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CONSTITUTIONAL IMPLICATIONS OF CRIME VICTIMS AS PARTICIPANTS

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INTRODUCTION

In deciding the constitutionality of crime victim impact statements in capital sentencing hearings,[1] the U.S. Supreme Court has identified three types of victim impact information: (1) evidence of the victim's unique personal characteristics, (2) evidence of the crime's impact on the victim's family and community, and (3) the victim's sentencing opinion.[2] In its 1987 decision in *Booth v. Maryland*, the Court banned victim impact testimony at capital sentencing proceedings as cruel and unusual under the Eighth Amendment.[3] However, the Court overruled *Booth* with respect to the first two types of impact statements in its 1991 *Payne v. Tennessee* decision, leaving unclear the admissibility of victims' sentencing opinions.[4]

Part I of this Article examines the evolution of victims from interested parties to participants giving sentencing recommendations. Part II examines the constitutionality of victim sentencing participation laws and explains why crime victims' sentencing recommendations in capital cases are constitutional.[5] In Part III, this Article shows how existing judicial procedures provide adequate constitutional safeguards. Finally, Part IV demonstrates how victims of capital homicide are harmed when the law denies them the ability to recommend sentences.

Victim participation rights obviate federal constitutional objections to victim sentencing recommendation because it is constitutional to allow participants an opportunity to be heard. The Supreme Court's holdings in *Booth* and *Payne* were based on the premise that

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1 A victim who provides impact information in a homicide case is actually the homicide survivor, typically a family member of the deceased.

2 *See* Booth v. Maryland, 482 U.S. 496, 502 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

3 *See id.* at 502–03, 509.

4 *See* Payne v. Tennessee, 501 U.S. 808, 827, 830 n.2 (1991).

5 This Article assumes that the hypothetical "participant" has "standing." Standing issues are outside the Article's scope.

victims testified as witnesses when giving victim impact information at sentencing.[6] However, the underlying law has changed to make crime victims participants, rather than witnesses, at sentencing hearings. Moreover, the underlying law has changed to grant victims the right to give sentencing recommendations. These changes alter the constitutional analysis. Now, any constitutional challenge to victim sentencing recommendations must be made against the constitutionality of *participants* recommending sentences, not as *witnesses* giving *opinions.* Such a challenge should fail. Granting the victim a participant's right to make a sentencing recommendation is not inherently cruel and unusual, because the legitimization of victim harm precludes Eighth Amendment concerns, and because a "public sense of justice"[7] supports it. Moreover, victim participant status does not violate due process, because the sentencing recommendation of a participant, unlike the recommendation of a witness, is not unfair or arbitrary. This is because victims, like the state, are harmed by the crime. Furthermore, due process is not "evolving" to silence victims in the criminal process. Rather, the states and Congress are moving to allow further victim involvement in criminal proceedings. The Constitution does not interfere with this laudable development.

I

CRIME VICTIMS NOW GIVE SENTENCING RECOMMENDATION AS PARTICIPANTS, NOT AS WITNESSES

At one time in the United States, the law considered crime victims interested parties and prosecutors in criminal cases.[8] However, in the 1900s in criminal procedure, public prosecutors dominated felony prosecution.[9] By limiting private prosecutions with the extensive use of public prosecutors, the states set the stage for the Court to turn common-law victim participation on its head. In *Linda R.S. v. Richard D.*,[10] the U.S. Supreme Court declared that a crime victim has no

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6 *See infra* notes 17–18 and accompanying text.

7 *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

8 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring)

9 *See* William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 649–50 (1976).

10 410 U.S. 614 (1973). In *Linda R.S.*, the mother of an illegitimate child brought an action to enjoin the discriminatory application of a provision in the Texas penal code that made it a misdemeanor to willfully fail to provide support to a child. *Id.* at 614–15. Prior Texas court decisions had held that illegitimate children were not protected by the statute. *Id.* at 615. Therefore, the mother in *Linda R.S.* argued that the statute violated the Equal Protection Clause of the Fourteenth Amendment by unlawfully discriminating between legitimate and illegitimate children. *Id.* at 616. In disposing of the mother's claim, the Court never reached the Equal Protection Clause issue. *Id.* at 619 n.6. Instead, the majority refused to recognize that the mother had standing to raise the claim in the first place. *Id.* at 619.

"judicially cognizable interest in the prosecution or nonprosecution of another."[11]

Former Yale Law School Dean Abraham Goldstein criticized the *Linda R.S.* ruling on historical grounds.[12] He observed that "[t]he American historical error confused the [Attorney General's] power to intervene and dismiss cases already initiated by private parties with the exclusive power to decide whether they should be initiated at all."[13] As a result of this misunderstanding, the Court "transformed" the interest in public prosecutorial review "into a rationale for total control of the initial stage, the charge itself."[14] While there is certainly room for Goldstein's interpretation, it is also accurate to interpret the *Linda R.S.* opinion as recognizing that state legislatures have the legitimate authority to restrict victims' common-law participation rights in the criminal process.[15] Furthermore, it is reasonable to interpret *Linda R.S.* as recognizing that the rise of the public prosecutor in the states meant the end of judicially cognizable victim interests in charging.[16]

In the era of *Linda R.S.*, while the Court was acknowledging legitimate state limitations on victim participation and before the modern advent of victim participation at sentencing, no legislation or state constitutional rights existed that allowed the victim to give a recommendation at sentencing. Given this procedural backdrop and the particular state laws at issue, the Court correctly identified victim impact statements in *Booth* and *Payne* as *testimonial* evidence provided by *witnesses.* In *Booth,* the Court noted that under Maryland law, victim impact information "*may* be read to the jury during the sentencing phase, or the family members *may* be called to *testify* as to the information."[17] In *Payne,* the Court noted that "[t]he *[s]tate presented the testimony* of [the victim's] mother."[18] These descriptions clearly indicate that the Court viewed those victims as sentencing witnesses, and not as victims with the civil right to address the sentencing authority.

In holding that the victim's personal characteristics and the crime's impact on the victim's family and community were constitutionally admissible, the *Payne* majority viewed victim testimony as "simply another form or method of informing the sentencing authority

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11 *Id.*

12 *See* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution,* 52 MISS. L.J. 515, 549–50 (1982).

13 *Id.* at 550.

14 *Id.*

15 *See, e.g.,* Meister v. People, 31 Mich. 99 (1875); Commonwealth v. Benz, 565 A.2d 764 (Pa. 1989).

16 *See* Timothy P. O'Neill, *The Good, the Bad, and the Burger Court: Victims' Rights and a New Model of Criminal Review,* 75 J. CRIM. L. & CRIMINOLOGY 363, 367–68 (1984).

17 Booth v. Maryland, 482 U.S. 496, 499 (1987) (emphasis added), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

18 *Payne,* 501 U.S. at 814 (emphasis added).

about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[19] Arguably, because only the first two types of victim impact information are factually relevant "witness" testimony,[20] victims' "witness" status might be seen as undermining the constitutionality of victims' sentencing opinions.

Since *Payne*, however, crime victims' status in the criminal process has changed. Victims are no longer witnesses providing opinion evidence, but are *participants* with state constitutional and statutory rights to give sentencing recommendations. In *Linda R.S.*, the Court pointed the way to the legitimization of victims' participation interests. It was only common-law "judicial" legitimacy of crime victims' interests in charging that *Linda R.S.* no longer recognized. The *Linda R.S.* Court left no doubt that Congress could provide for crime victim participation in the criminal process, emphasizing that "Congress may enact statutes creating legal rights, . . . even though no injury would exist without the statute."[21] Although *Linda R.S.* specifically applies to federal legislation, state legislatures also remain free, within the parameters of their respective constitutions, to enact statutes creating legal rights.[22]

In 1982, with the path to crime victim participation brightly illuminated by the Court, Goldstein argued that victims should have participation rights at sentencing, rights that could be "conferred by the legislature."[23] He endorsed a procedure to "break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all."[24] However, Goldstein's language is inappropriate: victims are not accurately categorized as "intervenors." Intervention is a civil procedure term, and crime victim rights of participation are in criminal, not civil, cases. Beyond this technicality, crime victims have a history in the criminal process that is distinct from the history of civil intervenors.[25]

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19 *Id.* at 825.

20 *See supra* text accompanying note 2 (listing the three types of victim impact information identified by the *Booth* Court).

21 Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973). This assertion remains true despite *United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997), which held that the federal victims' rights statute did not convey standing to victims. In *McVeigh*, the federal right to attend trial was merely advisory, because the government must only use its "best efforts" to enforce those rights listed in the Victims' Rights Act. *See id.* Because these federal statutory provisions are advisory, they do not actually comprise rights at all.

22 For example, the Supreme Judicial Court of Massachusetts, citing *Linda R.S.* as persuasive authority, has held that its state legislature can create legal rights by statute, enforceable by the courts. *See* Leardi v. Brown, 474 N.E.2d 1094, 1102 (Mass. 1985).

23 *See* Goldstein, *supra* note 12, at 552.

24 David Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 727 (1968) (quoted in Goldstein, *supra* note 12, at 553).

25 *See supra* note 8 and accompanying text.

Moreover, it is undesirable to carry the baggage of the civil intervenor into criminal procedure,[26] because civil intervenors typically have full-party status.[27] In contrast, crime victims only have participation rights at particular stages during the criminal process.[28] Furthermore, the defendant's due process rights, which grant the public prosecutor exclusive control over all critical criminal prosecutorial decisions, limit victim participation in felony cases.[29] Therefore, because the term "intervenor" leads to confusion, it is necessary to coin a new term, "participants," in order to clearly define the status of victims in the criminal process. The word "participant" has not previously been used as a term of art in criminal procedure, and therefore is readily adopted here as a new term meaning "crime victim with rights of intermittent participation in the criminal process."[30]

Participants now have an independent right to give sentencing recommendations. In some form or other, a victim has a right to speak at sentencing in all fifty states.[31] Many state legislative and constitutional enactments grant the victim the civil liberty to speak at sentencing independently of whether any other party proffers the victim as a witness or offers the impact information as evidence.[32] Thus, many states have granted victims the independent right as participants to communicate victim impact information, including sentencing recommendations.[33] Accordingly, the return to an increased role for victims in criminal proceedings means that the law considers victims to be participants when determining the constitutionality of victims' sentencing recommendations at state capital sentencing hearings.

The constitutions or statutes of forty states either explicitly or implicitly grant victims the right to give recommendations at sentencing.[34] Twenty-three of these states grant victims the constitutional right to address the sentencing authority.[35] Seventeen states do not have the right in their constitutions but grant the right by statute.[36]

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26 For example, civil intervention can be intervention as a matter of right or permissive intervention, and there are threshold legal tests that must be satisfied before a court will allow either type of intervention. *See* MICHAEL O'CONNOR, O'CONNOR'S FEDERAL RULES: CIVIL TRIALS 228–30 (1998).

27 *See, e.g.*, FED. R. CIV. P. 24.

28 These participation rights vary from state to state. *See infra* Appendix.

29 *See infra* note 73.

30 For those who prefer the use of Latin, the Latin term for "*participant*" is "*particep.*" Some debate exists as to whether the creation of new terms using Latin is helpful or merely makes law less accessible to all. The author has chosen English as more accessible to the lay reader.

31 *See infra* Appendix.

32 *See infra* Appendix.

33 *See infra* Appendix Part I.

34 *See infra* Appendix Part I.

35 *See infra* Appendix Part I.A.1, I.B.1, I.C.1.

36 *See infra* Appendix Part I.A.2, I.B.2, I.C.2.

For example, California grants a crime victim the "right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution."[37] In *People v. Stringham*, the California Court of Appeals concluded that this statute created victim participation rights.[38] In *Stringham*, a victim protested in open court the plea bargain struck in the homicide of a family member.[39] In upholding the trial court's rejection of the plea bargain, the appellate court recognized that the right to speak at sentencing included the right to speak at a plea bargain hearing, because sentencing is inextricably connected to a plea bargain.[40] The court noted,

> It would be difficult to conceive of a more absurd result than to adopt [the convict's] construction [of the statute] which would prevent a victim or next of kin from having a meaningful opportunity to protest a plea bargain that will allow a defendant to escape the punishment which the victim or next of kin feels is appropriate to the crime.[41]

Therefore, the court correctly acknowledged that victims' sentencing recommendation was part and parcel of the victims' independent right to address the sentencing authority.

II
PARTICIPANTS' SENTENCING RECOMMENDATIONS IN CAPITAL CASES ARE CONSTITUTIONAL

Both *Payne* and *Booth* proceeded on the assumption that only the prosecution and the defense could present recommendations as to the proper sentence in capital cases.[42] This assumption was all that was needed to resolve those cases. But when that assumption is revealed to be of limited application because victims are now considered participants giving recommendations, then clearly *Booth* and *Payne* do not shed much light on the constitutionality of *participant* sentencing recommendations. Now that victims have participant status to speak at sentencing, the rules of factual relevance that govern witnesses giving opinions do not govern victims' sentencing recommendations.[43]

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37 CAL. PENAL CODE §1191.1 (West Supp. 2002).

38 *See* People v. Stringham, 253 Cal. Rptr. 484, 491 (Cal. Ct. App. 1988).

39 *See id.* at 486–87.

40 *See id.* at 491–92.

41 *Id.* at 491.

42 Of course, in many states presentence report writers may also make a recommendation. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4331(b) (2001); FLA. STAT. ANN. § 921.231(4) (West 2001); IDAHO CODE § 19-515(e) (Michie Supp. 2002).

43 Law review articles continue to misidentify the crime victim as a "witness" and his recommendation as "opinion." *See, e.g.*, Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000). Professor Logan states, "The first, and most fundamental, reason in support of the prohibition of sentence opinion

Clearly, the harm to the state renders appropriate the public prosecutor's sentencing recommendations. Likewise, the harm to the victim makes participant sentencing recommendations appropriate. Therefore, because victim harm is a legitimate basis for participants' recommendations, such recommendations are as constitutionally permissible as prosecutors' sentencing recommendations.

The distinction between witness opinion and victim recommendation may be better understood by analogizing criminal sentencing recommendations to the civil "prayer for relief."[44] In civil cases, trial court level pleadings set out the relief sought as a prayer for relief. In criminal cases, however, there is no prayer for relief in the pleadings, perhaps because in noncapital cases the jury is not permitted to know the potential sentence before deciding the defendant's guilt. Instead, the prayer for relief is delayed to the sentencing phase, when the prosecutor and the defendant "pray" for a particular sentence. Essentially, victims do the same thing when they give a sentencing recommendation, by praying for relief in the form of a particular sentence desired. Thus, when victims (and, for that matter, prosecutors and defense attorneys) give sentencing recommendations, it is not "opinion" at all. Instead, the request for a particular sentence is proper because it is a recommendation, or in civil law parlance, a prayer for relief.

Recently, the Supreme Court embraced the legitimacy of victim harm in the capital case of *Calderon v. Thompson*.[45] In *Calderon*, the Court addressed the seemingly endless delay in the post-conviction process, explaining that to unsettle expectations in the execution of moral judgment "is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' *an interest shared by the State and the victims of crime alike*."[46] Closely related to this interest is the victim's interest in the imposition of an *appropriate* punishment.

The participant's interest in punishing may be an interest in any or all of the legitimate purposes of punishment, and thus the sentenc-

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testimony is its distinct irrelevance to capital decision making." *Id.* at 539. Professor Logan's identification of victims as *witnesses* is central to his position. He maintains that a witness's opinion is not relevant to aggravation. *Id.* However, once it becomes clear that the victim is a participant, not a witness, it becomes apparent that the victim's recommendation, like the prosecutor's recommendation, is relevant to sentencing even if it is not specifically relevant to mitigating or aggravating factors. This is because victim harm provides a basis for a sentencing recommendation, just as harm to the state allows the prosecutor to make a recommendation. Moreover, a prosecutor's, defendant's, or victim's recommendation does not need to consist of information relevant to aggravation or mitigation.

44 Special thanks to Professor Susan Mandiberg, Northwestern School of Law of Lewis & Clark College, for suggesting this analogy.

45 523 U.S. 538 (1998).

46 *Id.* at 556 (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)) (emphasis added) (citation omitted).

ing recommendation may implicitly reflect a quest for moral desert,[47] incapacitation, retribution, rehabilitation, or deterrence. Victim recommendations cannot be credibly pigeonholed into any single punishment rationale. For example, an effort to define participant recommendations as exclusively retributive fails if the victim seeks mercy rather than death.[48] Moreover, participants may seek specific deterrence or incapacitation to avoid future harm from the same perpetrator, or general deterrence to prevent similar crimes by others. The participant never controls the sentencing decision, but merely provides another perspective to the sentencing authority. A judge or jury still must make the ultimate punishment decision.

Because the basis for excluding victim opinion (that victims are merely witnesses giving opinion) no longer exists in a significant majority of jurisdictions,[49] any exclusion of victim recommendations must rest on the notion that there is something inherently cruel and unusual under the Eighth Amendment, or violative of due process, about crime victim *participants* giving sentencing recommendations in capital cases.[50] In examining the constitutionality of participant sentencing recommendations in noncapital cases, no court has ever found a constitutional violation.[51] Indeed, the Court in *Booth* seemed

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47 "Moral desert" is a term used to describe the concept of just desert as understood by the founders of the United States. *See* RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA 151–56 (2000) (providing a persuasive argument that the concept of "moral desert" has been lost in the contemporary debate over sentencing rationales and replaced with a much narrower concept of retribution).

48 For an account of a case in which the survivor of a murder victim sought mercy for the defendant, see *infra* notes 84–85 and accompanying text.

49 *See supra* Part I.

50 A third constitutional objection is that a defendant's equal protection rights are violated if a victim recommends death in Defendant A's case and another victim recommends life in the factually similar case involving Defendant B. However, the Court's acceptance in *Payne* of factually relevant victim impact testimony essentially rejects this line of reasoning. *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991).

51 Every state ruling on the constitutionality of victim recommendations in noncapital cases has held that trial court judges can hear all three types of impact evidence, *see supra* text accompanying note 2, including sentencing recommendations that are in the public interest. In *Randell v. State*, the Nevada Supreme Court reviewed a statute that provided crime victims the right to address the court at sentencing by permitting a victim to "'[r]easonably express any views concerning . . . the person responsible.'" 846 P.2d 278, 280 (Nev. 1993) (quoting NEV. REV. STAT. ANN. § 176.015(3)(b) (Michie Supp. 2001) (alteration in original)). The court held that the statute's language permitted victims to provide sentencing recommendations in noncapital cases. *See id.* In so ruling, the Nevada court cited with approval similar cases from California and Arizona. *See* State v. Ross, 696 P.2d 706 (Ariz. Ct. App. 1984); People v. Mockel, 276 Cal. Rptr. 559 (Cal. Ct. App. 1990); People v. Sewell, 259 Cal. Rptr. 34 (Cal. Ct. App. 1989); People v. Zikorus, 197 Cal Rptr. 509 (Cal. Ct. App. 1983). The Idaho Supreme Court came to the same conclusion under a similar statute, stating that the statute "[d]id not contain any limitations which would prevent a victim of a crime, at sentencing, from . . . making a sentencing recommendation."

to indicate that such recommendations were constitutional.[52] The question then becomes: why should victim recommendations be treated differently in capital cases? To be sure, the Supreme Court has held that the fact that "death is different" justifies some differences between capital and noncapital cases.[53] Nevertheless, the question remains whether there are any salient differences in the area of victim sentencing recommendation. There are none.

A participant's sentencing recommendation is similar to other state procedures that ultimately impact sentencing decisions. In most states, participants already have the right to confer with and recommend to the public prosecutor whether the death penalty should be pursued in the first place.[54] In addition, in many states participants can formally oppose a plea bargain in capital cases.[55] In other states, a victim's right to speak at sentencing implicitly grants the victim the right to oppose a plea bargain.[56] Accordingly, a trial court's decision to accept or reject a plea bargain can properly hinge upon the victim's recommendation.[57] It does not violate due process or the prohibition against cruel and unusual punishment for the prosecutor, in deciding whether to pursue the death penalty, to consider a participant's recommendation.[58] Similarly, it is constitutional for a judge to consider a participant's recommendation when he rejects a plea bargain and instead brings a case to trial. Therefore, because a victim's recommendation may already influence the sentence before trial, such as during the witness's testimony, participant recommendations at sentencing should not be considered unconstitutional. Ultimately, the argument for unconstitutionality is based on the possibility of prejudice to the jury;[59] yet empirical evidence directly contradicts the

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State v. Matteson, 851 P.2d 336, 339 (Idaho 1993); *accord* Ingoglia v. State, 651 A.2d 409, 414 (Md. Ct. Spec. App. 1995).

52 *See* Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987) (emphasizing that the decision to bar victim impact evidence in capital cases did not bar reliance on victim impact evidence in noncapital cases), *overruled by Payne*, 501 U.S. at 827.

53 The phrase "death is different" first appeared in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion).

54 *See* NAT'L VICTIM CTR., THE 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS' RIGHTS LAWS 127–52 (1996) [hereinafter VICTIMS' RIGHTS SOURCEBOOK]; *see also* McKenzie v. Risley, 842 F.2d 1525, 1537 n.25 (9th Cir. 1988) (noting that the public prosecutor's decision to pursue the death penalty is properly influenced by the victim's opinion)

55 *See* VICTIMS' RIGHTS SOURCEBOOK, *supra* note 54, at 233–58.

56 *See, e.g.*, *supra* notes 38–40 and accompanying text (describing a California Court of Appeal's decision in *People v. Stringham*).

57 *See supra* notes 38–41 and accompanying text.

58 *See McKenzie*, 842 F.2d at 1537 n.25.

59 *See* Payne v. Tennessee, 501 U.S. 808, 856 (1991) (Stevens, J., dissenting) (describing the majority's opinion in *Payne* as "serv[ing] no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason").

assumption that jurors are readily influenced, much less prejudiced, by participant recommendations.[60] Even if the empirical evidence revealed that juries considered victim recommendations in reaching particular outcomes in capital cases, such consideration does not necessarily demonstrate prejudice.[61] Absent prejudice,[62] a jury's due consideration of a victim's recommendation is perfectly appropriate.[63]

Moreover, any judicial exclusion of participant sentencing recommendations is more likely to prejudice a jury in favor of imposing a death sentence. Silencing participant sentencing recommendations stacks the deck in favor of the imposition of the death penalty, because a jury is likely to interpret participant silence as approval of the death penalty. This view is strongly supported by the *Booth* majority opinion, which acknowledged that "[o]ne can understand the grief

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60 *See* Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 340 (2003) ("If the use of [victim impact evidence] since 1991 made it substantially easier to obtain death sentences, the post-1991 rate of death sentences per murder should have increased. We observe no such increase . . . .").

61 In addition to the inherent difficulties in formulating an empirical framework that differentiates victims' sentencing recommendations from prejudicial impact, prejudice must be established in the particular case at issue to have constitutional import in that case. *Cf.* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (requiring proof of jurors' racial bias in that particular case before the defendant could avail himself of the Equal Protection Clause).

62 For a discussion of cases examining the issue of what constitutes prejudice, see Thomas M. Fleming, Annotation, *Negative Characterization or Description of Defendant, by Prosecutor During Summation of Criminal Trial, as Grounds for Reversal, New Trial, or Mistrial—Modern Cases*, 88 A.L.R. 4th 8 (1991); and Thomas M. Fleming, Annotation, *Propriety and Prejudicial Effect of Counsel's Negative Characterization or Description of Witness During Summation of Criminal Trial—Modern Cases*, 88 A.L.R. 4th 209 (1991).

63 Determining the constitutionally permissible scope of victim sentencing recommendations will be an issue even after such recommendations are generally permissible. In many states, victims have a constitutional or statutory right to attend and observe the trial. *See* VICTIMS' RIGHTS SOURCEBOOK, *supra* note 54, at 285–98. In addition to articulating facts about the deceased's characteristics and harm to the survivors, a victim should be able to express relevant facts from the trial that support the sentencing recommendation, including factually relevant victim impact evidence. The Oklahoma Court of Criminal Appeals ruled that in a death sentencing hearing in front of a jury, "[t]here was nothing improper in the opinions given by the three [victim] witnesses in this case that the death penalty was the appropriate sentence" but that the "evidence should be limited to a simple statement of the recommended sentence without amplification." Conover v. State, 933 P.2d 904, 921 (Okla. Crim. App. 1997); *see also* Ledbetter v. State, 933 P.2d 880, 891 (Okla. Crim. App. 1997) (describing the appropriate limits for giving sentencing recommendations in capital cases). The court's view that the victim's recommendation should be "a simple statement of the recommended sentence without amplification" is correct if by using the term "amplification," the court does not prevent the victim from relying upon other victim impact evidence (*i.e.*, victim characteristics and the resulting harm to survivors) as a foundation for the victim's recommendation. Under Oklahoma law, victims, unlike witnesses, have the implied independent right of participants to give a sentencing recommendation, whether or not the defense or prosecution proffers the victim as its witness or offers the victim's recommendation. *See* OKLA. CONST. art. II, § 34; OKLA. STAT. ANN. tit. 22, § 984.1 (West Supp. 2003).

and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings."[64] Jurors' general awareness of these feelings, combined with the lack of victim recommendations in capital cases, leads to the conclusion that the most significant recommendations of certain participants—that death is not an appropriate sentence—will be withheld from the sentencing authority. Thus, by opposing participant recommendations, one ensures that they will be suppressed even when they would help a defendant. For example, in *Robison v. Maynard*, the Tenth Circuit Court of Appeals affirmed the trial court's exclusion of the victim's sentencing recommendation against death because it was the factually irrelevant testimony of a witness.[65] Susan Bandes has argued that "the sorts of victim initiatives that have been successful have been those, and only those, that advance the prosecution's own agenda, while preserving the prosecution's complete freedom from third-party interference."[66] While inaccurate as a general proposition, this observation will prove true if participant sentencing recommendation is held unconstitutional.

Over thirty states have constitutional amendments providing crime victims with civil rights of participation in the criminal process.[67] The increasing legitimacy of the individual crime victim's interests in the United States has significant implications for a capital defendant's Eighth Amendment and due process claims. At the time of the framing of the Constitution, crime victims were "interested parties."[68] Furthermore, whether something is "cruel and unusual" under the Eighth Amendment is to a significant degree determined by the "public sense of justice."[69] An assessment of the public sense of justice must account for the increased role of victims in states' criminal processes. Such an accounting should lead to the conclusion that victim sentencing recommendations, like other types of victim impact evidence, are constitutional. Concurring in *Payne*, Justice Scalia, joined by Justices O'Connor and Kennedy, found no Eighth Amendment violation in factually relevant victim impact evidence, recognizing that there is "a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."[70] Now, more than a decade after *Payne*, there exists far more evidence of the public

64 Booth v. Maryland, 482 U.S. 496, 508 (1987), *overruled by Payne*, 501 U.S. at 827.

65 829 F.2d 1501, 1504–05 (10th Cir. 1987).

66 Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331, 333 (footnote omitted).

67 *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, app. A at 328–29 (listing state constitutions that give participant rights to victims).

68 *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 127–28 (1998) (Stevens, J., concurring).

69 *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

70 *Id.* (Scalia, J., concurring).

sense of justice in favor of crime victim participation in the criminal process. This evidence exists in many state laws granting crime victims various participant rights, including the civil right to give victim sentencing recommendations.[71] Moreover, this evidence is significant for due process analysis: if due process "evolves," then it is to some degree forged in changing cultural and legal contexts.[72] Because crime victims already have significant rights and are increasingly included in the criminal process, federal due process cannot credibly be said to be "evolving" towards further exclusion of the victim.[73]

Arguments that the content of victims' sentencing recommendations violates the Eighth Amendment are unpersuasive. As long as the death penalty is constitutional, one cannot credibly argue that a public prosecutor's recommendation of death is cruel and unusual. The state is permitted to make a sentencing recommendation because the state is harmed by the criminal act. Ultimately, the propriety of a sentencing recommendation is determined by the recommender's status. Because the victim, like the state, is harmed by crime, the victim's status as an aggrieved person with participant rights to give a recommendation (*i.e.*, a prayer for relief and *not* an opinion) obviates any Eighth Amendment concern.

One could also argue that the content of a victim's sentencing recommendation is cruel and unusual because it is the recommendation of an individual person rather than of a state official. One could make a similar argument against victim sentencing recommendation using a due process analysis: victim recommendation is fundamentally unfair and arbitrary because it comes from a harmed individual rather

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71 *See infra* Appendix (listing state constitutional and statutory provisions granting victims participation rights in criminal proceedings). *See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 642–48 (1999) (exploring the ability of victims to participate in criminal cases).

72 *See* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 840 (2002).

73 *See generally* BELOOF, *supra* note 71, at 642–48 (describing victim participation as a now-established value in the criminal justice process). The federal courts have already significantly limited victim participation by finding that a defendant's due process right requires the public prosecutor to retain crucial prosecutorial decisions in a felony case. *See, e.g.*, East v. Scott, 55 F.3d 996, 1000–01 (5th Cir. 1995); Person v. Miller, 854 F.2d 656, 663 (4th Cir. 1988). But a victim's sentencing recommendation does not intrude upon the public prosecutor's authority. Nor does a victim's recommendation interfere with the sentencing authority, because the jury retains complete discretion to weigh the recommendation. On a separate note, the limits of a defendant's due process claim can be seen in the recent unsuccessful efforts to eliminate, on due process grounds, privately funded prosecutors for petty offenses and privately funded prosecutors' assistance to the public prosecutor in felony cases. *See East*, 55 F.3d at 1000–01 (allowing the participation of a privately funded prosecutor in a capital murder trial); *Miller*, 854 F.2d at 663 (allowing the participation of a privately funded prosecution in criminal contempt proceedings); New Jersey v. Kinder, 701 F. Supp. 486, 489–92 (D.N.J. 1988) (upholding the constitutionality of private prosecutions in misdemeanor cases).

than the harmed state. These arguments presume that only the collective harm of an entire state justifies any right of participation in the criminal process. However, to maintain the argument that individual victim harm is an illegitimate basis for participation rights would require the repeal of laws in all fifty states that grant participation rights to victims. Furthermore, defining crime victim harm as illegitimate is so profoundly contrary to the common human experience—that victims *are* actually harmed by criminal acts—that such a fragile fiction will ultimately fail. The folly of delegitimizing victim harm in an effort to end victim participation is revealed in the history of criminal procedure, which begins with victims as prosecutors, then excludes victims from the criminal process, and finally treats victims as participants through a plethora of laws that grant victims participation, privacy, and protection. Moreover, in *Calderon*, the Supreme Court implicitly recognized victim harm as a legitimate basis for a victim's interest in punishment.[74]

III
EXISTING JUDICIAL TOOLS PROVIDE ADEQUATE CONSTITUTIONAL SAFEGUARDS

Because victim participants may or may not be represented by counsel, judges should supervise the delivery of a participant recommendation to the jury, review the recommendation in advance for propriety, and instruct the jury that the victim's recommendation (like the recommendation of the prosecutor or defendant) is a recommendation only. Because many jurors erroneously view the state as the victim's attorney, the court should instruct the jury that the prosecutor represents the citizens of the state, and the victim represents himself. Further instructions should make clear that the recommendations of others should not replace the jury's earnest deliberations and exercise of independent judgment.

In the unlikely event that an inappropriate emotional outburst accompanies a participant's sentencing recommendation, the court should cure it with an instruction as it would during trial. Participants are authorized to attend trial as a matter of right in many states.[75] If, during trial, a victim makes an inappropriate emotional outburst, courts consider it to be harmless error when corrected by instruction.[76] The same should be true at sentencing. The potential for an emotional outburst at sentencing is present whether or not participant recommendation is permitted because the same possibility exists

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74 523 U.S. 538, 556 (1998); *see* discussion *supra* note 46 and accompanying text.

75 *See* VICTIMS' RIGHTS SOURCEBOOK, *supra* note 54, at 285–98.

76 *See* Jay M. Zitter, Annotation, *Emotional Manifestation by Victim of Family of Victim During Criminal Trial as Ground for Reversal, New Trial, or Mistrial*, 31 A.L.R. 4th 229 (1984).

during the presentation of factually relevant victim impact testimony. Indeed, precisely the same possibility exists when a defendant or defendant's family member testifies at sentencing. In those circumstances, we rely on the ability of the trial judge to maintain appropriate control over the witness and, if necessary, to call for a brief recess, provide cautionary instructions to the jury, or take other appropriate action.[77] Participant recommendations should be handled similarly. If the participant's recommendation is properly contained and if juries are instructed as to the nature of participant recommendation, then juries will not be overwhelmed.[78] Therefore, no persuasive reason exists for excluding participant recommendations from juries.[79] As the *Payne* majority urged, states "remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs."[80] States should remain free to allow participants' sentencing recommendations to capital juries.

IV
VICTIMS ARE HARMED WHEN SENTENCING RECOMMENDATIONS ARE DENIED THEM

The Supreme Court, attuned to the concept of victim harm originating in the criminal act, the potential for further harm from the criminal process, and the inclusion of victim participation in the states' criminal proceedings, has shown increasing respect for the legitimate interests of crime victims. In *Morris v. Slappy*, the Court recognized that a criminal defendant's rights should not be applied in a manner that unnecessarily harms the crime victim.[81] This unnecessary harm occurs when courts silence victims' sentencing recommendations. For example, victims who want to recommend that death is

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77 *See* Donald M. Zupanec, Annotation, *Disruptive Conduct of Accused in Presence of Jury as Ground for Mistrial or Discharge of Jury*, 89 A.L.R. 3d 960 (1979).

78 The issue of whether victims will be prejudiced is distinct from whether the jury duly considers victim impact evidence and properly weighs it during deliberations. It is not necessary to prove that victim impact does not influence juries in order to establish its constitutional viability. *Compare* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 491–92 (collecting empirical evidence that victim impact testimony has little effect on sentencing), *and* Eisenberg et al., *supra* note 60 (same), *with* Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 550 ("Empirically, there is little post-*Payne* data on the effects of victim impact statements on capital juries, but what there is indicates that . . . victim impact statements in capital cases do increase the likelihood of a death sentence." (footnote omitted)), *and* Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 246–47 (1991) (reviewing a survey of judges in which all judges found impact statements to be at least somewhat effective).

79 The Supreme Court recently held that judge-imposed death is unconstitutional. *See* Ring v. Arizona, 122 S. Ct. 2428, 2432 (2002) (overturning the decision in *Walton v. Arizona*, 497 U.S. 639 (1990)).

80 Payne v. Tennessee, 501 U.S. 808, 824–25 (1991).

81 461 U.S. 1, 14–15 (1982).

not appropriate are forced into an agonizing choice among bad options. The first bad option is participating in the sentencing hearing by providing the first two types of victim impact—the deceased's characteristics and the particularized harm to the survivors. According to *Payne*, this option respects the murdered person as a "uniquely individual human being."[82] However, providing victim impact information without giving a participant sentencing recommendation essentially endorses the State's effort to obtain the death penalty.[83]

As a poor second option, the victim can simply refuse to participate in a sentencing hearing in which death is sought. Such refusal is problematic because it tacitly aids the quest for death. The jury is likely to perceive the victim's silence as acquiescence in the public prosecutor's pursuit of capital punishment. Moreover, this option strips victims of the ability to exercise their responsibility to the deceased, because waiving participation means that victims cannot even communicate factual harm to the sentencing authority. A procedure which inherently encourages one type of victim (who would recommend no death) to waive the right to participate in sentencing but not another (who would recommend death) is far from ideal.

A third unsatisfactory option is for the participants to convey victim harm and characteristics in a way that covertly communicates the victim's recommendation for or against death. The news documentary program *48 Hours* provided a vivid example of this option.[84] The defendant in a homicide brutally attacked the victim and her father, a preacher, in the preacher's parsonage. He stabbed the preacher two dozen times and stabbed the daughter, who survived, five times, fracturing her skull. The defendant's death sentencing hearings took place three times because of error unrelated to victim impact evidence. In the first two hearings, the jury sentenced the defendant to death. Between the second and third sentencing hearings, however, the daughter decided to oppose a death sentence. Because Florida law prohibited crime victims from giving their opinion regarding the appropriate punishment, the judge threatened the daughter with contempt if she expressed her recommendation. Therefore, in order to convey her recommendation that the death penalty was inappropriate, the daughter

> complie[d] with the letter of this edict while circumventing the spirit. She describe[d] the crime in an emotionless, matter-of-fact

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82 *Payne*, 501 U.S. at 818 (quoting Booth v. Maryland, 482 U.S. 496, 504 (1987) (internal quotation marks omitted)).

83 *See supra* note 64 and accompanying text.

84 *See* Tom Jicha, *The Risk of Forgiveness: On 48 Hours, Mercy Raises Troubling Questions*, SUN SENTINEL (Fort Lauderdale, Fla.), Oct. 2, 1997, at 3E. The entire factual account of this case is taken from Mr. Jicha's column.

> tone. She refer[ed] to [the murderer] as a "gentleman." Perhaps most significantly, she manage[d] to get her feelings across when the prosecutor ask[ed] about her job. [The daughter] sa[id] she ha[d] several, including working for the abolition of the death penalty.[85]

It is doubtful that the daughter actually thought or felt that the murderer was a gentleman, or that the brutal attack on herself and her murdered father evoked no emotion. Rather, the daughter manipulated her testimony to convey her recommendation that the defendant not receive the death penalty.

The ability of a victim to recommend the propriety of life over death by presenting her victim impact statement with an emotionally flat affect reveals the absurdity of a procedural prohibition on participant sentencing recommendations. A victim can simply suppress the richness of factually-relevant victim impact to achieve the goal of communicating her feelings about the impropriety of the death sentence. In an emotional (if not strictly factual) sense, the procedural exclusion of participant sentencing recommendations encourages the victim to lie. It is a safe assumption that it is easier for those victims seeking the death penalty to implicitly convey their recommendations because they do not need to suppress any emotion.[86] Therefore, the constitutional exclusion of victim sentencing recommendations would merely screen out those victims who are less capable of communicating their sentencing recommendations obliquely.

CONCLUSION

The states continue to reset the stage for criminal procedure by granting constitutional and statutory rights of participation, protection, and privacy to participants. The states' reliance on victim harm as a legitimate basis for victim rights has altered an important contextual aspect of the criminal process. The exclusion of the victim from the states' criminal processes ended judicially cognizable common-law interests of victim participation in criminal charging. Now, the modern states' statutory and constitutional inclusion of the victim in the criminal process sets the stage for federal constitutional accommodation of state crime victims as participants in state criminal processes, including the right to give sentencing recommendations in capital sentencing hearings.

In *Calderon,* the Supreme Court correctly opined that victims share an interest in punishment with the state,[87] because the victim is, in fact, harmed. This shared interest in punishment is supported by a

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85 *Id.*

86 *See supra* note 64 and accompanying text.

87 Calderon v. Thompson, 523 U.S. 538, 556 (1998).

history during which the Court recognized that victims were harmed, and were thus "interested parties" seeking punishment.[88] As Sir William Blackstone wrote: "In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual . . . ."[89] It also makes sense to allow victim sentencing recommendations because no one represents the murdered person other than the participant. The public prosecutor represents the state, not the participant, and the prosecutor's recommendation on the propriety of death may, or may not, agree with the recommendation of the participant. No one but the participant can truly, and directly, speak to the participant's "powerful and legitimate interest"[90] in seeing the proper sentence imposed.

Borne of the harm inflicted by the convict, many crime victims are naturally driven both by their unique status in the case and by a sense of profound responsibility to communicate sentencing recommendations. The Supreme Court said it well: "Civilized societies withdraw . . . from the victim . . . the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done . . . ."[91] No victims possess this yearning to see justice done more profoundly, or more acutely, than capital homicide victims. Despite the apparent constitutional validity of participants' sentencing recommendations, it is a bitter irony for victims that in capital cases, and only in capital cases, there remains no final validation from the Supreme Court concerning their right to provide sentencing recommendations.

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88 *See supra* note 8 and accompanying text.

89 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (Special Edition Legal Classics Library 1983) (1768).

90 *Calderon*, 523 U.S. at 556 (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (internal quotation marks omitted)).

91 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).

APPENDIX
VICTIMS' RIGHT TO GIVE A SENTENCING RECOMMENDATION IN THE FIFTY STATE JURISDICTIONS

I. STATES ALLOWING VICTIMS AS PARTICIPANTS IN SENTENCING

A. The Right to "Be Heard," to "Speak," or to "Make a Statement"

In this category of state constitutional and statutory laws, the provisions either expressly allow victims to recommend sentences or do so implicitly by giving victims the broad right to "be heard," to "speak," or to "make a statement." Courts that have ruled on these broad rights have interpreted them to include victims' right to make sentence recommendations.[92] With such broadly worded rights of allocution, recommendation is included unless specifically excluded.[93]

1. *Constitutions and Corresponding Statutes*

ALASKA CONST. art. 1, § 24: "Crime victims . . . shall have the . . . right to be allowed to be heard . . . at sentencing . . . ."

ARIZ. CONST. art. II, § 2.1(a)(4): "To preserve and protect victims' rights to justice and due process, a victim of crime has a right . . . to be heard at . . . sentencing."

CONN. CONST. art. I, § 8(b): "In all criminal prosecutions, a victim shall have . . . the right to make a statement to the court at sentencing . . . ."

CONN. GEN. STAT. ANN. § 53a-39(d) (West 2001): Prior to modifying a defendant's sentence, "the sentencing court . . . shall permit [the] victim of the crime to appear before the court . . . for the purpose of making a statement . . . ."

IDAHO CONST. art. I, § 22(6): "A crime victim . . . has the following rights: To be heard . . . at . . . sentencing. . . ."

ILL. CONST. art. I, § 8.1(a)(4): "Crime victims . . . shall have the . . . right to make a statement to the court at sentencing."

725 ILL. COMP. STAT. ANN. 120/4 (West Supp. 2002): "Crime victims shall have the . . . right to make a statement to the court at sentencing."

KAN. CONST. art. 15, § 15: "Victims of crime . . . shall be entitled to certain basic rights, including the right . . . to be heard at sentencing. . . ."

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92 *See supra* note 51 (discussing these court decisions); *see also* State v. Matteson, 851 P.2d 336, 339 (Idaho 1993) ("[T]he statute does not contain any limitations which would prevent a victim of a crime, at sentencing, from sharing the victim's opinion of the defendant or making a sentencing recommendation.").

93 For a list of jurisdictions that exclude victim sentencing recommendations, see *infra* Appendix Part II.

LA. CONST. art. I, § 25: "[A] victim of crime shall have the right to . . . be . . . heard during all critical stages of preconviction and postconviction proceedings . . . ."[94]

MD. CONST. Declaration of Rights art. 47(b): "[A] victim of crime shall have the right . . . to be heard at a criminal justice proceeding . . . ."

MICH. CONST. art. I, § 24(I): "Crime victims . . . shall have the . . . right to make a statement to the court at sentencing."

MICH. COMP. LAWS ANN. § 780.791(3)(d) (West Supp. 2002): "[The victim] impact statement . . . may include . . . [t]he victim's recommendation for an appropriate disposition or sentence."

MICH. COMP. LAWS ANN. § 780.793 (West Supp. 2002): "The victim has the right to appear and make an oral impact statement at the . . . sentencing."

NEB. CONST. art. I, § 28(1): "A victim of a crime . . . shall have . . . the right to be informed of, be present at, and make an oral or written statement at sentencing . . . ."

NEV. CONST. art. I, § 8(2)(c): "The legislature shall provide by law for the rights of victims of crime . . . to be . . .[h]eard at all proceedings for the sentencing . . . of a convicted person after trial."

NEV. REV. STAT. ANN. § 176.015(3)(b) (Michie Supp. 2001): "[B]efore imposing sentencing, the court shall afford the victim an opportunity to . . . [r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution."[95]

N.M. CONST. art. II, § 24(A)(7): "A victim . . . shall have . . . the right to make a statement to the court at sentencing . . . ."

N.C. CONST. art. I, § 37(1)(b): "Victims of crime . . . shall be entitled to the . . . right to be heard at sentencing of the accused in a manner prescribed by law . . . ."

OR. CONST. art. I, § 42(I)(a): "[T]he following rights are hereby granted to victims . . . : To be heard at the . . . sentencing . . . ."[96]

S.C. CONST. art. I, § 24(A)(5): "To preserve and protect victims' rights to justice and due process . . . , victims of crime have . . . the right to . . . be heard at any proceeding involving a . . . sentencing . . . ."

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94 *But see* LA. CODE CRIM. PROC. ANN., art. 905.2 (West Supp. 2002) (allowing victim impact evidence at capital sentencing hearings only as to the victim's characteristics and the impact of the crime on family members and friends, and describing this impact evidence as "testifying for the state").

95 The Nevada Supreme Court has interpreted this statute to allow victims' sentencing recommendations. *See* Randell v. State, 846 P.2d 278, 280 (Nev. 1993).

96 *But see* OR. REV. STAT. § 163.150(1)(a) (2001) (limiting victim impact evidence in capital cases to "the personal characteristics of the victim or the impact of the crime on the victim's family").

TENN. CONST. art. I, § 35(d): "[V]ictims shall be entitled to the . . . right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly."

UTAH CONST. art. I, § 28(1)(b): "[V]ictims of crime have these rights, as defined by law: . . . to be heard at important criminal justice hearings related to the victim . . . ."

WASH. CONST. art. I, § 35: "[A] victim of crime charged as a felony shall have the right . . . to make a statement at sentencing . . . ."

WASH. REV. CODE ANN. § 7.69.030(14) (West Supp. 2002): "[V]ictims [and] survivors of victims . . . have the following rights: . . . to present a statement personally or by representation, at the sentencing hearing for felony convictions . . . ."

WIS. CONST. art I, § 9m: "This state shall ensure that crime victims have all of the following privileges and protections as provided by law: . . . the opportunity to make a statement to the court at disposition . . . ."

2. *Statutes with No Accompanying Constitutional Provision*

CAL. PENAL CODE ANN. § 1191.1 (West Supp. 2002): "The victim of any crime . . . ha[s] the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his [or] her . . . views concerning the crime, the person responsible, and the need for restitution."[97]

HAW. REV. STAT. ANN. § 706-604(3) (Michie 1999): "In all circuit court cases, the court shall afford a fair opportunity to the victim to be heard on the issue of the defendant's disposition, before imposing sentence."

IND. CODE ANN. § 35-38-1-8(b) (Michie 1998): "A victim present at sentencing in a felony or misdemeanor case shall be advised by the court of a victim's right to make a statement concerning the crime and the sentence."

IND. CODE ANN. § 35-40-5-5 (Michie Supp. 2001): "A victim has the right to be heard at any proceeding involving a sentence . . . ."

KY. REV. STAT. ANN. § 421.520 (Banks-Baldwin 2001): "[A victim's] impact statement may contain . . . the victim's recommendation for an appropriate sentence."

ME. REV. STAT. ANN. tit. 17-A, § 1174(1)–(2) (West Supp. 2001): "The victim must be provided the opportunity to participate at sentencing by . . . [m]aking a statement in open court . . . or [s]ubmitting a written statement to the court either directly or through the attor-

97 This statute has been interpreted to include the right to give opinion. *See* People v. Mockel, 276 Cal. Rptr. 559, 561–62 (Cal. Ct. App. 1990).

ney for the State . . . . The court shall consider any statement made . . . in determining the sentence."

MINN. STAT. ANN. § 611A.038(a)(3) (West Supp. 2002): "A victim has the right to submit an impact statement to the court at the time of sentencing . . . . Statements may include . . . a victim's reaction to the proposed sentence or disposition."

MISS. CODE ANN. § 99-43-33 (1999): "The victim has the right to present an impact statement or information that concerns the criminal offense or the sentence during any entry of . . . sentencing . . . ."

MONT. CODE ANN. § 46-18-115(4)(a) (2001): "The court shall permit the victim to present a statement concerning . . . the victim's opinion regarding appropriate sentence."

N.H. REV. STAT. ANN § 651:4-a (1996): "Before a judge sentences . . . any person for capital . . . murder, . . . the victim . . . may reasonably express his views concerning the offense, the person responsible, and the need for restitution. . . . The judge may consider the statements of the victim or next of kin . . . when imposing sentence . . . ."

N.J. STAT. ANN. § 52:4B-36(n) (West Supp. 2002): "The legislature finds and declares that crime victims . . . are entitled to . . . make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime."

N.D. CENT. CODE § 12.1-34-02(14) (Supp. 2001): "Victim impact statement. The victim must be informed . . . of the victim's right to submit or make a written impact statement to the court in any criminal case. . . . This statement may include . . . the victim's recommendation for an appropriate sentence."

VT. STAT. ANN. tit. 13, § 5321(a)(2) (Supp. 2002): "The victim of a crime has the . . . right[ ] in any sentencing proceedings concerning the person convicted of that crime . . . to appear, personally, to express reasonably his or her views concerning the crime, the person convicted, and the need for restitution."

WYO. STAT. ANN. § 7-21-102(c)(iv) (Michie 2001): "[N]otice . . . shall inform the victim that his impact statement may include . . . [t]he victim's recommendation for an appropriate disposition."

B. The Right to "Be Heard When Relevant"

In this category of cases, victims have a right to "be heard" or "make a statement" when relevant. The sentencing recommendations of victims, as participants, are clearly proper.[98] As a result, these laws implicitly allow victim sentencing recommendations.

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98 *See supra* note 43 and accompanying text.

1. *Constitutions and Corresponding Statutes*

COLO. CONST. art. 2, § 16a: "Any person who is a victim of a criminal act . . . shall have the right to be heard when relevant . . . at all critical stages of the criminal justice process."

COLO. REV. STAT. § 24-4.1-302.5(d) (2002): "[E]ach victim of crime shall have the . . . right to be heard at any court proceeding that involves . . . the sentencing . . . of any person . . . convicted of a crime against such victim . . . ."

FLA. CONST. art. I, § 16(b): "Victims of crime or their lawful representatives . . . are entitled to the right . . . to be heard when relevant, at all crucial stages of criminal proceedings . . . ."

2. *Statutes with No Accompanying Constitutional Provision*

N.Y. CRIM. PROC. LAW § 380.50(2)(b) (McKinney Supp. 2002): "[T]he court . . . shall accord the victim the right to make a statement with regard to any matter relevant to the question of sentence."

C. The Right to Give "Impact"

This category of cases allows victims to give "impact." Because the term impact is defined by the U.S. Supreme Court as including "opinion,"[99] it is highly probable that these laws will be interpreted to include a victim's right to give a sentencing recommendation.

1. *Constitutions and Corresponding Statutes*

OKLA. CONST. art. II, § 34(1): "To preserve and protect the rights of victims to justice and due process, . . . [t]he victim . . . has a right . . . to be heard at any sentencing . . . ."

22 OKLA. STAT. ANN. tit. 22, § 984.1(A) (West Supp. 2003): "Each victim . . . may present a written victim impact statement or appear personally at the sentencing proceeding and present the statements orally."

R.I. CONST. art. I, § 23: "Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim."

R.I. GEN. LAWS § 12-28-4(b) (Supp. 2001): "Prior to the imposition of sentence . . . the victim of the criminal offense shall be afforded the opportunity to address the court regarding the impact which the defendant's criminal conduct has had on the victim."

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99 *See* Booth v. Maryland, 482 U.S. 496, 502 (1987), *overruled on other grounds by* Payne v. Tennessee, 501 U.S. 808 (1991).

2. *Statutes with No Accompanying Constitutional Provision*

ALA. CODE § 15-23-74 (1995): "The victim has the right to present evidence, an impact statement, or information that concerns the criminal offense or the sentence during any pre-sentencing, sentencing, or restitution proceeding."

MASS. ANN. LAWS ch. 279, § 4B (Law. Co-op. Supp. 2002): The statute allows victim impact, "excluding any crime for which a sentence of death may be imposed."

TEX. CODE CRIM. PROC. ANN. art. 56.03(b)(8) (Vernon Supp. 2002): This statute provides for a written impact statement that includes "any . . . information, other than facts related to the commission of the offense, related to the impact of the offense on the victim."

II. STATES NOT INCLUDING VICTIMS' SENTENCING RECOMMENDATIONS IN THE VICTIMS' RIGHT TO ADDRESS THE SENTENCING COURT

These laws clearly define what a victim can say and do when giving impact evidence, but do not include the right to give a sentencing recommendation. It is likely that these limitations are in reaction to the Supreme Court's decision in *Payne*.[100] Of course, even if the victim does not have a right to give a recommendation under these laws, the victim may still ask the court's permission, and the judge still retains the authority to listen to a victim's recommendation under his inherent authority to hear anything relevant to sentencing.[101]

A. Constitutions and Corresponding Statutes

VA. CONST. art. I, § 8-A: The General Assembly is instructed to provide victim rights, which may include "[t]he right to address the circuit court at the time sentence is imposed."

VA. CODE ANN. § 19.2-299.1 (Michie 2000): This statute limits victim impact to "economic loss," "physical or psychological injury," and change in "lifestyle or familial relationships."

B. Statutes with No Accompanying Constitutional Provision

ARK. CODE ANN. § 16-90-1112(a)(1) (Michie 2001): "Before imposing sentence, the court shall permit the victim to present a victim impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated."

DEL. CODE ANN. tit. 11, § 4331(e)(3)–(4), (7) (2001): An impact statement shall describe "physical injury [or] . . . any change in the

100 501 U.S. 808 (1991).

101 *See, e.g.*, *Mockel*, 276 Cal. Rptr. at 562.

victim's personal welfare or familial relationships . . . [or a]ny other information relating to the impact of the offense upon the victim."

GA. CODE ANN. § 17-10-1.2(c) (1997): This statute governing capital cases limits victim impact statements to "the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community."

IOWA CODE ANN. § 915.21 (West Supp. 2002): "A victim may orally present a victim impact statement at the sentencing hearing, . . . [which] shall include . . . economic loss . . . , physical injury . . . , change in the victim's personal welfare or familial relationships . . . , [and] any other information related to the impact of the offense upon the victim."

OHIO REV. CODE ANN. § 2929.19(A)(1) (Anderson 2002): "At the [sentencing] hearing, the offender, the prosecuting attorney, [and] the victim . . . may present information relevant to the imposition of sentence in the case."

OHIO REV. CODE ANN. § 2930.14(A) (Anderson 2002): "[T]he court shall permit the victim of the crime . . . to make a statement."

18 PA. CONST. STAT. ANN. § 11.201(5) (West Supp. 2002): "Victims of crime have the . . . right[ ] . . . , to offer prior comment on the sentencing of a defendant . . . to include the . . . physical, psychological and economic effects of the crime on the victim and the victim's family."

W. VA. CODE ANN. § 61-11A-2(b) (Michie 2000): "[T]he court shall permit the victim . . . [to make] an oral statement . . . . Any such statement . . . shall relate solely to the facts of the case and the extent of any injuries, financial losses and loss of earnings . . . ."

III. STATE CONSTITUTIONS AND STATE STATUTES ALLOWING VICTIM SENTENCING RECOMMENDATION IN THE DISCRETION OF THE COURT

A. Constitutions

MO. CONST. art. 1, § 32(2): "Crime victims . . . shall have the . . . right to be . . . heard at . . . sentencings . . . , unless in the determination of the court the interests of justice require otherwise . . . ."

B. Statutes

S.D. CODIFIED LAWS § 23A-27-1.1 (Michie 1998): "[T]he victim in the discretion of the court may address the court concerning the emotional, physical, and monetary impact of the defendant's crime upon him or her, and may comment upon the sentence which may be imposed upon the defendant."