

DIGNITY, EQUALITY, AND PUBLIC INTEREST FOR DEFENDANTS AND CRIME VICTIMS IN PLEA BARGAINS: A RESPONSE TO PROFESSOR MICHAEL O'HEAR

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In proposing meaningful consultation with victims and defendants in a context of advisory prosecutorial guidelines, Professor Michael O'Hear has an idea worth examining, and, in the main, worth supporting.¹ By "consulting" O'Hear means more than dictating; he means *meaningful* consultation. With meaningful consultation prosecutors explain things, gather information, listen to victims and defendants, and then formulate plea offers.

In proposing a plea process involving victims, O'Hear is exposed to dogmatic academic criticism because a premise of his proposal is the vindication of the victim. To gather a sense of the nature of such criticism, it is instructive to turn to Professor Erin O'Hara, who has insightfully written, "Given that virtually all law professors were trained in criminal law classes that ignored victim involvement in the criminal justice process, it is perhaps not surprising that it is considered heretical to suggest that direct participation by victims might be warranted."² O'Hara encourages replacing dogma with more creative academic thinking:

[A]s a positive matter, victim involvement in the criminal process is becoming and will continue to be a reality of our criminal justice process. Too often law professors feel content to dogmatically insist that crimes are wrongs committed against the public rather than an individual and that, therefore, victim involvement in criminal cases

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

2. Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 229-30 (2005).

beyond the potential witness capacity is inappropriate. Contrary to their assertions, however, victims have been involved in the disposition of criminal cases for much longer than they have been marginalized, and they are unlikely to remain impotent forces in the disposition of cases. As a consequence, advocates must think creatively about how to provide victims with participation at a minimal cost to existing procedural protections for defendants.³

O'Hear has risen to O'Hara's challenge by thinking creatively about "how to provide victims with participation at a minimal cost to existing procedural protections for defendants."⁴ Academic heresy or not, O'Hear's proposal advances the conversation about plea bargaining in an era of victims' rights. Moreover, O'Hear's idea is substantively grounded in, and promotes, important criminal process values.

I. THE HUMAN DIGNITY VALUE

O'Hear takes Professor Jerry Mashaw's scholarship on human dignity (as a basis for due process in administrative law) and applies it to crime victims' participation rights.⁵ This is a sensible approach given both the persuasive case Mashaw makes and the aptness of O'Hear's application to victim participation in criminal process. There is ample evidence in victims' rights laws to justify O'Hear's application of Mashaw's dignity theory. By 1999, twenty states expressly included the value of "dignity" in constitutional victims' rights.⁶ Other states have the same language in their respective statutes.⁷ The federal Crime Victims' Rights Act (CVRA) provides an express "right to be treated with fairness and with respect for the victim's dignity and privacy."⁸ The legislative history of the CVRA identifies the same type of concern for dignity that appears in Mashaw's scholarship: "Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees . . . to treat victims of crime with the respect they deserve

3. *Id.* at 233-34.

4. *See id.* at 234.

5. O'Hear, *supra* note 1, at 330-31.

6. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 328-30.

7. *Id.*

8. 18 U.S.C. § 3771(a)(8) (Supp. 2004).

and to afford them due process.”⁹ O’Hear is on solid ground in recognizing that victim participation is largely based on valuing the human dignity of crime victims.

II. THE EQUALITY VALUE AND ITS CHANGED NATURE

The idea of equality to avoid bias for similarly situated defendants in charging, plea bargaining, and sentencing is not new. For some, this equality is the only legitimate equality. Were this the only legitimate equality it would mean separating victims’ voices from the criminal process. Under this view, victims should not consult with prosecutors about pleas or make sentencing recommendations to judges because victims’ voices introduce individual victim harm which, in turn, creates the potential for unequal treatment of similarly situated defendants. To avoid this, the argument continues, defendant punishment should be determined by the criminal statute violated and to a lesser extent other criteria, such as the defendant’s criminal history, but should not include information from, or about, the victim.¹⁰

However, defendants do not have a monopoly over adverse bias in the criminal process; unequal dispositions also result from bias against victims. Like defendants, crime victims are at risk of bias when government actors exercise discretion. For example, one study found that non-white crime victims are disproportionately not afforded their rights at the plea bargain stage.¹¹ Professor Steven Carter reviewed the Baldus study, which examined death penalty cases involving black defendants and victims, and concluded that “[a] black defendant whose victim is white is *twenty-two times* more likely to receive the death penalty than is a black defendant whose victim happens to share his race.”¹² Professor Elizabeth Stanko’s study of a New York prosecutor’s office revealed bias in charging decisions involving a variety of types of victims.¹³ Another example is the failure to even consider domestic

9. 150 CONG. REC. S10911 (daily ed. Oct. 9, 2004) (statement of Senator Kyl).

10. See *Payne v. Tennessee*, 501 U.S. 808, 856–67 (1991) (Stevens, J., dissenting) (arguing against victim impact statements).

11. NAT’L VICTIM CTR., *COMPARISON OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS’ RIGHTS* (1997), reprinted in DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* 695 (2d ed. 2006).

12. Stephen L. Carter, Comment, *When Victims Happen To Be Black*, 97 YALE L.J. 420, 444 (1988).

13. Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors’ Screening Decisions: The Case of the New York County District Attorney’s Office*, 16 LAW & SOC’Y REV. 225 *passim* (1981–82).

violence victims to be crime victims until the 1980s.

O'Hear does not articulate his idea in terms of equality for similarly situated victims. However, it is a value he implicitly relies upon. Beyond this, O'Hear integrates the values of equality of similarly situated defendants and similarly situated victims into a procedure where victims and defendants are afforded separate consultations with the prosecutor. What Professor Paul Cassell aptly wrote about sentencing applies with equal force to plea bargaining: "Equality demands fairness not only *between* cases but also *within* cases. Victims and the public generally perceive great unfairness in a sentencing system with 'one side muted.'"¹⁴ In light of the potential for bias against victims, equality in plea bargains for similarly situated crime victims should be a priority.

III. THE VALUE OF THE PUBLIC INTEREST

The core idea proposed by O'Hear—that prosecutors consult meaningfully with victims and defendants in order to arrive at a just plea offer—is the bare minimum that a free society should demand of a state performing its public interest responsibilities. A credible argument can be made that a substantial part of the public's distrust of plea bargaining is that victims' interests and harm have not been valued in the public interest function of the plea bargain process. The legislated embodiment of public distrust is manifested in victims' rights of consultation with prosecutors,¹⁵ and laws that allow the victim to address the court at the plea hearing in almost all jurisdictions.¹⁶ Seen in this light, crime victims' rights push back against a restricted definition of "public interest" that has not, until recently, included individual victim harm and interests.

14. Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 494–95 (citations omitted).

15. National Center for Victims of Crime, <http://www.victimlaw.info> (follow "Topical" hyperlink; follow "Right to be Heard" hyperlink; select "Conferral with Prosecutor" and click "Next"; select "States and Territories" and click "Next"; under "Statutory and Regulatory Provisions," select "Select All" and click "Next"; select "Skip This Step" at Stage 5; at Stage 6, click "Search") (last visited Oct. 19, 2007) (listing current states with victim/prosecutor consultation laws).

16. See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 287 (2003) (explaining that the right to speak at sentencing includes the right to speak at consideration of plea hearings).

IV. OTHER COMMENTS

O'Hear identifies some of the practical problems of consultation—essentially the time, effort, and potential frustrations of making the consulting procedure work.¹⁷ His suggestion that prosecutors only be required to use “reasonable efforts” is unworkable because such language has been interpreted as granting the government the discretion to disregard victim participation rights.¹⁸ A better approach is to mandate consultation on the victim's request and solve the problem by relying on waiver. For example, victims who make themselves unavailable waive the right.¹⁹

O'Hear identifies a critic, Allen Edgar, who argues that consultation should not take place because of the potential of disappointed victim expectations.²⁰ Edgar's argument is unpersuasive. To deny *all* victims consultation because *some* victims might be disappointed in the plea bargain assumes too narrowly that victim satisfaction is measured only by getting the plea bargain the victim wants. The argument ignores that treating victims with respect for their dignity in the consultation process matters as much, if not more, to victim satisfaction. Moreover, victims often feel a sense of responsibility to see that justice is done. At least to some extent, this responsibility is satisfied with participation even if the desired outcome is not realized.

The frequently cited punishment values are deterrence (both individual and general), incapacitation, rehabilitation, and retribution. For O'Hear, victim participation is based on the retribution punishment rationale.²¹ Retribution is not the only sentencing value relevant to victim participation. In fact, victims may seek leniency or rehabilitation. Victims do not desire to see anyone else victimized, and so their participation supports deterrence. It is not necessarily the case that non-retributive rationales are exclusively defendant- or state-centric. The relationship of victim participation to sentencing rationales is ripe for further scholarly examination.

The external oversight board to monitor prosecutorial discretion

17. O'Hear, *supra* note 1, at 332–33.

18. *United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997) (denying the Oklahoma City bombing victims standing on review to object to their sequestration from trial because “best efforts” invested discretion in the government).

19. *E.g., In re Alton D.*, 994 P.2d 402, 406–07 (Ariz. 2000) (victim's failure to assert a right to restitution within a reasonable time constituted a waiver).

20. O'Hear, *supra* note 1, at 333.

21. *Id.* at 329–30.

suggested by O’Hear²² is unlikely to be useful given the subjectivity of assessing levels of criminal intent. Instead, a two-pronged approach is needed. First, a change in prosecutorial culture. When sex crimes and domestic violence crimes were considered undesirable work, smart, elected district attorneys made special prosecution units and tied status and promotion to these positions. Because an elected district attorney has a strong interest in keeping victims satisfied, the elected district attorney has an incentive to ensure that meaningful consultation takes place. Second, either failing to consult or denying the victim his right to address the court concerning the plea agreement should be grounds for a mis-plea. It may be, as O’Hear suggests, that judges are more likely than not to accept plea bargains over victims’ objections. Nevertheless, appellate courts uphold trial court decisions rejecting plea bargains because the prosecutor failed to consult the victim or the victim objected to the plea bargain.²³

Meaningful consultation within a framework of advisory charging and plea bargain guidelines is a promising approach to achieve equality for similarly situated victims, promote victim dignity, and satisfy the victim component of the public interest function. Central to O’Hear’s idea is the flexibility to have information provided by a victim potentially alter a sentence up or down. Such increased flexibility is critical to achieving buy-in from a victims’ rights perspective. The devil is in the details, what type of victim input will affect the offer? To what extent? Moderated by guidelines, O’Hear has proposed that which is constitutionally permitted in *Payne*,²⁴ victim characteristics and the harm to the individual victim and community. The victim should also be able to recommend a plea and sentence to the prosecutor.

V. CONCLUSION

While victims and defendants have important differences, O’Hear’s process respects dignity, which means that both victims and defendants are meaningfully heard and share a similar interest in due process. It is commonplace for plea offers to be made without meaningful consultation with defendants. While the lack of consultation is less

22. *Id.* at 343–44.

23. *E.g.*, *State v. Montiel*, 122 P.3d 571, 574 (Utah 2005) (rejection of plea bargain upheld where trial court “expressed reservations about accepting a plea when the State had not ‘even told the person who claims all these things occurred as to what [the State was] going to do’”) (alteration in original); *People v. Stringham*, 253 Cal. Rptr. 484, 491, 494 (Cal. Ct. App. 1988) (upholding trial court’s rejection of plea bargain based on victim’s objection).

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

socially acceptable when exercised against victims of crime, it is likewise inappropriate for defendants. Regarding the value of equality, the plea bargain process acquires a new type of equality as similarly situated victims are also treated similarly, measured not solely by the elements of a criminal statute, but also by the unique harm to, and characteristics of, the victim. As to the public interest function, it is served only when interested individuals are meaningfully consulted. O'Hear's valuable contribution is the simultaneous application of the three values of human dignity, equality, and the public interest function to establish meaningful plea bargain consultation with the state for defendants *and* victims alike.

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