requirements are found in some states. For instance, in some jurisdictions a citizen may arrest another for a felony only if the felony is actually committed in his presence.²⁵

Most cases involving the validity of citizen's arrests concern interpretations of the statutory "in presence" requirement.²⁶ Generally, courts have construed this standard strictly, resolving any ambiguity against the validity of the arrest.²⁷ Another significant

23. Interview with Assistant District Attorney Ed Yarbrough, July 10, 1974 [hereinafter cited as Yarbrough interview].

24. See, e.g., CAL. PENAL CODE § 837 (West 1970); TENN. CODE ANN. § 40-816 (1955).

25. 5 AM. JUR. 2d Arrest § 36 (1962).

26. See, e.g., *People v. Martin*, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924 (Dist. Ct. App. 1964).

27. See 5 AM. JUR. 2d Arrest §§ 35, 36 (1962). A private citizen cannot, for example, make an arrest for a misdemeanor committed earlier. In *Protective Life Ins. Co. v. Spears*, 231 So. 2d 510 (Miss. 1970), the "victim" of what he believed to be an attempted automobile homicide arrested his attacker some hours after the incident. The crime allegedly committed by the attacker was reckless driving, a misdemeanor, and the court held that an attempted arrest after the incident had transpired was not legal. In *People v. Martin*, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924 (Dist. Ct. App. 1964), police officers outside their jurisdiction and thus acting as private citizens arrested a man on the belief that he was violating the state's drug laws. Concluding that no offense was then being committed, the court stated that a citizen's

body of case law in the area of private arrest treats the issue whether, to justify arrest by a private person, an offense must actually have been committed. The majority view seems to be that a reasonable belief alone is not sufficient to justify an arrest by a private person for an offense less than a felony.²⁸ When the crime allegedly committed is a felony, there is a split of authority whether the offense actually must have occurred or whether reasonable belief of the occurrence of the felony is sufficient.²⁹

The private person who chooses to respond to a criminal wrong against him by arresting the alleged assailant assumes the risk of potential civil liability for false arrest, false imprisonment, or both.³⁰ The victim's or citizen's arrest is an extraordinary action that rarely occurs.³¹ Because of the potential civil loss as well as personal risk involved in effectuating an arrest, it is unlikely that the citizen's arrest will or should become a mechanism to be utilized by the victim desiring to influence the arrest decision.

(2) Victim—Police Interactions

(a) Introduction

Statutes in some states make it a criminal offense for an officer to refuse or neglect to make an arrest once a warrant has been issued pursuant to a complaint by a victim. LaFave observes that it is an offense in a few states for an officer to "neglect making any arrest for an offense . . . committed in his presence."³² The failure of an officer to arrest when no formal complaint or warrant has been issued is not a statutory criminal offense although some authority indicates that at common law an officer was bound by law to arrest for a felony committed in his presence.³³ Many states prohibit an officer from making a warrantless arrest for misdemeanors not committed in his presence.³⁴ Thus, a police officer frequently relies upon

arrest for a misdemeanor may not be made when the offense was "neither committed nor attempted in the citizen's presence." *Id.* at 94, 36 Cal. Rptr. at 926.

28. See *People v. Martin*, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924 (Dist. Ct. App. 1964); 6A C.J.S. *Arrest* § 14 (1975).

29. 5 AM. JUR. 2d *Arrest* § 36 & n.19 (1962).

30. See, e.g., Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

31. Nashville officers recalled very few cases of citizens' arrests, either attempted or accomplished.

32. LAFAVE, *supra* note 5, at 78-79. Most courts have rejected claims that an officer is civilly liable for failure to arrest. See *Annot.*, 41 A.L.R. 3d 700; Comment, *Crime Victim: Recovery for Police Inaction and Underprotection*, 1970 LAW & SOC. ORDER 279, 286-87. When protection is extended to an individual, however, negligent police performance is actionable. See, e.g., *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

33. 5 AM. JUR. 2d *Arrest* § 24 (1962).

34. *Id.* § 30.

a victim's complaint in proceeding against an offender when the offense is less than a felony and is not committed in the officer's presence. The victim's willingness to file a formal complaint is cited frequently as a major determinant of whether a police officer will abide by the victim's wishes at the arrest stage. Three distinct attitudes may be displayed by a victim at the arrest stage: (1) the victim may aggressively press an officer for the arrest of a suspect; (2) the victim may take affirmative action to persuade the officer not to arrest a suspect of the reported crime; or (3) the victim may be ambivalent. How police react to these attitudes depends largely on characteristics of the victim and the crime.

(b) Victim's "Dirty Hands"

As a general rule, police will not arrest a suspect if the complaining party is an individual who is involved in conduct of questionable legality. This principle is invoked in the case of a victim who complains to police that he has been robbed by a prostitute.³⁵ Professor LaFave, referring to the example of a man whose car was stolen by a prostitute, suggested that the police might seek to find the stolen car but are unlikely to attempt to find or prosecute the prostitute-thief.³⁶ The apparent, though unarticulated, rationale is that the victim's misconduct precludes police action despite his lawful right³⁷ to complain about the crime and seek police assistance in apprehending the offender. Similarly, if a "wrongdoing" victim desires not to prosecute, police invariably honor his request.³⁸

(c) "Relationship" Between Victim and Offender

It is widely recognized that if the victim and his alleged offenders are related by friendship, marriage, family or contract, the relationship is a particularly important element in determining the outcome of police-victim interaction. If, for example, the victim and offender are related contractually as landlord and tenant, the police are not likely to intervene to make an arrest in a dispute involving that relationship unless the victim vigorously asserts his desire for an arrest and indicates his willingness to cooperate. LaFave believes that the reason for this disinclination of the police to abide by the victim's desires is that the victim often has the alternative remedies of dissolving the legal relationship, or seeking civil relief, or both.³⁹

35. Summers interview, *supra* note 14.

36. LaFAVE, *supra* note 5, at 142, 143 & n.66.

37. W. LaFAVE & A. SCOTT, *supra* note 1, at 409.

38. Blakely interview, *supra* note 15; Summers interview, *supra* note 14.

39. LaFAVE, *supra* note 5, at 119.

The relationship between the victim and the alleged offender may have an impact even when the alleged crime is rape. One writer found that when the alleged rapist was the victim's date, Philadelphia police acting at the arrest stage deemed unfounded forty-three percent of the rape complaints. On the other hand, when the victim and offender were strangers, only eighteen percent of the rape reports were so deemed.⁴⁰

Perhaps the continuing relationship between victim and offender that most significantly affects the interaction between police and victim is the family dispute.⁴¹ One commentator who has studied extensively this problem maintains:

The general pattern of police treatment of domestic disputes evidences recognition . . . that such situations are socially distinguishable from criminal activity in general.

Police respond but they generally do not arrest . . . District Attorneys listen to complaints but generally do not charge. If an arrest is made and charges are filed, the prosecutor or judge often receives a request from the victim, who has since reconciled with the offender, that the charges be dismissed. Compliance is generally summary.⁴²

The above commentator further observes that police in Detroit will not even respond to a call for assistance made by a spouse who claims an assault arising from a marital dispute unless the spouse indicates a willingness to file a complaint and prosecute. Except in the most extreme cases the Detroit police department refers intra-family violence victims to social services groups prior to any preliminary police investigation.⁴³ Commentators note that in the absence of serious injury, possession of a weapon, insistence by one of the disputants upon signing a complaint, or repeated calls, police officers are unlikely to heed the victim's request for an arrest in an intrafamily dispute case.⁴⁴

The Nashville study buttresses these observations and conclusions. When the police officer is called to the scene of an intrafamily dispute, the officer perceives that his role changes from law enforcer to peacemaker. One reason for this perception is the officer's belief that the complaining spouse will not seek criminal prosecution after

40. Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 291 (1968). See also *Rape and Rape Laws*, *supra* note 19, at 928 (citing the Philadelphia study).

41. As the term connotes, it sometimes is very difficult to allocate blame to any one family member; thus the labels "victim" and "offender" are somewhat arbitrarily assigned to the participants.

42. Parnas, *Police Discretion and Diversion of Incidents of Intra-Family Violence*, 36 LAW & CONTEMP. PROB. 539, 543 (1971).

43. *Id.* at 547.

44. LAFAYE, *supra* note 5, at 122; Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 937-40.

passions have cooled. For example, a patrolman reported that when he has any doubts that a spouse will "follow through," he requires the spouse to swear out an arrest warrant before he will make the arrest.⁴⁵ Presumably, the appearance before the magistrate affirms or crystallizes the complainant's desire to prosecute. As the degree of serious physical injury increases, however, "victim control" lessens, regardless of the relationship between the parties. For example, when police learned of an attempted murder, and the victim declared that he had no desire to cooperate with the police or to prosecute the suspected assailant, who was believed to be the victim's wife, the police declared their intention to proceed with the arrest over the victim's protestations.⁴⁶

(d) Victim's Race

The decision to arrest may, to some extent, depend upon the race of the complaining victim. In the case of simple assault, for instance, some policemen have expressed the view that assault is an "acceptable means" of settling disputes between Negroes. When both victim and offender are black, LaFave notes that police are not likely to invoke the criminal process through an arrest:

Such offenses as bigamy and open and notorious cohabitation are overlooked by law enforcement officials, and arrests often are not made for carrying knives or for robbery of other Negroes. However, the practice is most strikingly illustrated by the repeated failure of the police to arrest Negroes for a felonious assault upon a spouse or acquaintance unless the victim actually insists upon prosecution.⁴⁷

LaFave maintains that in crimes perpetrated against Negroes by Negroes the victim's control of the arrest decision does not decrease as the seriousness of the offense increases.⁴⁸ One reason cited for the disinclination to proceed with an arrest unless the black victim of a black offender adamantly insists upon it is the probability that the victim will not proceed with formal prosecution of his assailant. In one study, for example, it was found that in thirty-eight of forty-three felonious assaults reported in one precinct during a one-month period the victims refused to prosecute.⁴⁹ The Philadelphia rape study supports the view that race influences the deci-

45. Blakely interview, *supra* note 15.

46. *The Tennessean* (Nashville), Feb. 8, 1974, at 21, col. 8. This theme is further developed in § e.

47. LAFAVE, *supra* note 5, at 111. See also, Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 575 (1960).

48. LAFAVE 112.

49. According to the author, most of the original calls to the police were for ambulance service rather than to request arrest of the assailant. Goldstein, *supra* note 47, at 574 & n.64.

sion to arrest. It was found that the police are more likely to believe that a rape allegation is unfounded when both victim and assailant are black than when both are white or when one is white and the other black.⁵⁰

Interviews with Nashville police failed to disclose tangible evidence of discrimination in handling victim-police interactions. One black detective, however, pointed to the apathy of lower economic groups toward the criminal justice system, and he attributed this attitude to the individual's belief that his needs go unheeded by police.⁵¹ Officers did not agree, however, with LaFave's statement that, as a matter of practice, Negroes' claims of felonious assault are handled differently from those of white victims. More detailed and systematic research techniques are required to establish reliably that racial discrimination is nonexistent in victim-police dealings.

(e) Victim's Status

One of the most frequently mentioned variables in the field of police-victim interaction—and the most difficult to quantify—is the victim's real or perceived status in the community. Rarely, however, will an official responsible for making an arrest decision expressly acknowledge the influence of this variable. The comment usually made by police is, "I'm sure it goes on, but I don't do it." One judge who admitted considering the victim's status in deciding whether to issue arrest warrants justified his practice on the ground that "the victim's status is relevant in deciding the credibility of the report."⁵² Additional reasons for considering a victim's status may include officials' fear of publicity and concern that a dissatisfied victim will complain to superior officers or governmental officials.

(f) Victim's Motives

Another variable in victim-police interactions is the victim's motive for seeking an arrest. Many times, arrest is sought as a means of pressuring the arrestee to make restitution for the harm done to the victim. A common example is the merchant who calls upon the police officer to arrest an individual for passing a worthless check.⁵³ Generally, when restitution is made and the victim does not thereafter seek arrest or prosecution, the police will not proceed further. When restitution appears to be the sole motive behind the

50. *Police Discretion*, *supra* note 40, at 302.

51. Summers interview, *supra* note 14.

52. Interview with the Honorable Leslie Mondelli, Davidson County General Sessions Judge, Oct. 2, 1974 [hereinafter cited as Mondelli interview].

53. LAFAVE, *supra* note 5, at 51.

complaint, the police, to insure the victim's continued cooperation, frequently demand that the victim file a formal complaint.⁵⁴

While restitution is the dominant motive behind some victims' complaints to police, other self-serving reasons for "feigned" arrests have been cited. In intrafamily encounters, for example, a victim's plea for the arrest of a spouse may be motivated by a desire for revenge or a desire to "cloud" the spouse's record so as to affect pending property or custody controversies.⁵⁵ It has been suggested, too, that a purported rape victim will sometimes seek an arrest to force marriage or attain personal revenge.⁵⁶ When police believe that the victim is seeking an arrest for restitution, revenge, or other ulterior purposes, officers tend to discount the victim's pleas. Victims' motives are of relatively little importance to most arrest decisions, however, because few situations arise in which the victim's subjective intent is discoverable.

(g) Severity of the Crime

As a general proposition, the policeman's view of the seriousness of a particular crime (or the way in which crime is committed) will determine the extent to which the policeman's arrest decision is influenced by the victim's desires.⁵⁷ For example, a victim's expressed desire for or against arrest may be decisive in a worthless check case; in the case of a forged instrument, however, the officer's decision to arrest will be influenced to a much lesser degree by the victim's attitude.⁵⁸ In minor property crimes in which no force or violence is involved, the determination by the police not to arrest will usually be decisive unless a victim indicates a clear willingness to cooperate with the police. Thus, the refusal of the victim to sign a complaint under such circumstances will almost assuredly terminate further police investigation.⁵⁹

In juvenile cases when the offenses are minor, police frequently decide not to investigate because the cases are not considered important enough to warrant the expenditure of substantial amounts of law enforcement resources.⁶⁰ A prevailing police attitude is that juveniles often commit minor offenses because of "immature judg-

54. *Id.* at 118, 119.

55. Blakely interview, *supra* note 15.

56. Note, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 460 (1970).

57. LAFAVE 117; Blakely, Summers and Vaughn interviews; interview with Detective Russ Hackett, July 10, 1974 [hereinafter cited as Hackett interview].

58. LAFAVE 117; Hackett interview.

59. See LAFAVE 21 n.16.

60. *Id.* at 106.

ment" or "youthful exuberance" and therefore pose no major threat to society. Because of this attitude the police are likely to ignore the desires of a person victimized by a juvenile offender. Rather than arrest juvenile offenders, police are inclined to give them warnings to "throw a scare" into them.⁶¹

(h) Other Considerations

A recent study of rape cases in Philadelphia revealed that the police officers' perception of the credibility of a rape allegation is influenced by the age of the complainant. Thus, Philadelphia police are more likely to conclude that a rape complaint is legitimate when the complaining party is an adult rather than a juvenile.⁶² The same study disclosed that the police considered when and to whom the victim made her report in determining whether to proceed with a rape case.⁶³ Another variable is the disgruntled victim's ability to pressure lackadaisical police through publicity.⁶⁴ Recently a victim dissatisfied with police inaction complained to the news media that criminal wrongdoing was going unpunished. The story appeared in a local newspaper,⁶⁵ and within a few days police action was initiated.

The identity of the alleged offender also influences the decision whether to arrest. The victim's wish that no arrest be made may be disregarded even when the crime is minor—if, (1) the offense is committed by someone known to the police as a "bad actor," or (2) police have expended significant resources for the apprehension of the suspect on previous charges. In both cases, the decision to arrest is based primarily on considerations unrelated to the victim. One author maintains that even in a minor case, when the offender is a known criminal, police will, if necessary, subpoena a recalcitrant victim as a witness.⁶⁶

D. Influencing the Bail Decision

The theoretical basis for the release of an accused on bail pending trial is that bail is a means of assuring the court that the accused will be available for the trial.⁶⁷ The major considerations taken into account in determining the amount of bail are the defendant's as-

61. *Id.* at 106, 107.

62. *Police Discretion*, *supra* note 40, at 302.

63. *Id.* at 286.

64. *See* Goldstein, *supra* note 47, at 552 n.15.

65. Nashville Banner, July 13, 1974, at 3, col. 3.

66. *See* LAFAYE 49; Goldstein, *supra* note 47, at 574.

67. *Gusick v. Boies*, 72 Ariz. 233, 233 P.2d 446 (1951).

sets and liabilities, his family ties, and any other information relevant to the question of whether he is likely to flee the court's jurisdiction prior to trial.⁶⁸ Any amount that exceeds the mythical figure needed to guarantee the defendant's presence is excessive and constitutionally proscribed.⁶⁹

In Nashville, the typical bail hearing is an informal proceeding usually involving only the judge, defendant, and arresting officer; seldom does the victim appear. In some cases, however, the victim does express his views on the pretrial release of the accused. The victim's opinion becomes known either through the victim's presence when bail is set, or by the transmittal through the police officer or, less often, through the district attorney's office. The author's field research revealed conflicting opinions about the effect a victim's attitude can have on the bail decision. One criminal court judge stated that the amount of bail depends only upon the offense and the offender.⁷⁰ Two other judges echoed this statement, but added that some weight is placed on the district attorney's recommendation (which, presumably, could be based upon the victim's attitude).⁷¹ On the other hand, two judges were of the opinion that the victim definitely *does* have an impact at the bail hearing;⁷² and one observed that the victim's attitude is crucial when release on recognizance is contemplated.⁷³

Prosecutors also were divided over the victim's role in the bail decision. The Davidson County District Attorney noted that the amount of bail may be determined by a victim's statement that threats had been made by the defendant.⁷⁴ Another prosecutor observed that even if the judge announces his unwillingness to consider the victim's feelings, the victim can influence the setting of bail simply by appearing before the judge and evoking sympathy for himself and disdain for the accused.⁷⁵

In summary, the victim in most cases has no effect on the bail

68. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE § 5.1 (Tent. Draft 1968).

69. *Stack v. Boyle*, 342 U.S. 1 (1951).

70. Interview with the Honorable Allen R. Cornelius, Davidson County Metropolitan Criminal Judge, Sept. 4, 1974. [hereinafter cited as Cornelius interview].

71. Interview with the Honorable Raymond Leathers, Davidson County Metropolitan Criminal Judge, Sept. 9, 1974. [hereinafter cited as Leathers interview]. Interview with the Honorable Gale Robinson, Davidson County General Sessions Judge, Sept. 3, 1974 [hereinafter cited as Robinson interview].

72. Mondelli interview, *supra* note 52; interview with the Honorable Donald Washburn, Davidson County General Sessions Judge, Sept. 24, 1974 [hereinafter cited as Washburn interview].

73. Mondelli interview.

74. Shriver interview, *supra* note 17.

75. Yarbrough interview, *supra* note 23.

decision because he usually is not present during the hearing. Moreover, even when the victim's views are made known, judges and prosecutors disagree on whether his views influence the judge's determination. Thus, the victim's impact on this phase of the criminal proceeding is seemingly minimal.

E. Influencing the Decision to Prosecute

The victim's role in the arrest decision overlaps another distinct stage of the criminal justice process: the initiation of formal prosecution by the state's attorney. The public prosecutor often becomes involved in a criminal action even before an arrest is made. Some states, for example, require the concurrence of both judge and prosecuting attorney for the issuance of a warrant.⁷⁶ An obvious effect of this statutory requirement is to involve the victim in the case long before the formal decision to prosecute is made. Many victims of crime, especially crimes involving real or threatened personal injury, seek aggressive prosecution of the wrongdoer. Some victims, however, are ambivalent about formal prosecution, and some actually seek to discourage the prosecutor from pursuing criminal charges.

It has been observed that victim-prosecutor interaction may be affected significantly by the manner in which the arrest stage blends into the formal prosecution stage. A victim's influence over the decision to prosecute is lessened when the alleged criminal conduct is reported to the prosecutor by police rather than by the victim. If the victim does file a complaint directly with the prosecutor, personal contact between the district attorney and the victim facilitates greater victim control over the exercise of prosecutorial discretion.⁷⁷

The prosecuting attorney has great discretion in determining whether to prosecute, what precise offense to charge, and whether to negotiate the charge.⁷⁸ The duties of prosecuting attorneys are usually prescribed in vaguely worded statutes that broadly outline their responsibilities. For example, Tennessee requires that the district attorney "prosecute on behalf of the state in every case in which the state is a party, or in any wise interested."⁷⁹ In some jurisdictions explicit exceptions to this general prosecutorial duty have been promulgated. Wisconsin declares that district attorneys are under no duty to prosecute "common assault and battery"

76. See, e.g., MICH. STAT. ANN. §28.1195 (1972); MILLER, *supra* note 5, at 5.

77. MILLER 16.

78. See MILLER 158; note 8 *supra* and accompanying text.

79. TENN. CODE ANN. § 8-703(1) (1973).

charges,⁸⁰ and a United States attorney "may forego his prosecution" and surrender an offender to state authorities when the offender is a juvenile arrested for "an offense punishable in any court of the United States."⁸¹ Few state legislatures have attempted to control the exercise of prosecutorial discretion or to delegate control to courts, victims, or other persons. Regardless of victim participation, only in rare cases will courts review or direct when or how a prosecution is to be conducted.⁸²

(1) Victim Bypassing Prosecutor

In some states, a victim can obtain the issuance of a warrant initiating prosecution without first obtaining the district attorney's consent.⁸³ In Michigan, for example, warrants may be issued without the prosecutor's approval if the complainant deposits "security for costs" with the court.⁸⁴ While provisions like the Michigan statute permit victims unilaterally to institute criminal proceedings, these provisions do not address the question whether the accused can be tried without the district attorney's cooperation.

Nevertheless, some attempts have been made by aggrieved victims in criminal cases to bypass completely the prosecutor. Case law dealing with a victim's circumvention of the district attorney is scarce. In one interesting case a citizen who had been involved in an affray with an alleged reckless driver retained an attorney who requested the district attorney to file criminal charges against the driver. After the district attorney refused to bring charges, private counsel successfully petitioned a local judge to disqualify the district attorney. The prosecutor sought a writ of prohibition to bar the lawyer from prosecuting. Characterizing the issue as whether an individual can institute a criminal proceeding "without conference, approval or authority of the district attorney," the court granted the writ and held that "the decision of when and against whom criminal proceedings are to be instituted is one to be made by . . . the district attorney."⁸⁵ California law thus requires that criminal com-

80. WIS. STAT. ANN. § 59.47 (1958); see Note, *Statutory Discretion of the District Attorney in Wisconsin*, 1953 WIS. L. REV. 170.

81. 18 U.S.C. § 5001 (1970); see Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROB. 64, 85 (1948).

82. Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507, 509, 511 (1957).

83. According to Miller, this occurs prior to a bindover order by magistrates, ". . . and so the criminal prosecution may be begun without the prosecutor's knowledge or against his wishes." MILLER, *supra* note 5, at 309, citing KAN. STAT. ANN. §§ 62-601, 62-602, 63-201 (1964) and WIS. STAT. ANN. §§ 954.01-.02 (1958).

84. MICH. STAT. ANN. § 28.1195 (1972); see MILLER, 309.

85. *People v. Municipal Court*, 27 Cal. App. 3d 193, 199, 204, 103 Cal. Rptr. 645, 649, 653 (1972).

plaints "be approved, authorized or concurred in by the district attorney before they are effective in instituting criminal proceedings."⁸⁶ Similarly, in *Keenan v. McGrath*,⁸⁷ a prisoner filed a "criminal" complaint in a federal district court, charging correctional officers with conspiracy to deny him his constitutional rights. The court dismissed the complaint after determining that the action was an effort by the prisoner to prosecute criminally prison guards. The First Circuit affirmed, observing:

Not only are we unaware of any authority for permitting a private individual to initiate a criminal prosecution in his own name in a United States District Court, but . . . to sanction such a procedure would be to provide a means to circumvent the legal safeguards provided for persons accused of crime⁸⁸

Judges, prosecutors, and defense attorneys interviewed by the author could recall no case in which a victim or complainant attempted to institute criminal proceedings without the cooperation of the prosecutor. A variation of this theme—private prosecution—has been employed in Tennessee and other states, however.⁸⁹

(2) Victim Participation in the Decision to Charge

(a) The Adamant Victim

Nashville prosecutors agree that adamant victims are observed most frequently in cases involving serious felonies—homicide, aggravated assault, rape, and armed robbery. The prevailing prosecutorial view is that the victim who most vigorously seeks full enforcement of the criminal law is the survivor of the deceased in a homicide case. Local prosecuting officials concede that "great weight" is given to the victim's desires in serious felony cases, especially homicides.⁹⁰ This could mean that if the district attorney determines that the facts and circumstances of a case do not clearly warrant prosecution for an unlawful homicide, the adamant victim could overcome the prosecutor's reluctance to charge. For example, the Nashville district attorney submitted a homicide case to the grand jury after three previous "no true bills"; but for the survivor's attitude, the case probably would not have been pursued.⁹¹

86. *Id.* at 206, 103 Cal. Rptr. at 655.

87. 328 F.2d 610 (1st Cir. 1964).

88. *Id.* at 611.

89. This topic will be discussed in § III(D) *infra*.

90. Interview with Assistant District Attorney Robert Schwartz, July 5, 1974 [hereinafter cited as Schwartz interview]; Shriver interview, *supra* note 17; Yarbrough interview, *supra* note 23.

91. Shriver interview. When the case was submitted the fourth time, explained the District Attorney, "[S]omehow we got a true bill. But the judge promptly dismissed it for

Although the victims' desires are important in serious felony cases, the weight given these desires varies according to the facts and circumstances of the particular case as well as the attitude of the individual prosecuting attorney. One assistant district attorney stated his policy as follows:

If I were faced with a case in which I believed that the facts reasonably supported a murder of first degree charge, I would proceed with this charge irrespective of the desires of the victim. On the other hand, if I felt that the facts reasonably supported a voluntary manslaughter offense but perhaps would not justify the more serious murder first degree category, the victim's desires might be strong enough to convince me to increase the charge to murder first degree. In a case of serious felony, then, I will sometimes pay heed to the victim's intent to "over-charge" but not to "undercharge."⁹²

Another assistant district attorney referred to this practice as "passing the buck."⁹³ While the prosecutor's judgment may be confirmed later by his inability to obtain an indictment or a conviction, the victim's immediate desires are met and the determination of no criminal responsibility is delayed until a judge or jury takes action. Another assistant district attorney,⁹⁴ while expressing concern for the victim's feelings, stated that he does not honor a victim's request to prosecute vigorously in either serious or petty cases because he considers it his duty to exercise independent professional judgment on the merits of each case. He recalled two or three cases in which victims who were dissatisfied with his decisions asked the district attorney to review the decisions. In each case, the assistant district attorney's determination remained unaltered.

Unlike the adamant victim of a serious crime, the adamant victim of a nonserious crime has relatively little influence over the prosecutor's charging decision. Thus, if the prosecuting attorney believes that the facts do not justify charging a nonserious crime, the prosecutor will probably dismiss the action irrespective of the presence of an adamant victim. One commentator has noted, for example, that in family disputes the prosecutor's office will impose a waiting period to give the persistent victim "cooling-off" time before initiating prosecution. If the district attorney then decides to honor the victim's insistence upon prosecution, the victim is "forcefully warned that [he or she] must follow through and cannot drop out at the last minute." This threat has been implemented in some

lack of speedy trial, and I think he was correct in doing so, and we could have never won the case . . . I feel these people [family of deceased] had a right to be heard."

92. Schwartz interview.

93. Yarbrough interview.

94. Interview with Assistant District Attorney Aaron Wyckoff, Aug. 16, 1974 [hereinafter cited as Wyckoff interview].

prosecutors' offices by requiring the victim with a change of heart to pay court costs.⁹⁵

A recurring example of prosecutors' disregard for the adamant victim's desire to prosecute is the case in which the victim is pressing for prosecution solely as a means to bring about financial restitution from the offender.⁹⁶ One Nashville prosecutor objected vociferously to the merchants' attempts to use the district attorney's office as a "collection agency" in bad check cases.⁹⁷

(b) The Reluctant Victim

Although the victim who desires no criminal prosecution of his offender usually can preclude it by failing to report the offense,⁹⁸ the crime sometimes comes to the attention of police or prosecutors by means other than the victim's report.⁹⁹ Moreover, occasions arise when the victim reports the offense but subsequently decides not to seek prosecution of the alleged offender. To what extent can a reluctant victim so influence a prosecutor as to prevent or stall prosecution? A public prosecutor must, of course, "be sure that the complaining witness will assist the state when the case comes up before trial."¹⁰⁰ A reluctant victim can be compelled by legal process to

95. Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733, 739 (1973).

96. Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1069 (1955). Miller suggests that if the victim presses for prosecution for a minor property crime, the victim may be required to agree to pay court costs for failing to cooperate. MILLER, *supra* note 5, at 181.

97. Schwartz interview, *supra* note 90. Compare MILLER 271, with NEWMAN, *infra* note 118, at 164. Miller says:

Victims of minor property crimes, such as recipients of bad checks normally are interested only in restitution for the loss suffered by them, and they seek the aid of the prosecutor solely to achieve that end. Although they are usually willing to threaten prosecution, seldom are they willing to actually assist in prosecution, even if restitution is not made. Indeed, that situation is seldom presented because offenders readily make restitution if given the opportunity as an alternative to charging. Prosecutors, for the most part, are willing to allow the criminal processes to be used to gain that objective, although they often express some dissatisfaction with their status as "collection agencies."

Newman's view is as follows:

Occasionally bad check, minor theft, and property damage cases are dismissed when restitution is made and when the offender is a person whose reputation or that of his family would be excessively harmed by formal conviction and sentencing. Often these cases are handled at the prosecution stage, where the prosecuting attorney will drop the charge when restitution is made. Some prosecutors, however, argue that their office is not a "collection agency" and persist in prosecution even though the defendant has made monetary amends.

98. Section II(A) *supra*.

99. See note 22 *supra* and accompanying text.

100. Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L.C. & P.S. 770, 782 (1933).

participate in the trial, but "in practice this is not done."¹⁰¹ In almost all nonserious cases, therefore, a reluctant victim's desire not to prosecute is honored by the prosecutor.¹⁰²

Occasionally, a victim is hesitant to cooperate with the prosecutor's office in the prosecution of a serious felony. While hesitant victims only occasionally are found in homicide or attempted homicide cases, they frequently are encountered in cases of rape. Regardless of the reasons for the victim's reluctance,¹⁰³ the vast majority of rape cases in which the victim opposes prosecution are dismissed. Because of the peculiar importance of the victim's testimony in this crime,¹⁰⁴ the state's case is almost totally undermined when the victim is unwilling to participate in a trial.¹⁰⁵ Each prosecutor interviewed in the Nashville field study said that a rape case would not proceed to trial if the victim did not desire prosecution of the accused.¹⁰⁶ Thus, the deference accorded the wishes of rape victims contrasts with that accorded victims of other serious felonies; the uncooperative victim of an armed robbery or attempted murder will not be accorded so great a degree of "control" over prosecutorial discretion.¹⁰⁷ When the crime charged is a nonserious felony or misdemeanor, it is common for the prosecutor to abide by the request of a reluctant victim.¹⁰⁸ Nashville prosecutors agree that in "less serious criminal cases," the victim's desire to dismiss the criminal charge against the accused usually is honored.¹⁰⁹ While the "less serious crime" standard is imprecise, prosecutors generally exclude from this category crimes in which real or threatened physical force is used. In domestic squabbles, however, even when force is used against one spouse, the complainant's request to dismiss the charge frequently is honored by the district attorney's office.¹¹⁰ The Davidson County Public Defender provided an illustration of how local

101. MILLER, *supra* note 5, at 29.

102. *Id.* at 173. See Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174, 184 (1965); Klein, *District Attorney's Discretion Not to Prosecute*, 32 L.A.B. BULL. 323, 327 (1957).

103. See note 56 *supra* and accompanying text.

104. *Id.* A rape allegation, for example, may be supported by nothing more than the victim's uncorroborated claim that the crime occurred.

105. Miller reports that in statutory rape cases, prosecutors "usually allow their charging decision to be controlled by the [victim's] attitude . . . when . . . opposed to charging." MILLER 177.

106. Shriver, Schwartz and Yarbrough interviews.

107. *Id.*

108. MILLER 174, 261-62; Note, *supra* note 96, at 1060, 1069.

109. Shriver, Schwartz, Wyckoff and Yarbrough interviews.

110. Interview with Assistant Public Defender Robert McGowan, Aug. 9, 1974 [hereinafter cited as McGowan interview]. It is interesting to note that this defender has contacted victims personally regarding the "dropping of charges."

prosecutors balance a victim's reluctance against the seriousness of the crime: if restitution is made by the offender in a "bad check" case, a dismissal request is honored; on the other hand, if the crime is forgery, the victim's desire to dismiss is not honored.¹¹¹

The reaction of Davidson County judges to the reluctant victim is very similar to that of prosecutors and public defenders. If the offense is not serious and if the district attorney, acting at the victim's request, recommends dismissal, the judge will dismiss the case.¹¹² One judge indicated that a victim's desire to dismiss a charge growing out of a family dispute would be honored even without the district attorney's recommendation; otherwise, the prosecutor's recommendation would be necessary.¹¹³

In summary, if the crime charged is a misdemeanor or nonserious felony, chances are good that the case will be dismissed if the victim so desires unless specific circumstances other than the victim's desires predominate. With the exception of the crime of rape, however, the reluctant victim's desires will not be heeded by the prosecutor in a serious felony case.

(3) Selection of Charge

The selection of the particular charge, like the decision to prosecute, is an executive decision within the prosecutor's discretion and hence is not controlled by the judiciary.¹¹⁴ Professor Miller has observed:

Although it has been suggested that . . . a trial court must be able to control charge selection to prevent limitation on its sentencing discretion, the law in general has not taken this position, and judicial opinions instead reflect the view that one of the essential functions of the prosecutorial office is the selection of the charge which the prosecutor deems most appropriate.¹¹⁵

The choice of criminal charge often is intricately influenced by the general considerations that a prosecutor takes into account in making the initial decision to prosecute. The impression that a victim makes on a prosecuting attorney may affect the prosecutor's appraisal of the strength of his case. This strengthened belief may lead the prosecuting attorney to charge a more serious crime to obtain a better bargaining position for the plea negotiation process.

111. Interview with Public Defender James Havron, July 9, 1974 [hereinafter cited as Havron interview].

112. Cornelius interview, *supra* note 70; Leathers interview, *supra* note 71; Mondelli interview, *supra* note 52; Washburn interview, *supra* note 72.

113. Robinson interview, *supra* note 71.

114. *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967). *People ex rel. Leonard v. Papp*, 386 Mich. 672, 683, 194 N.W.2d 693, 699 (1972).

115. MILLER, *supra* note 5, at 169.

The Nashville field study disclosed varying opinions about the victim's influence on the charge. One view is that in a serious felony case the victim's request for either a greater or lesser charge is not accorded great weight by the prosecutor.¹¹⁶ On the other hand, two prosecutors suggested that the victim's attitude does influence the prosecutor's charging decision.¹¹⁷ Commentators have reported that some prosecutors subscribe to the practice of "down-grading the charge when victim, complainants, or witnesses are disreputable"¹¹⁸ One general prosecutorial attitude is common to both the "prosecuting" and "charging" processes: the prosecutor will listen attentively to the victim who desires to "over-charge" in a serious felony case but not to the victim who desires to "over-charge" in a misdemeanor or nonserious felony case; conversely, the victim desirous of "under-charging" will experience greater success with misdemeanors or nonserious felonies than with serious crimes.

(4) Involvement in Plea Bargaining

The bargaining between defense counsel and the prosecuting attorney, a much-discussed topic,¹¹⁹ is another phase of the criminal justice process in which significant, low-visibility decisions are made. The result of the negotiation process is made known, but the means by which the outcome is reached go unnoticed. Bargaining assumes, of course, that a formal charge has been or is about to be placed against the accused and that the defendant seeks an exchange whereby a guilty plea to the offense charged or to a lesser offense will be offered for a concession from the prosecutor's office, usually a recommended sentence. In this context, does the victim have any influence over the decision by the government to accept or reject a tendered agreement?

The literature on the plea bargaining process is characterized by its almost total disregard for the role of the victim. Typically, matters to be evaluated by a prosecutor in bargaining include the nature of the offense, the condition of the defendant at the time the offense was committed and at the time of trial, the strength of the

116. Havron interview, *supra* note 111; Wyckoff interview, *supra* note 94.

117. Schwartz interview, *supra* note 90; Yarbrough interview, *supra* note 23. Schwartz stated that he might "over-charge" in a serious felony case because of an adamant victim, but would not "under-charge."

118. See, e.g., D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 120 (1966). The author states that ". . . the disrepute of the victim mitigates the criminal conduct of the defendant."

119. See, e.g., *id.*; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS*, 9-13 (1967); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

state's case, and the strains of the prosecutor's case load. Only one article purporting to catalog such considerations lists the victim's desires as a variable that should be considered by the district attorney.¹²⁰ The American Bar Association's standards relating to pleas of guilty ignore altogether the victim's role in plea bargaining.¹²¹ Similarly, standards relating to the prosecution and defense functions identify no role for the victim in discussions about pleas.¹²² The major works by Professors Miller and Newman make general references to the victim's role in plea bargaining. While recognizing that the victim's attitude must be considered by the prosecutor,¹²³ Miller does not suggest that a victim has or should have a direct role in the negotiations. Similarly, Newman describes a somewhat passive and indirect role for the victim in the bargaining process.¹²⁴

Contrary to the views of Miller and Newman is the view shared by members of the Davidson County District Attorney's office that the victim is indeed directly and personally involved at the plea bargaining stage of the criminal justice process. The prosecuting attorney communicates with the victim in an attempt to explain the nature of the bargaining process and to articulate precise reasons for his belief that the tendered plea is or is not desirable.¹²⁵ If the prosecutor fails to sway the victim to his viewpoint, the victim's opposition to the negotiated plea can influence the prosecutor to reject the offer.¹²⁶ This especially is true in serious felony cases, particularly unlawful homicide and rape. When the crime is less serious, the victim's opposition is not as likely to deter the prosecuting attorney

120. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53 (1968). He indicates this is an "extraneous" factor.

121. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (Tent. Draft 1967). The standards are couched in terms of interaction between prosecutor, defendant, defense counsel and the court.

122. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY (Tent. Draft 1967), ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION & THE PROSECUTION FUNCTION (Tent. Draft 1970). One oblique reference to the victim's role is made in relation to PLEAS OF GUILTY § 1.8(a) (iv):

In some case there may be good reasons for avoiding a public trial. This is particularly true in rape and indecent liberties cases where the victim would have to appear in court and repeat the details of what transpired. Testifying in public in these kinds of criminal cases is not only humiliating but may be a severely traumatic experience for the victim, especially for a child . . . [I]n cases of this kind it would seem most appropriate to grant charge or sentence concessions to the defendant who by his plea protects the interest of the victim. This is currently the practice of many courts.

123. "[A] prosecutor is likely to accept a plea to a considerably reduced charge . . . because of . . . a reluctant complainant and . . . a belief that prosecution is undesirable . . . when the victim does not feel sufficiently agreeable to prosecute." MILLER, *supra* note 5, at 105.

124. NEWMAN, *supra* note 118, at 68-69.

125. Shriver, Schwartz, Wyckoff and Yarbrough interviews.

126. Shriver interview.

from accepting the plea. One assistant district attorney said that he personally contacts the victim of any crime before submitting to defense counsel an offer to charge a lesser offense. The victim will not necessarily be contacted, however, if the prosecutor simply expresses his willingness to accept a guilty plea to the offense charged and make a recommendation that the minimum sentence be imposed.¹²⁷

It was learned from the Davidson County Public Defender's office that a relative or friend of a defendant has on occasion contacted the victim, who has then called the public defender's office to express a desire that the defendant be treated leniently. The public defender's office in this instance would inform the district attorney's office of the victim's call to encourage dismissal or favorable plea negotiations.¹²⁸ One assistant public defender recalled an occasion when he contacted a victim, the sister of the accused, to suggest that she seek a dismissal of the charge. The defender believes that the victim did communicate with the prosecutor's office because the case was dismissed.¹²⁹

Judges confirm that the victim is involved in the plea bargaining process. One trial judge urges the district attorney to contact the victim and inform him of the bargaining process so that he will fully understand the disposition of the case.¹³⁰ Another judge, however, while admitting that the victim plays a role in plea bargaining, voiced his opposition to the victim's involvement. This judge supported his position by alluding to a case in which a man and wife had a domestic quarrel that ended with the fatal shooting of the wife. The husband's counsel and the prosecuting attorney negotiated an agreement whereby the accused would plead guilty to voluntary manslaughter and the state would recommend punishment of not more than ten years in the penitentiary. Immediately before this agreement was submitted to the court the prosecutor contacted the victim's family—a brother residing in another state. The brother refused to approve a voluntary manslaughter plea and insisted that the case be tried on the original charge of first degree murder. By the time the prosecution and defense were ready to try the case, however, the brother had lost interest, and a plea of voluntary manslaughter was accepted pursuant to the original agreement. In that case, according to the judge, the victim's family should have had no

127. Yarbrough interview.

128. Havron interview.

129. McGowan interview, *supra* note 110. Of course, he was unable to say that this was the *only* reason for dismissal.

130. Leathers interview, *supra* note 71.

say in the bargaining process: the prosecutor had no duty to "satisfy" the brother of the deceased; on the contrary, the district attorney's duty was to see that "justice was done to the accused."¹³¹

The Nashville field study establishes that in general the victim plays a very significant role in the plea bargaining process. While the weight attached to the victim's desires may vary from one prosecutor to another, it is clear that the victim's desires are considered by the district attorney's office in deciding whether to submit an offer to defense counsel and whether to accept a tendered plea from the defendant.

F. Influencing Post-Conviction Decisions

(1) Sentence

All jurisdictions provide a framework within which matters to be considered in sentencing are heard and evaluated. Within this framework the victim's views may be made known in three ways. First, testimony in aggravation or mitigation of the sentence to be imposed may be adduced in person or by affidavit.¹³² Secondly, the victim's desires may be conveyed, expressly or impliedly, by the prosecutor.¹³³ Thirdly, the victim's attitude may be set forth in the presentence report compiled by the probation officer.¹³⁴ Research data concerning the victim's role in the sentencing process is scant and unsatisfactory. Professor Dawson's book contains two brief references to the role of the victim in the sentencing and probation processes,¹³⁵ but little attempt is made to clarify or measure the impact that a victim has on the sentencing decision.

131. Cornelius interview, *supra* note 70.

132. Annot., 77 A.L.R. 1211 (1932). This annotation recognizes the majority rule to be that "it is correct practice to hear evidence by affidavit or otherwise, in aggravation or mitigation"

133. Teitelbaum, *The Prosecutor's Role in the Sentencing Process: A National Survey*, 1 AM. J. CRIM. L. 75, 81 (1972). Next to the law enforcement viewpoint, the most important contribution that a prosecutor should make to the court is "the victim's viewpoint regarding the appropriate sentence."

134. Dressler says:

The court will want to consider the complainant's attitude, particularly in instances where he has been physically injured or has lost a considerable amount of property to the offender. The judge will not necessarily act according to the wishes of the injured person, yet he will want to have that individual's attitude defined in the report.

D. DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE, 109-10 (2d ed. 1969).

Articles dealing with pre-sentence investigations ignore altogether the victim's attitude as a component of the report. See, e.g., Judicial Conference of the U.S., *Pilot Institute on Sentencing*, 26 F.R.D. 231 (1961); Hardman, *The Function of the Probation Officer*, 24 FED. PROB. 3 (Sept. 1960); Treger, *The Pre-Sentence Investigation*, 17 CRIME AND DELIN. 316 (1971).

135. R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE, 17 n.8, 33 (1969).

Some courts have expressly recognized that concern for the victim is a legitimate consideration in sentencing. For example, in *Petition of Keefe*¹³⁶ the defendant sought a writ of prohibition to stop the trial judge from sentencing him after he pleaded guilty to careless operation of an automobile. Apparently, the defendant was asked whether he would bind himself to make restitution to the victim, and it was implied that his willingness to make restitution would be taken into consideration in imposing the sentence. The defendant asserted that the concern for the victim expressed by the judge was improper. In denying the petition, the Vermont Supreme Court declared that it was "proper for the court in determining the severity of the sentence to be imposed to be able, in its discretion, to consider whether arrangements for restitution have or have not been made."¹³⁷ Similarly, the Arizona Supreme Court rejected an inmate's challenge to the use of a probation officer's report that contained statements made by victims of related crimes.¹³⁸

The Tennessee sentencing procedure, unlike that of many other jurisdictions,¹³⁹ allocates to the jury the dual function of finding guilt or innocence and setting the appropriate sentence in one trial.¹⁴⁰ The victim's role at the sentencing stage in Tennessee is not as influential as it is at other stages in a criminal proceeding. In states that use other sentencing procedures, the victim may have a more direct effect on the sentence.

Because the jury serves as fact-finder and sentencer, most Nashville prosecutors believe that the most dramatic and effective way for a victim to influence the sentence is to make a favorable impression as a witness. Although one assistant district attorney expressed the opinion that the sentencing stage is one facet of the criminal process over which the victim has very little control,¹⁴¹ another prosecutor remarked that victims have influenced his sentencing recommendations to the jury in the presentation of the state's closing arguments.¹⁴² Nashville trial court judges agree with most of the prosecutors that the victim influences the sentence and

136. 115 Vt. 289, 57 A.2d 657 (1948).

137. *Id.* at 291, 57 A.2d at 658.

138. *State v. Nelson*, 104 Ariz. 52, 448 P.2d 402 (1968). No error was found when the witnesses gave statements to the probation officer describing how similar rapes occurred in another state.

139. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 26 (1967).

140. TENN. CODE ANN. §§ 40-2704, -2706, -2707, (1956). Efforts are now underway, however, to substantially modify this procedure. See TENN. CRIM. CODE & CODE OF CRIM. PROC. § 40-2301, *et seq.* (Proposed Final Draft 1973).

141. Schwartz interview, *supra* note 90.

142. Wyckoff interview, *supra* note 94.

that this influence usually is transmitted to the jury when the victim testifies against the accused.¹⁴³

(2) Probation

Victims may be involved in a probation release decision in one of two ways. First, a bargained plea might, with the victim's knowledge or approval, incorporate a recommendation of probation.¹⁴⁴ Secondly, if the defendant moves for suspended sentence and release on probation, the victim may participate directly in the judicial resolution of this request. Normally, a probation decision is based upon the probation officer's report and the prosecutor's statement of support or nonsupport for the conditional release. Nashville probation officers sporadically contact victims in the course of their investigations, though their inquiry is not necessarily for the purpose of gauging the victims' receptivity to probation.¹⁴⁵ The victim's attitude toward probation, if known, is included in the officer's report for consideration by the sentencing judge.

The Davidson County District Attorney related that victims' wishes and desires influence his decision to recommend or oppose probation.¹⁴⁶ An assistant prosecutor described his practice of consulting victims in advance of probation hearings to learn of their attitudes. If he believes that probation should be granted, he advises the victim of his right to appear at the probation release hearing and express his views to the trial judge. Probation was granted in three cases in which victims opposed the prosecutor's recommendation of probation.¹⁴⁷

The victim's role in the probation release decision ultimately is determined by the individual judge. One judge reported that the considerations bearing on his probation decision include the crime committed, the defendant's personal background, and the defendant's need for rehabilitation, but do not include the victim's feelings.¹⁴⁸ A contrary view was offered by another criminal court judge who employs the following unusual probation procedure:

143. Cornelius, Leathers, and Mondelli interviews. Judge Cornelius, while conceding this fact, disapproved of this practice—especially in cases in which a "special prosecutor" represents the victim's interest. See, § III(D) *infra*.

144. See § II(E) (4) *supra*.

145. Interview with Tom Stephens and Ed Fowlkes, Tennessee probation officers, June 24, 1974. Fowlkes explained that one reason for victim contact is to assess the psychological needs of the defendant.

146. Shriver interview.

147. Wyckoff interview.

148. Cornelius interview.

When a motion for suspended sentence has been set for hearing, the probation department prepares a presentence investigation report. The reporting officer does *not* recommend or oppose probation; I decide it in a "neutral" setting. The victim of the crime is *subpoenaed* to appear at the probation hearing. The serving officer is instructed to inform the victim of his *right* to appear and testify; if the victim desires not to attend, he is not forced to do so.

Approximately ninety-eight percent of victims subpoenaed do appear in court, many of whom testify as to the release of defendant on probation. In the cases in which the victim adamantly opposes probation, this has influenced a decision denying the probation request. Correspondingly, if the victim does not appear or offer testimony, or if he testifies "favorably," this influences a grant of probation.¹⁴⁹

A more visible and tangible form of victim participation is observed when the defendant is released on probation on the condition that he make restitution to the victim. Power to grant probation conditioned on restitution is expressly given by statute in some states¹⁵⁰ and elsewhere is implied in a statutory grant of broad discretion to the sentencing judge.¹⁵¹ The Federal Probation Act provides that "while on probation . . . the defendant . . . may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . ."¹⁵² Commentators have recognized that probation releases are increasingly conditioned upon restitution to the victim.¹⁵³ The President's Commission on Law Enforcement and Administration of Justice reported:

Financial reimbursement to victims is another condition used quite frequently in probation. It is not uncommon for a large probation agency to supervise the collection of millions of dollars in restitution for crime victims each year. Restitution can serve a very constructive purpose and of course it represents practical help for the victim. The central problem is to make certain that the rate of such payments is related to the ability of the offender to pay . . . perhaps the best approach is for the probation officer to include in his presentence report an analysis of the financial situation of the defendant, an estimate of a full amount of restitution for the victim, and a recommended plan for payment.¹⁵⁴

Generally, the defendant is given the opportunity to make restitution when the loss involves damage to property rather than personal injury.¹⁵⁵ One author concludes that restitutionary probation

149. Leathers interview.

150. See, e.g., MICH. STAT. ANN. § 28.1133 (1954).

151. DAWSON, *supra* note 135, at 102.

152. 18 U.S.C. § 3651 (1970).

153. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROBATION § 3.2 (1970); C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 116 (2d ed. 1964).

154. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 35 (1967).

155. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim*, 61 J.

is most often granted in bad check cases and larceny cases in which the stolen property has not been recovered.¹⁵⁶ The Nashville field survey buttresses this conclusion: reparation as a condition of probation release depends upon the nature of the offense and the agreement of the victim.¹⁵⁷ One example of probation conditioned upon restitution was recited by a criminal court judge who disapproves of the victim's having a role in probationary decisions:

The case involved a defendant accused of stealing an automobile. Defense counsel . . . negotiated a plea . . . [in return for the prosecutor's recommendation of] release on probation on the condition that restitution be made to the victim. I later discovered that the defendant had agreed to pay the victim on a monthly installment basis for the value of the automobile taken. Upon learning from the probation officer that there was a dispute as to the restitution agreement, I refused to release the defendant on probation under these circumstances. Therefore, I think that probation should be decided upon grounds other than the feelings of the victim.¹⁵⁸

Although most restitutionary probation releases may follow convictions for crimes against property, recently publicized cases show that these releases sometimes are granted even in cases of serious felonies against the person. For example, it was reported that a man who pleaded guilty to a charge of manslaughter was released on probation for a period of ten years on the condition that he pay \$150 a month to the three surviving sons of the victim.¹⁵⁹ Similarly, a man convicted of vehicular manslaughter was ordered to pay for the college education of his victim's two small children at the rate of \$1,500 per year for five consecutive years; the victim's widow reportedly was "satisfied" with this disposition.¹⁶⁰ Persons interviewed in Nashville, however, did not disclose any case in which the defendant had physically harmed another person and was granted probation on the condition of his making restitution.

Typical of cases recognizing the propriety of restitutionary probation is *United States v. Berger*,¹⁶¹ in which the defendant was convicted of violating the Fair Labor Standards Act for, *inter alia*, paying wages below the minimum standard. The defendant was placed on probation on the condition that he compensate the workers who had been victimized by his practices. Responding to the

CRIM. L.C. & P.S. 152, 155 (1970); Best & Birzon, *Conditions of Probation: An Analysis*, 51 GEO. L.J. 809, 826 (1963).

156. DAWSON, *supra* note 135, at 106.

157. Interview with Malcolm McCune, Assistant Public Defender, Aug. 9, 1974 [hereinafter cited as McCune interview]; Mondelli interview, *supra* note 52.

158. Cornelius interview, *supra* note 70.

159. The Tennessean (Nashville), July 1, 1974, at 4, col. 3.

160. The Tennessean (Nashville), June 5, 1974, at 14, cols. 5-6.

161. 145 F.2d 888 (2d Cir. 1944), *cert. denied*, 324 U.S. 848 (1945).

defendant's challenge to this condition, the Second Circuit stated, "Clearly the court could make reparation for losses caused by the offense for which conviction was had a condition of probation provided there were such losses."¹⁶² In a similar case,¹⁶³ the defendant pleaded guilty to theft and was placed on probation conditioned upon his making restitution to the victim. The Alabama Criminal Appellate Court found that no constitutional rights of the defendant were impaired by the conditional release.¹⁶⁴ The involvement of victims in the probation release decision, however, is not universally approved. In *Conyers v. People*¹⁶⁵ the defendant was guilty of unlawfully killing another person's animals. Sentenced to a term of two to three years in the state penitentiary, the defendant asked the Colorado Supreme Court to disqualify the district attorney who had prosecuted him and had recommended that he not be released on probation. Accompanying the defendant's application were affidavits indicating that the prosecutor had promised a local livestock association that he would not recommend probation in cases such as the one in which the defendant was involved. The livestock association had written the district attorney requesting that he not recommend probation for the defendant, and the prosecutor thereafter advised the defendant's attorney that he would oppose probation. The Colorado Supreme Court directed the trial court to consider the defendant's motion for probation on its merits and not to consider any recommendation from the district attorney.¹⁶⁶

(3) Parole Release and Clemency

Unlike inmates in many other jurisdictions, an inmate in Tennessee is not eligible for release on parole under a determinate sentence until he has served a minimum of one-half of his sentence or thirty years, whichever is less.¹⁶⁷ Because of the inordinately long time that inmates must serve before reaching parole eligibility,¹⁶⁸ it

162. *Id.* at 891.

163. *Warner v. State*, 52 Ala. App. 361, 292 So. 2d 480 (Crim. App. 1974). *See also* *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950) (actual damages caused by false certificates and papers concerning claims for home loan guaranty benefits); *State v. Foltz*, 14 Ore. App. 582, 513 P.2d 1208 (1973) (restitution to welfare department for money improperly paid); *State v. Morgan*, 8 Wash. App. 189, 504 P.2d 1195 (1973) (restitution to assault victim for medical expenses, lost wages, and "pain and suffering"); *People v. Miller*, 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967) (restitution for injuries caused by grand theft).

164. *Warner v. State*, 52 Ala. App. 361, 292 So. 2d 480, 484 (Crim. App. 1974).

165. 155 P.2d 988 (Colo. 1945).

166. *Id.* at 990.

167. TENN. CODE ANN. §§ 40-3612, -3613.

168. While in many jurisdictions certain offenders are not eligible for parole, most states provide for parole eligibility in terms of a minimum sentence served or a part of a maximum sentence. *See* DAWSON, *supra* note 135, at 222. Under Wisconsin law, for example, an inmate

is very likely that the victim's interest in the offender's release on parole wanes. This attenuation of interest would account for the paucity of contact between the Parole Board and the victim at a parole release hearing. The Tennessee Board of Pardons and Paroles serves the dual function of making parole release decisions and screening clemency petitions before they are submitted to the Governor's office.¹⁶⁹ Prior to deciding whether to release an inmate on parole, the Board distributes to state judges, district attorneys, and local news media a "docket" on which appear the names of eligible inmates. When a petition for clemency is to be considered, the board sends an explanatory letter to state judges, district attorneys, and news media announcing the inmate's petition.¹⁷⁰ According to almost every prosecuting attorney interviewed, only in the most unusual case does the prosecutor respond either affirmatively or negatively to these communications from the Parole Board. The prevailing opinion among the prosecutors and judges is that the parole release question, which is essentially whether the convict is rehabilitated and ready to be returned to society, should be answered by the Parole Board in deliberations uninfluenced by judges' or prosecutors' views.¹⁷¹ In some cases, victims have contacted prosecutors and judges concerning forthcoming parole release decisions; in these instances, the victims were advised to communicate directly with

must have served one-half of the minimum term or 20 years of a life term. WIS. STAT. ANN § 57.06(1) (a) (Supp. 1975).

169. TENN. CODE ANN. §§ 40-3603, -3612, -3613, -3623 (Supp. 1974).

170. Interview with Tennessee Board of Pardons & Paroles, Charles Traughber, Chairman, and Joe Mitchell, Board Member, July 27, 1974 [hereinafter cited as Parole Board interview]. The third member of the Board, Dorothy Greer, was unavailable.

171. For a case in which responses were made, the trial judge responded in part:

While it is my usual policy not to interfere with the action of the Pardon and Parole Board, this is one man that I believe should not receive executive clemency at this time. He was convicted of a heinous, atrocious, vicious crime and fled the jurisdiction of Tennessee and was caught in a foreign jurisdiction, brought back to Nashville and found guilty and sentenced to a long number of years in the penitentiary. . . .

. . . In my judgment, he should continue to serve his time.

The district attorney also opposed parole:

[W]hile I have no personal knowledge of how he conducted himself at the State Penitentiary, or what justification you see for affording him executive clemency, I do feel it important to point out that he was convicted by a duly impaneled jury of kidnapping for robbery and . . . the jury provided that his sentence would be without possibility of parole. Kidnapping for robbery is an extremely serious crime and it seems to me that it would do substantial violence to the legislative intent of that statute to propose executive clemency in order to get around the expressed judgment of the jury who heard the evidence in this case. While I am sure the persons who have worked with [the inmate] at the penitentiary are convinced that [the inmate] is seriously rehabilitated, his previous criminal record does not suggest that this man should be treated as an innocent first offender. I am enclosing herewith a copy of his record for your perusal.

the Tennessee Board of Pardons and Paroles.¹⁷²

A victim may appear personally before the Board to express his opinion concerning a parole release or clemency decision. According to the Board, however, there have been very few cases in which victims have made their views known to the board either directly or through their influence upon the opinions of judges or district attorneys. It appears that victims' views, when expressed, are taken into account but are given relatively little weight. The most influential factors are the inmate's prison record and evidence of rehabilitation. The chairman of the Parole Board stated that no victim had appeared personally during his tenure, but another member observed that victims have been present at hearings in past years.¹⁷³

A parole release hearing observed by the author suggests the way in which victims' views are transmitted to and considered by the Board. An inmate with a background of poverty and "general lawlessness," who was incarcerated for the offenses of second degree burglary and arson, was being considered for parole release. A "field report" read by one of the Board members included a lengthy description of the victim, the owner of a house that was burned to the ground. The report described the victim's status in the community, his work habits, and his living habits. The inmate was then brought before the Board and the circumstances surrounding the crime were recounted. The Board, after further deliberation, decided to grant parole. The Board chairman later explained that he had been contacted by the victim prior to the parole release hearing, and the victim had "expressed concern" that the inmate might be released. Because the chairman believed that this was an unusual circumstance, he directed that a field study be conducted to gather information on the crime, the victim, and the views of the community from which the inmate came. This data was thought to be relevant for at least three purposes: (1) to establish the credibility of the victim should he appear at the hearing; (2) to uncover any mitigating circumstances surrounding the crime; and (3) to gather information about the attitudes of the community to which the inmate intended to return.¹⁷⁴ The victim did not appear at the hearing, but the information was presented to the Board nevertheless.

Victims also are involved in the parole release decision through restitutionary plans similar to probationary release conditioned on

172. Leathers interview, *supra* note 71; Shriver interview, *supra* note 17; Wyckoff interview, *supra* note 94.

173. Parole Board interview.

174. *Id.*

restitution.¹⁷⁵ While restitutionary parole is much less common than restitutionary probation,¹⁷⁶ one program of parole release and restitution that is receiving much attention is the "Rehabilitation Through Restitution" program in Minneapolis, Minnesota. Under this experimental project convicts sentenced for nonviolent property crimes enter into written agreements with their victims by which they agree to make restitution for property taken or damaged. If the victim refuses to cooperate, a symbolic contract with the state establishes a specific number of hours of unpaid volunteer work to "make good the crime." The agreement then is presented to the parole board, and the prisoner is released to a half-way house where he must reside while he is employed in an outside job to fulfill the agreement. The inmate must remain in the program until he is fully released from parole restrictions. Started in 1972, the program as of June 3, 1974, had enrolled fifty-eight inmates. Only a "modest success" is claimed for the program as eighteen of the fifty-eight participants have disappeared, committed new crimes, or violated the terms of the agreement to the extent that full incarceration was required.¹⁷⁷ To date this program has not been employed in Tennessee.¹⁷⁸

When the Parole Board recommends that the Governor grant clemency, the Board's report to the chief executive includes all of the information that it has gathered, which may in some cases include statements from victims. The Governor's office, however, follows a policy of not contacting or communicating with victims concerning clemency decisions.¹⁷⁹

It is impossible to ascertain the precise weight, if any, that the Governor places on the desires of victims when those desires are known to him. For example, one aide noted that the Governor approved a commutation on the express condition that the offender not be returned to his home county. It cannot be determined whether this condition was based upon a recommendation of the judge or prosecuting attorney,¹⁸⁰ the Governor's perception of "community sentiment," or the victim's actual or perceived attitude.

175. See DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 241 (2d ed. 1969).

176. See DAWSON, *supra* note 135, at 311.

177. TIME, June 3, 1974, at 48.

178. The Board attempted such a release in one case, but was rebuffed by the attorney general on the ground that it would be discriminatory unless made available in all cases of parole release.

179. Parole Board interview, *supra* note 170. Interviews with H.R. McDonald, Jr. and Robert J. Kabel, members of Governor Winfield Dunn's staff, June 27, 1974. According to these interviewees, approximately 60-75% of the clemency petitions approved by the Board are ratified by the Governor.

180. Under the Board's "letter policy." See text accompanying note 166 *supra*.

III. EXISTING LEGAL MEANS OF EXERTING INFLUENCE¹⁸¹A. *Efforts to Force Prosecution*

(1) Mandamus

The writ of mandamus is a command in the name of the government directed to an official that orders the official to perform a particular duty. It is invocable only to enforce a clear legal right.¹⁸² Most courts are reluctant to grant a mandamus, and the writ is not available to victims of crime except under the most unusual circumstances. Chief obstacles to the use of mandamus by victims are the requirement that the party seeking the writ be "beneficially interested" and the rule that mandamus cannot be used to compel an officer to exercise his discretion in any particular manner.

(a) Party Beneficially Interested

Statutes authorizing the issuance of writs of mandamus vary greatly among jurisdictions. One of the most critical statutory differences is whether the petitioner must be a "party beneficially interested."¹⁸³ In general, where the "beneficially interested" rule is mandated, the victim of a crime must demonstrate that he suffered some injury distinctly different from that experienced by the general public. This may not be a serious obstacle in the case of a simple assault, but when a citizen is the "victim" of a violation of Sunday closing laws, for example, most courts have held that the citizen has no standing to compel the arrest or prosecution of the alleged violator.¹⁸⁴ In *State ex rel. Skilton v. Miller*,¹⁸⁵ a private citizen sought, on behalf of the citizenry, a writ of mandamus to compel the prosecution of an ice cream store owner for remaining open in violation of the Sunday closing law. The Ohio Supreme Court ruled that the petitioner had not shown that he was injured

181. A private citizen's arrest, which could be accomplished by the victim as discussed in § II(c) (1), *supra*, is not included in this section. Also excluded are tort actions against police officers, *see note 30 supra*, and prosecutors for failure to arrest or prosecute. Representative of suits in the latter category is the case of *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), in which a merchant filed suit against the government because of the failure of the F.B.I. and United States Attorney to investigate, arrest and prosecute persons picketing plaintiff's business establishment. The Fifth Circuit affirmed dismissal of the suit because "the discretion of the Attorney General in choosing whether to prosecute . . . is absolute." 375 F.2d at 247.

182. *See* E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 51.02, *et seq.* (3d ed. 1968).

183. *Compare* CAL. CIV. PRO. CODE § 1086 (West 1955) (requiring this showing) *with* TENN. CODE ANN. § 23-2001, *et seq.* (1955) (*contra*).

184. *See* Annot., 49 A.L.R.2d 1285 (1956).

185. 164 Ohio St. 163, 128 N.E.2d 47 (1955).

by the violation in any manner different from that suffered by the general public. In *Miles-Lee Auto Supply Co. v. Bellows*,¹⁸⁶ however, the owner of an automobile supply company allegedly damaged by another supply company's staying open in violation of a closing law was permitted to seek a writ of mandamus on the theory that his injuries were sufficiently different from those of society at large. In a different context, a class action was brought by inmates of Attica Prison alleging, among other things, that the special deputy state attorney general appointed to investigate the Attica uprising had not investigated and did not intend to investigate the crimes that allegedly had been committed against inmates by various state officers and officials. Following a federal district court ruling that the inmates did not have standing to bring the action, the Second Circuit formulated the question "whether the federal judiciary should, at the instance of victims, compel federal and state officials to investigate and prosecute persons who allegedly have violated certain federal and state criminal statutes."¹⁸⁷ The court concluded that the inmates did have standing under a federal mandamus statute¹⁸⁸ to compel the United States Attorney to "investigate and institute prosecutions against state officials."¹⁸⁹

(b) Exercise of Discretion

The second major hurdle facing the victim who seeks a writ of mandamus is that an official may be compelled to exercise discretion but cannot be compelled to exercise that discretion in any particular manner.¹⁹⁰ Thus, for example, when citizens allegedly harmed by violations of a city's pollution control ordinance brought an action for mandamus to compel the director of public safety to enforce the ordinance, the Ohio Supreme Court found that the director had made an investigation and had determined that no violations of the ordinance had occurred. Therefore, the writ was denied because discretion had been exercised even though in a manner not desired by petitioners.¹⁹¹

186. 26 Ohio Op. 2d 452, 197 N.E.2d 247 (Cuyahoga Cty. C.P. 1964).

187. *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 376 (2d Cir. 1973).

188. 28 U.S.C. § 1361 (1970).

189. 477 F.2d at 379. The action was unsuccessful, however, on other grounds. See § IIIA (1) (c) (iii) *infra*.

190. See McQUILLIN, *supra* note 182, at § 51.16.

191. *State ex rel. Bar Roalty v. Locher*, 30 Ohio St. 2d 190, 283 N.E.2d 164 (1972). See also *People ex rel. Lindgren v. McGuire*, 151 App. Div. 413, 136 N.Y.S. 88 (1912).

(c) Specific Uses of Mandamus

(i) Arrest

When no arrest warrant has been issued, courts unanimously have refused to grant writs of mandamus to compel an officer to make an arrest. In *Moses v. Kennedy*,¹⁹² petitioners sought to compel F.B.I. agents to arrest Mississippi law enforcement officials who allegedly had violated petitioners' constitutional rights. The court concluded that it was without power to issue mandamus: "The prerogative of enforcing the criminal law was vested by the Constitution . . . squarely in the executive arm of the government¹⁹³ Because of the inherent limitations upon the judicial power, . . . mandamus must be denied."¹⁹⁴ New York courts have been particularly unyielding in this regard. In *Restivo v. Dangan*,¹⁹⁵ the victim of an assault identified his assailants and alleged that they had beaten him. The police judge indicated that he would investigate the situation to determine if a warrant for arrest should be issued. The victim was dissatisfied and petitioned for the issuance of a writ of mandamus. A New York trial court denied the petition, holding that a mandamus proceeding would not lie to compel a magistrate to issue a writ "no matter how clear the case may seem to the Court." The court observed:

It is the settled law . . . that generally a mandamus proceeding will not lie to compel a magistrate to issue a warrant. . . . This Court has no power to compel the Police Justice to issue a warrant. . . .¹⁹⁶

Another New York court reinforced the *Restivo* decision in 1959, holding that "the courts will not grant mandamus to compel a magistrate or police justice to issue a warrant, 'no matter how clear the case may seem to the Court.'"¹⁹⁷ Mandamus therefore was denied to a person convicted of a traffic violation who sought the arrest of the testifying police officer for perjury.

In unusual circumstances, courts have issued mandamus to compel lower courts to issue warrants for an arrest. In *Ex parte United States*,¹⁹⁸ the United States Supreme Court granted a writ to compel a federal district court to issue an arrest warrant. A grand jury had returned an indictment for violations of banking laws. The

192. 219 F. Supp. 762 (D.D.C. 1963).

193. *Id.* at 764 quoting *Pugach v. Klein*, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961).

194. *Id.* at 764-65.

195. 191 Misc. 642, 77 N.Y.S.2d 563 (Sup. Ct. 1948).

196. *Id.* at 646, 77 N.Y.S.2d at 567-68.

197. *Hassan v. Magistrates Court*, 20 Misc. 2d 509, 511, 191 N.Y.S.2d 238, 240 (Sup. Ct. 1959).

198. 287 U.S. 241 (1932).

United States Attorney General unsuccessfully petitioned the federal district court for the issuance of a bench warrant. In granting the writ to force issuance of the bench warrant, the Supreme Court held that an indictment proper on its face cannot be rendered useless by a district court "under the guise of judicial discretion."¹⁹⁹ Characterizing the issuance of a bench warrant pursuant to a grand jury indictment as a ministerial rather than discretionary matter, the Court observed:

The effect of the refusal of the district court to issue a warrant upon an indictment fair upon its face . . . is equivalent to a denial of the absolute right of the government . . . to put the accused on trial. . . . [I]f a like attitude should be taken by district courts generally, serious interference with the prosecution of persons indicted for criminal offenses might result. Undoubtedly . . . mandamus is the appropriate remedy. . . . The authority conferred upon the trial judge to issue a warrant of arrest upon an indictment does not, under the circumstances here disclosed, carry with it the power to decline to do so. . . . [T]he power to enforce does not inherently beget a discretion permanently to refuse to enforce.²⁰⁰

(ii) Grand Jury

As prosecutors are charged with submitting cases to grand juries, there is little authority concerning petitions brought for the issuance of writs to grand juries. In a creative but misguided effort to force prosecution, a former mental patient brought a mandamus action to compel a grand jury to take jurisdiction of her grievance that a psychiatrist and the directors of a state mental hospital had conspired to deprive her of her civil rights. The federal district court held that a New York citizen has no right to submit a grievance directly to a grand jury and that mandamus therefore would not issue.²⁰¹

(iii) Prosecution

Although disgruntled victims frequently have brought actions for mandamus to compel a prosecutor to proceed with prosecution of the accused, the courts thus far are unanimous in holding that mandamus will not issue to compel prosecution.²⁰² The most fre-

199. *Id.* at 250.

200. *Id.* at 249-50.

201. *Morgan v. Null*, 117 F. Supp. 11, 16 (S.D.N.Y. 1953).

202. It has been held that a United States Attorney has absolute control over criminal prosecutions, and can dismiss or refuse to prosecute, any of them at his discretion. . . . [T]he federal courts are powerless to interfere with his discretionary power, nor can they compel him to prosecute a complaint, or even an indictment, whatever his reason for not acting.

Annot., 5 A.L.R. Fed. 922, 932 (1970). *See also* *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), in which the Court of Appeals found that it could not properly force the United States

quently articulated rationale for the decisions is that the prosecutorial function is a discretionary one with which the courts will not interfere.²⁰³ Representative of this view is a case in which petitioners, parents of a boy who allegedly had been murdered, sought a writ of mandamus to compel the district attorney to bring the alleged killer to trial. In denying the petition the court concluded that a district attorney's discretion "cannot be controlled by private parties through mandamus proceedings."²⁰⁴ More recently, in the Attica inmate case,²⁰⁵ the court reasoned as follows:

. . . federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made. . . .

The primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine. . . . [T]he problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary.²⁰⁶

One case involving an unusual procedure was *Smith v. Superior Court*,²⁰⁷ in which a writ of prohibition was sought by the attorney general of Arizona to prohibit a lower court judge from ordering the

Attorney to sign an indictment even though it was properly returned by a grand jury. See also *United States v. Brokaw*, 60 F. Supp. 100 (S.D. Ill. 1945); *Pugach v. Klein*, 193 F. Supp. 630 (S.D.N.Y. 1961).

203. "Mandamus of prosecutors . . . has been fairly consistently denied on the grounds that initiation of criminal proceedings is within the absolute discretion of the prosecutor or the nature of the question is beyond the competency of the court." Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507, 518 (1957). Miller, too, is unequivocal in expressing the practical ineffectiveness of mandamus as a remedy to control prosecutorial discretion. The reason that courts are adverse to this remedy is that the initiation of prosecution is "the very prototype of the discretionary or judgmental decision" that our legal system reserves for the public prosecutor. MILLER, *supra* note 5, at 332-34. See also *Ross v. United States Att'y's Office*, 511 F.2d 524 (9th Cir. 1975).

204. *State ex rel. Naramore v. Hensley*, 53 N.M. 308, 310, 207 P.2d 529, 530 (1949). Alternatively, the court noted that the state—not the parents—was the party "beneficially interested."

205. *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

206. *Id.* at 379-80. *Accord*, *Howell v. Brown*, 85 F. Supp. 537 (D. Neb. 1949); *Ascherman v. Bales*, 273 Cal. App. 2d 707, 708, 78 Cal. Rptr. 445, 446 (1969) (denying a petition for writ of mandamus to compel the prosecution even when the state's statute read, in part, "[t]he district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses . . ." This was interpreted to mean that "the duty entailed by the statute is discretionary."); *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944) (indicating that a citizen may have an alternate remedy under state law to personally present his case to the grand jury); *Hassen v. Magistrates Court*, 20 Misc. 2d 509, 511, 191 N.Y.S.2d 238, 243 (Sup. Ct. 1959) (emphasizing that "[j]ust because a crime has been committed, it does not follow that there must necessarily be a prosecution . . ."); *Bloomer v. Cheney*, 311 A.2d 101 (Vt. 1973).

207. 101 Ariz. 559, 422 P.2d 123 (1967).

attorney general to prosecute a criminal case. The Supreme Court of Arizona agreed, stating, "There is nothing in our Constitution or statutes which empowers judges of the Superior Court to direct the Attorney General to prosecute criminal proceedings at the trial court level."²⁰⁸ In but one reported case did an aggrieved party enjoy even a temporary victory in seeking a mandamus. The mother of a boy who was shot to death under questionable circumstances while in police custody requested the district attorney to order an inquest into the death of her son. When her request was denied, she brought an action for mandamus to compel the district attorney to conduct the inquest. A Wisconsin court granted the writ but, on appeal, the Wisconsin Supreme Court reversed. In accord with the unanimously-accepted rule, the court announced that the district attorney "is a constitutional officer and is endowed with a discretion that approaches the quasi judicial . . . The district attorney is not answerable to any other officer of the court in respect to the manner in which he exercises [his] powers."²⁰⁹

(2) Removal of Prosecutor

Just as victims have been unsuccessful in forcing prosecution by mandamus, so have they been thwarted in attempts to remove district attorneys from office for failure to prosecute. Typical of such unsuccessful efforts is a case in which five citizens claiming to be victims of an illegal oil pricing scheme sought to remove a district attorney who had failed to prosecute an oil company for the alleged crime. Concluding that the prosecuting attorney had "discretion in these respects," the Iowa Supreme Court held that victims must make a "clear showing of corruption . . . negligence or incompetency. . ." before an action for removal would be sustained.²¹⁰

There have been cases, however, in which actions to remove district attorneys for failure to commence prosecutions have been successful. In *State v. Foster*,²¹¹ a quo warranto proceeding was brought against a county attorney who had not prosecuted individu-

208. *Id.* at 560, 422 P.2d at 124.

209. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255, 260 (1965). Another example of mandamus used to rectify perceived leniency is *People v. Superior Court*, 199 Cal. App. 2d 303, 18 Cal. Rptr. 557 (Dist. Ct. App. 1962), in which the State of California, rather than the victim, sought by writ of mandamus to annul the order of a lower court granting probation to a person convicted of first degree murder on a guilty plea. In issuing the writ, the supreme court held that mandamus is "an appropriate proceeding" to challenge the grant of probation by the trial court judge. *Id.* at 305, 18 Cal. Rptr. at 559. This case leaves unresolved the question whether the victim alone has standing to challenge a grant of probation by a trial court judge.

210. *State ex rel. Gebrink v. Hospers*, 147 Iowa 712, 714, 126 N.W. 818, 819 (1910).

211. 32 Kan. 14, 3 P. 534 (1884).

als for alleged violations of the state's liquor laws. Despite the county attorney's claims that the citizenry did not desire enforcement of this law, that complainants could not be located, and that he therefore would have no prosecuting witness in a proceeding against alleged violators, the Kansas Supreme Court upheld the jury verdict of guilty and ordered the county attorney's removal from office.²¹² It appears that successful removal actions must be based upon a course of conduct demonstrating incompetency or violation of oath of office; the refusal to prosecute in any particular case would not justify removal from office.²¹³

B. Efforts to Block Prosecution

Although there are very few reported cases in which a victim attempts to stop criminal prosecution,²¹⁴ one such case arose when a Kentucky grand jury indicted a man for the crime of carnal knowledge of a female under the age of sixteen. At trial it was revealed that the defendant was the victim's cousin and that the victim had filed an affidavit stating that she had given birth to the defendant's child, was physically weak, and wanted the charges against the accused dismissed. Over the district attorney's objections the trial court ordered that the accused be discharged. On appeal by the state's attorney, the Kentucky Court of Appeals held that a dismissal can only be premised upon a motion by the prosecuting attorney, and the court therefore ordered that prosecution be continued:

[T]he fact that the injured party, or those who would naturally be aggrieved because of the wrongs complained of in the indictment, want the prosecution dismissed, [does not] change the situation. The prosecution is not for their benefit, but for the public good. . . . [T]he party who has suffered the immediate wrong . . . is without power to direct or control the prosecution. . . .²¹⁵

In some jurisdictions, statutory requirements for the prosecution of particular crimes may dictate a contrary result. In one case, for example, a husband who had sworn out a complaint for adultery against his wife chose not to participate as a witness at her trial and did not aid the prosecutor in pursuing the charge. Nevertheless, a conviction was obtained. On appeal, it was asserted that under the

212. See also *State ex rel. McKittrick v. Graves*, 346 Mo. 990, 144 S.W.2d 91 (1940) (upholding an ouster for failure to prosecute liquor, vice, gambling, and election law violations).

213. MILLER, *supra* note 5, at 305, reports that "unless lawlessness is rampant, enforcement at a low level and public indignation at a high one, the prosecutor is relatively immune from [removal] sanctions . . ."

214. Indeed, if the victim's attitude is made clear to the prosecutor, it is not unusual for him to dismiss or negotiate a lesser charge. See § II (E) *supra*.

215. *Commonwealth v. Cundiff*, 149 Ky. 37, 39-40, 147 S.W. 767, 768 (Ct. App. 1912).

applicable statute a prosecution for adultery could not be maintained without the cooperation of the offended spouse. The Oklahoma court agreed and, accordingly, reversed the conviction.²¹⁶ A different result was reached by the Minnesota Supreme Court, however, which construed Minnesota's adultery statute to require spousal cooperation in the "commencement" of the action but not in the "carrying on" of the prosecution.²¹⁷

C. *Compromise Statutes*

Approximately twenty states have statutes that specifically authorize "the dismissal of a criminal action upon a settlement of the civil liability growing out of the act charged."²¹⁸ The four major prerequisites for dismissal under such statutes are (1) that the criminal prosecution be based upon the same act as the civil settlement (the "identity of act" standard); (2) that the crime be a minor offense;²¹⁹ (3) that the court or prosecutor consent to dismissal; and (4) that the victim acknowledge receipt of satisfaction.²²⁰

Representative of the cases in which victims and offenders have met the requirements of a compromise statute is *State v. Garoutte*.²²¹ In that case the defendant was charged with vehicular manslaughter, a misdemeanor under Arizona law, and the state prosecutor appealed a dismissal granted under a compromise statute.²²² In ruling that the manslaughter action was properly dismissed, the Arizona Supreme Court found:

[T]he widow and legal representative of the minor children of the decedent appeared before the court and acknowledged receipt of financial satisfaction and payment of damages . . . in compromise and settlement of all civil causes of action arising from the act in question . . . [T]he widow . . . requested that defendant not be prosecuted under the pending charge.²²³

While the compromise statute offers the victim a viable means of influencing the disposition of certain specified offenses, courts have demanded that all requirements of the compromise statute be

216. *Taylor v. State*, 232 P. 963 (Okla. Crim. App. 1925).

217. *State v. Allison*, 175 Minn. 218, 220 N.W. 563 (1928). The court concluded that the crime is committed against the state and hence the prosecution may not be controlled by the victim.

218. Annot., 42 A.L.R.3d 315, 318 (1972). See 103 U. PA. L. REV. 1057, 1070 n.83 (1955) for a listing of these states.

219. This is defined either as a misdemeanor or as a crime not punishable by "fine and imprisonment."

220. See Annot., 42 A.L.R.3d 315 (1972).

221. 95 Ariz. 234, 388 P.2d 809 (1964).

222. ARIZ. REV. STAT. ANN. § 13-1591 (1956).

223. 95 Ariz. 234, 236, 388 P.2d 809, 810. See Also *Childs v. State*, 118 Ga. App. 706, 165 S.E.2d 577 (1968) (compromise of worthless check prosecution).

satisfied. For example, in *People v. O'Rear*,²²⁴ the court found that the defendant's civil liability arose from damages and injuries he caused in an automobile accident but that his criminal liability arose from the act of leaving the scene of the accident. The court reasoned that leaving the scene of an accident is not a misdemeanor that, by its nature, has an "overlapping of the civil remedy and the public remedy by way of prosecution."²²⁵ Accordingly, the lower court's grant of dismissal was reversed despite a clear showing that satisfactory restitution was rendered to the victim by the offender.²²⁶

Even if a victim and an offender desire to compromise, the judge or prosecutor may, in the exercise of his statutory authority, refuse to compromise the criminal charge. In *Morris v. State*,²²⁷ the complaining witness moved to dismiss the charge against the defendant on the basis of Oklahoma's compromise statute.²²⁸ The trial court refused to dismiss the prosecution for aggravated assault and battery and on appeal, the defendant asserted that Oklahoma's compromise statute required the lower court to dismiss the prosecution upon the victim's motion. The appellate court rejected this contention because "the trial court's action of granting or denying a complaining witness' motion to dismiss a misdemeanor is a discretionary matter and, therefore, will not be disturbed on appeal unless an abuse of discretion is shown. . . ."²²⁹ Similarly, in *State v. Frazier*²³⁰ the prosecuting witness told the district attorney that she did not desire to continue the prosecution of the defendant for criminal libel. The district attorney refused to abandon the prosecution, and a forfeiture was ordered against the defendant, who failed to appear at trial. Defendant's surety appealed the order of forfeiture on the ground that the offense charged was a misdemeanor and thus had been compromised within the meaning of the Louisiana statute. The Louisiana Supreme Court held that, although the statute provides for amicable settlement of misdemeanors between victims and offenders, "[t]here is no mandate to [the district attorney] to

224. 220 Cal. App. 2d 927, 34 Cal. Rptr. 61 (Super. Ct. App. Dep't 1963).

225. *Id.* at 930, 34 Cal. Rptr. at 63.

226. *See also* *Noble v. United States*, 190 F. 538 (9th Cir. 1911) (upholding a lower court denial of defendant's motion to dismiss because the victim failed to comply with the provision requiring personal acknowledgement of satisfaction to the victim, even though the affidavit filed by the victim recited, "I do hereby ask and petition the court to dismiss the case now pending in the court. . . ."); *State ex rel. Williams v. Supreme Court*, 20 Ariz. App. 282, 512 P.2d 45 (1973) (disturbing the peace not properly compromised); *State ex rel. Williams v. City Court*, 18 Ariz. App. 394, 502 P.2d 543 (1972) (failure to yield right-of-way not compromised).

227. 515 P.2d 266 (Okla. Crim. App. 1973).

228. OKLA. STAT. ANN. tit. 22, §§ 1291-92 (1971).

229. 515 P.2d at 268.

230. 52 La. Ann. 1305, 27 So. 799 (1900).

discontinue the prosecution on the demand of the party or parties who originated the same."²³¹

It is unclear how frequently compromise statutes are invoked. Only a small number of cases have reached the appellate courts, and almost all of these have concerned the question whether the mechanical requirements of a compromise statute have been satisfied.²³²

D. Private Prosecution

In most jurisdictions, a private attorney²³³ may be hired by the victim of a crime or by other persons interested in convicting the defendant to assist a prosecuting attorney in the conduct of a prosecution.²³⁴ A typical statute provides:

231. *Id.* at 1307-08, 27 So. at 800.

232. Even if statutory compromise cannot be accomplished, the prosecutor may be persuaded to dismiss the charge. At common law and under most statutes, a prosecutor can compromise and settle disputes "provided there is doubt and an honest dispute as to the state's rights and the compromise or settlement is a bona fide one. . . ." Annot., 81 A.L.R. 124, 125 (1932). See also *State ex rel. Wilson v. Young*, 44 Wyo. 6, 7 P.2d 216 (1932). A district attorney may favor compromise while the victim opposes it. In *Gould v. Parker*, 114 Vt. 186, 42 A.2d 416 (1945), Gould, a creditor of the estate of a deceased party whose financial affairs were being handled by Keale, sought a writ of prohibition to restrain the attorney general from presenting evidence before a special grand jury that had been called to consider a charge of embezzlement against Keale. Keale was arrested for misappropriation of funds from the estate, and Gould thereafter discovered that Keale had replaced the funds in the estate after reaching an understanding with the state's attorney that no further prosecution would result if restitution were made. Gould, unsatisfied with the settlement, applied for and was granted a special grand jury to examine the embezzlement charge against Keale. The action for prohibition was to prevent the state from presenting evidence that Gould feared would be favorable to a dismissal of the charge. The Vermont Supreme Court denied the writ of prohibition and stated that the district attorney is "not required to prosecute every complaint made to him, and may, in his discretion, take into consideration the fact that restitution has been made in deciding whether a case should be pressed." 114 Vt. at 190, 42 A.2d at 419.

Miller notes that "A Detroit prosecutor reported . . . that cases of nonsupport, conversion, fraud, and embezzlement are growing at such a rate that his office cannot prosecute all offenders; instead, private compromise settlement between the complainants and the offender are encouraged actively." MILLER, *supra* note 5, at 159.

233. A distinction is made between "private prosecutor" and "special prosecutor." The latter is hired by the state to aid the prosecutor, whereas the former is hired by a person having an interest in the criminal prosecution and participates at the behest of a private party.

234. Note, *Private Prosecution: A Remedy For District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209, 219 (1955); 63 AM. JUR. 2d *Prosecuting Attorneys* § 96 (1972). Closely related to private prosecution is the *qui tam* action. Created by statute, this action allows a private citizen to receive part of a fine or penalty for successfully suing persons involved in a wide variety of crimes. The plaintiff need not prove special damages, and both the government and plaintiff share in the penalty (a 50-50 division is common). See Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, *supra* at 222; Annot., 15 A.L.R. FED. 636 (1973). The plaintiff in a *qui tam* action is usually described as an informer who "himself [has] no interest whatever in the controversy other than that given by statute. . . ." *Marvin v. Trout*, 199 U.S. 212, 225 (1905); see *Fritz v. Gorton*, 83 Wash.

[T]he prosecuting witness in any criminal action or proceeding may, at his own expense, employ an attorney or attorneys to assist the county attorney to perform his duties in any criminal action or proceeding . . . and such attorney or attorneys shall be recognized by the county attorney and court as associate counsel in such action or proceeding, and no prosecution shall be dismissed over the objection of such associate counsel until the reason of the county attorney for such dismissal, together with the objections thereto of such associate counsel, shall have been filed in writing, argued by counsel, and fully considered by the court.²³⁵

While serious debate continues over the desirability of private prosecutors,²³⁶ there have been very few challenges on constitutional grounds to the use of private prosecutors. In seeking a writ of habeas corpus one petitioner asserted that he was denied a fair and impartial trial because of the participation of a private prosecutor "not sworn . . . nor appointed[,] . . . only hired by the family of the deceased [S]uch a procedure is unconstitutional in violation of the Fifth and Fourteenth Amendments" Without providing an analysis, the court simply rejected petitioner's contention that the facts justified the issuance of a writ.²³⁷ A similar claim was brought by a convicted murderer against a well known criminal defense attorney who was employed by the family of the deceased. It was alleged in the habeas corpus petition that the participation of the private attorney denied the petitioner due process in that the attorney had not been appointed by the trial court, did not take any oath of public service, and did not give a bond or otherwise qualify

2d 275, 313, 517 P.2d 911, 933 (1974). The action does not force criminal prosecution of the accused; rather, it is characterized as a "remedial" proceeding that imposes only a civil sanction. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943); *see Lambur v. Yates*, 148 F.2d 137 (8th Cir. 1945). Therefore, the *qui tam* action is not an appropriate legal avenue for the victim seeking to force criminal prosecution.

235. KAN. STAT. ANN. § 19-717 (1974).

236. *See* 50 N.C.L. REV. 1171 (1972). One Nashville judge cited the following example in support of his opposition to the practice:

An elderly man, driving while intoxicated, was involved in a head-on accident resulting in the death of a young man in the other vehicle. The victim's survivors employed the services of a special [private] prosecutor. The district attorney and defense counsel entered into a tentative agreement whereby the accused would plead guilty to voluntary manslaughter. The special prosecutor, however, concerned that the victim's survivors would not be adequately compensated, asserted that the defendant's insurance coverage of \$20,000 was not sufficient compensation. The special prosecutor threatened that if the accused did not come forward with more than the \$20,000 provided by the insurance policy, the prosecutor would insist upon prosecution for first degree murder. After the case was set for trial, the accused put together the additional sum of \$50,000, and at this point the special prosecutor, the district attorney, and defense counsel agreed to the plea of voluntary manslaughter.

Cornelius interview, *supra* note 70.

237. *Ex parte Powers*, 487 S.W.2d 101, 104 (Tex. Crim. App. 1972).

as an officeholder. The Fifth Circuit rejected petitioner's claims, stating:

There is no constitutional prohibition against the use of special prosecutors, and so long as the Criminal District Attorney retains control and management of the prosecution, the special prosecutor is not guilty of conduct prejudicial to the defendant, and the rights of the defendant are duly observed, no reason exists why such settled practice, in and of itself, should cause the reversal of a case.²³⁸

Although the practice of employing private prosecutors is firmly established in American law, its utility has been questioned. Professor Miller, who studied the use of private prosecutors in Michigan, Kansas, and Wisconsin, concluded that "private prosecution is at most a theoretical possibility—certainly in current administration it is not a practical reality—and thus is not an effective control over prosecutor charging discretion."²³⁹ Though the private prosecutor may not control the "charging" function, it is probable that his presence ensures more vigorous prosecution of the accused. The practice has its limitations, however. The major problem areas are (1) "control" of the criminal case, (2) private prosecutors' representation of victims in civil actions, and (3) conflicts between district attorneys and victims.

(1) "Control" Issue

It has been held that private prosecutors may participate only if the district attorney controls and manages the prosecution.²⁴⁰ Numerous cases have been brought on the ground that private prosecutors have exercised excessive control over the conduct of trials. No reported case has overturned a conviction on this ground.²⁴¹ Courts are inexact however, in articulating the bounds of the "control" limitation. For example, a "control" challenge was rejected in one case in which the private prosecutor presented the opening statement, the entirety of the state's case, and cross-examined all of defendant's witnesses.²⁴² New York courts have been especially lax in defining "control," and have upheld private prosecutions even in cases in which the public prosecutor was not physically present during the trial.²⁴³

238. *Powers v. Hauck*, 399 F.2d 322, 325 (5th Cir. 1968).

239. MILLER, *supra* note 5, at 329.

240. *People v. Farnsley*, 53 Ill. 2d 537, 293 N.E.2d 600 (1973); *McKay v. State*, 90 Neb. 63, 132 N.W. 741 (1911); *State v. Best*, 280 N.C. 413, 186 S.E.2d 1 (1972); *State v. Kent*, 4 N.D. 577, 62 N.W. 631 (1895); see 27 C.J.S. *District and Prosecuting Attorneys* § 28(2) (1959).

241. See, e.g., *Oglesby v. State*, 83 Fla. 132, 90 So. 825 (1922); *Neill v. State*, 207 P.2d 344 (Okla. Crim. App. 1949).

242. *Ryals v. State*, 434 P.2d 488 (Okla. Crim. App. 1967). See also *Bartell v. State*, 106 Wis. 342, 82 N.W. 142 (1900); *Kizer v. State*, 468 P.2d 56 (Okla. Crim. App. 1970).

243. In *People v. Van Sickle*, 13 N.Y.2d 61, 242 N.Y.S.2d 34 (1963), the victim of a

(2) Private Prosecutors' Representation of Victims in Civil Actions

In determining the propriety of a private prosecution the courts consider whether the private prosecutor also represents the victim or interested parties in related civil actions.²⁴⁴ Even when a conflict is demonstrated, however, the defendant must establish that the conflict prejudiced his trial. In *State v. Scott*,²⁴⁵ for example, an involuntary manslaughter conviction was appealed on the ground

misdeemeanor assault took complete control of the prosecution and won a conviction. Judge Van Voorhis, concurring in the result, declared:

Neither the District Attorney nor an assistant was present at the trial, the charge was not preferred or prosecuted by a public officer, but by the woman who claimed to have been mauled by defendant in the washroom. The defendant was represented by an attorney. . . . [T]he witnesses for the prosecution were examined and defendant and her witnesses cross-examined, not unskillfully, by the complaining witness.

Id. at 62, 242 N.Y.S.2d at 35. Reviewing this somewhat unusual fact situation, the seven appellate judges concurred in upholding the conviction but disagreed as to the rationale. The four-judge plurality declared:

[The New York statute] does not necessarily mean that the District Attorney or his deputy must be physically present at every criminal hearing However, it means at least that the District Attorney . . . must set up a system whereby he knows of all the criminal prosecutions in his county and either appears . . . or consents to appearance on his behalf by other public officers or private attorneys. *Id.* at 62-63, 242 N.Y.S.2d at 34-35.

Three judges, concurring in the result but writing a separate opinion, stated the rule differently:

The decision . . . where the individual has prosecuted without the assistance of counsel or a public officer . . . should turn on whether the defendant's rights have been prejudiced by the course of the trial. . . . [W]e disagree . . . that the District Attorney must know of all the criminal prosecutions. . . .

Id. at 65, 242 N.Y.S.2d at 37. More recently, in *People ex rel. Allen v. Citadel Management Co.*, 78 Misc. 2d 626, 355 N.Y.S.2d 976 (N.Y.C. Crim. Ct. 1974), a tenant, through private counsel, instituted a prosecution against his landlord for his failure to supply hot water. The record of this case indicates that the tenant's private counsel carried out the prosecution in its entirety. Some four days into the trial, defendant moved to dismiss the tenant's claim on the ground that the district attorney was the only official of the State of New York authorized to carry out this prosecution. The Criminal Court of New York retorted that "it is not for [the defendant] to select his prosecutor," quoting from *People v. Kramer*, 33 Misc. 209, 220, 68 N.Y.S. 383, 391 (N.Y.C. Gen. Sess. Ct. 1900), and overruled the landlord's challenge:

[T]he overwhelming weight of authority supports the view that the absence of representation from the District Attorney's office does not invalidate the procedure [A] holding that the District Attorney must be physically present . . . would work a great injustice to the spirit of the law, on persons who feel themselves aggrieved but might otherwise have no other recourse

78 Misc. 2d at 633, 355 N.Y.S.2d at 982.

244. One writer observes that when this occurs, the indictment can be used as a lever to enhance a settlement of the civil action. 50 N.C.L. Rev. 1171, 1176 (1972); see *Kizer v. State*, 468 P.2d 56, 58 (Okla. Crim. App. 1970). A number of states have statutes that prevent public prosecutors from receiving fees or participating in civil actions related to the criminal prosecution. See Annot., 82 A.L.R. 774 (1933). Similarly, a Maryland court invalidated an indictment against the defendant because a private attorney—representing a plaintiff in related civil action—was present before the grand jury which issued the indictment. *Coblentz v. State*, 164 Md. 558, 166 A. 45 (1933).

245. 72 Idaho 202, 239 P.2d 258 (1952).

that the private attorney assisting the prosecutor "had a financial or personal interest in the prosecution of the case for the reason that he represented the widow of the deceased in a civil action on substantially the same facts. . . ." ²⁴⁶ While recognizing the possibility of prejudice under these circumstances, the court held that this conflict did not disqualify the private prosecutor from participating in the criminal action. ²⁴⁷

(3) Conflicts Between District Attorneys and Victims

Occasionally a conflict between the district attorney's wishes and a victim's desires, as expressed through a private prosecutor, will arise before or during the prosecution. In *Perry v. State*, ²⁴⁸ for instance, defendant Clifford was charged with assault with intent to kill Perry, and at the preliminary hearing Perry admitted having had a relationship with Clifford's wife. Based upon these statements, Clifford employed a private attorney to demand that the prosecuting attorney file an adultery charge against Perry and Mrs. Clifford. The county attorney dismissed the assault charge against Clifford and also moved, over the objection of Clifford's attorney, to dismiss the adultery charge against Perry and Mrs. Clifford. The trial court ruled that the adultery prosecution could not be dismissed without the consent of the complaining spouse, Mr. Clifford. The appellate court reversed, declaring that Clifford did not have an unlimited right to carry on the adultery prosecution through a private prosecutor:

To hold that the injured spouse should have the absolute control of the criminal action which is instituted and to be able to determine absolutely whether it should be dismissed or carried on, would be to open the door of a treasure room for a horde of black mailers. ²⁴⁹

IV. COMPARATIVE LAW

As compared with many foreign jurisdictions, the American criminal justice system permits very little involvement of the victim in the charging and prosecutorial phases of the criminal case. While there are many informal ways in which the victim does participate in, influence, and sometimes even control the various discretionary decisions that are made, statutory and decisional law neither give

246. *Id.* at 706, 239 P.2d at 260.

247. *See also* *Park v. State*, 255 Ga. 618, 170 S.E.2d 687 (1969); *Brooks v. State*, 228 So. 2d 24 (Ala. Crim. App. 1969).

248. 181 P.2d 280 (Okla. Crim. App. 1947).

249. *Id.* at 286. The same result under similar facts was reached in *Tonkin v. Michael*, 349 F. Supp. 78 (D.V.I. 1972).

the victim substantial influence over the criminal case nor provide for significant interplay between the victim and the prosecutor.

In Germany the interaction between victim and prosecutor is much more formalized than in the United States. There, "[t]he prosecutor can . . . be compelled to file charges by a formal judicial proceeding brought by the victim of the crime."²⁵⁰ German law permits such private prosecution for only a narrow class of misdemeanors, however, and private prosecution reportedly is not used widely. Thus, one author noted that "with insignificant exceptions . . ., the public prosecutor has a monopoly over the criminal process."²⁵¹

If a crime is within the statutory provisions for private compensation, Thailand provides for an "inquiry official" or policeman to fix compensation if the victim and offender consent.²⁵² It has been reported that "private prosecutors" are permitted and that private and public prosecutions may take place separately or conjunctively.²⁵³ By statute, either the private or public prosecutor can object to the release of the defendant on bail.²⁵⁴

The formal relationship among victim, state, and accused is clear in France. There, a victim may bring a civil action against the accused at the same time and before the same court as the criminal prosecution. When he does so, the public prosecutor is obliged "to begin the criminal proceeding . . . even though the prosecutor . . . would prefer not to prosecute."²⁵⁵ The prosecution must begin regardless of whether the victim obtains compensation for the alleged damage.²⁵⁶ If the criminal prosecution has begun prior to the filing of the civil action, a victim may intervene to obtain relief.²⁵⁷

In Israel if the offense is minor, any person may initiate a criminal proceeding by filing a "private complaint," and the prosecution is carried out by the complainant unless the prosecuting attorney intervenes and takes over the prosecution. Even if the offense is a "non-private" offense, the complainant may apply to the attorney

250. Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 245 (1970).

251. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 442 (1974). It is interesting to note that, regardless of the victim's role in any particular case, the "German prosecutor, unlike the American prosecutor, is without discretionary power to withhold prosecution." Thus, selective enforcement "is almost wholly absent from the German system." DAVIS, *supra* note 8, at 194.

252. Huston, *A Preliminary Survey of Criminal Procedure in Thailand*, 16 SYRACUSE L. REV. 505 (1965).

253. *Id.* at 530, n.184.

254. *Id.* at 534.

255. Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965).

256. *Id.* at 698.

257. *Id.* at 697.

general for review of a decision by police or a prosecutor not to investigate or prosecute the crime.²⁵⁸ The court may order a convicted offender to compensate his victim in an amount not to exceed \$500 per offense.²⁵⁹

Similar to the Israeli "initiation" procedure is that of Scotland, where the trial court can authorize a private criminal prosecution if a public official refuses to proceed or allow private action.²⁶⁰ In Pakistan, too, certain minor crimes are privately prosecuted.²⁶¹ The victim of a crime in Spain may file a private complaint, called a *querrela*, to have the criminal and civil responsibilities of the defendant adjudicated in one proceeding.²⁶²

There is clearly ample foreign precedent for greater involvement of the victim in the American criminal justice process. Moreover, according to those who have studied criminal justice systems in foreign countries, no substantial adverse consequences have been experienced from the participation of victims in those systems.

V. SUMMARY AND RECOMMENDATIONS

This study confirms that the victim plays a significant informal role in the prosecution and disposition of a criminal case.²⁶³ The extent to which a vocal victim influences the criminal proceeding depends upon a number of variables, some of which are difficult to quantify. General patterns, however, can be identified. First, the victim exercises greater control over preliminary stages of the process, such as arrest, than later phases, such as sentencing and parole. Secondly, the victim of a misdemeanor or nonserious felony is better able to effect the dismissal of charges than the victim of a serious felony. Thirdly, the desires of a victim seeking vigorous prosecution of a serious-crime offender are given greater consideration than the desires of reluctant victims of the same offenses.

258. Harnon, *Criminal Procedure in Israel—Some Comparative Aspects*, 115 U. PA. L. REV. 1091, 1097 (1967).

259. *Id.* at 1098-99.

260. 65 YALE L.J. 209, 224 (1955) (citing Normand, *The Public Prosecutor in Scotland*, 54 L.Q. REV. 345, 347-48 (1938)).

261. 65 YALE L.J. 209, 224 (1955).

262. Murray, *A Survey of Criminal Procedure in Spain and Some Comparisons with Criminal Procedure in the United States*, 40 N.D.L. REV. 7, 16 (1964).

263. Beyond doubt, the Nashville field study refutes the very recent comment that "the victim plays virtually no role in the criminal case." The same commentator also boldly stated:

The victim's view is never sought or considered. He is not consulted about the original charge, any reduction of charge, or the sentence to be imposed. He is not part of the decision-making process, nor is he privy to the reasoning of the judge who imposes the sentence.

Greacen, *supra* note 3, at 11-12.

Fourthly, the wishes of reluctant victims of nonserious crimes are more likely to be honored than are the desires of aggressive victims of such crimes. Lastly, and perhaps most importantly, the victim's influence over the criminal case depends upon the receptivity and malleability of the individual with whom the victim interacts (police officer, prosecutor, or judge). The common denominator in all cases is the exercise of discretion—by police, prosecutors, judges, and correctional officials.

Although the victim sometimes exercises considerable informal influence through the day-to-day workings of criminal justice, the victim's formally recognized role is limited. Mandamus and removal actions by disgruntled victims are ineffective tools for controlling critical discretionary decisions. Compromise statutes, while expressly affording the victim an identifiable role in the decision to dismiss a case, are applicable only to a narrow class of criminal offenses. Private prosecution of the offender is available only to victims who can afford the services of privately retained prosecutorial assistance.

The general conclusions set forth above raise important questions. Should the victim have any influence over a criminal case? If so, over what kinds of cases should he have influence? What stages in the criminal process and what decisions should the victim affect? What should be the considerations in deferring to his wishes? How much weight should be accorded his desires?

To answer these questions attention should first be focused upon those basic objectives of the criminal justice system that relate to the victim's place in the system. It is submitted that the following objectives are desirable:

1. Crimes should be reported to responsible officials as promptly and accurately as possible.
2. Victims of crimes should be treated with respect and fairness.
3. Victims should have confidence in the criminal justice process and experience a sense of satisfaction with its outcome.²⁶⁴
4. Criminal offenders should be made to appreciate the consequences of their criminal acts, and they should be deterred from repeating their crimes.
5. A criminal offender should be accorded treatment by enforcement, prosecutorial, and judicial officials roughly equivalent to that accorded similarly situated criminal offenders.

264. "Satisfaction" encompasses (1) the victim's belief that revenge has been carried out against the offender, and (2) the victim's personal, monetary satisfaction.

6. Police, prosecutors, and judges should make decisions based upon relevant and material information.

It is highly desirable that officials at almost all stages of the criminal case know and consider the attitudes of victims. Attention to the feelings of the victim should encourage the reporting of crimes and engender confidence in our criminal justice system. Moreover, consideration for the victim's plight usually demonstrates respect for him. It might appear inconsistent to recommend greater attention to the wishes of victims while simultaneously urging equal treatment for offenders. Equal treatment of offenders is impossible if the dispositions of similar petty larceny cases, for example, differ because in one case the victim desires the return of property without criminal prosecution while in another case the shopkeeper seeks vigorous enforcement of the larceny law. Therefore, the proposition that victims be accorded significant consideration must be applied in conjunction with another recommendation of even greater importance: the exercise of official discretion must be limited and confined to assure consistency and fairness. Thus, a decision to arrest or prosecute—or any other decision in the criminal process—should be influenced by the complainant's attitudes only within guidelines promulgated to assure fairness to the victim, society, and the alleged offender. The American Bar Association,²⁶⁵ the National Advisory Commission on Criminal Justice Standards and Goals,²⁶⁶ and numerous commentators²⁶⁷ support the standardization and minimization of unbridled discretion.

The guidelines for official discretion should reflect the idea that society's interest in dealing with the offender grows as the criminal act becomes more serious. Hence the victim's role should decrease in importance as the gravity of the crime increases. Prosecutors should follow written procedures for communicating with victims prior to or during plea negotiations. Written standards should identify points that prosecutors may properly consider in weighing victims' attitudes (*e.g.*, the crime, the relationship of the offender to the victim, the defendant's prior record). Police officers, too, should be given explicit guidance for handling arrest decisions. Once discretion-governing standards are operative, deviation from the

265. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE URBAN POLICE FUNCTION § 4.2 (1973); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION & THE DEFENSE FUNCTION §§ 3.4(b)-9(b) (c) (1971).

266. See Standards 1.1, 2.1 and 3.3, as reported in 14 CRIM. L. REP. 2097 (Oct. 31, 1973).

267. See DAVIS, *supra* note 8. See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974), in which a similar proposal to ameliorate discretion associated with warrantless searches is articulated.

standards should be subject to review by either a judge or an administrative appellate tribunal.²⁶⁸

Whether or not governmental officials agree to specific requests of victims, it is essential that they communicate effectively with citizens aggrieved by criminal wrongs. The simple task of explaining to victims the nature of the criminal justice system, how it operates, and how the victim will be involved in it is relatively easy and is not very time-consuming. Even if the victim's attitudes should be given no significant weight, as in bail decisions, for example, the benefits of the simple dissemination of information seem enormous.

Any reform of the victim's role in the criminal process must take account of restitution, which may be made prior to the reporting of the crime, during the preliminary stages of the criminal prosecution in return for the dismissal of the case, as a component of probation release, or in some jurisdictions, as a condition of parole release. Private restitutionary arrangements made prior to the reporting of crimes should not be condoned because society has an interest in maintaining a structure within which police and public prosecutors make "screening" decisions about criminal conduct. Once a criminal wrong is reported to responsible officials, however, reparation plans should be viable options for victims and defendants. First, the prospect of obtaining compensation should encourage victims to report crime and cooperate with prosecutorial officials. Secondly, the knowledge that the offender has paid for the injuries inflicted by his criminal act may satisfy the victim's need for retribution and vindication. Thirdly, compensatory plans may be rehabilitative in that the offender may more clearly understand his personal responsibility for occasioning harm.²⁶⁹ Lastly, restitutionary programs may deter future criminal behavior.²⁷⁰ The same benefits should accrue from statutory victim compensation plans²⁷¹

268. This writer cannot anticipate the myriad fact situations which should be encompassed by such rules. For a more detailed analysis of this suggestion and ways of implementing it, see DAVIS, *supra* note 8, at 80-96, 126-33, 188-212 (1969).

269. Ron Johnson, supervisor of the Minneapolis "Rehabilitation through Restitution" program, *supra* note 177, stated:

It's one thing to break into a garage. It's another to have to look the owner in the eye afterwards. We are building a sense of responsibility.

Another writer characterizes this concept as "punitive restitution;" this approach seeks to establish "the functional responsibility of the Offender to the Victim." Poole, *Criminal Justice; A Systems Analysis Approach*, 1 LAW & LIBERTY 5, 7 (1975).

270. SCHAFFER, *RESTITUTION TO VICTIMS OF CRIME*, (1960), reports:

The institution of restitution is able . . . to make good the . . . loss of the victim . . . [and] . . . help the task of punishment.

Id. at 125.

[It may] . . . be reformative as well.

Id. at 126.

271. See note 4, *supra*.

that require offenders to reimburse the state for its payments to victims.²⁷²

Certain practices disclosed by this research should be discontinued. The policy of according weight to a victim's feelings depending on the victim's status, wealth, race, sex, or age does not forward any worthy objective and clearly conflicts with the goals of treating victims fairly and developing their confidence in the criminal justice system. Also, to the extent that judges accord any weight to the victim's desires in setting bail, they are influenced by immaterial data. Similarly, the victim's attitude is immaterial to the question whether to release an inmate on parole.

Should the practice of employing private prosecutors be encouraged or discouraged?²⁷³ Private prosecution, although permitted in some parts of Tennessee, is no longer allowed in Davidson County, principally because privately retained attorneys have a financial interest in the outcome of the litigation. According to local officials,²⁷⁴ private prosecutors lack the impartiality that is demanded of a public prosecutor. If district attorneys are not active in pursuing prosecutions, as one proponent of private prosecution asserts, perhaps the appropriate remedy is the employment of special assistants at public expense²⁷⁵ or, if necessary, the ouster of the prosecutor. To inject into the system a private attorney employed by the victim—a victim who necessarily has adequate financial resources—contradicts the American notion of evenhanded justice. Moreover, if recommendations like those made herein are adopted and applied fairly, victims should not find it necessary to employ

272. One writer commented:

The offender should understand that he injured not only the state and law and order but also the victim—primarily the victim The institutions of compensation and restitution can not only make good the injury or loss of the victim but also, at the same time, help the task of punishment. This is where victim compensation should fit into the criminal justice system.

Schafer, *The Proper Role of a Victim-Compensation System*, 1 CRIME & DELIN. 45, 46 (1975). See also ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES & PROCEDURES, § 2.7(c) (iii) (1968) (recommending that the amount of a fine should take into account the defendant's ability to make restitution to the victim); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROBATION, § 3.2(c) (viii) (1970) (listing restitution to the victim as an appropriate condition of probation).

273. Arguments for and against this practice are presented in Note, *Private Prosecution*, *supra* note 234 and 50 N.C.L. REV. 1171, 1175 (1972).

274. Cornelius interview, *supra* note 70; Shriver interview, *supra* note 17.

275. See, e.g. TENN. CODE ANN. § 8-606 (Supp. 1973) (authorizing employment of additional counsel by the Governor and state attorney general "where the interest of the state requires"); TENN. CODE ANN. § 8-706 (Supp. 1973) (giving the circuit or criminal court the power to appoint a district attorney general pro tem if the district attorney "fails to attend any term . . . or is disqualified. . .").

private counsel to prosecute offenders.²⁷⁶

The last recommendation, although difficult to implement, is the cornerstone of all the previous recommendations: police officers, prosecutors, and judges should be selected cautiously. Because of the many vital discretionary functions performed by these persons, it is essential that they exercise good judgment. Regardless of the degree to which discretion can be restricted by written rules, these persons must weigh circumstances and exigencies in individual cases to reach results beneficial to the victim, society, and to a lesser extent the accused. Those responsible for selecting these persons, whether the electorate, officials having appointive powers, or directors of personnel, should give greater attention to the kind of decision-makers they are selecting.

276. Effective review procedures as outlined by DAVIS *supra* note 8, should minimize the incidence of disenfranchised victims.

